

# Giuliani Promotes His Chief of Staff to No. 2 Spot

By David Firestone

Aug. 29, 1996

See the article in its original context from August 29, 1996, Section B, Page 1 [Buy Reprints](#)

[VIEW ON TIMSMACHINE](#)

TimesMachine is an exclusive benefit for home delivery and digital subscribers.

## About the Archive

*This is a digitized version of an article from The Times's print archive, before the start of online publication in 1996. To preserve these articles as they originally appeared, The Times does not alter, edit or update them.*

*Occasionally the digitization process introduces transcription errors or other problems; we are continuing to work to improve these archived versions.*

Tightening his inner circle of top aides, Mayor Rudolph W. Giuliani yesterday promoted his chief of staff, Randy M. Mastro, to the position of Deputy Mayor for Operations, effectively making him the second-in-command at City Hall.

Mr. Mastro replaces Peter J. Powers, the Mayor's lifelong friend who recently announced his resignation and plans to return to private business at the end of this month. Though Mr. Mastro will get Mr. Powers's commanding office at the head of City Hall's central corridor, he will not receive Mr. Powers's former title, First Deputy Mayor.

Administration officials said the Mayor thinks that title must be earned in office, noting that Mr. Powers was not named First Deputy until after his first year as a deputy mayor. They also said there was still a possibility that Randy L. Levine, the city's former labor commissioner who is now the chief labor negotiator for Major League Baseball, would eventually return to the administration in a co-equal position with Mr. Mastro.

At least for now, however, Mr. Mastro will be first among equals among the city's four deputy mayors when he takes over on Sept. 3, supervising the day-to-day operations of city government and acting on the Mayor's behalf on those rare occasions when Mr. Giuliani leaves

town. Most of the city commissioners will report directly to him, and he will also act as the liaison with Federal and state agencies and other elected officials.

The appointment is considered unlikely to bring any significant change in direction in the administration; Mr. Mastro is already an important member of the four-man circle of advisers, who along with the Mayor, determine the administration's agenda and policy. (The others are Mr. Powers, Mr. Levine and Dennison Young Jr., counsel to the Mayor.) Mr. Giuliani acknowledged as much yesterday at a news conference.

"This doesn't signify a change in direction, because Randy is very much a part of this team," Mr. Giuliani said. "It means the administration will be moving in very much the same direction." He added that he thought the administration was "very successful, and what we need to do is to keep doing the same things we've been doing."

Although Mr. Mastro has worked with Mr. Giuliani for much of the last decade, since joining the United States Attorney's office in 1985, he does not have as intimate a relationship with the Mayor that Mr. Powers has had, and administration insiders predicted that he would not carry as much authority. Nor will he make Mr. Powers's salary of \$139,500, instead continuing to make \$138,000.

In particular, Mr. Powers, who is to become the Mayor's campaign manager in next year's re-election effort, will continue to have the Mayor's ear on political matters, an area where Mr. Mastro will likely play less of a role.

"I have enormous respect for Randy, but he doesn't have a lot of political experience," said Guy V. Molinari, the Republican borough president of Staten Island. "We'll have to see how that factors in." Unlike Mr. Powers or Mr. Giuliani, who are both Republicans, Mr. Mastro is a Democrat.

Also yesterday, the Mayor named Bruce Teitelbaum, the deputy chief of staff and the administration's liaison to the Jewish community, as acting chief of staff after Mr. Mastro changes jobs.

The announcement ceremony, held in the Blue Room of City Hall, was packed with city commissioners and aides in a display of the loyalty that both Mr. Giuliani and Mr. Mastro value so highly.

Standing beside his 6-month-old daughter, Arianna, and his wife, Dr. Jonine Bernstein, an assistant professor of epidemiology at the Mount Sinai School of Medicine, Mr. Mastro received sustained applause as he twice embraced the Mayor, whom he called both "a role model and an inspiration" in his life.

"I'm very much looking forward to this challenge and very much looking forward to supporting the important mission and agenda that he has set for all of us," Mr. Mastro said in his quiet rasp of a voice. "So let's go forward and keep doing the good things we're doing."

Somehow, during the ceremony, Mr. Molinari wound up holding Mr. Mastro's baby, just as he held his own granddaughter during his daughter Susan's keynote speech at the Republican National Convention earlier this month.

"Nowadays, it's required if you give a speech that you hold a baby," the Mayor joked. "And Guy Molinari will show us how to hold the baby."

Mr. Mastro, who turned 40 last week, has been a Giuliani loyalist since 1985, when he served as an assistant United States Attorney under Mr. Giuliani in the Southern District of New York.

More than any of the other former prosecutors who joined the administration, he carried Mr. Giuliani's prosecutorial zeal against organized crime into City Hall, achieving a high profile in his legal battles against mob influence in the Fulton Fish Market and other wholesale food markets, the San Gennaro festival, and the carting industry.

Law enforcement authorities have credited him with achieving most of his goals in those areas, evicting more than 20 companies linked to organized crime at the fish market and bringing in new companies to haul commercial waste in the city, thereby bringing down prices. For his efforts, he has received numerous death threats, and he and his family are protected by police bodyguards.

Inside the administration, however, Mr. Mastro is better known as the gatekeeper to high-level appointments in city agencies and the dispenser of patronage positions. Several commissioners, speaking privately, said they had been told by Mr. Mastro to hire staff members with political connections, and said he passed judgment on their choices of top aides.

Last spring, Mr. Mastro was interviewed, along with Mr. Powers and other city officials, by the United States Attorney's office, which is investigating improprieties in the awarding of city contracts to a Queens social service agency, the Hellenic American Neighborhood Action Committee, known as Hanac. Investigators have said they are trying to determine the role played by one of Mr. Mastro's top aides, Anthony Carbonetti, the director of appointments, in the awarding of the \$43 million contracts.

Mr. Mastro is said by administration officials to be more impetuous and peremptory than the more deliberative Mr. Powers, more likely to display his temper with commissioners who resist instantly implementing City Hall's orders.

One official said that the administration runs on a mixture of loyalty, fear and affection, and suggested that the first two elements would now be more prominent than the third. Another said that Mr. Mastro was thought to be more socially liberal than Mr. Powers.

But virtually everyone interviewed yesterday said that as long as the strong-willed Mr. Giuliani remained the city's chief executive, the configuration of his aides was of lesser importance than it had sometimes been in other administrations.

"The players may come and go," said one commissioner, "but the director remains the same."

## PROFILE

Randy M. Mastro

**BORN:** Aug. 21, 1956, Bernardsville, N.J.

**FAMILY:** Married to Dr. Jonine Bernstein, assistant professor of epidemiology at Mount Sinai School of Medicine. Father of 6-month-old girl, Arianna.

**RESIDENCE:** Manhattan.

**EDUCATION:** Bachelor's degree, Yale University, 1978. Law degree, University of Pennsylvania, 1981.

**CAREER:** 1981: law clerk to Justice Alan B. Handler, New Jersey Supreme Court. 1982-85: associate, Cravath, Swaine & Moore. 1985-89: assistant U.S. Attorney and deputy chief of the Civil Division, Southern District of New York. 1989-93: partner, Gibson, Dunn & Crutcher. 1993: outside counsel to Rudolph W. Giuliani's mayoral campaign. 1994-present: Mayor's chief of staff.

**DOG:** Bogart, a collie.

---

A version of this article appears in print on , Section B, Page 1 of the National edition with the headline: Giuliani Promotes His Chief of Staff to No. 2 Spot

# ACT UP activists resist New York City Mayor Rudy Giuliani's AIDS policies, 1994-95

## Goals

1. Prevent abolition of Department of AIDS Services
2. Resist budget cuts

## Time period

3 January, 1994 to 25 April, 1995

## Country

United States

## Location City/State/Province

New York City

## Location Description

most demonstrations took place at City Hall

[View On Map \(/map#case-4958\)](#)

[Jump to case narrative](#)

[\(/content/act-activists-resist-new-york-city-mayor-rudy-giuliani-s-aids-policies-1994-95#case-study-detail\)](/content/act-activists-resist-new-york-city-mayor-rudy-giuliani-s-aids-policies-1994-95#case-study-detail)

[Expand all details](#)

## Methods ➤

### Methods in 1st segment

008. Banners, posters, and displayed communications (</category/gene-sharps-198/008-banners-posters-and-displayed-communications>)

034. Vigils (</category/gene-sharps-198/034-vigils>)

- In addition to protests, AIDS activists held daily vigils at City Hall to remember victims lost to AIDS.

047. Assemblies of protest or support (</category/gene-sharps-198/047-assemblies-protest-or-support>)

### Methods in 2nd segment

002. Letters of opposition or support (</category/gene-sharps-198/002-letters-opposition-or-support>)

- Nonprofits that would take on the responsibility of DAS functions deluged the Giuliani administration in letters of protest about cuts to the division.

008. Banners, posters, and displayed communications (</category/gene-sharps-198/008-banners-posters-and-displayed-communications>)

032. Taunting officials (</category/gene-sharps-198/032-taunting-officials>)

- When Giuliani conducted a town hall meeting, protesters shouted and threw fliers at him.

034. Vigils (</category/gene-sharps-198/034-vigils>)

- In addition to protests, AIDS activists held daily vigils at City Hall to remember victims lost to AIDS.

038. Marches (</category/gene-sharps-198/038-marches>)

047. Assemblies of protest or support (</category/gene-sharps-198/047-assemblies-protest-or-support>)

### Methods in 6th segment

008. Banners, posters, and displayed communications (</category/gene-sharps-198/008-banners-posters-and-displayed-communications>)

038. Marches (</category/gene-sharps-198/038-marches>)

047. Assemblies of protest or support (</category/gene-sharps-198/047-assemblies-protest-or-support>)

172. Nonviolent obstruction (</category/gene-sharps-198/172-nonviolent-obstruction>)

## Segment Length

80 days

## Leaders, partners, allies, elites ➤

### Leaders

AIDS Coalition to Unleash Power (ACT UP)

### Partners

New York Urban League, the Federation of Protestant Welfare Agencies and the United Jewish Appeal-Federation of Jewish Philanthropie, health advocacy groups, Housing Works, STAND UP Harlem

### External allies

The Committee Against Anti-Asian Violence, National Congress for Puerto Rican Rights, CUNY Coalition Against Cuts

### Involvement of social elites

Health Commissioner, Dr. Margaret A. Hamburg concerned that tuberculosis control efforts could be hampered if AIDS patients fall out of social safety net since AIDS victims are ten times more likely to develop infectious tuberculosis.

Actress Susan Sarandon and Rosie Perez

Marva L. Hammons, commissioner of the Human Resources Administration said, "But, no, I am not in favor of the total elimination of D.A.S."

## Opponent, Opponent Responses, and Violence ➤

### Opponents

Giuliani administration

### Nonviolent responses of opponent

Formed barriers with police cars and created a solid phalanx of officers to block protesters' march.

Did not allow press conferences on the steps of City Hall because supposedly the demonstration groups of more than 20 people hindered access to the building.

### Repressive Violence

High arrest numbers, protesters yanked from their seats, some protesters were zip-tied, dragged, and forcibly removed from the area on orange stretchers.

## Classifications ➤

### Cluster

Human Rights

### Classification

Defense

### Group characterization

AIDS activists

## Joining/exiting order of social groups ➤

### Groups in 1st Segment

New York Urban League

the Federation of Protestant Welfare Agencies and the United Jewish Appeal-Federation of Jewish Philanthropy and other nonprofits that would have to take on responsibilities of DAS

### Groups in 6th Segment

National Congress for Puerto Rican Rights

The Committee Against Anti-Asian Violence

CUNY Coalition Against Cuts

### Segment Length

80 days

## Success Outcome ➤

### Success in achieving specific demands/goals

2 out of 6 points

### Survival

1 out of 1 points

### Growth

3 out of 3 points

### Total points

6 out of 10 points

### Notes on outcomes

Although ACT UP members and AIDS activists managed to prevent the complete abolition of the Department of AIDS Services, by the end of 1995, they could not totally prevent Giuliani's budget cuts which is why they received a score of 2 points for their success. The last demonstration was a coalition effort by all the groups affected by Giuliani's cuts.

## Case Study Details

When Rudolph (Rudy) Giuliani took office as New York City's 107th Mayor on 1 January 1994, the city had a budget deficit of \$2.3 billion. The Republican candidate planned to close the city deficit by eliminating 15,000 city jobs. Police, firefighters, and teachers, which made up 60 percent of total city employees, were exempt from the job cuts. With these exemptions, the city administration had to find its staff reductions from less than 40 percent of its 216,000-strong work force. As a result, the Human Resources Administration (HRA), under which the Department of AIDS Services (DAS) existed, became a main target for job cuts due to its large size and heavy budget of \$7.4 billion.

The New York City Human Resources Administration created the Division of AIDS Services, later known as HIV/AIDS Services Administration (HASA), in 1985 as New York found itself at the center of the AIDS epidemic. The 740-person agency assigned a caseworker to each patient to help the patients by putting together benefit packages, including Medicaid reimbursement, food stamps, welfare assistance, housing subsidies or shelter. In 1994, DAS served over 16,000 AIDS patients, a number projected to double by 1997. Despite this increased demand for the agency's services, talks within the Giuliani administration included severely cutting its \$22-million-a-year staffing budget if not eliminating the unit entirely. Because state and federal law did not require DAS to exist, the department was particularly vulnerable to complete dismantlement. Other proposals included keeping a smaller 100 to 300 person staff, who would evaluate patients, register them for benefits, and then rely on community-based organizations to address the rest of the patients' needs.

Giuliani's expected budget plan immediately worried AIDS activists, so on 3 January 1994, two days after he took office, the NY AIDS Coalition to Unleash Power (ACT UP) rallied at City Hall to demand the Mayor make the AIDS crisis a priority of his administration. Because the Mayor's office was located inside City Hall, the Lower Manhattan building became somewhat of an epicenter of the campaign's demonstrations. In March, protesters gained access to the third floor of City Hall and hung a 30 foot by 10 foot banner that ridiculed the building as the "AIDS Hall of Shame." ACT UP members repeated this method using a similar banner a few times afterwards. Each time, City Hall security removed the banner after five minutes, and no arrests were made.

Because Giuliani's proposed plan threatened the budgets of a wide range of government services, such as education, healthcare, and youth programs, various groups congregated at City Hall to protest the budget cuts. On 22 March 1994, ACT UP/NY, joined by Housing Works and Stand Up Harlem, gathered over 1,000 demonstrators at Brooklyn's Cadman Plaza for a march across the Brooklyn Bridge to demand the preservation of the Department of AIDS Services. When the march reached the bridge entrance, the protesters, who were diverse in gender, race, and sexual orientation, encountered a brief standoff with the police. On the roadway, the police created a barricade with cars and formed a solid phalanx. Most participants retreated and used the walkways, though many continued on the roadway. Those that remained approached the police lines in waves, then seated themselves in the middle of the road. After one wave was zip tied and dragged away, the next wave walked forward, sat down, and replaced them. This continued until, ultimately, police arrested 45 people and charged them with disorderly conduct. This demonstration succeeded in blocking traffic due to the police presence on the bridge.

On 11 April 1994, Rudy Giuliani conducted a 90-minute town hall meeting at Junior High School 56 in the Lower East Side. Over 100 discontented participants from two different protest groups demonstrated outside the school. One group protested the Board of Community School District 1's decision not to renew the contract of its superintendent, William E. Ubina while the other protest group, consisting of 50 ACT UP members, protested the abolition of DAS. The raucous protesters heckled the Mayor and shouted slogans, such as "AIDS cuts equal death. Rudy, this means war." The protesters yelled and threw fliers as the Mayor tried to respond to questions, disrupting the town hall meeting.

The next day, 12 April, protesters, again from a variety of issue groups, gathered on the steps of City Hall to conduct what they considered routine press conferences. However, security officials denied protesters access to the building. Officials turned away two groups: the first represented four parents' advocacy organizations while the other group was comprised of AIDS advocates and included the actresses Susan Sarandon and Rosie Perez. A commanding officer determined that the groups came to demonstrate rather than conduct a news conference and relegated the two groups' press conferences to the sidewalk. He noted that groups of protesters larger than 20 made the building difficult to access and stated that groups of this size were not allowed to protest on the steps. This drew criticism from a number of community members. Norman Siegel, executive director of the New York Civil Liberties Union, said "The steps of City Hall have become a public forum. It seems unconstitutional to prohibit press conferences on the steps." Ronnie M. Eldridge, a Councilwoman from Manhattan echoed similar thoughts, "Never have I seen the repressive kind of techniques that we have seen here recently. We can't start limiting who can come in here. That is not democracy." Giuliani stated he had no role in the decision to ban demonstrations on the City Hall steps.

The day took a turn when two dozen protesters locked arms and attempted to block a hallway yards away from the Mayor's office. The demonstrators chanted: "People with AIDS are under attack, what do we do?" Thirty to forty security officials participated in arresting the protestors; some protesters simply stood to be handcuffed and walked themselves out while other protesters resisted before security officials grabbed, cuffed, placed them on orange stretchers, and forcibly removed them from the building.

On 10 May, Mayor Giuliani released his proposed \$31.6 billion budget plan for the city. The plan left the Department of AIDS Services intact, but it would limit the number of caseloads to save \$350,000. Giuliani left the DAS seemingly untouched, but the official plan had not yet been released. In response to Giuliani's executive budget, ACT UP members returned to City Hall and hung a banner that read: "DAS is not enough, Rudy. Fight AIDS now!" Police arrested 18 protesters.

After Giuliani released the budget plan, protests specific to DAS funding subsided for the next year. However, on the evening of 25 April 1995, AIDS activists joined over 2,000 protesters and participated in a mass demonstration called "Shut the City Down!" This demonstration was the campaign's largest and resulted as a coalition effort of the various constituencies affected by Giuliani's policies. These groups included students and professors from the CUNY schools, the homeless, health care workers, AIDS activists, the disabled, and families of people killed by the police. Around 30 groups were involved in the planning, including ACT UP, the Committee Against Anti-Asian Violence, the National Congress for Puerto Rican Rights and the CUNY Coalition Against Cuts.

The demonstration began with four separate rallies, each centering on different issues. Planned obstructions at four different sites followed the rallies. At Battery Tunnel, 50 protesters, mostly students, barricaded an entrance to the ramp and unraveled a banner that read: "Stop for Peaceful Protest." Meanwhile, on the Manhattan Bridge, two dozen demonstrators who wore signs on their stomachs that called for the end of police brutality, locked arms and refused to move from the bridge entrance. Downtown at the Brooklyn Bridge, two dozen homeless people and homeless advocates stood on the bridge for 20 minutes holding a banner that read: "The City is Ours." The biggest demonstration of the four took place at the Midtown Tunnel.

AIDS activists and health services and disability supporters began their rally at Bellevue Hospital and at around 5:30 PM converged towards the Midtown Tunnel. About 75 protesters shut down all six lanes that fed into the tunnel entrance. The President and CEO of Housing Works, Charles King, helped coordinate the die-in so that people with disabilities could use their bodies out of their wheelchairs as physical barriers to the bridge. This caused a road gridlock during which traffic stalled for six blocks. For all four demonstrations, police arrived within 15 minutes and began arrests. Most arrests took place at the Midtown Tunnel, where police ordered a city bus be emptied to tow away 75 arrested participants. In all, the demonstration's arrest count totaled 185 people.

Although ACT UP members and AIDS activists managed to prevent the complete abolition of the Department of AIDS Services, by the end of 1995, they could not totally prevent Giuliani's budget cuts. The AIDS agency suffered a cut of \$3.1 million and was re-organized to tighten the scope of services the city offers its AIDS patients. The administration also toughened its criteria for those who could receive benefit packages.

## Research Notes



### Sources

- Anon. 1994. "Mr. Giuliani's Blinkered Budget; On AIDS, an Intolerable Cut." The New York Times, April 5. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422025719/http://www.nytimes.com/1994/04/05/opinion/mr-giuliani-s-blinkered-budget-on-aids-an-intolerable-cut.html>).
- Anon. n.d. "ACT UP Accomplishments and Chronology in Brief." ACT UP New York - ACT UP Accomplishments and Chronology in Brief. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422030321/http://actupny.com/actions/index.php/act-up-news/70-latest-news/106-act-up-chronology-in-brief>).
- Mitchell, Alison. 1994. "Political Memo; Imperiled AIDS Agency Is at Center of Budget Storm." The New York Times, April 4. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422030352/http://www.nytimes.com/1994/04/04/nyregion/political-memo-imperiled-aids-agency-is-at-center-of-budget-storm.html?pagewanted=all>).
- Hicks, Jonathan P. 1994. "Mayor Enters Hostile Zone On Henry St." The New York Times, April 12. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422030729/http://www.nytimes.com/1994/04/12/nyregion/mayor-enters-hostile-zone-on-henry-st.html>).
- Hicks, Jonathan P. 1994. "AIDS Services Decision Ignites City Hall Protests." The New York Times, April 13. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422030946/http://www.nytimes.com/1994/04/13/nyregion/aids-services-decision-ignites-city-hall-protests.html>).
- Barry, Dan. 1998. "Combative AIDS Group Says City Cut Financing Out of Spite." The New York Times, April 12. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422031126/http://www.nytimes.com/1998/04/12/nyregion/combative-aids-group-says-city-cut-financing-out-of-spite.html>).
- Loving, Jesse Heiwa. 2016. "All in Good Time." POZ. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422031351/https://www.poz.com/article/All-in-Good-Time-12511-3382>).
- Larsen, Jonathan. 1994. "Hundreds Take to Brooklyn Bridge to Protest AIDS Cuts." UPI, March 22. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422031821/http://www.upi.com/Archives/1994/03/22/Hundreds-take-to-Brooklyn-Bridge-to-protest-AIDS-cuts/4752764312400/>).
- Kleinfield, N. R. 1995. "Rush-Hour Protest Causes Gridlock." The New York Times, April 26. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422032003/http://www.nytimes.com/1995/04/26/nyregion/rush-hour-protest-causes-gridlock.html>).
- Shepard, Benjamin. 2015. "Reflections on March/ April 1995 'Bridges and Tunnels' Budget Protests. 'This City Is Ours.'" Play and Ideas. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422032540/http://benjaminheimshepard.blogspot.com/2015/03/reflections-on-march-april-1995-budget.html>).
- Firestone, David. 1996. "Giuliani's Softer Tone; After Years of Social Service Cuts, Mayor Changes Targets." The New York Times, January 31. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422032113/http://www.nytimes.com/1996/01/31/nyregion/analysisgiuliani-s-softer-tone-after-years-social-service-cuts-mayor-changes.html>).
- Myers, Steven Lee. 1995. "Child Welfare Agency Offers Plan to Cut Its Budget." The New York Times, December 7. Retrieved April 20, 2017 (<https://web.archive.org/web/20170422032231/http://www.nytimes.com/1995/12/07/nyregion/child-welfare-agency-offers-plan-to-cut-its-budget.html>).

Name of researcher, and date dd/mm/yyyy

Juli Pham 12/04/2017



The Global Nonviolent Action Database is a project of Swarthmore College, including the Peace and Conflict Studies Program, the Peace Collection, and the Lang Center for Civic and Social Responsibility.



The Global Nonviolent Action Database is licensed under a Creative Commons [Attribution-NonCommercial-NoDerivatives 4.0 International](http://creativecommons.org/licenses/by-nc-nd/4.0/) (<http://creativecommons.org/licenses/by-nc-nd/4.0/>) license (<https://creativecommons.org/licenses/by-nc-nd/4.0/>) unless otherwise noted.

Registered users can [login \(/user\)](#) to the website.

### Cases

- [Browse Cases \(/browse\)](#)
- [Browse Cases by Tags \(/browse-by-tags\)](#)
- [View Cases on Map \(/map\)](#)

### Methods

- [Browse Methods \(/browse-methods\)](#)

### About

- [About the Database \(/content/about-database\)](#)
- [Nonviolent Action Defined \(/content/nonviolent-action-defined\)](#)
- [Three Applications of NVA \(/content/three-applications-nonviolent-action\)](#)
- [Campaigns, Not Movements \(/content/campaigns-not-movements\)](#)
- [Coding Definitions \(/content/coding-definitions-0\)](#)
- [How to Cite Cases \(/content/how-cite-cases\)](#)
- [Resources \(/content/linksresources\)](#)

### Contact

- [Contact Us \(/contact\)](#)
- [Suggest a Case \(/contact\)](#)

[User Login \(/user\)](#)



## [Hernandez v. Barrios-Paoli](#)

Court of Appeals of New York

September 8, 1999, Argued ; October 19, 1999, Decided

No. 146

### Reporter

93 N.Y.2d 781 \*; 720 N.E.2d 866 \*\*; 698 N.Y.S.2d 590 \*\*\*; 1999 N.Y. LEXIS 3430 \*\*\*\*

In the Matter of Daniel Hernandez, Appellant, and James Bynum et al., Intervenors-Petitioners, v. Lilliam Barrios-Paoli, as Commissioner of the Human Resources Administration of the City of New York, et al., Respondents.

**Prior History:** [\*\*\*\*1] Appeal, by permission of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered September 3, 1998, which (1) reversed, on the law, an order and judgment (one paper) of the Supreme Court (Emily Jane Goodman, J.; opn [175 Misc 2d 550](#)), entered in New York County in a proceeding pursuant to CPLR article 78, granting a petition to enjoin the municipal respondents from taking any adverse action with regard to petitioner's application for public assistance for his failure to appear for an eligibility verification review, and directing respondents to issue directives eliminating such reviews as a requirement for establishing or maintaining benefits and services provided through the Division of AIDS Services Income Support, and (2) dismissed the petition.

[Matter of Hernandez v Barrios-Paoli, 253 AD2d 585](#), reversed.

**Disposition:** Order reversed, with costs, and order and judgment of Supreme Court, New York County, insofar as it pertained to petitioner Hernandez, reinstated.

### Core Terms

---

eligibility, investigations, benefits and services, public assistance, Local Law, symptomatic, clinical, public benefit, regulation, interview, mandated, illness, benefits, staff

### Case Summary

---

#### Procedural Posture

Petitioner appealed order of the Supreme Court, New

York County (New York) which affirmed the denial of petitioner's application for public benefits under [N.Y.C. Admin. Code § 21-126 et seq.](#), without an eligibility verification interview.

#### Overview

Petitioner, who suffered from HIV, applied to Division of AIDS Services Income Support (DASIS) for public benefits and services. Petitioner submitted all necessary documents needed to receive public benefits. The Human Resources Administration (HRA) advised him that without an Eligibility Verification Review (EVR) interview, he would not receive public assistance. At issue in petitioner's appeal was whether [N.Y.C. Admin. Code § 21-126 et seq.](#) was violated by the EVR procedure. The court concluded that the EVR procedure, violated the language of the statute and contravened its purpose. [N.Y.C. Admin. Code § 21-128\(a\)\(1\)](#) made it clear that DASIS staff, rather than EVR investigators were required to ensure access to benefits and services for those suffering from HIV. The court held that EVR investigations for DASIS clients contravened one of the intended purposes of the statute: to ease unnecessary administrative burdens for public assistance applicants suffering from HIV in New York City.

#### Outcome

Order reversed; eligibility verification interviews contravened the purpose of Local Law 49 by creating an unnecessary administrative burden to public assistance applicants suffering from HIV.

**Counsel:** *Armen H. Merjian*, New York City, for appellant. The Division of AIDS Services Income Support [\*\*\*\*2] (DASIS) law plainly eliminates the Eligibility Verification Review (EVR) requirement for DASIS clients. ( [Matter of Auerbach v Board of Educ., 86 NY2d 198](#); [Matter of Tucker v Board of Educ., 82 NY2d 274](#); [Oelsner v State of New York, 66 NY2d 636](#); [State of New York v Cities Serv. Co., 180 AD2d 940](#); [Matter of Industrial Commr. of State of N. Y. v Five Corners Tavern, 47 NY2d 639](#); [Matter of Long v](#)

[Adirondack Park Agency, 76 NY2d 416](#); [Albright v Metz, 88 NY2d 656](#); [Ferres v City of New Rochelle, 68 NY2d 446](#); [Matter of Yolanda D., 88 NY2d 790](#); [Matter of Sutka v Conners, 73 NY2d 395.](#))

Michael D. Hess, Corporation Counsel of New York City (Kristin M. Helmers and Leonard Koerner of counsel), for respondents. I. Since EVR is a process and not an element of eligibility, an eligibility requirement, or an eligibility standard, the Court below properly held that it does not violate Local Law No. 49 and that Local Law No. 49 did not implicitly eliminate its use for DASIS clients. ([Jiggetts v Grinker, 148 AD2d 1, 75 NY2d 411](#); [\*\*\*\*3] [McCain v Koch, 70 NY2d 109](#); [Matter of Beaudoin v Toia, 45 NY2d 343](#); [Matter of Kress & Co. v Department of Health, 283 NY 55](#); [Matter of Consolidated Edison Co. v Department of Env'tl. Conservation, 71 NY2d 186](#); [Matter of Lorie C., 49 NY2d 161](#); [Matter of Delmar Box Co. \[Aetna Ins. Co.\], 309 NY 60](#); [Schrader v Carney, 180 AD2d 200](#); [McKechnie v Ortiz, 132 AD2d 472, 71 NY2d 873, 72 NY2d 969.](#)) II. Even if EVRs were a "requirement," the Court below properly held that Local Law No. 49's directive that the "requirements with respect to such access to and eligibility for benefits and services shall not be more restrictive" than the requirements of State and Federal law applies only to additional benefits and services provided in the Commissioner's discretion and has no applicability to provision of the basic benefits at issue here. Hence, the "shall not be more restrictive" language cannot operate to eliminate EVRs for DASIS clients. ([Oden v Chemung County Indus. Dev. Agency, 87 NY2d 81](#); [Matter of Buffalo Columbus Hosp. v Axelrod, 165 AD2d 605](#); [\*\*\*\*4] [American Smelting & Ref. Co. v Stettenheim, 177 App Div 392](#); [Kruger v Page Mgt. Co., 105 Misc 2d 14, 80 AD2d 525](#); [Matter of Clonan, 176 Misc 557](#); [Matter of Raritan Dev. Corp. v Silva, 91 NY2d 98](#); [Matter of Auerbach v Board of Educ., 86 NY2d 198](#); [People v Giordano, 87 NY2d 441.](#)) III. The "single location" provision of Local Law No. 49 was not intended to prohibit home visits by EVR investigators and therefore, by implication, to eliminate use of the EVR process in its entirety. IV. The "staff of the division" provision of Local Law No. 49 was not intended to prohibit home visits by EVR investigators and therefore, by implication, to eliminate use of the EVR process in its entirety. ([Town of Massena v Niagara Mohawk Power Corp., 45 NY2d 482.](#))

**Judges:** Chief Judge Kaye and Judges Bellacosa, Levine, Ciparick, Wesley and Rosenblatt concur.

Opinion by: SMITH

## Opinion

[\*784] [\*\*\*590] [\*\*867] Smith, J.

At issue in this appeal is whether Local Laws, 1997, No. 49 of the City of New York codified in the [Administrative Code of the City of New York § 21-126 et seq.](#), is [\*\*\*\*5] contravened by the Eligibility Verification Review (EVR) procedure for AIDS and clinical/symptomatic HIV clients served by the Division of AIDS Services Income Support (DASIS) of the Human Resources Administration (HRA). For the reasons set forth below, we conclude that it is, and that the order of the Appellate Division should be reversed.

I.

In July 1997, petitioner, who suffers from clinical/symptomatic HIV, applied to DASIS for public benefits and services. [\*\*\*591] He was subsequently interviewed at the Manhattan DASIS office, where he completed an application and submitted all necessary documents needed to receive public benefits. Thereafter, petitioner was informed that he was scheduled for an EVR investigation at HRA's Brooklyn office. In response to an inquiry, HRA advised him that without an EVR interview, he would not receive public assistance.

Petitioner commenced this CPLR article 78 proceeding challenging HRA's requirement that he submit to an EVR investigation. <sup>1</sup> Supreme Court granted the petition, concluding that the Administrative Code of the City of New York did not permit the additional investigation for establishing eligibility [\*\*\*\*6] for public benefits and services. The Appellate Division reversed and dismissed the petition, holding that EVRs do not violate the Administrative Code. We disagree and now reverse the order of the Appellate Division.

II.

DASIS is an agency within the Department of Social Services established administratively by HRA in 1985 to assist persons with clinical/symptomatic HIV or AIDS in securing vital public benefits and services. Local Law

<sup>1</sup> Shortly after petitioner commenced the instant proceeding, HRA eliminated the requirement that DASIS applicants travel to its Brooklyn office for an interview and replaced it with a mandated home visit.

No. 49, which was signed into law in 1997, mandates that the staff of DASIS "provide access to benefits and services ... to every person with clinical/symptomatic HIV illness ... or [\*\*\*\*7] with AIDS ... [\*785] who requests assistance, and ... ensure the provision of benefits and services to eligible persons" ([Administrative Code § 21-126](#)).

[Section 21-128 \(a\) \(1\)](#) of the Code defines "Access to benefits and services" as:

"[T]he provision of assistance by staff of [DASIS] to a person with clinical/symptomatic HIV illness or with AIDS *at a single location* in order to apply for publicly subsidized benefits and services, to *establish any and all elements of eligibility* including, ... those elements required to be established for financial benefits, and to maintain such eligibility and shall include ... assistance provided at a field office of the department, at the home of the applicant or recipient, at a hospital where such applicant or recipient is a patient or at another location, in assembling such documentation as may be necessary to establish any and all elements of eligibility [\*\*868] and to maintain such eligibility" (emphasis supplied).

[Section 21-128 \(b\)](#) [\*\*\*\*8] further delineates the types of benefits and services provided by DASIS and states that:

"Any eligible person shall receive only those benefits and services for which such person qualifies in accordance with the applicable eligibility standards established pursuant to local, state or federal statute, law, regulation or rule. ... The commissioner shall have the authority to provide access to additional benefits and services and ensure the provision of such additional benefits and services whenever deemed appropriate. The requirements with respect to such access to and eligibility for benefits and services *shall not be more restrictive than those requirements mandated by state or federal statute, law, regulation or rule*" ([Administrative Code § 21-128 \[b\]](#) [emphasis supplied]).

Accordingly, when an individual suffering from either clinical/symptomatic HIV illness or AIDS applies for public assistance benefits and services, that application is referred to DASIS. The DASIS staff member conducts a field visit and a public assistance interview to establish eligibility for publicly subsidized benefits. Additionally, every six months DASIS collects [\*786] and verifies [\*\*\*\*9] information in order to recertify continuing eligibility for public assistance (see,

[Administrative Code § 21-218 \[e\]](#)).

The EVR program was implemented in 1995 and is administered by HRA's Office [\*\*\*592] of Revenue and Investigation. This program investigates and verifies all applications of persons seeking subsidized public benefits in New York City. According to HRA's Policies and Procedures Manual, DASIS clients are interviewed by EVR staff to "ensure that all DASIS clients are deemed eligible prior to case acceptance." EVR investigators "specially trained in eligibility verification ... provide intensive assessment of each applicant's eligibility," which includes "home visits [and] in-depth interviews." Moreover, EVR investigators may contact other individuals and organizations to obtain information regarding an applicant's eligibility, income and resources.

III.

The resolution of this appeal turns on the construction of Local Law No. 49. Thus, we begin our analysis with the familiar maxim that statutory interpretation requires courts to first look to the plain meaning [\*\*\*\*10] of the words of a statute. Next, we look at the spirit and purpose of the statute and the objectives sought to be accomplished by the Legislature. Indeed, the general spirit and purpose of the statute is an important aid in understanding the meaning of its words.

We conclude that the EVR procedure, when applied to DASIS clients, violates the language of Local Law No. 49 and contravenes the purpose of the statute. The statutory language makes clear that *DASIS* staff, rather than EVR investigators, must provide and ensure access to benefits and services, which includes "establish[ing] any and all elements of eligibility including ... those elements required to be established for financial benefits, and to maintain such eligibility" ([Administrative Code § 21-128 \[a\] \[1\]](#)).

Respondents' contention that EVR is merely a process and not an additional eligibility determination is unavailing. Respondents concede that an applicant's benefits may be denied on the basis of noncompliance with an EVR review, which goes to the heart of eligibility. Indeed, the very notice sent by EVR investigators to an applicant who fails to complete an EVR interview states that "[c]ompliance [\*\*\*\*11] with the EVR review is an eligibility requirement. Your failure to report for the interview or to respond to notices left at your home by EVR investigators [\*787] may result in rejection of your application or closing of your case. You must provide all the documents ... needed to help

establish **[\*\*869]** your eligibility" (emphasis supplied). Thus, notwithstanding that DASIS has already determined an applicant's eligibility for public benefits and services, HRA also requires applicants to undergo EVR investigations in order to establish eligibility. We therefore conclude that EVR investigations for DASIS clients create eligibility factors which are incompatible with [section 21-128 \(a\) \(1\)](#).

Furthermore, [section 21-128 \(b\) of the Administrative Code](#) expressly states that, "The requirements with respect to such access to and eligibility for benefits and services shall not be more restrictive than those requirements *mandated* by state or federal statute, law, regulation or rule" (emphasis **[\*\*\*\*12]** supplied).<sup>2</sup> Respondents **[\*\*593]** point to [Social Services Law §§ 132](#) and [134](#), as well as the corresponding regulations promulgated thereunder, to bolster their contention that EVR investigations are mandated by State law. Although these statutes and regulations may authorize the EVR process, they do not *mandate* it.

**[\*\*\*\*13]** Pursuant to [Social Services Law § 132 \(1\)](#), "When an application for assistance or care is received ... an investigation and record shall be made of the circumstances of such person." The statute permits the investigation to secure information necessary to determine if an applicant is, in fact, in need of assistance by permitting an examination of, among other things, an applicant's residence, age and physical condition. Furthermore, the statute delineates that

---

<sup>2</sup>While the Appellate Division determined that this phrasing qualifies only the immediately preceding sentence rather than the passage as a whole, we find that interpretation to be strained. The preceding sentence states that "[t]he commissioner shall have the authority to provide access to additional benefits and services and ensure the provision of such additional benefits and services." Inasmuch as there are no State or Federal *requirements* with regard to additional benefits and services (e.g., nutrition and transportation allowances), the Appellate Division's reading of the statute would render this provision meaningless, in direct contravention of settled principles of statutory construction (see, e.g., [Lederer v Wise Shoe Co.](#), 276 NY 459, 465).

Moreover, the legislative history states that this language "would mandate that the requirements *with respect to accessing benefits and services* shall not be more restrictive than those requirements mandated by State or Federal statute, law, regulation, or rule" (City Council Comm Report, at 5 [May 22, 1997] [emphasis added]).

"[n]otwithstanding any other inconsistent provision of law, the commissioner shall provide by regulation for methods of determining eligibility for public assistance" ([Social Services Law § 132 \[3\]](#)). Finally, [section 134 of the Social Services Law](#) mandates that any social service official **[\*788]** responsible for investigating any application for public assistance **[\*\*\*\*14]** must maintain close contact with the applicant granted public assistance, including frequent visits to the home or institution.

While the foregoing provisions mandate that social service officials conduct investigations of applicants and grantees of public assistance, the statutes do not require that these investigations be executed by EVR investigators. Instead, the statutes merely provide a skeletal framework within which the Commissioner of Social Services must act.<sup>3</sup> Here, Local Law No. 49 effectuates the intent of the State statutes by directing *DASIS* to (1) establish an applicant's eligibility, (2) take necessary steps to maintain such eligibility, and (3) conduct recertification determinations with regard to persons with clinical/symptomatic HIV illness or AIDS, as directed by the Commissioner and in accordance with State and Federal law (see, [Administrative Code § 21-128 \[a\] \[1\]](#); [e], [f]).

**[\*\*\*\*15]** Respondents contend that if the City Council had intended to eliminate EVR for DASIS clients, "they could easily have done just that." But clearly the City Council could not have eliminated a verification **[\*\*870]** process mandated by State or Federal law. Thus, because Local Law No. 49 prohibits the imposition of any additional requirements not "*mandated* by state or federal statute, law, regulation or rule" ([Administrative Code § 21-128 \[b\]](#) [emphasis added]), and EVR is an additional eligibility requirement imposed by the City, we conclude that EVR eligibility investigations for DASIS clients are prohibited by [section 21-128 \(b\)](#).

Finally, the spirit and purpose of Local Law No. 49 also compel our conclusion. There is no dispute that Local Law No. 49 was enacted to facilitate access to necessary public benefits and services for individuals suffering from clinical/symptomatic HIV illness and AIDS in New York City. When the meaning of certain terms in a statute is unclear, "a court's role is not to delve into the minds of legislators, but rather to effectuate the

---

<sup>3</sup>The corresponding regulations do not mandate EVR investigation either (see, e.g., [18 NYCRR 351.28](#), [351.2 \[b\]](#), [\[e\]](#), [\[e\] \[1\]](#); 351.1 [a], [c]; 351.5 [a]; 351.6, 351.6 [a]).

statute [\*\*\*\*16] by carrying out the purpose of the statute as it is embodied in the words chosen by the Legislature" ( [Braschi v Stahl Assocs. Co., 74 NY2d 201, 208](#)). Construing Local Law No. 49 as eliminating EVR investigations for DASIS clients is consistent with the explicit intent of City lawmakers to [\*789] streamline eligibility determination procedures and requirements for this unique group of public assistance applicants, as evidenced by the words of the statute and the legislative history. To illustrate, the City Council Committee Report specifically explains that "[t]he definition of 'access to benefits and services' was reworded from that provided in the original bill to stress the fact that applicants for benefits and services should be able to receive assistance from [\*\*\*594] HRA in a single location, be it the field office, home, hospital, or other convenient location" (City Council Comm Report, at 3, n 3 [May 22, 1997]). The report further notes that the single location requirement contemplated "that all elements of eligibility, including those currently occurring at HRA's Eligibility Verification Review office (EVR), take place at the same location" [\*\*\*\*17] (*id.*).

Thus, the conclusion is manifest. EVR investigations for DASIS clients contravene one of the intended purposes of Local Law No. 49: to ease unnecessary administrative burdens for public assistance applicants suffering from clinical/symptomatic HIV illness or AIDS in New York City. Finally, nothing in this decision should be taken as prohibiting efforts or procedures to prevent or eliminate fraud.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the order and judgment of Supreme Court, New York County, insofar as it pertained to petitioner Hernandez, reinstated.

Chief Judge Kaye and Judges Bellacosa, Levine, Ciparick, Wesley and Rosenblatt concur.

Order reversed, etc.

## Housing Works v. Giuliani

56 F. App'x 530 (2d Cir. 2003)  
Decided Jan 3, 2003

Nos. 01-9436, 01-9440.

January 3, 2003. This case was not selected for  
531 publication in the Federal Reporter \*531

Contractor filed § 1983 action alleging that city terminated or refused to renew pre-existing contracts on basis of contractor's protected First Amendment activity in criticizing city's HIV/AIDS policies. The United States District Court for the Southern District of New York, Victor Marrero, J., [179 F.Supp.2d 177](#), denied city officials' motion to dismiss on qualified immunity grounds, and officials appealed. The Court of Appeals held that officials were not entitled to qualified immunity.

Affirmed.

Appeal from the United States District Court for the Southern District of New York, (Marrero, Judge).

Matthew D. Brinckerhoff (David H. Gans, on the brief), Emery Cuti Brinckerhoff Abady P.C., New York, N.Y., for Plaintiffs-Appellees.

Alan Beckoff (Stephen J. McGrath, Nadine Rivellese, Bob Bailey, on the brief), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, N.Y., for Defendants-  
532 Appellants. \*532

Present: MESKILL, CALABRESI, and B.D. PARKER, Jr., Circuit Judges.

---

### SUMMARY ORDER

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court be and it hereby is **AFFIRMED**.

The defendants appeal a judgment of the United States District Court for the Southern District of New York (Marrero, *J.*) denying their motion to dismiss, on the grounds of qualified immunity, the plaintiffs' claims of violations of [42 U.S.C. § 1983](#). The motion to dismiss was brought pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. We agree with the district court that the plaintiffs have pled sufficient facts to survive the defendants' motion.

The district court's published opinion provides a complete account of the relevant background of this appeal. *Housing Works v. Turner*, [179 F.Supp.2d 177](#) (S.D.N.Y. 2001). We therefore limit our discussion to the defendants' two arguments on appeal: that they should have been accorded qualified immunity (1) against the plaintiffs' claims for violations of the First Amendment and (2) against the plaintiffs' claims for violations of the Equal Protection Clause. We review the district court's denial of the defendants' motion to dismiss on the pleadings de novo, accepting the allegations in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party, here the plaintiff. *Patel v. Searles*, [305 F.3d 130, 134-35](#) (2d Cir. 2002).

A government official sued in his or her individual capacity is entitled to qualified immunity: (1) when the conduct complained of is not prohibited by federal law; (2) even when such conduct is

prohibited, if the plaintiffs right to be free from such conduct was not clearly established at the time of the conduct; or (3) if the defendant's action was objectively reasonable in light of the legal rules clearly established at the time it was taken. See *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65-66 (2d Cir. 1999).

The defendants first argue that, on the facts pled, they are entitled to qualified immunity for any alleged violations of the First Amendment. The parties agree that at the time of the relevant actions, it was clearly established that "the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 670, 673, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996). To date, however, the Supreme Court has held that an independent contractor has a First Amendment right against retaliation only where there is a "pre-existing commercial relationship" between the parties. *Id.* at 685, 116 S.Ct. 2342 ("[W]e emphasize the limited nature of our decision today. Because *Umbehr's* suit concerns the termination of a preexisting commercial relationship with the government, we need not address the possibility of suits by bidders or applicants for new government contracts who cannot rely on such a relationship.") This court has yet to go beyond *Umbehr* on this point and we have recently held that, while independent contractors' right against retaliation may in fact extend to situations where there is no pre-existing commercial relationship, such an extension is not yet clearly established and consequently, a defendant against such a claim is entitled to qualified immunity. *African Trade Info. Ctr., Inc.*

533 *v. Abromaitis*, 294 F.3d 355 (2d Cir. 2002). \*533

The defendants in this case argue that they are entitled to qualified immunity because, they assert, the facts pled fall into that class of cases that *Umbehr* has expressly left undecided. They base this claim on the fact that at the time of the alleged retaliatory actions, there was no contract between

the City of New York and the plaintiffs. The defendants' argument presupposes, however, that when the Supreme Court in *Umbehr* said "pre-existing commercial relationship," it meant only continuing contractual relationships. This is too parsimonious a reading. Had the Court intended to limit *Umbehr* to situations where there was a continuing contract, it would have used language to that effect. Its choice of the broader term "commercial relationship" shows in no uncertain terms that the right of independent contractors against retaliation extends beyond cases of existing contracts. See *Umbehr*, 518 U.S. at 708-09, 116 S.Ct. 2342 (Scalia, J., dissenting). So too does the Court's decision on the same day in *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 116 S.Ct. 2353, 135 L.Ed.2d 874 (1996), which held that the First Amendment right against retaliation applied where the plaintiff, an independent contractor, did not have a continuing contract with the defendant, but was merely placed on a list of available contractors. See *id.* at 721 (holding it sufficient that there was "a relationship that, based on longstanding practice, [the plaintiff] had reason to believe would continue").

The plaintiffs' complaint alleges that Housing Works had a longstanding relationship with the City of New York to provide a variety of services to the homeless and to people with AIDS, a relationship evidenced by a number of contracts with the City of New York. The district court correctly concluded that the plaintiffs had alleged a "pre-existing commercial relationship" within the clearly established limits of *Umbehr*. It therefore properly rejected the defendants' arguments that they enjoyed qualified immunity against the plaintiffs' claims of First Amendment retaliation.

The plaintiffs also allege violations of the Fourteenth Amendment, arguing that they have "been intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120

S.Ct. 1073, 145 L.Ed.2d 1060 (2000) (per curiam). The defendants contend on appeal that "[t]his claim is merely a restatement of Housing Works's First Amendment claim and should have been dismissed on that basis." Here the defendants seem wrongly to assume that if retaliatory treatment does not violate the First Amendment, it then has a "rational basis," as that term is used in equal protection jurisprudence. The error of this position is well explicated by the district court's clear analysis of the plaintiffs' equal protection claim. 179 F.Supp.2d at 199-201. In any case, since the defendants have chosen to rest their equal protection argument entirely on their First Amendment argument, and since the latter fails,

the defendants have not made a case for qualified immunity for the alleged violations of the Equal Protection Clause.

Accordingly, we AFFIRM the judgment of the district court.

357 \*357

---



# Housing Works, Inc. v. City of New York

United States District Court for the Southern District of New York

November 12, 1999, Decided ; November 12, 1999, Filed

99 Civ. 8975 (AGS)

## Reporter

72 F. Supp. 2d 402 \*; 1999 U.S. Dist. LEXIS 17600 \*\*

HOUSING WORKS, INC., Plaintiff, -against- CITY OF NEW YORK; NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES(DHS); MARTIN OESTERREICH, Commissioner of DHS; SUSAN WIVIOTT, Associate Commissioner of DHS; JOHN/JANE DOES # 1-10; UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD); and ANDREW CUOMO, Secretary of HUD, Defendants.

**Disposition:** [**\*\*1**] Plaintiff's motion for a preliminary injunction GRANTED and defendants' cross-motion to abstain from proceeding with this action DENIED.

## Core Terms

---

Housing, ranking, non-responsibility, projects, funding, Vendex, score, defendants', state court, contracts, programs, retaliation, retaliatory, state court action, protest, reranking, renewal, alleges, pre-applications, asserts, circumstantial evidence, demonstrations, bidder, proposals, motive, preliminary injunction, fiscal, downgraded, homeless, protected speech

## Case Summary

---

### Procedural Posture

Plaintiff, in action alleging violations of [U.S. Const. amend. I, XIV](#), and seeking relief against defendant city and officials with respect to defendant city's rankings of plaintiff projects regarding eligibility for public funding, sought preliminary injunction for reinstatement of rankings for funding. Defendants cross-moved for abstention.

### Overview

Plaintiff, in action alleging violations of [U.S. Const. amend. I, XIV](#), seeking relief against defendant city and officials with respect to defendant city's rankings of plaintiff's projects regarding eligibility for public funding,

sought preliminary injunction for reinstatement of rankings. Defendants cross-moved for abstention. The court refused to abstain after examination of the Colorado River abstention doctrine factors. Action did not involve exceptional circumstances such that the court should refrain from exercising subject matter jurisdiction and abstain from proceeding. The court found that absent an injunction, plaintiff would be denied federal funding because of defendants' downgrading of plaintiff's projects. If downgrading was in retaliation for plaintiff's public criticism of administration, injuries were not remote or speculative. Substantial evidence of retaliatory intent was present. Plaintiff's applications were treated differently than other applications. The mayor's failure to rule on plaintiff's administrative appeal foreclosed challenging a finding of non-responsibility in court. The injunction issued.

### Outcome

Plaintiff's motion for a preliminary injunction was granted, and defendants' cross-motion to abstain from proceeding was denied. Absent an injunction, plaintiff would be denied federal funding because of defendants' downgrading of plaintiff's projects. If downgrading was in retaliation for plaintiff's public criticism of administration, injuries were not remote or speculative.

**Counsel:** For HOUSING WORKS, INC., plaintiff: Matthew D. Brinckerhoff, Emery, Cuti, Brinckerhoff & Abody, P.C., New York, NY.

For CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES (DHS), MARTIN OSTERREICH, SUSAN WIVIOTT, defendants: Naomi Sheiner, Michael D. Hess, Corporation Counsel of the City of NY, New York, NY.

**Judges:** ALLEN G. SCHWARTZ, U.S.D.J.

**Opinion by:** ALLEN G. SCHWARTZ

## Opinion

---

**[\*404] OPINION AND ORDER**

ALLEN G. SCHWARTZ, DISTRICT JUDGE:

Plaintiff Housing Works, Inc. ("plaintiff" or "Housing Works") filed this action seeking injunctive and declaratory relief. Plaintiff asserts claims under [42 U.S.C. § 1983](#), alleging that it has been deprived of its rights to freedom of speech and equal protection guaranteed by the [First](#) and [Fourteenth Amendments to the U.S. Constitution](#). Plaintiff also asserts claims pursuant to Article I, §§ 8, 9, 11 of the New York State Constitution and challenges New York State administrative law. This matter is now before the Court on plaintiff's motion for a preliminary injunction directing defendants **[\*\*2]** (i) to reinstate plaintiff's original rankings in defendants' ranking of the 1999 applications for U.S. Department of Housing and Urban Development ("HUD") funding, and (ii) to transmit the reinstated ranking to HUD before the close of the application deadline for next fiscal year. Defendants cross-move the Court to abstain from proceeding with this action. For the reasons set forth below, plaintiff's motion is GRANTED and defendants' cross-motion is DENIED.

**I. FACTS**

The facts below are undisputed except where otherwise indicated.

**[\*405] A. History of tension between Housing Works and the Giuliani Administration:**

Housing Works is a not-for-profit corporation that operates two supportive housing programs in New York City. Defendants are the City of New York ("City"), the City's Department of Homeless Services ("DHS"), DHS Commissioner Martin Oesterreich ("Oesterreich"), former DHS Associate Commissioner for Policy and Planning Susan Wiviott ("Wiviott"), and DHS employee Sheila Sawyer ("Sawyer") who is one of the Jane Does, (Sawyer Aff. P 3), (collectively: "defendants").

Housing Works, begun in 1991, provides housing and other services for homeless "persons with AIDS and **[\*\*3]** HIV" ("PWAs"). (Decl. of Charles King, dated Oct. 6, 1999 ("King Decl."), PP 2, 23.) Plaintiff's clients are not only PWAs but individuals who are also mentally ill, emotionally disturbed, financially needy, or chemically dependent, including individuals with such problems who were rejected by other providers. (King

Decl. P 3.) Housing Works has a history of criticizing what it perceives as the indifference to PWAs of the administration of Mayor Rudolph Giuliani. It concedes that it has disrupted a Town Meeting, engaged in civil disobedience in the entrance of the mayor's office, taken over the Division of AIDS Services offices, disrupted HIV Planning Council meetings and engaged in other similar conduct, some of which is referred to below. (King Decl. P 59 n.10.)

In 1994, Housing Works vigorously opposed plans to abolish the City's Division of Aids Services ("DAS") (now known as: Division of Aids Services and Income Support or "DASIS"). (King Decl. P 19.) Housing Works particularly criticized then Deputy Mayor Fran Reiter ("Reiter"), in a series of demonstrations. (King Decl. P 20.) Housing Works' representatives, accompanied by a TV crew, entered a meeting that plaintiff alleged **[\*\*4]** had been convened for the purpose of abolishing DAS, and began to read on camera from a document that plaintiff refers to as Reiter's "secret" agenda. As quoted in the *New York Times* of December 15, 1994, Reiter responded by decrying Housing Works' "non-negotiable demands and grandstanding" that had engendered "unproductive, time wasting meetings". (King Decl. P 21; *Id.* at Ex. B.) The Administration ultimately did not abolish DAS. (King Decl. P 22.)

Housing Works organized the "This City Is Ours" rush-hour demonstration against the mayor on April 25, 1995, blocking four bridges and tunnels. (King Decl. P 59 n.10.) Later, Housing Works commenced an action challenging the benefits provided to PWAs by the City, [Henrietta D. v. Giuliani, 1996 U.S. Dist. LEXIS 22373](#), No. 95 Civ. 0641 (SJ), 1996 WL 633382 (E.D.N.Y. Oct 25, 1996) (seeking to force Human Resources Administration to provide better benefits). (See King Decl. P 15.)

In March of 1997, Charles King ("King"), co-executive director of Housing Works, attended a meeting between the City's Human Resources Administration ("HRA") and Housing Works concerning new contracts and contract renewals. (King Decl. PP 1, 32.) **[\*\*5]** Housing Works alleges that HRA's then-Commissioner Lillian Barrios-Paoli ("Barrios-Paoli") (i) threatened Housing Works with retaliatory treatment if it continued to "cause trouble" by advocating on behalf of PWAs, (ii) asked Housing Works why it was so hostile to the Giuliani Administration, and (iii) advised that Housing Works could not expect favorable treatment with Housing Works' attitude. (King Decl. P 33.) Pamela S. Brier ("Brier"), Chair of the Board of Directors of Housing

Works, also attended the March 1997 meeting and corroborates King's version. (Affidavit of Pamela S. Brier, dated April 2, 1998, attached to King Decl. as Ex. I ("Brier Aff."), PP 1-4.)

Brier advised King to keep a low profile, which he did until October 22, 1997, when Housing Works publicly demonstrated [\*406] against what it perceived as the City's unfairness in not entering into certain contracts with Housing Works. (Brier Aff. PP 6-7.) King was arrested along with 37 others after what Housing Works alleges was a "peaceful demonstration" at the offices of HRA and at Mayor Giuliani's reelection headquarters. (King Decl. PP 36, 59 n.10.) The same day, HRA issued a press release stating that it would not renew [\*\*6] Housing Works' contracts totaling approximately \$ 4.5 million and would no longer enter into contracts with Housing Works relating to Housing Works ongoing projects. (King Decl. PP 37, 46.)

In September 1997, approximately one month prior to HRA's press release referred to above, Lou-Ellen Barkan ("Barkan"), then Chief of Staff for Deputy Mayor Randy Mastro ("Mastro"), discussed Housing Works with a City employee (whose name she cannot recall). (King Decl. P 40.) The first entry in Barkan's two pages of notes on that discussion is: "Housing Works (*Fran Hates them*)", referring to Fran Reiter, and below that: "Act-up" and "AIDS advocacy". (King Decl. P 40 (emphasis in original); Ex. J att. to King Decl.) Defendants note that City officials who were considering the contracts with Housing Works have denied that Reiter played any role in the Administrations' decisions as to the contracts. (Bailey Aff. in Opp. to Applications for Preliminary Injunctions P 179, submitted to state court. ("Bailey State Aff."))

The hand-written notes of Beth Kaswan ("Kaswan"), the City's Chief Procurement Officer and of the head of the Mayor's Office of Contracts ("MOC"), and of MOC staffer Jeffrey Weinstein [\*\*7] ("Weinstein"), certain of which were prepared prior to October 22, 1997, the date of the press release, refer to the City's concern that Housing Works might embark on another demonstration or protest. (King Decl. P 41; Ex. K,L att to King Decl.) Weinstein wrote, on October 7, 1997, "Doing nothing will force HWks to do something--going public". (King Decl. P 42 n.6; Ex. L. at 3, att to King Decl.) Both Kasman and Weinstein referred in their notes dated October 20, 1997 to a strong rumor that Housing Works would protest at City Hall, with Kasman adding that Mastro "needs a report on all they (HW) did wrong" and that Mastro had told Barrios-Paoli that she "must be prepared to respond

on camera tomorrow". (King Decl. P 43, 44; Ex. K at 11; Ex L at 5.) Kasman's notes dated October 21, 1997 bracket news of an imminent protest together with a reference to a meeting with David Klasfeld ("Klasfeld"), then on Mastro's staff. (King Decl. P 45; Ex. K at 13.) Kasman's hand written notes also refer to Housing Works' demonstrations or marches that she had heard of from Richard Bonamarte, HRA's Chief Contracting Officer, from Gerard Hoey, HRA's Inspector General at the Department of Investigation, [\*\*8] and from Barkan. (King Decl. P 41 n.5.)

On October 29, 1997, in a meeting with Barkan following the demonstration, Kasman wrote "Housing Works broke into campaign headquarters & chained themselves to desks". (King Decl. P 47; Ex. K at 13.) Weinstein, attending the MOC meeting over which Kasman presided, wrote "This a.m. chained themselves to desks at mayor's campaign headquarters". (King Decl. P 48; Ex. L at 11.)

In November 1997, Housing Works commenced an action in state court entitled [\*Housing Works, Inc. v. City of New York\*, 680 N.Y.S.2d 487, 255 A.D.2d 209 \(N.Y. App. Div.1998\)](#), challenging the non-renewal and termination of Housing Works contracts for the provision of supportive services to PWAs. (King Decl. PP 15, 49.)

In March 1998, Housing Works obtained and released to reporters a copy of a report commissioned by the Mayor's Office of AIDS Policy that was highly critical of HRA. The *New York Times*, on March 12, 1998, called the report "nightmarish", and summed it up by stating that HRA had permitted PWAs to be housed in hotels where "criminal activity is rampant", citing [\*407] "drug dealing, prostitution and extortion", with the full knowledge of some City [\*\*9] workers. (Ex. O attached to King Decl.; King Decl. PP 18, 61.) The report received wide circulation in the media, and Mayor Giuliani was quoted as saying it was "a very very false picture . . . for the purposes of getting attention for themselves". The mayor's press secretary was quoted as saying that Housing Works was seeking to promote "their own biased political agenda." (Ex. O attached to King Decl.)

Thereafter, Housing Works commenced an action in this Court, [\*Housing Works v. Safir\*, 1998 U.S. Dist. LEXIS 10962, No. 98 Civ. 4994 \(HB\), 1998 WL 409701](#) (S.D.N.Y., Jul. 21, 1998), against Howard Safir, Commissioner of the New York City Police Department, the City of New York, and Mayor Giuliani. In July 1998, a preliminary injunction was granted enjoining the

defendants from enforcing a policy of the New York City Police Department limiting the size of groups conducting press conferences on the steps of City Hall to 25 people. Following issuance of the injunction, Housing Works held a press conference on the steps of City Hall. (King Decl. P 15.) At the press conference Housing Works protested the City's violations of Local Law 49, which codified the existence of the Division of AIDS Services **[\*\*10]** and mandated the availability of certain services to persons afflicted with AIDS. (King Decl. P 58.) A report setting out the violations asserted that thousands of potential beneficiaries were unaware of their eligibility for benefits because the City had failed to properly publicize such eligibility. (King Decl. P 58.) Housing Works protesters carried placards of Mayor Giuliani stamped "AIDS Criminal", in blood red. (King Decl. P 58.)

In November 1998, Mayor Giuliani left a press conference when asked about Housing Works, grimacing and throwing his hands up in disgust; the event was filmed and broadcast on the nightly news. (King Decl. PP 16, 60.) In November 1998, as Housing Works prepared to stage the protest at City Hall referred to in *Safir*, a widely-publicized vigil organized to "Tell the Mayor: People with AIDS are dying", the mayor took security measures, claiming that Housing Works was a "suspect organization". (King Decl. PP 16, 60; Ex. A attached to King Decl.)

In December of the same year, Housing Works staged another City Hall protest, in commemoration of World AIDS Day, carrying banners and reading aloud the names of persons who had died of AIDS. Housing Works had **[\*\*11]** sought and secured injunctive relief in [Housing Works v. Safir, 1998 U.S. Dist. LEXIS 10962, No. 98 Civ. 4994 \(HB\), 1998 WL 823614](#) (S.D.N.Y., Nov. 25, 1998), to permit Housing Works, on the steps of City Hall, to commemorate World Aids Day and to criticize Mayor Giuliani's alleged indifference. (King Decl. P 15.)

During the period of successive demonstrations in late 1998, Housing Works applied for a "Welfare-to-Work" contract, a contract to provide job training for public assistance recipients with HIV/AIDS, in response to an October 1998 solicitation by the State Department of Labor ("SDOL") and State Department of Health ("SDOH"). (Turner Aff. P 4.) The proposal required a written approval by the local social services district, which for Housing Works meant HRA approval. (King Decl. P 86.) HRA added "affirmative approvals" to all proposals submitted to it en route to SDOL, but for three

proposals, one of which was Housing Works'. (Turner Aff. P 7; Ex. 6 att. to Bailey Decl.) Those three proposals were awarded merely "form letters of certification". (Turner Aff. P 7; Ex. 6 att. to Bailey Decl.) HRA's certification of Housing Works as a potential service provider was submitted to the State in **[\*\*12]** December 1998. (King Decl. P 86.)

King alleges that on or about February or March 1999, he was informed that Housing Works was the highest ranked bidder. (King Decl. P 87.)

On February 23, 1999, HRA Commissioner Turner sent a letter to the State Commissioner of Labor "withdrawing its **[\*408]** 'Certification Form for the State of New York Department of Labor HIV Welfare-to-Work Request for Proposals'" with respect to the proposals submitted by three agencies, including Housing Works. (Ex. 6 att. King Decl., letter from Turner to SDOL dated Feb. 23, 1999). Turner's explanation for the withdrawal was that the certification had been provided with a view to "allowing the selection committee as broad a review as possible", and that he had thought HRA would later have another chance to comment, this time on the proposals already deemed reviewable, but had been apprised a month earlier that HRA would not be on the final selection committee. (Ex. 6 att. King Decl., letter from Tuner to SDOL dated Feb. 23, 1999). Housing Works disputes this rationale for the withdrawal, asserting that the letter was sent because Housing Works was going to be awarded the contract. (King Decl. P 88.) Turner's letter **[\*\*13]** conclusively stated that all three proposals were "non-responsive . . . to the goals of HRA's Division of Aids Services and Income Support regarding private sector job development, preparation and placement." (Ex. 6 att. Bailey Decl., Letter of Turner, Feb 23, 1999). The letter detailed Housing Works' history: the March 17, 1998 DOI report, a September 4, 1998 nonresponsibility determination, and a November 18, 1998 Appellate Division decision in *Housing Works v. City of New York*. (Ex. 6 att. Bailey Decl., Letter of Turner, Feb 23, 1999). The letter did not detail the history of the other two programs. (Ex. 6 att. Bailey Decl., Letter of Turner, Feb 23, 1999).

Thereafter, Turner met with Karen Papendrea of SDOL and Humberto Cruz ("Cruz") of SDOH, allegedly in order "to clarify the reasons for HRA's decertification of Housing Works as a potential vendor". (Turner Aff. PP 6, 7.) Housing Works submits that the Turner meeting was called in order to prevent Housing Works from being awarded the job contract. (King Decl. P 89.)

Turner stated that it would be irresponsible for HRA to approve distribution of funds to Housing Works in light of the audits and the fact that HRA had not recovered [\*\*14] the misallocated funds, especially since City monies would provide significant funding for the state job training contract. (Turner Aff. PP 6, 7; King Decl. P 89.) Moreover, Turner told SDOL that if Housing Works received SDOL funds, HRA would neither refer clients to Housing Works' programs nor approve Housing Works' billing for services rendered to clients who approached it on their own. (Turner Aff. P 8.)

At the meeting, the State suggested that a third nonprofit organization would handle all financial and accounting aspects of the contract in order to alleviate any concerns as to Housing Works' financial responsibility, and that Turner rejected the proposal. (King Decl. PP 89, 90. Cruz transc.) At the meeting Turner also threatened to refuse to certify Housing Works as a Welfare-to-Work site, with the alleged result that Housing Works' clients would be precluded from participating in Housing Works' job training even if Housing Works did receive the contract. (King Decl. P 92; Cruz transc.) Housing Works was not awarded the job training contract. (Cruz trans.)

## B. Housing Works' Financial History

Defendants contend, in substance, that the City's response to Housing Works [\*\*15] traces, not to the latter's public statements and demonstrations, but to its troubled financial history. Housing Works, in response, submits the following.

By late 1995 and early 1996 it had become clear to Housing Works, a burgeoning organization, that its accounting system had become inadequate. (King Decl. P 23.) Housing Works' management personnel were not being timely updated on Housing Works' financial status. (King Decl. P 24.) Cash flow mired and Housing Works was unable to meet payroll or make timely payments to creditors. (King Decl. [\*\*409] P 24.) Housing Works alleges that the type of financial problems detailed are not unusual for non-profits providing these kinds of services, and that others experienced the same difficulties with HRA, and that only Housing Works was singled out for punitive treatment. (King Decl. P 38.)

Housing Works avers that it immediately informed HRA of its financial and accounting problems and worked with HRA and accounting firms Ernst & Young and Peat, Marwick, & Mitchell in early 1996 to produce a

corrective action plan. (King Decl. P 25.)

The City's Department of Investigation ("DOI") examined Housing Works' books and concluded in July 1996 that Housing [\*\*16] Works' record keeping was inadequate, that funds had been commingled, that separate bank accounts had not been maintained, that there were unexplained fund transfers to other companies, and that a full scale audit should be performed. (King Decl. P 26; Ex. C att to King Decl.)

The DOI report also faulted Housing Works for the fraudulent endorsement of checks by a Housing Works employee.<sup>1</sup> Housing Works alleges that as soon as Housing Works had discovered the misconduct in 1993, it retained a certified public accountant to review accounts and to clarify what had occurred and that Housing Works reported the matter to the New York County District Attorney's Office ("DA's Office"). (King Decl. P 26 n.2.) Housing Works alleges that as soon as the DA's Office permitted plaintiff to advise HRA, i.e., July 1995, plaintiff did so, enclosing a reimbursement for \$ 5495.00, the total amount of misappropriated funds owed to HRA. (King Decl. P 26 n.2; Ex. E att. King Decl.) Later, in 1996, plaintiff provided the DOI investigator with all the supporting documentation. (King Decl. P 26 n.2.) Housing Works alleges that it made the City whole even though Housing Works had itself suffered a loss in [\*\*17] excess of \$ 100,000 as a result of the fraud. (King Decl. P 26 n.2.)

On December 12, 1996, John Dereszewski, Director of Contract Services for DASIS, wrote in a memorandum:

In my view, Housing Works has made sufficient progress in recovering from the fiscal crisis it experienced at the beginning of this year to warrant our support for this venture.

(Ex. D, att. to King Decl.)

An HRA memo to MOC in August 1997 dismissed the possibility of "an alternate responsible vendor to provide [\*\*18] housing to the DAS clients currently being served by Housing Works" on the grounds that

---

<sup>1</sup>Housing Works alleges that HRA and the City satisfied themselves that this matter was a non-issue. (King Decl. P 26 n.2; Exs. C, D att. to King Decl.) Notwithstanding, Housing Works contends that this fraud has been repeatedly relied upon by the City for its actions, cropping up most recently in the Appellate Division's reversal of a preliminary injunction granted in the state case, [Housing Works, Inc. v. City of New York](#), 680 N.Y.S.2d 487, 255 A.D.2d 209 (N.Y. App. Div. 1998). (King Decl. P 26 n.2.)

"the fiscal reforms were reviewed satisfactorily by HRA fiscal program and MIS staff, and have significantly improved Housing Works' ability to control its fiscal operations." (King Decl. P 27 & n.3; Ex. E att. to King Decl.)

In January 1997, Gregory Caldwell ("Caldwell") became Deputy Commissioner of HRA in charge of DASIS and learned of the 1996 DOI report. (See King Decl. P 28.) Caldwell had worked for Reiter from 1994 to 1997, during the period when Reiter had left to oversee Mayor Giuliani's reelection campaign, and Reiter had helped Caldwell get his job at HRA. (See King Decl. P 29.) It is alleged that when Caldwell consulted Reiter concerning the report, she advised Caldwell to audit Housing Works. (King Decl. PP 30-31.) An audit was conducted by Jack Hiralall, P.C. (King Decl. PP 52.)

On October 22, 1997, HRA issued a press release stating that it refused to enter into any contracts with Housing Works. On November 7, 1997, Housing **[\*410]** Works filed suit in state court in [Housing Works, Inc. v. City of New York, 680 N.Y.S.2d 487, 255 A.D.2d 209 \(N.Y. App. Div. 1998\)](#), **[\*\*19]** see discussion *supra* Part A.

A second DOI report was issued on March 17, 1998, criticizing Housing Works's poor record-keeping and its commingling of funds, problems that Housing Works alleges had been resolved to HRA's satisfaction in 1996. (King Decl. PP 38, 50 & n.7; Ex. M att. to King Decl.) Plaintiff alleges that this DOI report purported to be the result of a new investigation but reviewed the same calendar years of 1995 and 1996 and the same issues as did the 1996 DOI report issued in the aftermath of Housing Works' financial crisis. (King Decl. PP 50, 51.) The 1996 DOI report did address the same issues but related only to calendar year 1995. (Ex. C, att. King Decl.) The two DOI reports draw the same conclusions. (King Decl. P 51.) Housing Works alleges that the funds that came from HRA constituted a reimbursement of monies due Housing Works. (King Decl. P 50 n.7.) The second DOI report clearly disagrees with plaintiff's claims in this regard. (Ex. M att. King Decl.)

On March 18, 1998, HRA informed plaintiff that based on the second DOI report and the Hiralall audit, it was considering issuing a finding that Housing Works was "non-responsible". (King Decl. P 52.) On June 3, 1998, HRA **[\*\*20]** determined Housing Works to be a "non-responsible" bidder. Housing Works appealed this determination to the new Commissioner of HRA, Jason Turner. (King Decl. P 53.) The finding was affirmed by

Commissioner Turner on September 4, 1998. (King Decl. P 54.)

Housing Works appealed HRA's final determination to Mayor Giuliani on September 14, 1998. (King Decl. P 54.) Housing Works has received no ruling on the appeal from the mayor, although more than a year has elapsed. Mayor Giuliani has failed to rule despite the rule that "a prompt written decision with respect to the merits of the bidder's appeal" is required. *New York City, N.Y., Rules* § 7-03(e)(4) (1998).

Housing Works contends that the mayor's failure to rule has effectively foreclosed Housing Works from challenging the finding in court. (King Decl. P 54; Ex. V att. to King Decl.)

## C. HUD funding

### 1. HUD's past funding for two of Housing Works' programs

Housing Works operates, *inter alia*, two permanent supportive housing projects, the East Ninth Street program in lower Manhattan, and the East New York program, in East New York, Brooklyn. (King Decl. P 8.) Residents of both programs are individuals with chemical **[\*\*21]** dependency or are afflicted with mental illness. (King Decl. P 10.) As residents, they enjoy privacy and independence, programs to develop living skills, comprehensive health care, health education, employment opportunities, employment skills training, the opportunity to model themselves after their Resident Aides (successful graduates of the job program) and the opportunity to help regulate their own program through the "Residents' Council". (King Decl. P 11.)

Financial assistance to construct and implement these two programs derived in part from \$ 3.9 million in HUD assistance. (King Decl. P 9.) Housing Works received \$ 1.9 million in 1995, and another \$ 1 million for its East Ninth Street residence in 1996, from HUD's Supportive Housing Program. (King Decl. P 12; Wiviott Decl. P 17.) The Supportive Housing Program is one of three HUD sponsored funding programs under the Continuum of Care Homeless Assistance Programs ("COCHAP"). (King Decl. P 12; Wiviott Decl. P 6.) Wiviott points out that Housing Works received funding at this time, although Housing Works had already begun staging protests on behalf of PWAs against the Giuliani Administration. (Wiviott Aff. P 17.)

Both programs **[\*\*22]** fulfilled Housing Works' goals as contracted to HUD: to assist the **[\*411]** homeless to remain in permanent housing, to increase life skills, and to have greater self-determination in medical treatment. (King Decl. P 13.)

Without additional HUD funds, it is alleged that the East Ninth Street site will lack 50% of required annual revenue and the East New York program will be denied nearly 70% of required annual revenue. (King Decl. P 14.) Housing Works as a whole currently operates at a loss as a result, it is alleged, of the Giuliani Administration's refusal to contract with Housing Works. The loss of HUD funds, it is alleged, would be devastating to the two programs. (King Decl. P 14.)

## 2. The application process for the Supportive Housing Program

HUD's application process with regard to projects benefiting the City's homeless is known as the "Super Notice of Funding Availability ("SuperNOFA" or "HUD NOFA") process. (Declaration of Susan Wiviott, signed Oct. 12, 1999 ("Wiviott Decl.") P 3.) Under SuperNOFA, HUD utilizes a community-based approach known as the Continuum of Care, whereby each locality develops a plan for meeting the needs of its homeless population, and submits to HUD **[\*\*23]** the locality's applications for federal funding from COCHAP that best meet those needs. (Wiviott Decl. P 3.)

The Continuum of Care in New York City is implemented by The Way Home Coalition ("Coalition"), a partnership of non-profit community based homeless service providers, city agencies, and state agencies, that provide services to the City's homeless. (Wiviott Decl. P 4.) One of those city agencies is DHS, which provides a range of services to the City's homeless population. (Wiviott Decl. PP 2, 4.) The Coalition has a Steering Committee, comprised of a DHS representative and representatives of eight other member organizations, to develop policy, establish priorities, and identify gaps in City services already provided to the homeless, in order to design an effective Continuum of Care plan. (Wiviott Decl. P 4.) The Steering Committee designated the following four categories of programs as high-priority: renewals and providers of services to drug addicts, to the mentally disabled, and to persons with AIDS. (Wiviott Decl. P 28.) Housing Works asserts that as a renewal program serving a specialized population of PWAs, it is a high priority program four times over. (Wiviott Decl. P **[\*\*24]** 28.) Wiviott disagrees, asserting

that, in an attempt to fill an existing gap in services, the latter three are priority categories applicable to new programs only. (Wiviott Decl. P 28.) The Steering Committee has designated DHS to oversee and coordinate the City's HUD NOFA application. (Wiviott Decl. P 4.)

One of Wiviott's responsibilities as DHS Associate Commissioner of Policy and Planning, a position she held from September 1994 to September 8, 1999,<sup>2</sup> was to oversee the annual application process and report directly to the DHS Commissioner. (Wiviott Decl. PP 1,5.) Day-to-day supervision of the HUD NOFA application process was executed by Sawyer, the DHS employee who reported directly to Wiviott. Sawyer has been Senior Policy Analyst since November 1996. (Wiviott Decl. P 5; Sawyer Aff. P 1.) It was Wiviott who was the DHS representative on the Coalition's Steering Committee. (Wiviott Decl. P 5.)

**[\*\*25]** DHS oversees COCHAP's Supportive Housing Program; the other two COCHAP programs are reviewed by the New York City Department of Housing, Preservation and Development ("HPD"), which submits them to DHS only for final inclusion to HUD. (Wiviott Decl. P 7.) DHS sends a pre-application form to those past recipients and new organizations intending to apply and also, with the help of DHS consultant Howard Burchman ("Burchman"), supplies technical assistance for **[\*412]** questions concerning pre-application. (Wiviott Decl. P 8.) Two people chosen by DHS evaluate and score each completed pre-application it receives, and if the project is applying for renewal, one evaluator also usually visits the site. (Wiviott Decl. P 9.) The scoring form evolved over the last "four or five years"; the scoring form for renewal programs was developed by Sawyer under Wiviott's supervision. (Wiviott Decl. P 9.) HUD requires that all projects proposed for funding in the Continuum of Care plan be given a numerical rank from highest to lowest, but does not suggest a method for ranking. (Wiviott Decl. P 11.) In New York City, ranking is accomplished by Wiviott and Sawyer, and by the Commissioner, who approves the ranking. **[\*\*26]** (Wiviott Decl. P 11; Sawyer Aff. P 3.) They take into account: scorer evaluations, density of geographic distribution of programs per borough, failure to spend a previous HUD grant, and program-type. (Wiviott Decl. P 11.)

---

<sup>2</sup>Since September 8, 1999, Wiviott has been Associate Executive Director for Planning of the Jewish Board of Family and Children's Services. (Wiviott Decl. P 5.)

The ranking is inserted into the Narrative, which is a HUD mandated description of the locality's Continuum of Care plan and was prepared for New York City in 1999 by Burchman, Wiviott, Sawyer, and the Steering Committee. (Wiviott Decl. P 10.) The Narrative is inserted into an application form, as HUD mandates, and DHS provides ranked applicants with applications to complete and to submit directly to HUD. (Wiviott Decl. PP 10,11.)

The rankings are important because the HUD allocation is disbursed to the projects in order of rank in accordance with each project's requirements, until the money runs out. It is also a fact that HUD has in the past awarded additional sums beyond its anticipated allocation. (Sawyer Aff. P 3.) Because the HUD allocation for 1999 is known to be \$ 54 million, and projects ranking 1 through 56 in the 1999 applications have requested an aggregate of \$ 53,918, 674, a ranking this year lower than 56 effectively forecloses receipt of HUD funds. **[\*\*27]** (King Decl. P 66.)

Oesterreich asserts that directing that plaintiff be ranked lower than the anticipated aggregate HUD allocation was an effective way to ensure that DHS would not be in the position of recommending funding for Housing Works' programs. (Oesterreich Aff. P 8.) Sawyer avers that because of HUD's past practice of awarding additional sums, even projects ranked below 56 this year will probably not be foreclosed from receiving COCHAP funding. (Sawyer Aff. P 13.)

### **3. Housing Works' application for HUD funding in 1999**

On April 12, 1999, Housing Works submitted its application to the City. (King Decl. P 63, 64.) Sawyer, the DHS official responsible for the SuperNOFA process, asserts that she "thought that both of Housing Works' programs looked good during [her] site visits, and [she] had no major problems with their pre-applications." (Sawyer Aff. P 6.) At the hearing she testified that both projects were "excellent" and "high quality". She further testified that, in all material respects, the projects "met or exceeded HUD goals". She noted that prior to her evaluations Housing Works had lost funding from DASIS. She gave the East 9th Residence a score of 80/90 and **[\*\*28]** the East New York residence a 77/90. (Sawyer Aff. P 6.) When Sawyer scored plaintiff's pre-application, Housing Works received a score that would have translated into ranks of 30th and 33rd with regard to the two subject

programs. (King Decl. P 70.)

Oesterreich, the newly appointed DHS Commissioner, testified that he ordered that Vendex reports be reviewed for all bidders, and thereafter the Vendex report for Housing Works disclosed that plaintiff had been found to be "non-responsible". He, therefore, directed that Housing Works' programs be ranked low enough to ensure that DHS would not be in the position of recommending funding for Housing Works' programs. (Oesterreich Aff. P 8.) He states that no official instructed **[\*413]** him to rerank plaintiff's projects. (Oesterreich Aff. P 11.) Wiviott, in turn, directed Sawyer to rank Housing Works' projects lower than 56th but not consecutively. (King Decl. PP 71, 72; Sawyer Aff. P 7.) Sawyer thereupon ranked plaintiff's projects 57th and 60th respectively, predetermining the scores Housing Works should be given in order to justify that ranking. (King Decl. P 73.)

On May 21, 1999, when DHS released the rankings of the 71 projects, Housing Works' **[\*\*29]** two projects were ranked 57th and 60th. (King Decl. P 65.) Of the 35 projects seeking renewal, plaintiff's was last; the next lowest was 44th, and the top 40 were almost all renewals. (King Decl. P 67.)

The reason for Oesterreich's order changing plaintiff's scoring is in dispute.

All three individual defendants assert that they have no animus toward Housing Works. (Oesterreich Aff P11; Wiviott Decl. P 16; Sawyer Aff. P 3.) King agrees that Sawyer bears no animus. (King Dep., City Ex. 7 at 153.) Oesterreich has "no particular recollection" that he heard of any of Housing Works' activities, though Wiviott and Sawyer were "aware" of Housing Works' critical views through the media. (Oesterreich Aff P11; Wiviott Decl. P 16; Sawyer Aff. P 3.) Wiviott adds that many of the organizations DHS deals with are critical of the Giuliani Administration. (Wiviott Decl. P 16.) Defendants dispute plaintiff's assertion that animus motivated the reranking and assert that they downgraded Housing Works because of the Vendex warning that plaintiff was a non-responsible bidder.

Plaintiff's Vendex record reveals that HRA had determined that Housing Works is a "non-responsible" bidder. <sup>3</sup> (Oesterreich Aff. **[\*\*30]** P 7.) The Vendex

---

<sup>3</sup>The City Department of Health also made a determination of non-responsibility, dated July 15, 1998, but it is based on the same data used by HRA in its finding. (Oesterreich Aff. P10.)



database is the prime source for a City official's information on the prior performance and reliability of an entity seeking to contract with the City. (Oesterreich Aff. P 3.) Oesterreich and Sawyer did not testify to having seen Vendex reports at the time of the ranking, only Wiviott did. (King Decl. P 77; Wiviott Decl. P 21.) Oesterreich asserts that by mid-April defendants had not yet examined the Vendex database, relying instead on personal experience and the applicants' own representations. (Oesterreich Aff. P 6.) Oesterreich then gave orders to search the Vendex database, but it was Wiviott who was conversant with HUD NOFA and who reported to him on the Vendex findings. (Oesterreich Aff. PP 5, 7.) Sawyer, too, asserts that it was Wiviott who told her that the Vendex information was negative. (Sawyer Aff. P 3.) Even Wiviott, however, knew only that a financial problem of Housing Works' had resulted in the termination of an HRA contract, but knew no details of that allegation: i.e., its substance, when it occurred, how much money was involved, what remedies Housing Works had undertaken. (King Decl. P 79; Wiviott Decl. P 22.) The Vendex warning simply "confirmed **[\*\*31]** accounts [Wiviott] had previously read in the paper". (Wiviott Decl. P 22.)

Moreover, notwithstanding Oesterreich's testimony that he ordered a Vendex check, defendants did not generate Vendex reports for 57 of 95 applicants, any of whom, it is alleged, could also have been non-responsible bidders. (King Decl. P 77.) Also, Wiviott did not inform Oesterreich that Vendexes for several renewal applications ranked higher than plaintiff's had been submitted by entities as to which advice of caution warnings had been noted. (Wiviott Decl. P 24.)<sup>4</sup>

**[\*\*32]** **[\*414]** Oesterreich concedes that he had not, at the time of the ranking, reviewed the basis for plaintiff's "non responsibility" status, but asserts that he has since done so and would make the same decision concerning reranking of plaintiff. (Oesterreich Aff. P 10.) Concerning the pending appeal of the non-responsibility determination, Oesterreich simply avers that he is

---

<sup>4</sup>Another renewal project, Banana Kelly, is alleged to have been the subject of an FBI investigation in May for alleged misappropriation of funds on a large scale, at the time of the reranking. (Oesterreich Aff P9; Sawyer Aff. P 3.) The investigation into its alleged financial improprieties made headlines; defendants assert that they were only made aware of the alleged misappropriation after the final rankings had been sent to HUD and it was too late to change the rankings. (Oesterreich Aff P9; Sawyer Aff. P 3.) After Housing Works was downgraded, Banana Kelly emerged higher in rank.

familiar with the appeals process and that in the case of a successful appeal the Vendex database would either remove the finding of non responsibility or indicate that the finding of non-responsibility was no longer valid. (Oesterreich Aff. P4.) Oesterreich states that twenty years of experience<sup>5</sup> in City contracting has taught him that a "non-responsibility" determination on a Vendex is a form of "debarment", precluding any City contracts until the underlying problem is cured. (King Decl. P 80.) Oesterreich explained that he did not need to analyze the basis for the non-responsibility determination (i)because his agency was not entering into the contract itself, merely a stewardship, and (ii)because a non-responsibility determination is not issued for minor reasons. (Oesterreich Aff P3, 6, 7.) Oesterreich submits that **[\*\*33]** because there are other projects with no "non-responsible" status, it would be unfair to displace them with a questionable group. (Oesterreich Aff P8.) He states that DHS is acting as a steward for HUD money, and its credibility is on the line to ensure that the money is not squandered or spent irresponsibly. (Oesterreich Aff PP 3, 6.)

Plaintiff urges that a "non-responsibility" determination is never the basis for preclusion unless the agency concludes that the determination is material for the purposes of its own contract; non-responsibility for one agency may be wholly irrelevant to another. (King Decl. P 82.) Plaintiff cites City's Procurement Policy Board ("PPB") Rules, New York City, N.Y., Rules § 7-03 and 7-08, as interpreted by Bonamarte, Chief Contracting and Procurement Officer:

Under the PPB **[\*\*34]** rules . . . each agency must independently make a responsibility determination based on the fact pattern and how it affects their contract. . . each responsibility determination is contract specific . . . It kind of depends on the reasoning for the nonresponsibility determination. . . . agencies are required to look at that information, consider it with respect to the circumstances that affect their contract and then make an independent decision.

(King Decl. P 82; Ex W,V attached to King Decl., at 16, 17, 19.)

Sawyer created new scoring sheets reflecting scores that were proportional to the downgrade in the ranking.

---

<sup>5</sup>Oesterreich started as a contract manager in the City's Department of Employment in 1974, rising to Deputy Commissioner of Operations in 1996, and was appointed to his present position at DHS in 1999.

Sawyer's scores for all the projects matched proportionately to the rankings she awarded. (Sawyer Aff. PP 8, 10.) Sawyer was not required to produce the original score sheet and contends that she could have disposed of it had she wished to conceal a motive. (Sawyer Aff. P 12.) Sawyer adds that there was no reason to rescore Housing Works except for her own "compulsive neatness" and "desire to make scores match", because she could have ranked Housing Works lower regardless of its scores, given that HUD has no requirement that there be scores or that they match. **[\*\*35]** (Sawyer Aff. PP 8, 9, 12.)

Housing Works argues that its ranking was the only one based on DHS' newly asserted right to rank an applicant where it chooses, instead of according to numeric scores reflecting the Coalition criteria, which was the process that DHS had communicated **[\*415]** to potential applicants and to HUD in the Narrative. (King Decl. P 75.) The Narrative states: "All pre-applications are ranked and prioritized by DHS staff and other, relevant city agencies on the basis of criteria developed by the Coalition." (Ex. C attached to Decl. Charles King Supp. Housing Works Order to Show Cause for Expedited Discovery, dated August 17, 1999). HUD wrote to the mayor stating that "significant evidence exists to suggest" that City staff took "unilateral action to change priorities of at least two proposed projects . . . [with] a history of adversarial relationships with the City" in contravention of New York City's Continuum of Care. (Ex. U attached to King Decl.)

Neither of DHS' two scoring sheets for plaintiff's programs refer to the Vendex report or to financial irregularities. (King Decl. P 78; Sawyer Aff. P 8.) Sawyer explains that the score sheets had no place for Vendex data **[\*\*36]** to be entered, notwithstanding that she indicates that she did rely on the Vendex information to support the action she took. (King Decl. P 73; Sawyer Aff. PP 8, 11.)

#### D. Procedural history

Plaintiff filed this action on August 17, 1999, seeking preliminary and permanent injunctive relief, declaratory relief, attorneys fees, interest, and costs. The complaint asserts claims under [42 U.S.C. § 1983](#), alleging that plaintiff has been deprived of its rights to freedom of speech and equal protection under the [First and Fourteenth Amendments to the U.S. Constitution](#). Plaintiff also asserts claims pursuant to Article I, §§ 8, 9, 11 of the New York State Constitution, and challenges

the DHS administrative actions as arbitrary and capricious.

On August 19, 1999 plaintiff filed an Order to Show Cause, seeking a preliminary injunction and expedited discovery. Judge Chin, sitting in Part I, granted expedited discovery. On September 28, 1999, the Court issued a Stipulation and Order of Dismissal with respect to the federal defendants, dismissing the claims against them without prejudice. HUD has informed the Court that it will abide by the order of the Court with **[\*\*37]** regard to the ranking of Housing Works' projects. This matter is now before the Court on plaintiff's motion for preliminary injunction. The City defendants cross-move the Court to abstain from proceeding with this action under the doctrine articulated by the Supreme Court in [Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 47 L. Ed. 2d 483, 96 S. Ct. 1236 \(1976\)](#). A hearing was held with respect to this motion on November 5, November 8, and November 9, 1999.

#### E. Facts Underlying Motion to Abstain

The defendants' motion with regard to the issue of abstention directs the Court's attention to certain litigation in the state courts. The issue presented here is whether this Court should defer to the state court in which that litigation is proceeding. The relevant facts are set forth below.

On November 19, 1997, plaintiff Housing Works, along with three named plaintiffs of a proposed class of individuals with AIDS (the "State Court Plaintiffs"), commenced an action in state court against the City of New York ("City"). ("State Court Action"). See [Housing Works, Inc. v. City of New York, 255 A.D.2d 209, 680 N.Y.S.2d 487](#) (1st **[\*\*38]** Dep't 1998). (See also Amended Complaint in State Court Action, annexed as Exhibit 21 to Defendants' Notice of Cross-Motion ("State Court Compl.") PP 1, 2.) The State Court Action alleged that the City had induced Housing Works to continue to provide housing and services after the expiration date of its contract to provide the services, misleading Housing Works into believing that its contract would be extended and its expenditures reimbursed. See [Housing Works, 680 N.Y.S.2d at 487](#). Housing Works further alleged that the City's actions were in retaliation for Housing Works' exercise of **[\*416]** its right to freedom of speech. See [Housing Works, 680 N.Y.S.2d at 487](#). The State Court Plaintiffs characterized the State Court Action as one related to another action before Justice Emily Jane Goodman, and the action was assigned to Justice

Goodman as a related case. (Affidavit of Bob Bailey ("Bailey Aff.") P 20.) On November 20, 1997, Justice Goodman issued a temporary restraining order ("TRO"), ordering the City, *inter alia*, to pay the rents on the apartments of Housing Works' clients. (See Decision of Gangel-Jacob, J. dated September 25, 1999 in State **[\*\*39]** Court Action ("Gangel-Jacob Order"), annexed as Exhibit 19 to Defendants' Notice of Cross-Motion, at 2.) On December 2, 1997, the City removed the action to federal court, and the case was assigned to Judge Mukasey. (See Gangel-Jacob Order at 3; Bailey Aff. P 21.)

The parties thereafter stipulated to the dismissal of the federal claims with prejudice, and the matter was remanded back to state court. (See Gangel-Jacob Order at 2.) The State Court Plaintiffs have asserted that they agreed to drop their federal cause of action and remand the case back to state court because the City had complied with a "temporary food stamp restoration order entered by this court." (See Gangel-Jacob Order at 2.)

On January 20, 1998, the State Court Plaintiffs amended their complaint to allege a due process violation on the ground that the City's actions were a de facto bar to Housing Works' participation in City contract work, and Housing Works had not been granted notice and an opportunity to be heard. See [Housing Works, 680 N.Y.S.2d at 487](#). However, the amended complaint does not assert causes of action under the federal constitution. (See State Court Compl.) Defendants **[\*\*40]** in this action imply that the State Court Plaintiffs' actions in this regard were motivated by a desire that their case be before Justice Goodman. (Bailey Aff. PP 22, 23.)

The City appealed the stay issued by Justice Goodman and, on February 20, 1998, the Appellate Division vacated the TRO. (See Gangel-Jacob Order at 3.) Justice Goodman reinstated the TRO, and issued a permanent injunction on April 28, 1998. (See Gangel-Jacob Order at 3.) On November 19, 1998, the First Department reversed Justice Goodman's decision and vacated the preliminary injunction. See [Housing Works, 680 N.Y.S.2d at 487](#). The Appellate Division also concluded that "as the motion court improperly made numerous credibility determinations without holding a factual hearing . . . we believe the better course is to remand the action to a different Justice." *Id.* The State Court Action was eventually reassigned to Justice Gangel-Jacob.

On May 21, 1999 Housing Works submitted to the City a

proposed Second Amended Complaint in the State Court Action, which added numerous federal constitutional claims. (Bailey Aff. P 33.) The City informed Housing Works that it would not oppose the amendment. **[\*\*41]** *Id.* Also on May 21, 1999, the City, through DHS, as set forth above, released its rankings of projects for HUD funding that placed Housing Works' projects at 57th and 60th respectively. (Affidavit of Charles King ("King Aff.") P 65.)

On June 11, 1999, instead of filing their amended complaint, the State Court Plaintiffs moved to discontinue the State Court Action without prejudice, so that it could commence a new action in federal court. (See Gangel-Jacob Order at 4.) The State Court Plaintiffs asserted in support of their motion that (i) its case, having been converted to one for damages, would proceed more expeditiously in federal court; (ii) litigation expenses would be lower in federal court; (iii) discovery is broader in federal court; (iv) the federal court would provide greater deference to a jury determination. (See Gangel-Jacob Order at 4.) The City opposed the motion, arguing that the action had proceeded very far in state court, and that the State Court Plaintiffs were merely attempting to avoid the effects **[\*417]** of the decision of the Appellate Division. (*Id.*)

On August 17, 1999, plaintiff filed this action alleging violations of federal law, including the [First \*\*\[\\*\\*42\]\*\*](#) and [Fourteenth Amendments to the United States Constitution](#), and seeking relief with respect to the City's rankings of its projects eligible for HUD funding. Defendants allege that plaintiff's strategy was to have this case litigated before Judge Baer, before whom related litigation was pending. (Bailey Aff. P 35 n. 3.) Judge Baer declined to accept this action as related, and it was assigned to this Court.<sup>6</sup>

## II. MOTION TO ABSTAIN

It should be noted that federal courts have a "'virtually unflagging obligation' to exercise their jurisdiction." [Burnett v. Physician's Online, Inc., 99 F.3d 72, 76 \(2d Cir. 1996\)](#) (citing [Colorado River, 424 U.S. at 817](#)). **[\*\*43]** However, various exceptions to this rule

---

<sup>6</sup> On September 28, 1999, Justice Gangel-Jacob denied the State Court Plaintiffs' motion to discontinue. (See Gangel-Jacob Order at 8.) Justice Gangel-Jacob declined to make a finding as to the State Court Plaintiffs' motivation, denying the motion on the grounds that there would be substantial prejudice to the City. (See Gangel-Jacob Order at 5-8.)

exist, including what has become known as the *Colorado River* abstention doctrine. A *Colorado River* abstention is considered in situations where both federal and state courts have exercised jurisdiction over a controversy, but should only be applied under "exceptional" circumstances. See [Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800, 818, 47 L. Ed. 2d 483, 96 S. Ct. 1236 \(1976\)](#) ("the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist."). In particular, *Colorado River* abstention should not be applied unless the federal and state actions are truly "concurrent." See [Sheerbonnet, Ltd. v. American Express Bank Ltd., 17 F.3d 46, 49 \(2d Cir. 1994\)](#). In determining whether the actions are concurrent, a court may consider whether both actions involve the same (i) parties, (ii) subject matter, and (iii) relief requested. See [Sheerbonnet, 17 F.3d at 49 - 50 \[\\*\\*44\]](#) (collecting cases; refusing to abstain because the actions were not truly concurrent).

If the actions are concurrent, a number of factors should be considered in determining whether *Colorado River* abstention is appropriate, including six factors discussed by the Second Circuit in *Burnett*:

- (1) the assumption of jurisdiction by either court over any res or property,
- (2) the inconvenience of the federal forum,
- (3) the avoidance of piecemeal litigation, and
- (4) the order in which jurisdiction was obtained []
- (5) whether state or federal law supplies the rule of decision, and
- (6) whether the state court proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction.

[Burnett, 99 F.3d at 76](#). Additionally, "the balance should be heavily weighted in favor of the exercise of jurisdiction." See [Sheerbonnet, 17 F.3d at 49](#) (citing [Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 16, 74 L. Ed. 2d 765, 103 S. Ct. 927 \(1982\)](#)).

#### A. Whether the Two Actions Are Truly "Concurrent"

#### 1. Parties.

The State Court Action was filed as a class action, and, therefore, [\*\*45] included a number of plaintiffs who are not parties to this action. Similarly, this action includes defendants who were not parties to the State Court Action, including officers of [\*418] DHS sued in their official capacities. Housing Works is the only plaintiff in this action.

Although the parties are similar in both actions, "similarity of parties is not the same as identity of parties." See [Sheerbonnet, 17 F.3d at 50](#) (citing [Alliance of Am. Insurers v. Cuomo, 854 F.2d 591, 603 \(2d Cir. 1988\)](#)).

#### 2. Subject Matter.

The State Court Action dealt with specific contracts under which Housing Works provided services, and alleged tortious interference and retaliation relating to those contracts. This action, however, is limited to the issue of DHS' recommendations to HUD and the circumstances surrounding defendants' decision to alter the rankings of Housing Works' projects. The subject matter therefore, although overlapping, is not identical. See [Alliance of Am. Ins., 854 F.2d at 603](#) ("While there may be some overlap of subject matter, it is not sufficient to make these actions concurrent.")

One similarity between the actions, however, [\*\*46] is that the City alleges the same non-discriminatory justification for the actions challenged in both actions—Housing Works' financial and accounting problems. Similarly, in both actions, Housing Works alleges that the non-responsibility rating given to them is a mere pretext for retaliatory action.

#### 3. Relief Requested.

The State Court Action is two years old, and is not likely to involve extensive injunctive relief. This action, however, involves a request for immediate injunctive relief and an allegation that irreparable harm is about to occur. Therefore, the relief requested in both actions is not currently identical, although plaintiff could likely apply in the State Court Action to amend its complaint and for a preliminary injunction seeking the same relief as that requested in this action. On balance, it appears as if this action seeks significantly different relief from the State Court Action as it now exists.

#### B. Application of Colorado River Factors.

### **1. The assumption of jurisdiction by either court over any res or property,-**

There is no real property at issue in either litigation. *Colorado River* envisions that there is a problem when two courts attempt **[\*\*47]** to assert jurisdiction over the same property. See [Colorado River, 424 U.S. 800, 818, 47 L. Ed. 2d 483, 96 S. Ct. 1236](#) (noting that "the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts.") This factor does not apply here, and therefore weakens the case for abstention.

### **2. The inconvenience of the federal forum,-**

Litigating in this Court is not inconvenient for the defendants. Its location is virtually the same as the state court, and extremely close to the seat of City government. The City litigates in this district daily.

### **3. The avoidance of piecemeal litigation**

This action does have substantial overlap with the state court action. However, this action does involve a new dispute, which can be fairly easily separated from the disputes at issue in the State Court Action. There is no serious concern here that "inconsistent disposition of these claims between two concurrent forums would breed additional litigation," see [Arkwright-Boston Manufacturers Mutual Insurance Company v. City of New York, 762 F.2d 205, 211 \(2d Cir. 1985\)](#), because this action will predominantly involve **[\*\*48]** factual determinations as to whether defendants' actions were motivated by legitimate concerns about plaintiff's financial problems or by a desire to retaliate against protected behavior. The individuals involved **[\*419]** in the decisionmaking are different in both actions, and it is entirely possible that the City could be found to have retaliated with respect to the contracts at issue in the State Court Action, but not with respect to the HUD rankings in this action. It would, likely, have been more efficient if Housing Works chose to pursue the relief it now seeks in the State Court Action. However, this hardly amounts to an "exceptional circumstance" requiring the Court to abstain from exercising the jurisdiction granted to it by Congress.

### **4. The order in which jurisdiction was obtained**

"Priority should not be measured exclusively by which complaint was filed first, but rather in terms of how much progress has been made in the two actions." [Moses H.](#)

[Cone, 460 U.S. at 21](#). Here, the State Court Action has been proceeding for two years and extensive discovery has been taken. Further, defendants allege that plaintiff's request for declaratory relief is intended so that **[\*\*49]** a res judicata effect can be had with respect to the State Court Action. This factor does lend support to defendants' request for abstention.

### **5. Whether state or federal law supplies the rule of decision**

As noted in *Moses H. Cone*, "the presence of federal-law issues must always be a major consideration weighing against surrender [of federal jurisdiction]." See [Moses H. Cone, 460 U.S. at 26](#). Plaintiff asserts predominantly federal causes of action under [42 U.S.C. § 1983](#) and the [First](#) and [Fourteenth Amendments to the United States Constitution](#). Although defendants note that plaintiff could have amended its complaint in the State Court Action to assert claims similar to the federal claims alleged in this action, "the mere fact that a state court of general jurisdiction can entertain any claim between two parties properly before it is too insubstantial a basis for compelling a party which wishes to bring federal constitutional claims in federal court to present those claims to a state court instead." [Brooklyn Inst. of Arts & Scis v. City of New York & Rudolph W. Giuliani, 64 F. Supp. 2d 184, 195, 1999 WL 989081, \\*10 \(1999\)](#). This factor therefore weighs strongly against abstention.

### **6. Whether the state **[\*\*50]** court proceeding will adequately protect the rights of the party seeking to invoke federal jurisdiction**

While New York courts are capable and willing to enforce rights guaranteed to plaintiff under federal law, certain of the City's actions underlying this dispute suggest that federal jurisdiction is appropriate. In particular, the Court notes that the mayor has created a barrier to the state courts' consideration of an important issue in this case: whether HRA's finding that Housing Works was a non-responsible bidder should be upheld. As stated previously, although "a prompt written decision with respect to the merits of the bidder's appeal" is required, the Mayor has failed, for a period of 14 months, to act on plaintiff's appeal, effectively foreclosing Housing Works from litigating this issue in state court. See [New York City, N.Y., Rules § 7-03\(e\)\(4\) \(1998\)](#); King Decl. P 54; Ex. V att. to King Decl. In determining whether this Court should defer to the state courts and abstain from proceeding with this action, this

Court cannot ignore the conduct of defendants that have had an impact on plaintiff's ability to proceed in state court.

### C. Conclusion

The Court [**\*\*51**] concludes that this action does not involve exceptional circumstances such that the Court should refrain from exercising its subject matter jurisdiction and abstain from proceeding with the action. This action involves parties and subject matter that, while similar to the State Court Action, are not identical. Additionally, the considerations that guide a decision on whether to abstain under *Colorado River*, on balance, counsel against [**\*420**] abstaining from this action asserting claims under [§ 1983](#) and federal law. Accordingly, defendants' motion for abstention is denied.

## III. MOTION FOR PRELIMINARY INJUNCTION

### A. Applicable Legal Standard

A party seeking to obtain a preliminary injunction must normally satisfy a two-prong test: it must (i) establish that it will suffer irreparable harm in the absence of an injunction; and (ii) demonstrate either (a) "likelihood of success on the merits" or (b) "sufficiently serious questions going to the merits to make them a fair ground of litigation and a balance of hardships tipping decidedly in its favor." [Jolly v. Coughlin, 76 F.3d 468, 473 \(2d Cir. 1996\)](#). Where, as here, the moving party seeks to enjoin "government [**\*\*52**] action taken in the public interest," and seeks a mandatory injunction, one that will "alter the status quo by commanding a positive act", [Jolly, 76 F.3d at 473-74](#), the second prong of the standard is more rigorous; plaintiff must demonstrate "a clear and substantial likelihood of prevailing on the merits". See *id.*

The Court notes at the outset that a district court's issuance of an injunction is reviewed for abuse of discretion: applying "incorrect legal standards" or relying on "clearly erroneous findings of fact". [North Atlantic Instruments, Inc. v. Haber, 188 F.3d 38, 43 \(2d Cir. 1999\)](#) (collecting cases).

### B. Irreparable Harm

In order to satisfy the first prong for the issuance of a preliminary injunction, plaintiff must demonstrate that it "would be irreparably harmed if the injunction were not

granted." [NAACP v. Town of East Haven, 70 F.3d 219, 224 \(2d Cir. 1995\)](#). "A moving party must show that the injury it will suffer is likely and imminent, not remote or speculative, and that such injury is not capable of being fully remedied by money damages." *Id.*; see also [Tucker Anthony Realty Corp. v. Schlesinger, 888 F.2d 969, 975 \(2d Cir. 1989\)](#). [**\*\*53**]

"Violations of [First Amendment](#) rights are commonly considered irreparable injuries for the purposes of a preliminary injunction." [Bery v. City of New York, 97 F.3d 689, 691 \(2d Cir. 1996\)](#) (involving artists challenging city law requiring vendors' licenses in order to sell visual art in public places) (citing [Elrod v. Burns, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 \(1976\)](#)). Numerous cases hold that threatened sanctions, such as a threat of dismissal from one's employment, in retaliation for activities protected by the [First Amendment](#) constitutes irreparable harm. See, e.g., [Sperry Int'l Trade, Inc. v. Government of Israel, 670 F.2d 8, 11 \(2d Cir. 1982\)](#) (involving challenge by employees of Sheriff's department who contended that employees were threatened with dismissal because of their lack of affiliation with Democratic party).

Here, absent an injunction, plaintiff will be denied HUD funding as a result of defendants' downgrading of plaintiff's projects. If, as plaintiff contends, defendants' reranking was in retaliation for plaintiff's [First Amendment](#) activities, plaintiff's injuries are not "remote" or "speculative" injury, [**\*\*54**] but rather "direct and purposeful penalization". See [Brooklyn Institute of Arts and Sciences v. City of New York, 64 F. Supp. 2d 184, 1999 U.S. Dist. LEXIS 16709, 1999 WL 989081, \\*13 \(E.D.N.Y. 1999\)](#) (Gershon, J.) (finding alleged [First Amendment](#) retaliation to be irreparable injury when, *inter alia*, City had already cut off appropriated funding to plaintiff, even though plaintiff had neither shown that withholding funding had prevented it from operating specific exhibit, nor shown that withholding funding would force imminent closing of entire Museum).

Plaintiff, however, has not shown that the threatened injury is substantially likely to occur absent the injunction unless it can establish a substantial likelihood of success on the merits of its [First Amendment](#) claim. Because the Court concludes, in [**\*421**] section II.C *infra* that plaintiff has shown that its [First Amendment](#) claim is likely to succeed, plaintiff has established irreparable injury.<sup>7</sup> See [Beal v. Stern, 184 F.3d 117,](#)

<sup>7</sup> Plaintiff asserts another two injuries that it claims are irreparable: (i) Housing Works' two supportive housing projects

[123-24 \(2d Cir. 1999\)](#) (emphasis added), *quoted in Brooklyn Institute*, 1999 WL 989081, \*12 ("The conclusion that freedom of expression is threatened, however, depends on the merits **[\*\*55]** of the action"); [Hsu v. Roslyn Union Free School Dist. No. 3, 85 F.3d 839, 853 \(2d Cir.1996\)](#).

Defendants allege that the two actions Housing Works filed against the City in late September are evidence that plaintiff's speech has not been chilled. See *U.S. ex.rel. Housing Works, Inc. v. City of New York*, 98 Civ. 23228 (filed 9/13/99); *Wright v. Giuliani*, 99 Civ. 10091 (filed 9/9/99). This evidence does not demonstrate, however, that Housing Works' speech has not been, nor will be, chilled. See *Brooklyn Institute*, 1999 WL 989081, \*13 ("That the Museum has so far stood up to these efforts **[\*\*56]** does not deprive it of the right to injunctive relief."). The fact that a party has continued to exercise its [First Amendment](#) rights to some extent, does not mean that it is not being chilled into engaging in less speech than it otherwise would have. Cf. [Elrod, 427 U.S. at 373](#) ("The loss of [First Amendment](#) freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). The Court finds that plaintiff has established irreparable injury absent an injunction.

### C. Plaintiff's Likelihood of Success on its [First Amendment](#) Retaliation Claim

Plaintiff alleges that under [42 U.S.C. § 1983](#), defendants violated both its free speech and equal protection guarantees under the [First](#) and [Fourteenth Amendments of the U.S. Constitution](#).<sup>8</sup> Because we find that plaintiff has demonstrated a likelihood of success on the merits of its [First Amendment](#) claim, we do not reach the equal protection claim.

**[\*\*57]** Plaintiff brings this action under [42 U.S.C. § 1983](#), arguing that defendants have deprived it of rights guaranteed to it by the [First](#) and [Fourteenth Amendment](#) under color of state law when defendants downgraded Housing Works' two projects allegedly in retaliation for plaintiff's publicly voiced criticisms of the Giuliani

---

will have to be closed; and (ii) Housing Works' clients will lose Housing Works' services. Because the Court finds that plaintiff will suffer irreparable injury because its speech will be chilled, the Court need not consider the other two proffered grounds for injury.

<sup>8</sup> Plaintiff does not assert that the other claims set forth in its complaint meet the standard for a preliminary injunction.

Administration's treatment of PWAs.

This Court has made clear that even though a person has *no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely*. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests--especially, his interest in freedom of speech. . . . This would allow the government to "produce a result which [it] could not command directly".

[Perry v. Sindermann, 408 U.S. 593, 597, 33 L. Ed. 2d 570, 92 S. Ct. 2694 \(1972\)](#) (citation omitted) (emphasis added) (holding that even though plaintiff had no contractual or tenure right to renewed contract, alleged retaliatory non-renewal of contract could be basis for alleging **[\*\*58]** [First Amendment](#) violation); see also [Cuban Museum of Arts and Culture, Inc. v. City of Miami, 766 F. Supp. 1121, 1125 \(S.D. Fla. 1991\)](#) (holding that even though Cuban Museum lacked contractual right to renewal of lease from City of Miami, alleged retaliatory non-renewal of lease could be basis for [First Amendment](#) retaliation claim). Similarly, **[\*422]** even though plaintiff has no right to the renewal of its multi-million dollar HUD grant, defendants may not deny this renewal in retaliation for plaintiff's exercising its right to free speech.

There is a two step process for establishing a [First Amendment](#) retaliation claim under [section 1983](#). A plaintiff must show: (i) "that [its] conduct was protected by the [First Amendment](#), and (ii) "that defendants' conduct was motivated by or substantially caused by [plaintiff's] exercise of free speech". [Gagliardi v. Village of Pawling, 18 F.3d 188, 194 \(2d Cir. 1994\)](#) (citations omitted); see also [Board of County Commissioners, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 684, 135 L. Ed. 2d 843, 116 S. Ct. 2342 \(1996\)](#); [Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284-85, 50 L. Ed. 2d 471, 97 S. Ct. 568 \(1977\)](#). **[\*\*59]** However, defendants may avoid liability if they are able to establish, as an affirmative defense, that "in light of their knowledge, perceptions, and policies at the time of the termination", they would have downgraded the rank of plaintiff's two projects even in the absence of plaintiff's protected speech. [Umbehr, 518 U.S. at 684](#); see also [Adler v. Pataki, 185 F.3d 35, 47 \(2d Cir. 1999\)](#).

### 1. Conduct protected by the [First Amendment](#)

First, plaintiff has established that its conduct was protected by the [First Amendment](#), because, under these circumstances, speech is protected if it is a matter of public concern. See [Umbher](#), 518 U.S. at 685; [Ezekwo v. New York City Health and Hospitals Corp.](#), 940 F.2d 775, 781 (2d Cir. 1991) (citing [Connick v. Myers](#), 461 U.S. 138, 147-48, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)) ("An inquiry to be determined in light of the content, form and context of a statement."). Plaintiff: (i) has engaged in a series of widely-publicized demonstrations and protests against the Giuliani Administration's policies, and (ii) has prosecuted several lawsuits against the Giuliani **[\*\*60]** Administration allegedly seeking to improve the condition of PWAs.

## 2. Retaliatory Motive

Second, plaintiff has established a clear and substantial likelihood that it will be able to demonstrate at trial that plaintiff's exercise of its free speech substantially caused defendants' act of reranking Housing Works' applications.

The Court finds that plaintiff's evidence is sufficient because it has shown well-documented circumstantial evidence of a retaliatory motive. See, e.g., [Fernandez v. City of Poughkeepsie](#), 67 F. Supp. 2d 222, 1999 U.S. Dist. LEXIS 14872, 1999 WL 767431, \*5 (S.D.N.Y. 1999) ("It is sufficient to allege facts from which a retaliatory intent on the part of the defendant reasonably may be inferred."); see also [Morris v. Lindau](#), 196 F.3d 102, 1999 U.S. App. LEXIS 26535, 1999 WL 961738, \*5 (2d Cir. 1999) ("Causation can be established . . . indirectly by means of circumstantial evidence . . ."); cf. [Chertkova v. Connecticut Gen. Life Ins. Co.](#), 92 F.3d 81, 87 (2d Cir. 1996) (stating that circumstantial evidence is often the only means available to prove retaliation claims); [Ramseur v. Chase Manhattan Bank](#), 865 F.2d 460, 464 (2d Cir. 1989) **[\*\*61]** ("employers are rarely so cooperative as to include a notation . . . that their actions are motivated by factors expressly forbidden by law."); [Kane v. Krebsler](#), 44 F. Supp. 2d 542, 547 (S.D.N.Y. 1999) ("Rarely can plaintiffs obtain documents or testimony wherein an employer specifically proclaims his or her desire to retaliate against an employer for engaging in protected speech.").

### a. Proximity in time

Circumstantial evidence of retaliation may be found when defendants are aware that plaintiff has engaged in protected speech and defendants' challenged behavior

closely follows that protected speech. See [Davis v. State of California Department of Corrections](#), 1996 U.S. Dist. LEXIS 21305, Civ. No. S-93-1307DFL [GGH](#), 1996 WL 271001, \*6 (E.D. Cal. Feb. 23, 1996) (citing [Yartzoff v. Thomas](#), 809 F.2d 1371, 1376 (9th Cir. **[\*423]** 1987)) ("A showing of causal link is frequently inferred from two elements of circumstantial evidence: first, that defendant knew of the plaintiff's protected activity at the time the adverse action was taken, and second, there was closeness in time between the protected action and the allegedly retaliatory employment decision."); [Holava-Brown v. General Electric Co.](#), 1999 U.S. App. LEXIS 20146, at \*10, No. 98-9661, 1999 WL 642966, **[\*\*62]** \*3 (2d Cir. Aug. 20, 1999) ("Circumstantial evidence commonly takes the form" of temporal proximity and "if the time that elapses between the protected activity and the adverse action is short enough, nothing more is necessary to satisfy the causation prong."); [Colon v. Coughlin](#), 58 F.3d 865, 872 (2d Cir. 1995) (concluding in retaliation claim that though "we examine prisoners' claims of retaliation with skepticism . . . such temporal proximity between an inmate's lawsuit and disciplinary action may serve as circumstantial evidence of retaliation."); [Decintio v. West Chester Cty. Medical Center](#), 821 F.2d 111, 115 (2d Cir. 1987) ("Proof of causal connection can be established indirectly by showing that the protected activity was followed closely by discriminatory treatment."); [Wells v. Wade](#), 36 F. Supp. 2d 154, 1999 WL 42171, at \*4 (S.D.N.Y. 1999) (same).

Here, plaintiff has established that, at the time the reranking was ordered, defendants knew of plaintiff's protected speech. Plaintiff's protected activity includes numerous suits filed against the City and appealed, in the years 1995, 1996, 1997, 1998, and 1999. Plaintiff's **[\*\*63]** protected activity also includes repeated demonstrations, *inter alia*, the 1994 protests criticizing Reiter's role in the proposed abolition of DAS (King Decl. P 19); the 1995 "This City is Ours" rush-hour blockage of tunnels (King Decl. P 59 n.10); the 1997 protest wherein Housing Works' activists allegedly "chained themselves to desks" at Mayor Giuliani's campaign headquarters (King Decl. P 47); the July 1998 protest on City Hall steps against the City's alleged violations of Local Law 49, wherein protesters waived placards of Mayor Giuliani stamped in blood red "AIDS Criminal" (King Decl. P 58); the November 1998 vigil at City Hall to "Tell the Mayor: People with AIDS are Dying" (King Decl. P 16); the December 1998 commemoration of World AIDS Day, staged on the steps of City Hall (King Decl. P 57). Plaintiff's extensive criticism of the Giuliani Administration's treatment of



PWAs received lavish media coverage, including clips on evening news and an extensive collection of newspaper articles. (Exs. A, O att. to King Decl.; Def. Ex. 30.) The employees at DHS clearly were aware of the nature and tenor of Housing Works' activities. (Wiviott tr.; Sawyer tr.; Oesterreich tr.)

Defendants **[\*\*64]** were also aware, at the time they reranked plaintiff, of the mayor's hostility toward Housing Works, as depicted by the media. Given Housing Works' barrage of the Giuliani Administration, it is not surprising that in November 1998, for example, Mayor Giuliani left a press conference when asked about Housing Works, grimacing and throwing up his hands in disgust, an event filmed and broadcast on the nightly news. (King Decl. PP 16, 60.) The administration also instituted security measures at a Housing Works' demonstration of late 1998 that included snipers on the roof of City Hall and chain-link fences. (Ex. A att. to King Decl.; King Decl. PP 16, 60.) The *New York Times* reported that Mayor Giuliani viewed Housing Works as having painted a "very very false picture . . . for the purpose of getting attention for themselves." (Ex. O att. to King Decl.)

Defendants' knowledge of plaintiff's barrage of demonstrations and law suits of the last five years, including the year preceding defendants' April 1999 decision challenged in this litigation, was temporally proximate to that decision, even if that knowledge accrued incrementally, as each event occurred. See, e.g., *Holava-Brown*, 1999 WL 642966, **[\*\*65]** \*4 (holding that all of plaintiff's speech must be considered such that speech stretching over a period of time can be temporally proximate to defendant's **[\*424]** challenged act: "Where an employee has engaged in continuing protected activity, all of that activity should be taken into account in analyzing its causal relationship to the [challenged decision]."). Even though a number of months may have elapsed between plaintiff's last demonstration and defendants' reranking of Housing Works' projects in April 1999, plaintiff continued actively litigating against the City even during that time.<sup>9</sup> The proximity in time between plaintiff's protected speech and defendant's conduct constitutes indirect evidence that plaintiff's rankings were tainted by an improper motive.

---

<sup>9</sup> Even were there not a sufficiently short interval, it would be difficult for defendants to credibly argue that the passage of several months could cleanse some five years of plaintiff's high profile criticism and the concomitant apathy engendered among defendants.

**[\*\*66]** In *Marchese v. Goldsmith*, 1994 U.S. Dist. LEXIS 7940, Nos. Civ. A. 92-6952, Civ. A. 92-6954, 1994 WL 263301 (E.D. Penn. Jun. 13, 1994), *affd*, 47 F.3d 1161 (3d Cir. 1995), an employee in a city sewage treatment plant claimed that his discharge was in retaliation for whistleblowing concerning sample tampering during the city's attempt to remedy EPA violations. Defendant, the mayor, had inherited the "escalating" problem from the previous administration. *Id.* at \*2. The court found that the mayor knew that Marchese had raised the issue of sample-tampering and treated him as a "troublemaker". *Id.* at \*4. After several months, while the mayor was attempting to remedy the problem, Marchese approached the mayor's assistant director of operations for public works, again relating his suspicions of sample tampering by the clean-up crew. The official "threw his hands up" and exclaimed "J C

! I've got to start telling the Mayor we're going to start another federal investigation?" *Id.* at \*4. Four days later, the mayor put Marchese on leave, claiming that curing the EPA violations had revealed that Marchese's incompetence had caused the violations. The Court **[\*\*67]** found retaliatory intent in part because the defendant was aware of the whistleblower and because the termination was temporally proximate to the last of a series of violation allegations that plaintiff had lodged with the mayor--or rather with his subordinate, which the court found much the same thing. There, as here, plaintiff sought to raise awareness concerning alleged problems with an administration's policies, and the mayor and his administration were well aware that plaintiff engaged in that criticism. There, as here, plaintiff has criticized the mayor a number of times, and defendant's reranking of plaintiff was temporally proximate to the last of plaintiff's speech activities. There, as here, substantial evidence of retaliatory intent is present.

#### b. Disparate treatment

Evidence that defendants acted toward plaintiff disparately from the manner in which defendants acted toward others may serve as circumstantial evidence of retaliation. See, e.g., *Sumner v. United States Postal Service*, 899 F.2d 203, 209 (2d Cir. 1990) ("The causal connection . . . can be established indirectly with circumstantial evidence, for example, . . . through evidence of disparate **[\*\*68]** treatment of employees who engaged in similar conduct . . ."); *Decintio*, 821 F.2d at 115 (same); *Grant v. Bethlehem Steel*, 622 F.2d 43, 46 (2d Cir. 1980) (same); *Green v. City of Montgomery*, 792 F. Supp. 1238, 1254 (N.D. Ala. 1992) ("Types of circumstantial evidence commonly

encountered which can support an inference that retaliatory motive played some part" include "departures from the normal procedural sequence" and "deviating from [defendants'] own written procedures to carry out adverse action against the protesting employee").

**(i) DHS disparately treated projects that were being rescored**

An example of aberrant behavior by defendants in this case that suggests retaliatory [\*425] motivation is the rescoring of Housing Works' pre-applications that was executed without interaction with plaintiff and without explanation on the score sheet itself. Sawyer scored pre-applications before she ranked them, and her scores for all the projects matched proportionately to the rankings she awarded. (Sawyer Aff. PP 8, 10.) When Wiviott told her to change the rank of both of Housing Works' projects because of the non-responsibility determination, [\*\*69] Sawyer rescored Housing Works' projects to match the new score. (Sawyer Aff. P 7; King Decl. P 73.)

Sawyer had scored and rescored other pre-applications that had triggered fiscal concerns. In one instance, she had initially awarded a program zero points for failing to provide certain funding information. (Sawyer tr.) Sawyer communicated with representatives of that program, held a conference, helped construct a solution, and then rescored that program when the solution was implemented, awarding the full 15 points. (Sawyer tr.) Because the maximum score was 90, this represented a significant score improvement, and concomitant rank upgrade. (Sawyer Aff. P 6.) On the second score sheet, Sawyer also delineated exactly what had generated the rescoring. (King Decl. 10; Ex. R att. to King Decl; Pl. Ex. EE.; Sawyer tr.)

When, however, Sawyer rescored Housing Works on the basis of fiscal concerns that had been raised allegedly by the Vendex record, she did not communicate with Housing Works about the problem, she did not hold a conference, she did not help construct a solution, and she did not explain on the score sheet why she was changing the score. (Sawyer tr.) Instead, Sawyer simply [\*\*70] struck off points here and there, to bring the score down enough to match the ranking that Wiviott had predetermined. (Sawyer tr.) Sawyer explained that she did not insert any explanation at all for the rescoring because "DHS scoring forms were not designed to reflect information obtained from the Vendex database", even though the form was letter-sized, double-spaced, and filled out by

hand, and Sawyer admitted that there would have been ample room to do so. (Sawyer Aff. P 8, 11; Sawyer tr.) When Sawyer was asked why she treated the two Housing Works' pre-applications differently than the other pre-applications, her reply was succinct: "My sense was that it was non-negotiable," she said. (Sawyer tr.)

It is clear, however, that had Sawyer wished to discuss the fiscal problems with Housing Works constructively, not only she, but neither of the other DHS defendants would have been able to do so; none of them knew what these fiscal problems were. Oesterreich testified that all the information that he had was the Vendex notation that HRA had made a determination of non-responsibility. Wiviott testified that in addition to the non-responsibility determination, she "had this vague sort of [\*\*71] notion" that the sum of \$ 600,000 was at issue in some way, but beyond that knew no more. (Wiviott tr.) Sawyer knew nothing beyond what Wiviott informed her. (Sawyer tr.)

**(ii) HUD's concerns as to disparity in treatment**

This disparity in treatment did not go unnoticed by HUD. On July 8, 1999, following receipt of the DHS ranking, HUD wrote to the mayor stating that "after undertaking a review of the situation . . . significant evidence exists to suggest" that City staff took "unilateral action to change priorities of at least two proposed projects both of *which were proposed by agencies which had a history of adversarial relationships with the City.*" (Ex. U att. to King Decl.) (emphasis added). The HUD letter stated that a "fair and open process" was required and that HUD had "very serious concerns" that "projects which were either prioritized highly in the planning process or met the criteria for high prioritization were removed from the priority list altogether or *ranked much lower than other similar groups as result of actions taken by City staff.*" (Ex. U att. to [\*426] King Decl.) (emphasis added). Although the HUD letter did not refer specifically to Housing Works, the [\*\*72] Court infers that HUD was likely referring to the City's re-rankings that are the subject of this proceeding, since they are the only ones that have been brought to the attention of the Court.

Defendants submit that HUD nowhere requires that ranks be assigned in accordance with score sheets, and that, consequently, defendants were not bound to follow that procedure. (King Decl. P 75; Sawyer Aff. P 7; Wiviott Decl. P 11.) The issue, however, is not whether the Coalition might have established a different procedure and different criteria for ranking, but whether

DHS uniformly applied the criteria that the Coalition, in the form of the Steering Committee, had ultimately chosen. The lack of uniformity evinced by rejecting use of the numeric scores reflecting Coalition criteria in the scoring of Housing Works' projects is emphasized by the fact: (i) that the Steering Committee had established four categories of priority programs: renewals, projects benefiting clients with AIDS, projects benefiting mentally ill persons, and projects benefiting the chemically dependent, and that both Housing Works' projects fit all four criteria, (Wiviott Decl. P 28); and (ii) that Sawyer had found on visiting [\*\*73] the sites that both of Housing Works' projects were "excellent" and "high quality" and "met or exceeded HUD goals", and had consequently initially scored Housing Works in a manner that would have translated into a rank of 30th and 33rd respectively on Housing Works' two projects. (Sawyer Aff. P 6; King Decl. P 70; Sawyer tr.)

The fact that defendants treated plaintiff's pre-applications differently than it had treated other applications, supplies circumstantial evidence that defendant's behavior was retaliatory.

### c. Pattern of antagonism

Evidence of a "pattern of antagonism" or of prior retaliatory conduct may serve as circumstantial evidence of retaliation. See [Rodriguez v. Torres, 60 F. Supp. 2d 334, 341 \(D. N.J. 1999\)](#) (finding that plaintiff had circumstantially established retaliatory intent, in part because there was "proof of a 'pattern of antagonism' toward plaintiff during the relevant time period"); [Farrell v. Planters Lifesavers Co., 22 F. Supp. 2d 372, 393 \(D. N.J. 1998\)](#) (noting that plaintiff offered no evidence to suggest pattern of antagonism that could give rise to inference of retaliation); see also [Morris v. Washington Metropolitan Area Transit Authority, 226 U.S. App. D.C. 300, 702 F.2d 1037, 1046 \(D.C. Cir. 1983\)](#) [\*\*74] ("[Defendant's] response to criticism on other subjects, if proved, was persuasive of its motivation in firing [plaintiff] for the reasons [plaintiff] claims."); [Marchese, 1994 WL 263301 \\*3-4](#) (finding retaliatory intent in mayor's termination of plaintiff's employment, in part because mayor had singled out plaintiff, a whistleblower, fostering long standing friction between plaintiff and city employee, and because later, right before plaintiff's termination, mayor's director of operations had "thrown up his hands" when plaintiff wished the director to tell mayor of new EPA violations allegations); [Green, 792 F. Supp. at 1254](#) ("types of circumstantial evidence commonly encountered which can support an inference that retaliatory motive played some part" include "the

historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes" . . . the specific sequence of events leading up to the challenged decision");

Here, not surprisingly given the nature and aggressiveness of plaintiff's protest activities, there is a clear showing of a pattern of antagonism by the Giuliani Administration [\*\*75] towards plaintiff.

### (i) Statements made by senior Giuliani Administration officials in the circumstances surrounding HRA's refusal to renew contracts

An example of the City's overt hostility towards Housing Works is further evident from statements made in the circumstances [\*\*427] surrounding HRA's non-renewal of City contracts related to Housing Works' ongoing projects. In March 1997, King and Brier attended a meeting between Housing Works and HRA concerning new contracts and contract renewals; they allege that HRA's then-Commissioner Barrios-Paoli: (i) threatened Housing Works with retaliatory treatment if it continued to "cause trouble" by advocating on behalf of PWAs, (ii) asked Housing Works why it was so hostile to the Giuliani Administration, and (iii) advised that Housing Works could not expect favorable treatment with Housing Works' attitude. (King Decl. PP 1, 32, 33; Brier Aff. PP 1-4.) Defendants dispute that Barrios-Paoli was threatening King and Brier. What is undisputed is: (i) that, out of character with plaintiff's demonstrated penchant for aggressive advocacy, plaintiff did not protest or demonstrate against what it perceived as the City's unfairness in not entering [\*\*76] into certain contracts with Housing Works, from that point until October 22, 1997, (Brier Aff. PP 6-7); and (ii) that the same day the protest was held, October, 22, 1997, HRA issued a press release stating that it would not renew Housing Works' contracts totaling approximately \$ 4.5 million and would no longer enter into contracts with Housing Works relating to its ongoing projects, (King Decl. PP 37, 46). Given that HRA had been considering whether to renew plaintiff's contracts for more than six months, HRA's timing of the release of its decision to coincide with the date of plaintiff's protest supports an inference that there was animosity harbored by HRA towards plaintiff's advocacy tactics.

This inference is further supported by a reference in the notes of Barkan, Deputy Mayor Mastros' then-Chief of Staff, in September 1997, approximately one month prior to HRA's press release referred to above. Barkan took notes on a discussion that she had with a City

employee (whose name she cannot now recall) concerning Housing Works, the first line of which reads: "Housing Works (*Fran Hates them*)", referring to Fran Reiter, and below that: "Act-up" and "AIDS advocacy". (King Decl. P **[\*\*77]** 40 (emphasis in original); Ex. J att. to King Decl.) Plaintiff notes that it had earlier subjected Reiter to extensive criticism concerning her participation in an aborted attempt by the Giuliani Administration to abolish DAS. (King Decl. P 70.) Defendants submit that Reiter had not acted in the contract dispute. (Bailey State Aff. P 179).

Both Kasman, the City's Chief Procurement Officer, and MOC staffer Weinstein referred in their notes dated October 20, 1997 to a strong rumor that Housing Works would protest at City Hall, with Kasman adding that Mastro "needs a report on all they (HW) did wrong" and that Mastro had told Barrios-Paoli that she "must be prepared to respond on camera tomorrow". (King Decl. P 43, 44; Ex. K at 11; Ex L at 5.) Kasman's notes dated October 21, 1997 bracket news of an imminent protest together with a reference to a meeting with Klasfeld, then on Mastro's staff. (King Decl. P 45; Ex. K at 13.) Mastro's instructions may have been issued in anticipation of media questions following the expected Housing Works protest. Mastro's direction, however, provides additional support for the inference that the press release was deliberately timed because of the Giuliani **[\*\*78]** Administration's ire with the militant advocacy group. *See Green*, 792 F. Supp. at 1254 (holding that defendant's surveillance of plaintiff was basis for retaliatory intent because gathering information on plaintiff suggested seeking of pretext); cf. *Cruz v. Aspin*, 1994 U.S. App. LEXIS 25555, No. 93-55468, 1994 WL 497846, \*3 (9th Cir. Sept. 9, 1994) (holding that plaintiff established causal link necessary for inference of unlawful retaliation in part because of "unusually close supervision from [his immediate supervisor] and his successor").

### **(ii) Mayor's failure to rule on plaintiff's appeal**

A pointed example of the mayor's antagonism towards Housing Works is the mayor's treatment of plaintiff's appeal **[\*428]** from HRA's finding of non-responsibility, treatment that is unusual enough to warrant an inference of retaliatory intent on the part of defendants. Under *New York City, N.Y., Rules* § 7-03, Housing Works had the right to appeal the HRA Commissioner's affirmation of HRA's non-responsibility determination. On September 14, 1998, plaintiff timely appealed to the mayor. (King Decl. P 54.) As of this date, November 1999, more than a year later, Housing Works has

received **[\*\*79]** no ruling from the mayor on its appeal. (King Decl. P 54.) Mayor Giuliani has failed to rule despite the fact that the law is clear; "a prompt written decision with respect to the merits of the bidder's appeal" is required. *New York City, N.Y., Rules* § 7-03(e)(4) (1998). The Court takes judicial notice that, historically, mayors have handled these appeals expeditiously, due to the grave consequences that a determination of non-responsibility has on the finances and vitality of the beleaguered entity. *See supra* Part III.C.2.b. (analyzing defendant's deviation from normal procedure as basis for retaliatory intent).

The mayor's failure to rule has effectively foreclosed Housing Works from challenging the finding of non-responsibility in court. (King Decl. P 54.) The City submits that the non-responsibility determination can now be deemed denied, but plaintiff is entitled by law to its appeal and should not have to challenge the City in court to do that which the law clearly requires. Putting a small non-profit entity to that burden imposes the risk of depleting plaintiff's slender resources, in order to obtain relief that is not in issue. The mayor's inaction is evidence of **[\*\*80]** his antagonism towards plaintiff, and his willingness to be perceived as having retaliated.

### **(iii) Turner's refusal to allow plaintiff to be awarded the state job training contract**

A final example of antagonism displayed by the Giuliani Administration concerns HRA's tenacious and ultimately successful bid to have New York State agencies deny Housing Works funding. In late 1998, during an especially concentrated period of plaintiff's successive demonstrations against the Giuliani Administration, *see supra* Part III.C.2.a, Housing Works applied for a "Welfare-to-Work" contract, a contract to provide job training for public assistance recipients with HIV/AIDS, in response to an October 1998 solicitation by the State Department of Labor ("SDOL") and State Department of Health ("SDOH"). (Turner Aff. P 4.) The "Welfare-to-Work" proposals required a written approval by the local social services district, which for Housing Works meant HRA approval. (King Decl. P 86.) HRA added "affirmative approvals" to all proposals submitted to it en route to SDOL, but for three proposals, one of which was Housing Works'. (Turner Aff. P 7; Ex. 6 att. to Bailey Decl.) Those three proposals were **[\*\*81]** awarded merely "form letters of certification". (Turner Aff. P 7; Ex. 6 att. to Bailey Decl.) HRA's certification of Housing Works as a potential service provider was submitted to the State in December 1998. (King Decl. P 86.)

King alleges that in or about February or March 1999, he was informed that Housing Works was the highest ranked bidder. (King Decl. P 87.)

On February 23, 1999, HRA Commissioner Turner sent a letter to the State Commissioner of Labor "withdrawing its 'Certification Form for the State of New York Department of Labor HIV Welfare-to-Work Request for Proposals'" with respect to the proposals submitted by three agencies, including Housing Works. (Ex. 6 att. King Decl., letter from Tuner to SDOL dated Feb. 23, 1999). Turner's explanation for the withdrawal was that the certification had been provided with a view to "allowing the selection committee as broad a review as possible", and that he had thought HRA would later have another chance to comment, this time on the proposals already deemed reviewable, but had been apprized in January that HRA would not be on the final selection committee. [\*429] (Ex. 6 att. King Decl., letter from Tuner to SDOL dated Feb. 23, 1999). Housing [\*82] Works disputes this rationale for the withdrawal, asserting that the letter was sent because Turner had been informed that Housing Works was going to be awarded the contract. (King Decl. P 88.)

Turner's letter contained a conclusive assertion that all three proposals were "non-responsive . . . to the goals of HRA's Division of Aids Services and Income Support regarding private sector job development, preparation and placement." (Ex. 6 att. Bailey Decl., Letter of Turner, Feb 23, 1999). The letter also detailed Housing Works' fiscal history: the March 17, 1998 DOI report, the September 4, 1998 nonresponsibility determination, and the November 18, 1998 Appellate Division decision in *Housing Works v. City of New York*. (Ex. 6 att. Bailey Decl., Letter of Turner, Feb 23, 1999). The letter did not detail the fiscal history of the other two programs. (Ex. 6 att. Bailey Decl., Letter of Turner, Feb 23, 1999).

Turner not only sent a letter to SDOL, he met, thereafter, with Karen Papendrea of SDOL and Humberto Cruz ("Cruz") of SDOH, allegedly in order "to clarify the reasons for HRA's de-certification of Housing Works as a potential vendor". (Turner Aff. PP 6, 7.) Housing Works submits [\*83] that the Turner meeting was called in order to prevent Housing Works from being awarded the job contract. (King Decl. P 89.) Turner reasserted that it would be irresponsible for HRA to approve distribution of funds to Housing Works in light of the audits and the fact that HRA had not recovered the misallocated funds, especially since City funds would provide significant funding for the state job training contract. (Turner Aff. PP 6, 7; King Decl. P 89.)

Further, Turner told SDOL that if Housing Works received SDOL funds, HRA would: (i) neither refer clients to Housing Works' program (ii) nor approve Housing Works' billing for services rendered to clients who approached it on their own, effectively precluding Housing Works' from receiving the funds for the job training were Housing Works awarded the state contract. (Turner Aff. P 8; King Decl. P 92; Cruz trans.)

Moreover, in order to alleviate any of HRA's concerns as to Housing Works' financial responsibility, at the meeting Cruz had suggested that a third nonprofit organization would handle all financial and accounting aspects of the contract. (King Decl. PP 89, 90. Cruz tr.) Cruz explained why the solution was suggested. He testified [\*84] that in his experience, social service non-profit organizations typically have accounting and record-keeping problems, not because the organizations embezzle funds but because the grant-based nature of the funding causes them to rechannel grant money to tide over projects whose grant money is dwindling. (Cruz tr.) Cruz further explained that because Housing Works is an effective program and serves a particularly needy and neglected part of the homeless community, the State tries to help them to address their accounting and record-keeping problems. Finally, Cruz pointed out that Housing Works' had successfully come through other fiscal crises with State assistance and that, consequently, the State proposed the plan to Turner. (Cruz tr.) Turner rejected the proposal. (King Decl. PP 89, 90. Cruz tr.)

Housing Works was not awarded the state job training contract. (Cruz tr.)

Turner's unreasonable refusal to adopt even the State-suggested compromise contributes to a picture of antagonism towards plaintiff, an example of the animosity the Giuliani Administration harbored towards the militant advocacy group.

#### **d. Conclusion**

Plaintiff has circumstantially established retaliatory intent [\*85] based on defendants' awareness of plaintiff's protected activity, the temporal proximity of the challenged action to that activity, defendant's disparate treatment of plaintiff's [\*430] pre-applications, and the pattern of antagonism toward plaintiff.

The Court acknowledges that any mayoral administration might reasonably resent activities such as those engaged in, particularly the militant kind seemingly favored by plaintiff. Plaintiff's right to continue to express that criticism, however, is protected by the

First Amendment. See Terminiello v. Chicago, 337 U.S. 1, 4, 93 L. Ed. 1131, 69 S. Ct. 894 (1949) ("[A] function of free speech under our system of Government is to invite dispute. It may indeed best serve its purpose when it induces . . . dissatisfaction with conditions as they are or even stirs people to anger."); see also The New York Times Co. v. Sullivan, 376 U.S. 254, 270-73, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964) (discussing parameters of free speech "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, [\*\*86] and sometimes unpleasantly sharp attacks on government and public officials . . . . Criticism of their official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.").

### 3. Affirmative defense

Defendants have not shown that they will be able to establish at trial that they would have downgraded plaintiff's projects even in the absence of plaintiff's protected speech. Defendants claim that they reranked plaintiff because they had no wish to recommend a financially irresponsible candidate for funding, but the Court finds this proffered motivation to be pretextual. The alleged non-responsibility finding relates to matter such as mis-applying funds to projects, failing to maintain proper records, and having been derelict in reporting. These are serious matters, but ones that both the State and Federal governments have recognized as not uncommon when dealing with under-funded and inadequately financed not-for-profit entities serving the poor. The State and Federal governments have clearly expressed the view that Housing Works serves an important function and are prepared to deal with them even [\*\*87] given this history. Indeed, even the City's DHS has acknowledged the excellent performance of Housing Works. The City's proffer of the alleged Vendex non-responsibility report as its sole basis for the reranking notwithstanding its admission that it never investigated whether all of those entities that it ranked above Housing Works had similar reports nor inquired as to the basis of such report, coupled with its refusal to process the appeal to which Housing Works was entitled, suggests that, in this case, the non-responsibility basis for its actions is pretextual.

#### a. Differential treatment

In Cuban Museum, 766 F. Supp. at 1127, the court

rejected as pretextual the City of Miami's claim that the reason it had denied a lease-renewal to plaintiff was not because plaintiff had exhibited controversial art but because the City was investigating allegations of plaintiff's self-dealing directors. The court reasoned that the City's investigation had been disparately implemented and, significantly, did not investigate "directors other than those who had been linked with the controversial art." See *id.* (finding that defendant "never exhibited real concern over possible [\*\*88] self-dealing and auction profits" in connection with the other, purportedly self-dealing directors). Another instance, in that case, where defendant's selective treatment of those who had engaged in protected speech supported the court's finding of pretext, was defendant's selective implementation of a Miami city ordinance governing renewals. *Id.* at 1128 ("The manner in which the City manages city-owned property reveals that . . . *The City has regularly allowed others* to use city-owned property without formal leases . . . .") (emphasis added); see also Sumner, 899 F.2d at 209 (rejecting as pretextual defendant's [\*\*431] claim that basis for disciplining plaintiff was infraction of "sitting on a carrier case", in part because fellow Postal Service employee testified that he had never heard of anyone being disciplined for that infraction in 35 years of service).

In this instance, the Court concludes that defendants' assertion of the critical importance of the non-responsibility determination is pretextual, based circumstantially on, among other factors referred to above, the way the Vendex search had been selectively implemented among applicants for HUD [\*\*89] grants. Oesterreich testified that it was the non-responsibility determination, that induced him to instruct Wiviott, who in turn directed Sawyer, to rerank plaintiff below the \$ 54 million mark. (Oesterreich Aff. P 8; Sawyer Aff. P 7; King Decl P 71.) However, the individual defendants admit that they knew little, if anything, of the details underlying that non-responsibility determination or concerning anything else regarding plaintiff's finances. Oesterreich conceded that all he knew of plaintiff's financial problems was the non-responsibility determination. (Oesterreich P 10.) Wiviott testified that in addition to the non-responsibility determination, she "had this vague sort of notion" that the sum of \$ 600,000 was at issue in some way, but beyond that knew no more. (Wiviott tr.) Sawyer knew nothing beyond what Wiviott informed her. (Sawyer tr.) Consequently, in claiming that plaintiff's history of financial irregularity was what motivated the downgrading, defendants necessarily rely solely on the Vendex notation of non-responsibility.

Yet it is far from clear that either Vendex records or determinations of non-responsibility played so central a role regarding the process of [\*\*90] ranking any pre-application other than Housing Works' pre-application. *First*, in previous years, DHS had not found it necessary to consult the Vendex database at all in determining the rankings of projects. (Oesterreich Aff. P 6.) *Second*, when Oesterreich instituted the use of Vendex searches on his appointment as Commissioner in March 1999, he instructed Wiviott to run a search on all applicants, *but she ultimately searched only 57 out of 95*. (King Decl. P 77.) Regardless of the reason for the partial search, "at least some" of the remaining programs applying might also have been determined to be non-responsible, as Wiviott conceded. (Wiviott tr.) Wiviott submitted that some of the applicants whose Vendex records had not been examined had been forwarded to DHS by agencies that had "probably done a Vendex search", but admitted that she did not know that to be the case. (Wiviott tr.) This lack of knowledge is inconsistent with defendants' assertion that these determinations were decisive in establishing which applicants were to be recommended to HUD. *Third*, while Oesterreich asserted that the non-responsibility determination was pivotal to the reranking of plaintiff, [\*\*91] Wiviott testified that the information was unimportant, that it "merely affirmed what I already knew" what she already" generally knew about it, and I had a very strong sense that I was right about it, and, you know, I didn't necessarily investigate or look into it, but I had a fairly strong sense" based on "what I had read, and probably it had been discussed." (Wiviott tr.)

Defendants' emphatic reliance on the Vendex recorded non-responsibility determination was not uniform, but apparently of paramount importance only insofar as the bidder involved was Housing Works. This differential treatment circumstantially supports the conclusion that defendants' proffered motive was pretextual.

Defendants assert both: (i) that in 1995 and 1996 they recommended plaintiff for its original HUD grants though plaintiff had already begun protesting and litigating and defendants were already aware of this, and (ii) that the only difference between the 1995 and 1996 applications was the fact that there had been a non-responsibility determination in the interim. That difference, defendants submit, accounts for the reranking, and that if defendants had [\*432] sought to retaliate, they would have done so in [\*\*92] 1995 and 1996.

This argument is unpersuasive on two counts. *First*, the fact that defendants did not choose to retaliate in

determining the projects recommended for the 1995 and 1996 HUD grants, would not, in any case, foreclose the possibility that defendants are retaliating here, especially in light of the fact that three extra years of demonstrations and litigation may have substantially increased defendants' inclination to retaliate. *See, e.g., Marchese* 1994 WL 263301, \*3-4, (noting that one instance of protected speech might be the "last straw" even though protected speech might have been ongoing for period of time). In 1995, after all, plaintiff had not yet, *inter alia*, paraded placards with the mayor's face stamped "AIDS Criminal" in blood-red ink, chained themselves to desks in the mayor's headquarters, litigated a succession of cases in state and federal trial and appellate courts concerning the City's treatment of PWAs, or released what the New York Times called a "nightmarish" report, that the Giuliani Administration had kept confidential, revealing HRA's treatment of PWAs.

*Second*, defendants are incorrect in asserting that the only relevant [\*\*93] change between 1995 and 1999 was plaintiff's non-responsibility determination. Another change was the Vendex database search. It is undisputed that no Vendex search was administered by DHS in the process of ranking programs until Oesterreich intervened in April 1999, and, at that, after the original ranking for 1999 had already been completed. (Oesterreich Aff. P 6.) It follows that in the 1995, 1996, 1997, 1998 rankings (and even in the 1999 ranking until April 15, 1999 when Oesterreich ordered the Vendex check that resulted in a reranking) any number of applicants--including Housing Works--might have had non-responsibility determinations on their records and defendants would have had no idea that this was the case. Therefore, the fact that defendants recommended plaintiff for HUD funding in 1995 and 1996, years prior to plaintiff's non-responsibility determination, is not proof that, had there been a non-responsibility determination noted on plaintiff's Vendex in 1995, DHS would have withheld its recommendation in the same manner that DHS has done in 1999. Contrary to defendants' assertion, 1995 is not an appropriate benchmark against which to measure the downgrading of plaintiff [\*\*94] in 1999. Indeed, the record reflects that: (i) from and after 1996, Housing Works had performed its projects at levels describe by the City's witnesses as "excellent" and "high quality" and at levels "exceeding HUD's goals"; (ii) Housing Works had addressed its accounting and reporting problems, and (iii) both the State and Federal governments were prepared to continue to fund Housing Works projects.

#### **b. Insufficient evidence on the day the challenged**

### decision was made

Even were defendants' proffered, permissible motive not pretextual, defendants have not offered any evidence that they had actual knowledge of the facts underlying the allegedly permissible motive on the date the challenged decision was made. *See Umbehr*, 518 U.S. at 685 (stating that defense requires evidence of defendant's knowledge "at the time of the termination"); [Pataki](#), 185 F.3d at 47; [Sagendorf-Teal v. County of Rensselaer](#), 100 F.3d 270, 274 (2d 1996). When a permissible motive is substantiated by "after-occurring" events, such as (i) plaintiff's *behavior subsequent* to defendant's challenged decision or (ii) *evidence of plaintiff's behavior* that **[\*\*95]** defendant *acquired after* defendant's challenged decision, defendant is still liable. *See, e.g., Sagendorf-Teal*, 100 F.3d at 275 (holding that defendant's liability for [First Amendment](#) violation, based on discharging plaintiff for her report criticizing the handling of prison event, was not mitigated by fact that "after-occurring" rule infractions by plaintiff would properly have warranted discharge had the earlier firing not have **[\*433]** already happened); *see id.* (finding no affirmative defense when "some other circumstance later occurs or later comes to the employer's attention").

The non-responsibility determination on a bidder's vendex record, under the PPB rules, cannot be relied upon by a City agency which has not examined the non-responsibility determination to see if the basis for it would also bar the bidder's bid in the instance under consideration. (Exs. W,V att. to King Decl.) Defendants have asserted that it was the fact of the non-responsibility determination alone that governed their decision, *see supra* Part III. C.3.a. Oesterreich had twenty years experience as a City official in areas relating to the administration of contracts and was familiar **[\*\*96]** with the PBB rules relating to non-responsibility determinations. (Oesterreich Aff. PP 1,2.)

Oesterreich claims that though DHS did not know the basis for HRA's non-responsibility determination at the time of the reranking and the submission of the applications to HUD, Oesterreich has in the interim examined the basis for the non-responsibility determination and is "confident" that it provides sufficient basis to downgrade plaintiff. (Oesterreich Aff. P 10.) He argues that, retrospectively, his decision to downgrade plaintiff was correct. Under *Umbehr* and its progeny, however, this "after-acquired evidence" is insufficient to afford defendants a viable defense, particularly in light of the views expressed by the State and Federal governments.

The Court concludes that the voluminous facts in the record evince well-documented circumstantial evidence of retaliatory intent, such that plaintiff has established a clear and substantial likelihood of success on the merits at trial.

### IV. CONCLUSION

For the foregoing reasons, plaintiff's motion is GRANTED and defendants' cross-motion is DENIED.

Accordingly, after hearing testimony and argument in this matter and carefully reviewing **[\*\*97]** the evidence submitted, the Court hereby issues the following preliminary injunction:

1. City Defendants and HUD, their officers, directors, principals, agents, servants, employees, successors, assigns, and all those acting in concert or participation with them, are hereby ORDERED to re-rank Housing Works' Supportive Housing Program ("SHP") projects consistent with the priorities established by the Way Home Coalition and to do so without downgrading Housing Works' rankings because of defendants' disapproval of Housing Works' criticism of the Giuliani Administration or its advocacy on behalf of persons with HIV or AIDS.
2. The Court finds that a re-ranking consistent with these criteria requires that Housing Works' projects be ranked by City defendants and HUD as 30th and 33rd respectively and they are hereby ORDERED to be so ranked.
3. City Defendants and HUD are to effectuate the new rankings promptly upon receipt of this ORDER.

SO ORDERED.

ALLEN G. SCHWARTZ, U.S.D.J.

Dated: New York, New York

November 12, 1999

---

End of Document



## Housing Works, Inc. v. Turner

179 F. Supp. 2d 177 (S.D.N.Y. 2001)  
Decided Nov 29, 2001

00 Civ. 1122 (VM); 00 Civ. 3561 (VM)

178 November 29, 2001 \*178

Matthew D. Brinckerhoff, David H. Gans, Emery, Cuti, Brinckerhoff Abady, P.C., New York City, for Housing Works, Inc., Bruno Alicia, James Arnold, Paul Alston, Douglas Cho-Hill, Reyes Cruz, Patrick D. Dolby, Dexter C. Duskin, Earl C. Ellis, Yvette Gregory, Barry Harris, Iesha Jackson, Donile Knight, Takeasha Newton, Laverne Patent, Tatia Smith, Velisa Green Summerlin, Jan Thurman, Robert Tolbert and Roberto Valderrama.

Bob Bailey, Michael D. Hess, Corp. Counsel of City of NY, New York City, for City of New York, Rudolph Guiliani, Fran Reiter, Lilliam Barrios-Paoli, Jason Turner, Mark Hoover, Gregory Cladwell, John A. Dereszewski, Richard Bonamarte, Neal L. Cohen, Mitchell Netburn and James Capozziello.

Nadine Rivellese, NYC Law Dept., New York City, for Randy Mastro, Elizabeth kaswan and Lou-Ellen Barkan.

179 \*179

180 \*180

### **DECISION AND ORDER**

VICTOR MARRERO, United States District Judge. West Page 181

Plaintiff Housing Works, Inc., together with nineteen of its client-members (hereinafter collectively referred to as "Housing Works"), is, by its own admission, a vociferous and opinionated community-based, not-for-profit corporation, advocating on behalf of persons living with HIV and AIDS, many of whom are often homeless and drug-dependent. Housing Works initiated these actions against the City of New York (hereinafter the "City") and several high-ranking municipal officials, including the Mayor, pursuant to Title VII of the Civil Rights Act, [42 U.S.C. § 1983](#) for alleged violations of the First and Fourteenth Amendments to the United States Constitution. Housing Works also brought a number of claims under New York State and City law. Defendants have moved under [Rule 12\(c\) of the Federal Rules of Civil Procedure](#) to dismiss all claims. Because Housing Works has alleged facts sufficient to support its federal and state constitutional claims and because the present controversy raises a legal issue of first impression in this Circuit, the motions are granted in part and denied in part.

### **I STANDARD OF REVIEW**

When a party, after the filing of an answer, moves for judgment on the pleadings pursuant to [Fed.R.Civ.P. 12\(c\)](#) on the grounds of failure to state a claim, the court may employ the same standards applicable to a motion brought pursuant to [Rule 12\(b\)\(6\)](#). [Nat'l Ass'n of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories](#), [850 F.2d 904, 910](#) n. 2 (2d Cir. 1988); [see also Davidson v. Flynn](#), [32 F.3d 27, 29](#) (2d Cir. 1994).

Therefore, in the context of the present motion, the Court accepts the well-pleaded assertions of fact in the complaint as true and draws all reasonable inferences and resolves doubts in favor of the non-moving party. See Kaluczky v. City of White Plains, 57 F.3d 202, 206 (2d Cir. 1995) (citations omitted). The focus of the Court's <sup>183</sup> inquiry is not whether plaintiffs will ultimately prevail, but whether the claimants are entitled to an opportunity to offer evidence in support of their claims. See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds, Davis v. Scherer, 468 U.S. 183 (1984). Therefore, a motion to dismiss under either Rules 12(c) or 12(b)(6) for failure to state a claim will be denied "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

## **II FACTS AND PROCEDURAL HISTORY**

The present action, spanning a relevant time period of ten years, names as defendants the City and sixteen municipal employees or agents. The long and complex history of the case requires a thorough recitation for purposes of this motion. Accepting, as it must, the well-pleaded allegations in the complaint as true, the Court acknowledges the following factual assertions as set forth in the pleadings.<sup>1</sup> **A THE PARTIES**

<sup>1</sup> The present case began as two separate actions in District court: Housing Works, Inc. v. Turner, No. 00 civ. 1122 (S.D.N.Y. Feb. 15, 2000) (hereinafter the "Turner complaint") and Housing Works, Inc. v. Giuliani, No. 00 Civ. 3561 (S.D.N.Y. May 10, 2000) (hereinafter the "Giuliani complaint"). In substance, the two complaints overlap on one core set of facts with respect to retaliation for exercise of protected First Amendment activity, and the federal and state constitutional claims are identical in both. On this basis, the Court accepted the action corresponding to the Giuliani complaint as related to its

predecessor. The opposition and reply briefs on the Rule 12(c) motion were consolidated to encompass both actions, and the court addresses the claims in both complaints in this Decision and Order. Jack Hiralall, P.C. moves separately for dismissal of the ninth claim in the Giuliani complaint, alleging accountant malpractice. When appropriate, the Turner and Giuliani Complaints are collectively referred to as the "complaints."

Housing Works is a leading not-for-profit organization which administers programs dedicated to serving persons living with HIV/AIDS. Its mission is to provide critical housing and support services to its clients. Housing Works claims to be unique among its peers in that it focuses on assisting persons with the most pressing problems, often so severe that other organizations regularly turn them away. Housing Works's clients are often homeless, "desperately ill, often emotionally troubled, chemically dependent, financially crippled, and socially disgraced."<sup>2</sup>

<sup>2</sup> Giuliani complaint, at ¶ 1.

The organization's mission has a simple philosophical underpinning — supportive housing coupled with critical support services is the best prescription for fostering independent, self-sustaining lifestyles and a return to productive activities among its clients. According to Housing Works, this prescription has achieved notable success. Prior to the events leading up to this action, Housing Works purports to have served more than 10,000 homeless persons living with AIDS, many of whom lived, and continue to live, productive and independent lives.<sup>3</sup>

<sup>3</sup> Id. at ¶¶ 30, 34-36.

Housing Works also seeks to provide a comprehensive range of services. In addition to its core housing mission, it offers case management services, substance abuse and mental health

counseling, client legal services, medical monitoring, job training, and a theater project.

184 \*184

Defendants include the City and sixteen municipal employees or agents, acting in their individual, and in some cases their official, capacities. The Complaints also identify several municipal agencies with which those individuals are associated.

The Giuliani Complaint names Mayor Rudolph W. Giuliani (hereinafter "Giuliani") as its primary defendant. Housing Works claims that Giuliani was the principal policy-maker with respect to all of the municipal agencies relevant to the action. Along with Giuliani, the complaint alleges that his deputies Randy Mastro (hereinafter "Mastro"), Fran Reiter (hereinafter "Reiter") and Reiter's Chief of Staff Lou-Ellen Barkan ("Barkan") were also involved in the alleged wrongdoing as policy-makers acting in their individual and official capacities. In addition, the Giuliani Complaint names as a defendant the City Chief Procurement Officer, Elizabeth Kaswan (hereinafter "Kaswan"), in her role as policy-maker with respect to the Mayor's Office of Contracts (hereinafter "MOC").<sup>4</sup>

<sup>4</sup> When appropriate, the city, Giuliani, Mastro, Reiter, Kaswan and Barkan are referred to collectively as the "Mayoral Defendants."

One of the principal municipal agencies at issue in this case is the New York City Human Resources Administration (hereinafter "HRA"), which includes the New York City Department of Social Services. According to the Complaints, HRA had primary responsibility for administering several housing programs and for certifications relating to various federal, state and municipal projects, as well as municipal benefits. Housing Works named two Commissioners of HRA as defendants: Lilliam Barrios-Paoli (hereinafter "Barrios-Paoli"), whose tenure ended some time in 1997 and Jason Turner (hereinafter "Turner"), who presumably succeeded Barrios-Paoli. In addition

to the two Commissioners, the Complaints name as defendants the following HRA officials: Richard Bonamarte (hereinafter "Bonamarte"), Agency Chief Contracting Officer of HRA; Jack McKay (hereinafter "McKay"), Acting General Counsel of HRA; Gregory Caldwell (hereinafter "Caldwell"), Deputy Commissioner of HRA in charge of the Division of AIDS Services and Income Support (hereinafter "DASIS"); John Dereszewski (hereinafter "Dereszewski"), Director of Contract Services for DASIS; and Mark Hoover (hereinafter "Hoover"), First Deputy Commissioner of HRA.<sup>5</sup>

<sup>5</sup> Hoover is a named defendant only in the Turner Complaint. All other individual defendants are named in the Giuliani complaint. When appropriate, the city, Barrios-Paoli, Turner, Caldwell, Dereszewski, Bonamarte, McKay and Hoover are referred to collectively as the "HRA Defendants."

The Giuliani Complaint also identifies officials of the New York City Department of Health (hereinafter "DOH") as defendants. DOH is the municipal agency charged with setting the public health agenda for the City and with implementing effective public health strategies. In dispute here, however, is DOH's role in administering certain agreements with independent contractors, such as Housing Works, to provide initial assessment and case management services to the public. The Giuliani Complaint also names Neal Cohen (hereinafter "Cohen"), Commissioner of DOH; Mitchell Netburn (hereinafter "Netburn"), Agency Chief Contracting Officer for DOH; and James Capozziello ("Capozziello"), Acting Agency Chief Contracting Officer for DOH.<sup>6</sup>

<sup>6</sup> When appropriate, the City, Cohen, Netburn and Capozziello are referred to collectively as the "DOH Defendants."

185 Finally, the Giuliani Complaint asserts a claim against Jack Hiralall, P.C. (hereinafter \*185 "Hiralall"), a professional business organization

engaged in providing accounting services and retained by the City to perform an audit of Housing Works's financial records.<sup>7</sup> **THE RELATIONSHIP BETWEEN THE PARTIES**

<sup>7</sup> All defendants combined, with the exception of Hiralall, are collectively referred to as the "city," or the "city Defendants."

Since its inception in 1991, Housing Works and the City have had a relationship characterized by fragile, oftentimes divisive, programmatic mutual dependence and support. Specifically, Housing Works has operated four programs that it alleges were adversely affected by the City's retaliatory actions: (1) the Intake Program, which seeks to provide initial assessment, case management and crisis intervention for people living with HIV/AIDS who are homeless or threatened with homelessness; (2) the Residential Housing Program, which attempts to secure residential leases for persons living with HIV/AIDS in scattered sites throughout the New York metropolitan area; (3) the Residential Facilities Program, which provides apartment housing in two buildings owned by Housing Works; and (4) the Second Life Job Training Program (hereinafter "JTP") which provides Housing Works clients with a work/study program culminating in full-time employment and related benefits, within the Housing Works organization.<sup>8</sup> Through its leasing and purchasing activities, Housing Works held leases on over two hundred residential apartment units and owned outright an additional sixty-eight units as of October 1997.<sup>9</sup>

<sup>8</sup> Giuliani complaint, at ¶ 38.

<sup>9</sup> *Id.* at ¶ 60.

Housing Works depended on the City, as well as the state and federal governments, for a substantial portion of its funding. Conversely, the City outsourced a number of critical administrative and operational functions to Housing Works. Housing Works was often at the front line making initial

case assessments, securing housing and then providing a range of services to persons living with HIV/AIDS. Stated another way, by virtue of its programs, Housing Works had a "vendor" relationship with the City in which Housing Works would provide housing and support services in return for reimbursement from public funds at a later date.<sup>10</sup>

<sup>10</sup> *Id.* at ¶ 57.

The relationship between the parties was not merely an ad hoc arrangement calling for occasional reimbursements when proof of services provided was submitted. According to Housing Works, the parties had a long-term contractual relationship reflected in at least three separate agreements.

### **1 The Scattered Site and Ryan White Enhancement Contracts**

In 1992, Housing Works and the City, through HRA, entered into a written agreement (hereinafter the "Scattered Site Contract") to provide housing for people living with AIDS. Pursuant to the Scattered Site Contract, Housing Works provided private residential housing and supportive services to persons living with AIDS and their families referred to Housing Works by HRA. To meet its obligations under the Scattered Site Contract, Housing Works would advance rents to private landlords and absorb the initial costs of supportive services. The parties contemplated that the City would later reimburse

<sup>186</sup> Housing Works for those costs. \*186

The initial term of the Scattered Site Contract lasted for three years, and it appears from the record that the agreement was extended to on or about June 30, 1997. When it was entered into, the Scattered Site Contract had an annual value of close to \$1 million and covered approximately forty households. Through various amendments and extensions, the value of the Contract increased to \$4.3 million, covering two hundred households.

To meet its obligations under the Scattered Site Contract, Housing Works held 180 residential apartment leases to accommodate the referrals from HRA. These apartments were scattered throughout Manhattan, Brooklyn, Queens and the Bronx. In administering the Scattered Site program, Housing Works also leased commercial real estate in the Bronx for its administrative offices under a ten-year agreement.

Apart from the Scattered Site Contract, Housing Works also received a supplement from federal funds made available by DOH. The supplement was disbursed to Housing Works through HRA by operation of a separate agreement, the Ryan White Enhancement Contract (hereinafter the "Ryan White Contract"). Pursuant to the Ryan White Contract, Housing Works provided supplemental social services to the participants of the Scattered Site program. The Ryan White Contract had an annual value of approximately \$187,700.

## **2 The DOH Intake Contract**

In June 1997, Housing Works and the DOH completed negotiations on a three-year agreement (hereinafter "DOH Intake Contract"), contemplating the provision of general intake, assessment and referral services by Housing Works to persons living with AIDS. In return for providing these services, the City, through DOH, would later reimburse Housing Works. Although Housing Works began performing intake services on July 1, 1997, the DOH Intake Contract was not formally executed until August 18, 1997, and it is unclear whether the DOH Intake Contract was never properly registered by the City Comptroller's Office as required by law or simply terminated.

The DOH Intake Contract had an annual value of \$150,000, and Housing Works contends that it continued to provide services under the agreement for six to nine months without receiving any reimbursement.

## **3 Housing Works's History of Financial Mismanagement**

From its inception in 1991, Housing Works grew at a fast clip. The increase in the number of persons and households covered under housing and support contracts described above clearly attest to that fact. As often occurs in periods of rapid growth, the systems that Housing Works first implemented became inadequate as the magnitude of certain tasks expanded. By late 1995, Housing Works concedes that its accounting systems could no longer adequately track its fiscal situation. The organization became entangled in a financial crisis, severely affecting cash flow and impeding its ability pay its creditors and employees.

According to Housing Works, it informed HRA of the looming financial crisis as soon as the situation was discovered. Consultations with HRA led to the hiring of professional accounting firms for the purpose of developing and implementing a corrective action plan. These consultations with HRA and the accountants took place during the Spring and Summer of 1996.

During that same time period, the New York City Department of Investigations <sup>187</sup> (hereinafter "DOI") conducted a review of Housing Works's financial records. In July 1996, DOI issued a memorandum which confirmed that as of late 1995, Housing Works's accounting practices were inadequate. In addition, the DOI memorandum recommended that HRA conduct an audit of Housing Works's Scattered Site Contract.

For the better part of 1996, HRA closely monitored Housing Works's finances and the ongoing implementation of the corrective plan. By December 1996, Housing Works contends that it had fully implemented the corrective measures and that HRA expressed its satisfaction that proper measures had been put into place. According to Housing Works, HRA's satisfaction was formally memorialized in an internal memorandum in which Dereszewski indicated that Housing Works had successfully implemented a nine-point

corrective action plan. Subsequently, in August 1997, Housing Works asserts that HRA provided MOC with a memorandum making an affirmative finding of Housing Works's responsibility as a contractor.

Therefore, although Housing Works concedes that it had financial management problems in the past, it underscores that those problems ended as of December 1996, when it successfully implemented the corrective action plan and received formal recognition of the corrective measures.

### **C HOUSING WORKS'S CONSTITUTIONALLY PROTECTED ACTIVITIES**

Although the City, its various social services agencies and Housing Works were enmeshed in several mutually dependent and supportive contractual arrangements, the Court has already noted that these relationships were marred by divisiveness. According to Housing Works, this aspect of the parties' relationships was attributable to Housing Works's vigorous advocacy on behalf of persons living with AIDS. In keeping with its vision of a broad-spectrum organization dedicated to enhancing the lives of those afflicted with HIV/AIDS, Housing Works not only arranged for housing and provided critical support services, it also argued vigorously in various fora on behalf of persons living with HIV/AIDS.

As alleged in the Giuliani Complaint, "Housing Works has long been a vocal and militant critic of the Giuliani Administration's attempts to cut and restrict essential services and benefits provided for low-income people with HIV and AIDS."<sup>11</sup> The group staged a number of protests against the Mayor and the municipal agencies responsible for social services. In one of the more dramatic exploits, Housing Works members participated in a "coalition demonstration," which attempted to block rush hour traffic at local bridges and tunnels.<sup>12</sup> In another, eleven people were arrested

during a Housing Works protest for chaining themselves to desks at the Mayor's campaign headquarters.<sup>13</sup> The Complaints also detail an almost routine participation by Housing Works in annual demonstrations, such as World AIDS Day, disruptions at HIV policy planning meetings and instances of civil disobedience in front of City Hall.

<sup>11</sup> *Id.* at ¶ 41.

<sup>12</sup> *Id.* at ¶ 43.

<sup>13</sup> *Id.*

In addition, Housing Works was an active litigant, most often targeting the City, its agencies and its employees, some of them named defendants in this case. The litigation initiated by Housing Works included: Housing Works, Inc. v. City of New York, No. 99 Civ. 8975 (S.D.N.Y. Aug. 17, 1999) (seeking reversal of a City agency's ranking of Housing Works in an application for federal funding); Housing Works, Inc. v. Safir, No. 98 Civ. 4994 (S.D.N.Y. July 14, 1998) (challenging the City's limitation of the size of a Housing Works protest in front of City Hall); Henrietta D. v. Giuliani, No. 95 Civ. 0641 (E.D.N.Y. Oct. 25, 1996) (seeking preliminary injunction against the City and State to prevent them from implementing their allegedly ineffectual system of distributing benefits to City residents living with AIDS/HIV); and Hernandez v. Barrios-Paoli, 720 N.E.2d 866 (N.Y. 1999) (Article 78 proceeding challenging HRA's eligibility verification review for DASIS benefits).

There is no dispute between the parties that the activities described above are protected by the First Amendment and analogous provisions of the New York State Constitution.

### **D THE ALLEGATIONS OF RETALIATION**

The crux of Housing Works's federal claims is that in response to its vocal criticism of the Giuliani Administration's HIV/AIDS policies, the City and the individual defendants retaliated against

Housing Works by, *inter alia*, refusing to renew its contracts with the City and by preventing Housing Works from securing any future funding in connection with municipal, state and federal grants. The Complaints allege the following retaliatory measures.

### **1 The City's Refusal to Renew the Scattered Site and Ryan White Contracts**

In or about January 1997, Reiter advised Caldwell to conduct a subsequent audit of Housing Works's financial records relating to the Scattered Site Contract for the time period between July 1, 1994 and December 31, 1996. According to Housing Works, the time frame recommended was deliberately and narrowly tailored to capture the years corresponding to its financial crisis, and Reiter recommended the audit notwithstanding the approval by the relevant municipal agency, HRA, of Housing Works's corrective plan. For the purposes of this audit, Caldwell, acting through HRA, retained the firm of Jack Hiralall, P.C. to conduct the accounting.

In the subsequent months, Housing Works made repeated inquiries as to the status of the Scattered Site Contract, which was set to expire on June 30, 1997, and as to the prospects for renewal. According to Housing Works, Barrios-Paoli, Bonamarte, Dereszewski and other HRA Defendants falsely stated that the City was on the verge of extending the Scattered Site Contract. HRA Defendants made similar representations in connection with the Ryan White Contract which was set to expire on March 3, 1997. Housing Works alleges that these officials made specific statements causing it to believe that both of the Contracts would be renewed for an additional one-year term. These statements were allegedly made in order to induce Housing Works to continue to perform under both Contracts without reimbursement beyond their respective termination dates.

In addition, it appears that the City's outward conduct manifested an intention, at the very least, to renew the Contracts. In or about late June 1997, Caldwell and Dereszewski "approved" Housing Works's budget for an additional 12-month period.<sup>14</sup> On June 24, 1997, six days before the expiration of the Scattered Site \*189 Contract, Dereszewski insisted that Housing Works duly execute and deliver all documents necessary to process the contract extension. As late as September 1997, the HRA Defendants allegedly continued to make false representations about the pending renewal, and, more importantly, HRA continued to refer persons living with AIDS to Housing Works for placement in the Scattered Site program, as if there were no interruption in the arrangement between the parties. With respect to the Ryan White Contract, HRA allegedly continued to monitor compliance with the agreement, requesting the submission of status reports and billings.

<sup>14</sup> *Id.* at ¶ 97.

Throughout this period of uncertainty, Housing Works continued to advance rent payments to landlords pursuant to the Scattered Site Contract and to provide supplemental services to Scattered Site clients pursuant to the Ryan White Contract. Beginning in August 1997, the City refused to reimburse Housing Works for the services that it continued to provide. On October 16, 1997, Housing Works filed a notice of claim with the City Comptroller for past due amounts on services provided. By that point, the relationship between the parties had become strained to the point where Housing Works began planning a demonstration to protest the City's actions. The organization began distributing flyers announcing a demonstration to be held on October 22 at HRA's offices to protest the City's refusal to reimburse Housing Works for services provided since July 1, 1997.

Housing Works alleges that, as word began to leak, the City was plotting its response. The Mayor's Office, MOC and DOI communicated

extensively with each other about the impending demonstration. According to Housing Works, "[d]uring the days leading up to the October 22, 1997 demonstration (and thereafter), defendants Mastro, Barkan, Kaswan, and other representatives of the Mayor's Office and MOC methodically located each and every contract or potential contract involving Housing Works and proceeded to systematically stop them all from being consummated, registered, or in any way advanced."<sup>15</sup>

<sup>15</sup> *Id.* at ¶ 121.

Apparently, Housing Works's protest went ahead as scheduled. Immediately following the demonstration, the HRA issued a press release which stated: "[b]ased on the latest audit report, which found over \$500,000 in funds unaccounted for by Housing Works, HRA could not renew the Housing Works scattered site contract which expired on June 30, 1997 or enter into new contracts."<sup>16</sup> According to Housing Works, the allegations of financial mismanagement were a pretext for retaliation against it for its exercise of protected First Amendment rights.

<sup>16</sup> *Id.* at ¶ 123.

## **2 The Refusal to Recognize the DOH Intake Contract**

After having formally executed the DOH Intake Contract on August 18, 1997, Housing Works continued to perform its obligations under the agreement in subsequent months. According to Housing Works, on October 23, 1997, the day after the HRA press release and shortly after the filing of Housing Works's notice of claim, the Mayor, MOC, and DOH Defendants arranged to have the DOH Intake Contract pulled from the Comptroller's Office before it could be registered.

Housing Works further alleges that one of its officers spoke with DOH Chief Contracting Officer Netburn on January 14, 1998. In that conversation, Netburn allegedly confirmed that the

190 MOC had in fact \*190 pulled the DOH Intake Contract and that it would not be registered until the subsequent investigation of Housing Works Scattered Site records, apparently still ongoing, was completed. In addition, Netburn revealed that Kaswan had informed him that no action of any kind would be permitted on a contract with Housing Works until the investigation was completed. Housing Works also claims that Netburn notified it that the City's "policy" was to refuse to do business with people who were involved in litigation with the City.<sup>17</sup> **E THE ALLEGATIONS OF CONTINUING RETALIATION**

<sup>17</sup> *Id.* at ¶ 166.

In addition to the City's allegedly unlawful refusal to renew the Scattered Site and Ryan White Contracts and to register the DOH Intake Contract, Housing Works claims that the City instituted a blanket policy against it, again in retaliation for its criticism of the City's AIDS policies, which prevented Housing Works from securing any additional contracts.

### **1 HRA's New Scattered Site Contract**

On October 6, 1997, HRA released a request for proposals (hereinafter "RFP") for a new scattered site program to commence July 1, 1998, covering 1,130 apartment units earmarked for persons living with AIDS. The RFP included some of the units previously administered by Housing Works in its Scattered Site program. Housing Works's units were put up for bids in three separate categories, which identified Housing Works as a current vendor. The rules of the RFP prohibited any one applicant to bid on more than one unit increment within a category.

Pursuant to the RFP, bidders identified as current vendors were given a distinct and measurable advantage over prospective bidders because all potential awardees were rated on a scale of 1-100,



with 30 points allocated to the bidder's experience. The points in the experience category were much easier to obtain with the current vendor label.

On November 16, 1997, shortly after the demonstration and the HRA press release, Caldwell and Dereszewski amended the RFP, which had the effect, according to Housing Works, of making it impossible for it to recover the approximately 200 units that it once had under its administration. HRA achieved this effect by altering the categories and the unit increments available for bidding. Notwithstanding the amendment, Housing Works submitted a proposal under the terms of the initial RFP, admittedly hoping to obtain a judicial order requiring HRA to proceed under the framework of the original RFP.

In response, Caldwell wrote to Bonamarte recommending that Housing Works's proposal be rejected as unresponsive and unreviewable. Thereafter, Housing Works amended a state court complaint to add a cause of action for retaliation based on the amended RFP. A week later, HRA amended the REP again.

The second amended RFP permitted Housing Works to bid on all its existing apartments, but it dramatically altered Housing Works's status from that of current vendor to non-incumbent bidder. The disadvantage was fatal. Housing Works alleges that even Dereszewski conceded that the revision to non-incumbent status made it "extremely difficult, extremely unlikely" that Housing Works would score the necessary points to bid successfully.<sup>18</sup> \*191 In or about June 1998, Housing Works's proposal was rejected.

<sup>18</sup> Id at ¶ 155.

## **2 Additional Funds under the Ryan White Care Act**

In 1997, the Medical Health Research Association of New York City, Inc. (hereinafter "MHRA"), a private contractor that administers funds made available pursuant to the Ryan White Care Act, issued an RFP for the provision of support

services, including harm reduction and day treatment for persons living with AIDS. According to the Giuliani Complaint, Housing Works was the successful bidder on the MHRA Ryan White funds, which had an annual value of \$450,000. Housing Works alleges that the subject of the MHRA Ryan White funds arose in the same conversation with Netburn described above. Like the DOH Intake Contract, the MHRA Ryan White Contract was subject to the City's policy that it would take no action on any contract with Housing Works until the completion of the Scattered Site investigation.

## **3 The 9th Street and East New York Residences**

From 1992-97, Housing Works negotiated with federal, state and City officials for financial assistance in the opening and operation of two residences, located on 9th Street in Manhattan and in East New York, Brooklyn, dedicated exclusively to persons living with AIDS. According to the Giuliani Complaint, the parties agreed upon the final terms of the operating contracts sometime in June or July 1997. The conclusion of the negotiations was marked by a final agreement entered into between Housing Works and HRA in July 1997.

Thereafter, HRA repeatedly informed Housing Works that the operating contract for the residences was being processed. According to Housing Works, it was notified on October 22, 1997 that HRA would not enter into any new contracts with Housing Works, including the operating contract for the residences.

## **4 Housing Works's Job Training Program and the New York State Welfare-to-Work Initiative**

As part of its broad service offerings, Housing Works also operates a "Second Life Job Training Program" (hereinafter "JTP").<sup>19</sup> The JTP provides a rigorous nine-month work/study program which concludes with the graduates' guaranteed employment in an administrative position within the Housing Works organization. The JTP boasts a

75 percent retention rate for graduates after one-year of employment. The JTP works in conjunction with DASIS to ensure that JTP participants receive the vocational, medical, clinical and supportive services and benefits they need.

<sup>19</sup> The relevant facts of Housing Works's claims relating to the Welfare-to-Work application are set out in the Turner complaint.

On October 5, 1998, the New York State Department of Labor (hereinafter "NYSDOL") and the New York State Department of Health (hereinafter "NYSDOH") issued an RFP as part of their Welfare-to-Work Initiative, which provided funding for projects designed to promote job training for people living with HIV/AIDS. Funding under the Initiative was contemplated to begin on March 1, 1999, with awardees receiving \$600,000 over two years. As a precondition for selection, applicants were required to obtain the written approval of the local services district, which for Housing Works was HRA.

On December 12, 1998, Housing Works submitted <sup>192</sup> its application pursuant to the \*<sup>192</sup> State RFP. Its application allegedly included a certification form signed by Turner, dated December 5, 1998, indicating that HRA had approved the application. In all other respects, the application satisfied all of the program's design components as specified in the RFP. According to Housing Works, the panel making preliminary evaluations of the application ranked Housing Works first out of ten applications.

Before the final awards were made, Housing Works contends, Turner wrote a letter to the Commissioner of NYSDOL on February 23, 1999, informing the Commissioner that the City was withdrawing its prior certification of Housing Works's application under the RFP. The correspondence stated as the grounds for the City's withdrawal of certification Housing Works's past financial management problems.

At the behest of NYSDOL and NYSDOH, representatives of Housing Works, the relevant state agencies and Turner and Hoover convened for a special meeting. NYSDOL and NYSDOH officials asked Turner and Hoover to reconsider their withdrawal of the certification in order to accommodate the applicant ranked number one. Furthermore, NYSDOL and NYSDOH proposed a number of alternatives, under which Housing Works would receive funding under financial controls or through intermediaries to alleviate the concerns expressed by Turner and Hoover. According to Housing Works, Turner and Hoover rejected all of the proposed alternatives, stating simply that HRA refused to support any plan which would provide State funds to Housing Works. In addition, Turner threatened to punish Housing Works's JTP participants if any State funds were provided to Housing Works under the Welfare-to-Work Initiative. In or about August 1999, NYSDOL informed Housing Works that its proposal had not been selected for the Welfare-to-Work funding.

According to Housing Works, HRA's retaliation did not stop there. In addition to withdrawing its certification for the State Welfare-to-Work Initiative, HRA also refused to certify Housing Works as an approved City job training provider. This separate certification from the City allows the participants of certified job training programs to receive transportation, child care and clothing allowances. Housing Works charges that HRA's refusal to approve Housing Works as a certified job training provider has deprived its individual clients from receiving those public assistance benefits.

### **5 Non-Responsibility Findings**

On the basis of the January 1997 audit of Housing Works's Scattered Site program and the City's belief that Housing Works was indebted to it, two separate municipal agencies, HRA and DOH, made affirmative findings of Housing Works's non-responsibility as a contractor. Housing Works

asserts that it filed administrative appeals through the relevant chain of command. Both of those affirmations were eventually appealed to Giuliani, who has not yet acted upon them. According to Housing Works, Giuliani's deliberate flouting of his obligations is not only grounds for a separate claim for relief, but also indicative of the retaliatory nature of the City's response to Housing Works's applications.

## **F HOUSING WORKS'S CLAIMS**

On the basis of these allegations, Housing Works brought nine claims against the City and sixteen individual municipal officials involved in the matters now before the Court.<sup>20</sup> The first claim, brought under 42 U.S.C. § 1983 (hereinafter "[§ 1983](#)" or "Title VII"), alleges a violation of Housing Works's right to free speech secured by the First and Fourteenth Amendments to the United States Constitution. The second claim is made pursuant to the free speech provisions of the New York State Constitution. The third, also brought under [§ 1983](#), and fourth claims allege violations of the Equal Protection Clauses of the United States and New York State Constitutions, respectively. The fifth and sixth claims assert administrative violations of the New York City Charter and the Procurement Policy Board rules in connection with the allegedly unlawful suspension of Housing Works as a contractor and with the non-responsibility findings. The seventh and eighth claims are brought under state law for fraud and unjust enrichment. And the ninth claim is brought against Hiralall for accountant malpractice.

<sup>20</sup> The legal basis for the first four claims in both the Giuliani and Turner complaints are identical. The first and third claims are brought under [§ 1983](#) for violations of the First Amendment and the Equal Protection clause, respectively. The second and fourth claims are brought under the New York State constitution analogues to the First Amendment and the Equal Protection clause. The only difference is that the

Turner claims focus exclusively on the events surrounding the withdrawal of HRA's certification of Housing Works's application for State funds under the Welfare-to-Work Initiative. Because of the identity of the legal issues and related factual bases, the court consolidates, for purposes of this motion, the first four claims in the Turner and Giuliani complaints.

For various reasons discussed in greater detail in subsequent sections, the City and the individual defendants have moved to dismiss the Complaints for failure to state legally sufficient claims.

## **III DISCUSSION A RETALIATION FOR PROTECTED FIRST AMENDMENT ACTIVITY**

Housing Works's activities and constitutional rights protecting them have been the subject of other litigation in this Court. In a recent case, the proposition that the First and Fourteenth Amendments prohibit the City and its municipal officers from abridging Housing Works's right to free speech and to petition the government for redress of its grievances was undisputed. See [Housing Works, Inc. v. Safir](#), 101 F. Supp.2d 163, 167 (S.D.N.Y. 2000) (although government may impose reasonable time, place and manner restrictions on speech, "[p]laintiff's right to protest the City's lack of services for persons afflicted with AIDS and HIV is a fundamental right grounded in the First Amendment, as the parties agree."), [appeal dismissed](#), 203 F.3d 176 (2d Cir. 2000); see also [Soranno's Gasco, Inc. v. Morgan](#), 874 F.2d 1310, 1314 (9th Cir. 1989) ("The right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances.").

Housing Works avers that the City unlawfully retaliated against it for its vigorous demonstrations and proactive litigation by, *inter alia*, (1) refusing to renew the Scattered Site and Ryan White Contracts; (2) barring Housing Works from

operating as a City contractor; (3) blocking all pending contracts with Housing Works; (4) unlawfully issuing non-responsibility findings; (5) withdrawing the City's certification of Housing Works's application for State Welfare-to-Work funds; and (6) failing to certify Housing Works as an approved job training provider.

In order to state a claim under [42 U.S.C. § 1983](#), a plaintiff must establish that (1) the conduct  
194 complained of was \*194 committed by a person acting under color of state law, and (2) the conduct at issue deprived a person of a right, privilege or immunity secured by the Constitution or laws of the United States. See [Jett v. Dallas Independent School Dist.](#), [491 U.S. 701, 723](#) (1989); [Wimmer v. Suffolk County Police Dep't](#), [176 F.3d 125, 137](#) (2d Cir. 1999), [cert. denied](#), [528 U.S. 964](#) (1999). The contested issue here is whether Housing Works's complaint properly alleges the deprivation of a right, privilege or immunity secured by the Constitution. Housing Works claims that, as an independent contractor, it has a right to be free from retaliatory termination or non-renewal of its agreements with the City even if it vigorously exercises its right to free speech and petition. For its part, the City claims that what really happened here is that the City refused to renew certain contracts that had already expired, that it also declined to enter into new contracts with Housing Works and that neither of those actions constitute a deprivation of a legally protected right secured by the Constitution.

Both parties cite extensively to [Board of County Commissioners, Wabaunsee County, Kansas v. Umbehr](#), [518 U.S. 668](#) (1996), in support of their positions.<sup>21</sup> The context of the Supreme Court's ruling in [Umbehr](#) is essential to understanding the full import of that decision to this case.

<sup>21</sup> See also [O'Hare Truck Service, Inc. v. City of Northlake](#), [518 U.S. 712](#) (1996) (companion case to [Umbehr](#)).

[Umbehr](#) was the first case in which the Supreme Court addressed the issue of whether, and to what extent, the First Amendment limits the ability of a federal, state, or local government in terminating their contractual relationships with independent contractors because of the latter's exercise of their right to free speech. [518 U.S. at 673-74](#). Two related lines of cases, however, informed the Court's decision in [Umbehr](#). First, the Court had addressed on numerous occasions the limits of a governmental entity's right to take adverse action against its [employees](#) for exercising their right to free speech. The basic proposition in the line of cases dealing with government employees, whether federal or state, is that public employment amounts to a valuable financial benefit which when threatened with loss may be used to chill valuable speech on matters of public concern by those employees. See [Umbehr](#), [518 U.S. at 674](#); [Waters v. Churchill](#), [511 U.S. 661, 674](#) (1994).

A sharp line of distinction, however, should be drawn between the actions of the state as sovereign vis-a-vis the public and the actions of the state as an employer. Unquestionably, the public at large receives the full protection of the First Amendment against restrictions on speech. As the Supreme Court noted, however, "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same things." [Waters](#), [511 U.S. at 672](#). Therefore, the government employee cases recognize the need to balance the employee's interests in commenting on matters of public concern against the interests of government employers in promoting the efficiency of public services. See [Pickering v. Board of Education of Township High School Dist 205](#), [391 U.S. 563, 568](#) (1968). \*195

Employing the [Pickering](#) balancing test on a case-by-case basis, the Supreme Court has recognized a number of restrictions on a government employer's ability to restrict its employees' First

Amendment rights. The Court has held that government employees are protected from termination for publicly or privately criticizing their employers,<sup>22</sup> for supporting or associating with a particular political party, unless there is a legitimate reason for requiring political affiliation,<sup>23</sup> and for refusing to take an oath regarding their political beliefs.<sup>24</sup> The protection for government employees was expanded further in Rutan v. Republican Party of Illinois, 497 U.S. 62, 79 (1990), where the Court held that promotions, transfers, and the hiring of new applicants based on political affiliation violates the employee's or applicant's First Amendment rights, in the absence of a vital government interest.

<sup>22</sup> see Mt. Healthy city Board of Education v. Doyle, 429 U.S. 274 (1977).

<sup>23</sup> See Branti v. Finkel, 445 U.S. 507 (1980).

<sup>24</sup> See Keyishian v. Board of Regents of Univ. of State of N.Y., 385 U.S. 589 (1967).

Second, the Court's decision in Umbehr relied in part on the doctrine of unconstitutional conditions, which holds that the government is not free to deny a benefit to anyone on a basis that infringes the constitutionally protected right to free speech, even when that person has no entitlement to that benefit. See Perry v. Sindermann, 408 U.S. 593, 597 (1972). The unconstitutional conditions doctrine is not limited to government employees, but extends to cover persons with a much more attenuated relationship with the government. See Umbehr, 518 U.S. at 680.

Against this backdrop, plaintiff in Umbehr filed a claim under § 1983 alleging that the County Board had refused to renew his trash hauling contract because of his vigorous criticism of the three-member Board. See id at 670. The Supreme Court, after reciting the development of the principles enunciated in the line of cases above, found that, for purposes of the First Amendment right at issue, there was no legally relevant distinction between government employees and independent

contractors. Id at 684 ("In sum, neither the Board nor Umbehr have persuaded us that there is a 'difference of constitutional magnitude,' . . . between independent contractors and employees in this context. Independent government contractors are similar in most relevant respects to government employees, although both the speaker's and the government's interests are typically — though not always — somewhat less strong in the independent contractor case.") (citations omitted). Furthermore, the Court identified possible risks in finding such a distinction: "Determining constitutional claims on the basis of such formal distinctions, which can be manipulated largely at the will of the government agencies concerned . . . is an enterprise that we have consistently eschewed." Id at 679 (citations omitted).

The Court held, therefore, that the County Board could not restrict the plaintiff's right to free speech by terminating his contract and that the Pickering balancing test would safeguard a municipality's ability to terminate contractors for legitimate reasons. To prevail on a claim under § 1983, the plaintiff was required to show that the termination was motivated by his speech on a matter of public concern,<sup>196</sup> which requires more than the mere fact that he exercised his right to free speech before the termination. Id at 685. Upon such a showing, the County would have a valid defense if it could demonstrate that the termination would have occurred regardless of the speech in question or if it made a persuasive case that the County's legitimate interests outweigh the free speech rights at stake. Id Notably, the Court made an express qualification which, in the case at bar, goes to the heart of the parties' dispute with respect to the matters at issue: "Finally, we emphasize the limited nature of our decision today. Because Umbehr's suit concerns the termination of a Pre-existing commercial relationship with the government, we need not address the possibility of

suits by bidders or applicants for new government contracts who cannot rely on such a relationship." Id. (emphasis supplied).

In the present dispute, the City has honed in on this final qualification to support its argument that Housing Works has no constitutionally recognized right to free speech in this case because it was seeking a renewal of certain contracts — such as the Scattered Site and Ryan White Contracts — that had previously expired, or it endeavored to enter into new contractual arrangements. Under either theory, the City posits, Housing Works falls squarely into the "bidders or applicants for new contracts" category about which the Court expressly reserved judgment in Umbehr.

The City further attempts to marshal support from a post-Umbehr case where the Third Circuit found no constitutional violation for a governmental entity's refusal to retain or engage independent contractors bidding on new contracts. In McClintock v. Eichelberger, 169 F.3d 812, 813 (3d Cir. 1999), plaintiff was an advertising and marketing firm that over a twelve-year period had two finite contracts to perform discrete projects for a multi-county planning commission. In addition to the two projects, the plaintiff acted as vendor for a three-year period marketing various promotional items such as magnets, vinyl banners and bags to the governmental entity. See id. at 814. Subsequently, plaintiff bid on a new advertising campaign scheduled to begin in 1997. See id. Prior to submitting its bid, plaintiff had supported and performed services for certain political candidates. One particular commission member had opposed these candidates, and plaintiff lost the contract to a third party.

In affirming the district court's dismissal of the § 1983 claim, the court found that plaintiff did not have a pre-existing commercial relationship with the commission and was merely making a new application, thus taking plaintiff out of the context of Umbehr and placing it within the zone of uncertainty created by the Supreme Court's

reservation. In the present case, the City relies on McClintock in endeavoring to show that Housing Works also falls outside the ambit of Umbehr, thus negating the claim of a constitutional violation.

This Court rejects the City's position for two reasons. First, in concluding that Housing Works was merely a new applicant or a former contractor seeking to revive a terminated agreement, the City oversimplifies the factual allegations Housing Works recites in the Complaints. In fact, the Court finds more critical differences than similarities between Housing Works and the plaintiff in McClintock. First, Housing Works cannot be relegated to a category of independent contractors with whom the City had sporadic, discrete projects. Rather, as alleged in the Complaints, Housing Works and the City were involved in a longstanding, continuous relationship characterized by mutual, <sup>197</sup> programmatic dependence and support pursuant to the Scattered Site and Ryan White Contracts. That relationship had remained active and uninterrupted for several years right up to the time covered by the events here in question. Under their contractual arrangement, the City would send a constant stream of referrals to Housing Works, which would place clients in one of its 200 hundred residential units and provide basic support services. Housing Works was required at all times to keep lines of communication open with City officials, who requested the proper forms, status reports and proof of services provided on a regular basis. At a minimum, the type of relationship alleged here is continual and ongoing as opposed to sporadic and discretely limited. Housing Works also claims that it continued to provide housing and support services, and presumably continues to provide at least some of those services today, notwithstanding the clear statement of the City's refusal to renew the contracts as set forth in the HRA press release of October 22, 1997.

In this sense, Housing Works appears altogether different from the plaintiff in McClintock and much closer to the plaintiff in Ervin and

Associates, Inc. v. Dunlap, 33 F. Supp. 2d 1, 7 (D.D.C. 1997). After having enjoyed a five-year contractual relationship with the Department of Housing and Urban Development (hereinafter "HUD") providing a range of financial advisory services, plaintiff began to lose bids as a result of his vocal criticism of HUD's privatization initiative. The court found that "Ervin's preexisting relationship with HUD is sufficient to place him within Umbehr's ambit. . . . Ervin had a relationship with HUD that began in 1989 and, to the extent that he is still performing on any previously awarded contracts, continues today." Id

The City is correct, to an extent, in framing the relevant issue as a legal one that this Court is authorized to rule upon in the context of the present motion, namely, does Housing Works have a constitutional protection against termination or non-renewal of its contracts in the context of the facts alleged? As to the Scattered Site, Ryan White Enhancement and DOH Intake Contracts, the Court finds, as a matter of law, that the Complaints sufficiently allege a preexisting contractual relationship between Housing Works and the City longstanding and continuous enough to place this case within the purview of Umbehr and its logical implications.

But, insofar as a full resolution of all of Housing Works's allegations will require the trier of fact to weigh a number of factual considerations after hearing all of the evidence, the City's argument again unduly simplifies this analysis. See McClintock, 169 F.3d at 817-18 (Roth, J., dissenting) ("The first assumption critical to the outcome reached by the majority is its factual determination that McClintock and Cherryhill did not have a 'pre-existing commercial relationship' with Southern Alleghenies.") (emphasis supplied). For instance, Housing Works has sufficiently alleged that the MHRA Ryan White Contract and the operating agreements relating to the two residential buildings were duly executed and that Housing Works began to perform under the agreements. Given the scope of the parties'

contractual arrangements in the past, one plausible interpretation of this assertion is that the MHRA Ryan White Contract was an extension of an ongoing commercial relationship, bringing that agreement within the ambit of Umbehr as well. Alternatively, a factfinder might deem it necessary to ask whether the MHRA Ryan White Contract and the operating agreements were perfected, when they entered into force and whether they were effectively terminated on the \*198 basis of protected First Amendment activity. Although the Court can resolve some of the clearly focused legal issues that the City's motion raises, it cannot pass judgment on a host of others that are more properly matters of fact. It is not within the proper province of the Court, in considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(c), to override the role of the trier of fact shortly after the close of pleadings. On the basis of the facts alleged, Housing Works is entitled to an opportunity to show that it was a preexisting contractor whose agreements with the City were not renewed or effectively terminated because of the organization's robust First Amendment activity. See Scheuer, 416 U.S. at 236.

Second, the Court is inclined to reject the City's position because this case raises an important issue of first impression that has not been addressed in this Circuit. In qualifying its holding in Umbehr, the Supreme Court neither supported nor rejected the notion of a First Amendment right of independent contractors without a pre-existing relationship with the government to be free from unconstitutional denials of their applications. It is an open question whether this controversy presents a set of facts compelling the recognition of such a constitutional right.

Because the Court holds that Housing Works has alleged facts sufficient to bring it within the rule enunciated in Umbehr, the Court reserves judgment on the question of whether Housing Works would have those same rights absent the finding of a pre-existing commercial relationship. In passing, however, the Court notes that although

some courts have expressly declined to address this issue in the absence of further guidance, their abstention is not unanimous. See McClintock, 169 F.3d at 818 (Roth, J., dissenting) ("I find that the Supreme Court's First Amendment jurisprudence does not support the kind of status-based limitation on individuals' rights of political expression and association that the majority's decision endorses.").

Most notably, in a recent decision by the United States Court of Appeals for the Sixth Circuit, the court rejected the notion that only independent contractors with pre-existing relationships are entitled to First Amendment protections in the awarding of new contracts. Lucas v. Monroe County, 203 F.3d 964, 972-75 (6th Cir. 2000). Plaintiffs in Lucas consisted of a company that had already been providing towing services as a listed provider on the Sheriff Department's rotation list and a towing company that had applied for inclusion on that list. Id. at 967-68. On summary judgment, the district court dismissed the applicant's First Amendment claim primarily on the grounds advanced by the City here — that the applicant was not an independent contractor that had a pre-existing relationship with the municipality. Id. at 972. The Sixth Circuit reversed the dismissal of the new applicant's First Amendment claim, invoking, in part, the principles of the unconstitutional conditions doctrine as articulated in Sindermann Id. at 972-75.

As the Supreme Court's analysis in Umbehr shows, the present controversy sits at the confluence of three separate, but closely related strands of constitutional jurisprudence: the First Amendment rights of government employees, the doctrine of unconstitutional conditions and the principle of freedom of speech as extended to certain government contractors by Umbehr itself and its progeny. Although the intersection of these rulings should provide this Court with a wealth of precedent to guide its decision, neither the Supreme Court nor the Second Circuit has

199 addressed the precise legal issue as framed \*199 by

this controversy. In order to preserve the spirit of each of these strands, however, courts should take pains to avoid inconsistent results. Were the City's position validated, an independent contractor with a pre-existing, longstanding and continuous business relationship seeking a new or renewed municipal contract and a prospective government employee applying for a non-policymaking position, both engaging in the exact same speech or expressive conduct, might well find that the latter is protected from retaliation in her application while the former will suffer the risk of losing the contract. In addition to the facial inconsistency, the result seems less defensible in light of one of the Supreme Court's stated grounds for its decision in Umbehr, that there is no difference of constitutional magnitude between independent contractors and government employees in the context of First Amendment protections. Such a result would also seem to violate the spirit of Sindermann, Rutan and Umbehr.

For these reasons, the City's motion to dismiss Housing Works's first and second claims in the Giuliani Complaint is denied.<sup>25</sup> With respect to the Scattered Site, Ryan White and DOH Intake Contracts, Housing Works has adequately pleaded facts giving rise to an inference that the City terminated or refused to renew pre-existing contracts on the basis of Housing Works's protected First Amendment activity. Housing Works has also sufficiently alleged facts with respect to the MHRA Ryan White Contract and the operating agreements for the two residences to defeat a Rule 12(c) challenge at this stage in the litigation.

<sup>25</sup> Free speech claims under the First Amendment and the New York State constitution are subject to the same standards and the court's analysis applies to both of Housing Works's free speech claims. See Pico v. Board of Education, 474 F. Supp. 387, 394 (E.D.N.Y. 1979) ("The claims to freedom of speech and



academic freedom under the New York State constitution are governed by the same principles that apply under the first amendment to the federal constitution."), rev'd on other grounds, 638 F.2d 404 (1980), cert. granted, 454 U.S. 891 (1981), aff'd, 457 U.S. 853 (1982); see also East Meadow community concerts Association v. Board of Education of Union Free School Dist. No. 3, 219 N.E.2d 172, 174 (N Y 1966) (analyzing the alleged constitutional harm under the same standards and noting that "[t]he expression of controversial and unpopular views, it is hardly necessary to observe, is precisely what is protected by both the Federal and State constitutions.").

The Court agrees with the City's contention, however, that a claim alleging a violation of Housing Works's First Amendment rights may not be predicated on the City's actions with respect to Housing Works's Welfare-to-Work application. The allegations surrounding that application show that the City's involvement was limited to the certification aspect of a bidding process that was controlled by State agencies. In that regard, HRA was asked to approve or deny a certification that was only one part of the process. Furthermore, the City was not the ultimate decisionmaker. In the Welfare-to-Work initiative, the relevant New York State agencies were responsible for awarding contracts. Under these facts, one cannot properly conclude that the City terminated or refused to renew a contract. Nevertheless, the Court notes that evidence of the City's conduct in the Welfare-to-Work application may be probative of retaliatory intent.

## **B EQUAL PROTECTION**

The City also moves to dismiss the third and fourth claims based on the Equal Protection provisions of the United States and New York State Constitutions, respectively. In essence, the

200 City advances two \*200 rationales in support of its motion. First, with respect to the principal

allegations of contract termination, or refusal to renew, in the Giuliani Complaint, the City contends that Housing Works has failed to show that the alleged selective treatment was based on an impermissible consideration such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. (See Defendant's Memorandum in Support of Motion to Dismiss Giuliani Complaint, dated July 24, 2000 (hereinafter "Defendants' Memorandum"), at 7). Reasserting its contention that Housing Works has failed to show that the City's actions triggered a violation of Housing Works's First Amendment rights, the City opines that the Equal Protection claim also fails. Second, in connection with the allegations in the Welfare-to-Work RFP, the City avers that Housing Works cannot show that it was similarly situated with other applicants, thus negating unequal treatment. As the Court reads Housing Works's Complaints, these rationales contain misstatements of law and fact.

With respect to the City's first argument, the legal requirement that it purports to impose on Housing Works is inapplicable. The language and the case cited by the City concern the elements of an equal protection claim based on selective enforcement.<sup>26</sup> See LaTrieste Restaurant and Cabaret, Inc. v. Village of Port Chester, 40 F.3d 587, 590 (2d Cir. 1994). Housing Works has not alleged, however, a claim of equal protection based on selective enforcement. Its claim is based on the simple proposition, affirmed by equal protection jurisprudence, that it was subject to arbitrary and irrational discrimination as compared to other persons similarly situated. Housing Works may prevail on its equal protection claim if it can show that it "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

26 In LaTrieste, the Second circuit noted that "selective enforcement is a `murky corner of equal protection law in which there are surprisingly few cases.'" 40 F.3d at 590 (citations omitted). The court found that an equal protection violation for selective enforcement would arise if: (1) plaintiff, compared with others similarly situated, was selectively treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. Id

Thus, under the standards set forth in Olech, Housing Works has met its burden at the pleading stage by alleging that many other non-profit public service organizations had financial management problems and that Housing Works was singled out for differential treatment with no rational basis, in this case on the unacceptable grounds of its exercise of First Amendment rights. These allegations also defeat the City's second argument, that Housing Works could not show unequal treatment. If Housing Works substantiates its claim that other non-profit corporations suffered from similar financial problems, but never received arbitrary or vindictive treatment, then Housing Works will have taken the necessary steps toward establishing differential treatment.

The Court notes that although Housing Works could not sustain a claim for a violation of its First Amendment rights in the context of its Welfare-to-Work application, Housing Works's equal protection claim is not limited in the same way. All that is required here is a showing that Housing Works, as compared to others similarly situated, was treated differently \*201 and that there was no rational basis for the difference in treatment. See id All of Housing Works's factual allegations of vindictive treatment are premised on the City's retaliation for Housing Works's criticism of the Giuliani Administration. Therefore, any of the events alleged in the Complaints, including

Housing Works's Welfare-to-Work application, may serve as the factual basis for an Equal Protection violation, assuming that Housing Works establishes the elements required by Olech

For these reasons, the City's motion to dismiss the third and fourth claims of the Complaints is denied.

**C QUALIFIED IMMUNITY, DIRECT PARTICIPATION AND THE APPLICABILITY OF THE STATUTE OF LIMITATIONS AS TO REITER 1 Qualified Immunity**

The City also moves to dismiss the Complaints as to all of the individual defendants on the basis of qualified immunity. In Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), the Supreme Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The defense of qualified immunity exists "to protect the State and its officials from over-enforcement of federal rights." Johnson v. Fankell, 520 U.S. 911, 919 (1997). Qualified immunity also guards against the "risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Anderson v. Creighton, 483 U.S. 635, 638 (1987).

In essence, the individual defendants argue that because there is no recognized First Amendment violation for non-renewal of an expired contract or refusal to enter into a new one with an independent contractor, the officials believed that their conduct was objectively reasonable. The Court is not persuaded that the individual defendants have advanced a compelling argument for qualified immunity.

To assess claims of qualified immunity pursuant to Harlow, the Second Circuit has established a three-step inquiry. A government official sued in

his individual capacity is entitled to qualified immunity: (1) when the conduct complained of is not prohibited by federal law; (2) when such conduct is prohibited, if the plaintiff's right to be free from such conduct was not clearly established at the time of the conduct; or (3) if the defendant's action was objectively and legally reasonable in light of the legal rules clearly established at the time it was taken. See X-Men Security, Inc. v. Pataki, 196 F.3d 56, 65-66 (2d Cir. 1999) (citations and quotations omitted). As the Circuit Court in X-Men noted, "[t]hese three issues should be approached in sequence, for if the second is resolved favorably to the official, the third becomes moot; a favorable resolution of the first moots both the second and third." Id at 66.

The individual defendants cannot rely on any of the grounds set forth in the X-Men test. The Supreme Court's decision in Umbehr was issued on June 28, 1996, a year before the critical events alleged to have occurred in 1997-98. More importantly, the individual defendants' argument hinges on their unduly narrow interpretation, rejected above, of the factual allegations in this action. By characterizing this case as one involving new contracts or renewals of expired contracts, the City hopes to take the matter beyond  
 202 the \*202 proscriptions of Umbehr and into the arena of permissible official conduct, conferring qualified immunity on the individual defendants. But, as discussed above, Housing Works has alleged sufficient facts to show the existence of at least three pre-existing contractual arrangements that may have been unjustifiably terminated. Therefore, in this Court's view, Umbehr controlled the actual facts of this case at the times the underlying events occurred, and the individual defendants cannot claim qualified immunity for conduct that was objectively known to violate federal law.

These same arguments are reiterated in the City's contention that the right claimed by Housing Works was not clearly established at the time the actions were taken. This position also depends on

whether this Court chooses to adopt the City's version of the facts. Because the Court has rejected that view, the argument also must fail. There is no question that the principles of Umbehr were put into play by the individual defendants' actions, occurring at least one year after that decision was released. Furthermore, the Court concurs with Housing Works that there is nothing unclear about the importance of First Amendment activity. Any municipal entity or official who expresses displeasure about any person's exercise of free speech rights and then manifestly subjects that person to adverse action must know that the First Amendment will be implicated. More than seven years ago, the Supreme Court expressed a warning precisely on point when it stated that "these cases establish a basic First Amendment principle: Government action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected." Waters, 511 U.S. 669. A few moments of reflection would have led the individual defendants to the admonition in Waters and the rule set forth in Umbehr.

For all of these reasons, the Court also finds that, as a matter of law, it was not objectively reasonable for the individual defendants to believe that their actions were permissible under the First Amendment.

In their motion to dismiss the Turner Complaint, Turner and Hoover raise additional grounds for qualified immunity. They contend that because they genuinely believed that Housing Works's past financial mismanagement was grounds to withdraw or deny certification of its Welfare-to-Work application, they should be entitled to qualified immunity. Rather than substantiating a legal claim to qualified immunity, this assertion merely raises a number of related factual issues. Qualified immunity does not turn exclusively on the reasonableness of the defendants' perceptions about the plaintiff's activities. The reasonableness of the defendants' conduct in light of legal rules in

existence at the time defendants' action was taken should also be considered. Whether Housing Works's past financial problems deserve the weight that defendants seek to give them and whether that justification was merely a pretext for retaliation are not issues that are proper or ripe for decision on the present motion.

Therefore, the Court concludes that the individual defendants cannot rely on the doctrine of qualified immunity to defend the charges of constitutional violations brought by Housing Works.

## **2 Direct Participation**

Giuliani, Netburn, Turner and Hoover also move to dismiss the first four claims against them based on the grounds that Housing Works has failed to plead sufficiently their direct participation in the  
 203 \*203 alleged constitutional violations. In a § 1983 claim against municipal employees, "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages." Williams v. Smith, 781 F.2d 319, 323 (2d Cir. 1986); see also Wimmer v. Suffolk County Police Dep't, 176 F.3d 125, 138 (2d Cir. 1999) (to sustain § 1983 claim requires proof of direct participation in the violation or failure to remedy the violation after learning of it through a report or an appeal). Because direct participation is a question of fact, all reasonable inferences must be drawn in favor of the non-moving party on a motion to dismiss the complaint. See Williams, 781 F.2d at 323. Although Housing Works's factual allegations, and the reasonable inferences drawn therefrom, sufficiently aver the direct participation of Giuliani and Turner, the same cannot be said with respect to Netburn and Hoover.

### **a Giuliani**

Giuliani asserts that the only allegation against him is that he "has not yet decided Housing Works' second-level appeals from those determinations."<sup>27</sup> Giuliani further contends that "[t]here is no allegation that defendant Giuliani

actively participated in the alleged violations of Housing Works' constitutional rights, or that he is even aware of any violations."<sup>28</sup>

<sup>27</sup> Defendants' Memorandum, at 8.

<sup>28</sup> Id

These statements gloss over substantial portions of the Giuliani Complaint. For instance, Housing Works explicitly alleges that Giuliani had expressed his outrage at Housing Works's free speech activities, thus raising an inference of hostile animus. Several of the individual defendants who played critical roles in the alleged violations worked directly under Giuliani in agencies that comprised part of the Office of the Mayor. For instance, Housing Works alleges that the MOC was the agency that pulled several of its municipal contracts from the Comptroller's Office. Finally, the complaint alleges that all of the individual defendants were involved in a conspiracy to violate Housing Works's constitutional rights, which when placed against the allegations of Giuliani's alleged comments and hostile animus, raises a fair inference pointing toward Giuliani's direct involvement.

Housing Works emphasizes Giuliani's role in its pending appeals as indicative of direct participation. While it may be difficult to substantiate direct involvement solely on this basis, the apparent neglect of Housing Works's appeals, when viewed as a whole with all other allegations in the pleadings, sufficiently supports an inference of Giuliani's direct participation. See Housing Works, Inc. v. City of New York, 72 F. Supp.2d 402, 427-28 (S.D.N.Y. 1999) ("A pointed example of the mayor's antagonism towards Housing Works is the mayor's treatment of plaintiff's appeals from HRA's finding of non-responsibility, treatment that is unusual enough to warrant an inference of retaliatory intent on the part of defendants."), appeal dismissed, 203 F.3d 176 (2d Cir. 2000).

### **b Turner**<sup>29</sup>

29 Because the court has dismissed Housing Works's First Amendment claim to the extent that it relies on the Welfare-to-Work RFP, the only constitutional claims remaining against Turner are the equal protection ones. Therefore, Turner's direct participation is viewed only from that perspective.

Turner, the Commissioner of HRA, claims that the only allegations against him are that he impeded the State from awarding the Welfare-to-Work Contract to Housing Works and that he delegated  
204 \*204 the adjudication of Housing Works's non-responsibility appeal to the General Counsel of HRA. Turner also glosses over pertinent factual allegations.

Housing Works contends that Turner initially approved its State Welfare-to-Work application, but later retracted certification in retaliation for Housing Works's constitutionally protected activities. The purported basis for the withdrawal of certification was Housing Works's past financial troubles. When NYSDOL and NYSDOH requested a meeting to discuss alternatives, Housing Works claims that Turner summarily rejected all meaningful options, stating that HRA would refuse to endorse any plan providing State funds to Housing Works. Furthermore, Housing Works claims that Turner threatened it with withdrawal of its City JTP certification — a threat which materialized shortly thereafter. When juxtaposed with Housing Works's allegations that many other public interest organizations in its position had financial troubles, but were not subjected to this type of vindictive treatment with no rational basis, Turner's role is directly implicated in an equal protection claim.

### **c Netburn**

The allegations and inferences of direct participation, however, cannot be sustained with respect to Netburn. He claims that the only allegations against him are that he participated in a telephone call with Keith Cylar, Co-Executive

Director of Housing Works, in which he informed Cylar that certain individuals in MOC and Kaswan had prevented the registration of Housing Works's DOH Intake Contract. Housing Works contends that in that same conversation Netburn also informed it of a City "policy" not to do business with those involved in litigation with the City.

Assuming all of these allegations are true, they do not amount to an inference of direct participation in the particular acts that comprise the constitutional deprivations claimed here. The most that can be gleaned from these facts is that Netburn was a messenger. Without more substantial involvement, a claim against Netburn for constitutional violations cannot be sustained. See Edmonson v. Coughlin, 21 F. Supp.2d 242, 254-56 (W.D.N.Y. 1998).

### **d Hoover**

Some of the allegations surrounding the state Welfare-to-Work application are also made against Hoover, who was First Deputy Commissioner of HRA under Turner. Thus, Hoover was present at the NYSDOL/NYSDOH meeting in which Turner and Hoover rejected all alternative funding proposals. Hoover was also present when the alleged threat to rescind Housing Works's City JTP certification was made.

Apart from these allegations by association, Housing Works makes no distinct and independent assertions about Hoover's role in these events. Hoover moves to dismiss the constitutional claims against him on the grounds that direct participation has not been established and that his actions, as a matter of law, cannot constitute the proximate cause of Housing Works's injuries. The Court agrees.

First, without any additional facts specifying Hoover's own role in the Welfare-to-Work application, it is difficult to conclude that he directly participated in a meaningful way. For instance, while the sequence of events with respect to the Welfare-to-Work application begins with

Turner's initial certification of Housing Works, the allegations against Hoover amount to the mere proposition that he was there when the crucial events took place, in his role as Deputy to Turner.

Second, Hoover is correct to note that in his position as Deputy Commissioner of HRA under  
205 Turner, he was not necessarily \*205 in a position to either overrule or dictate the City's position with respect to Housing Works's application. Relying on Edmonson, 21 F. Supp. 2d at 256, Hoover argues that his actions as a Deputy cannot be the proximate cause of Housing Works's constitutional deprivation. Given the paucity of independent factual allegations as to Hoover's role and his position as subordinate to the ultimate decisionmaker(s), the Court finds that Hoover's direct participation has not been established and that Hoover's actions were not the proximate cause of Housing Works's alleged constitutional violations.

### **3 Applicability of the Statute of Limitations to the Claims against Reiter**

Former Deputy Mayor Reiter argues that the only allegations against her are that (1) while in office she was a policy-maker responsible in part for HRA, DOH and MOC; (2) sometime in 1995, she labeled Housing Works a "troublemaker" after being infuriated by the organization's activities; and (3) in January 1997, she advised Caldwell to conduct an audit of Housing Works's Scattered Site finances. Although the record is unclear, it appears undisputed that Reiter left her position with the City shortly after she recommended the audit in January 1997. On the basis of these allegations, Reiter claims that she did not directly participate in any constitutional deprivation, that her actions cannot be the proximate cause of any constitutional violation and that the applicable three-year statute of limitations bars the claims against her. The Court agrees that the statute of limitations bars the claims against Reiter.

In New York, the statute of limitations for § 1983 actions is three years. Ormiston v. Nelson, 117 F.3d 69 (2d Cir. 1997). All of the allegations of Reiter's involvement end in January 1997, while the complaint naming Reiter as a defendant was filed on May 10, 2000, after the limitation period had expired. Although Housing Works does allege that Reiter's name appeared on documents generated in September 1997 which purportedly confirm her attitude toward Housing Works, these allegations do not describe her conduct or direct participation. In addition, Reiter points out that she was not an employee of the City when these documents were allegedly created and that her actions, therefore, were not taken under "color of law," as required by § 1983. As a consequence, the statute of limitations has expired as to the claims against Reiter and those claims are dismissed.

In summary, the Court finds that reasonable inferences of direct participation may be drawn from the actions of defendants Giuliani and Turner. However, the claims against Netburn, Hoover and Reiter are dismissed because of lack of direct participation, absence of proximate cause and the expiration of the statute of limitations, respectively.<sup>30</sup> **D CLAIMS FOR DAMAGES AGAINST THE CITY 1 Damages against the City for Violations of the New York State Constitution**

<sup>30</sup> In the event that the court dismisses the constitutional claims against Netburn, Housing Works has stated its intention to move to amend the complaint to amplify the allegations against him. Housing Works's request will be addressed in the court's Order at the conclusion of this Decision.

The City Defendants also move to dismiss any claim for damages based upon alleged violations of the New York State Constitution — Housing  
206 Works's second \*206 and fourth claims for relief. The City contends that there is no statutory or

common law basis for a municipality's liability for damages based on violations of the New York State Constitution.

Housing Works responds by urging the Court to extend the decision of the New York Court of Appeals in Brown v. State of New York, 674 N.E.2d 1129, 1138-39 (N.Y. 1996), which held that plaintiffs stated a cause of action for damages against the State for violations of the equal protection clause and search and seizure provisions of the New York State Constitution. Housing Works also contends that nothing in the Brown decision limited or abrogated a private right of action against a municipality and that the reasoning in Brown applies equally to the present case against the City. Furthermore, it asserts that the free speech provisions of the New York State Constitution historically have provided broader guarantees than the First Amendment, thus favoring the recognition of an independent action for damages based on the New York State Constitution. Although Housing Works's points are well-taken, the Court declines to imply a new cause of action for damages against municipalities based on an extension of Brown

Plaintiffs in Brown brought a class action against the State for its role in the investigation of a knife-point attack on an elderly woman in the City of Oneonta. See id at 1131. Having identified her attacker as an African-American male, the New York State Police conducted two sweeps in its search for the assailant: the first sweep targeted every African-American male student at the nearby State college, while the second involved haphazard interrogations of any non-white male found in and around Oneonta. Id at 1131-32. The court's analysis began with the recognition that "New York has no enabling statute similar to those contained the Federal civil rights statutes permitting damage actions for the deprivation of constitutional rights," and that any recognition of a damage remedy must flow from the New York State Constitution itself. Id at 1137.

Without question, the fundamental principles delineated in Brown have an enduring resonance. In part, the court relied on the Supreme Court's decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).<sup>31</sup> The court's interpretation of the Bivens decision lends some support to Housing Works's position here:

<sup>31</sup> The Brown court based its decision on a three-part analysis which, in addition to Bivens, included (1) the rationale in § 874A of the Restatement (Second) of Torts, and (2) common law antecedents of the equal protection and search and seizure provisions of the New York State constitution. Id at 1138.

The underlying rationale for the [Bivens] decision, in simplest terms, is that constitutional guarantees are worthy of protection on their own terms without being linked to some common-law or statutory tort, and that the courts have the obligation to enforce these rights by ensuring that each individual receives an adequate remedy for violation of a constitutional duty. If the remedy is not forthcoming from the political branches of government, then the courts must provide it. . . .

Id at 1138. Thus, the court found that "a cause of action to recover damages may be asserted against the State for violation of the Equal Protection and Search and Seizure Clauses of the State Constitution." Id at 1138-39.

This reaffirmation of the positive nature of the State Constitution has received <sup>207</sup> strong endorsement from eminent jurists. As Justice Brennan once wrote:

state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law — for without it, the full realization of our liberties cannot be guaranteed.

William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 491 (1977).

There is, however, one significant distinction between plaintiffs in Brown and Housing Works. In Brown, plaintiffs' claims for damages pursuant to 42 U.S.C. § 1981 were dismissed because of the Supreme Court's earlier determination that § 1983 provides the exclusive damages remedy for a violation of rights secured by § 1981. Brown, 674 N.E.2d at 1137; see also Jett v. Dallas Ind. School Dist., 491 U.S. 701, 731 (1989). Thus, the court in Brown was faced with a circumstance not present to same extent here: "claimants, who suffered similar indignities, must go remediless because the duty violated was spelled out in the State Constitution." Brown, 674 N.E.2d at 1141. In the present controversy, the Court has sustained Housing Works's claims properly brought under § 1983 for alleged violations of the federal First Amendment and Equal Protection Clause. Housing Works is not remediless here, and the need to venture into uncharted areas of implied causes of action under the New York State Constitution is abated.

Several post-Brown decisions from courts in this District confirm this conclusion. In Wahad v. Federal Bureau of Investigation, 994 F. Supp. 237, 238 (S.D.N.Y. 1998), plaintiff sought to amend his complaint to add a cause of action for damages

based on an alleged violation of the due process clause of the New York State Constitution. The court denied the motion to amend, finding that "[u]nlike Brown where the plaintiffs had no remedy against the State, Plaintiff has stated a viable Section 1983 claim against the Municipal Defendants for the alleged due process violation." Id. at 240. Similarly, in Flores v. City of Mount Vernon, 41 F. Supp.2d 439, 447 (S.D.N.Y. 1999), plaintiff's claims for damages under the search and seizure provision of the New York State Constitution were dismissed because "no private right of action exists for violations of the New York State Constitution where a Plaintiff has alternative damage remedies available, as Mrs. Flores does under her § 1983 claim."<sup>32</sup>

<sup>32</sup> In addition to the grounds stated in Wahad and Flores, the court in Townes v. city of New York, No. 94 civ. 2647, 1998 WL 106140, \*4 (S.D.N.Y. Mar. 10, 1998), rev'd on other grounds, 176 F.3d 138 (2d Cir. 1999), cert. denied, 528 U.S. 964 (1999), pointed out that even if an extension of Brown was warranted, plaintiffs' state law claims under the State constitution would be barred by the applicable statute of limitations, requiring that actions against a municipality or police officer be commenced within one year and ninety days after the events alleged. The same statute of limitations would preclude Housing Works's state constitutional claims here.

More recently, the New York Court of Appeals addressed yet another attempt to extend the scope of Brown to recognize a claim for damages arising from the search and seizure provisions of the New York State Constitution. See Martinez v. City of Schenectady, No. 139, 2001 WL 1459659, slip op. (N.Y. Nov. 19, 2001). In Martinez, plaintiff had  
208 been arrested, tried \*208 and convicted for possession of narcotics, based on a search warrant that later proved to be unconstitutional. See id. After serving four years of her prison term, plaintiff was released and thereafter filed claims



for damages against the City of Schenectady and individual police officers for violations of the search and seizure provisions of the New York State Constitution. See id The Court of Appeals affirmed the dismissal of the claims for damages, reiterating that the "'narrow remedy' established in Brown . . . cannot be stretched to fit the facts before us." Id

Specifically, the court found that the remedy in Brown addressed two interests: the private interests of plaintiffs harmed by the constitutional violations and the public interests in deterring future violations. The Court found that both of these objectives were met by an alternative remedy already realized by plaintiff — her release from prison. Because plaintiff was not remediless, she could not assert a cognizable constitutional tort claim. Given the New York Court of Appeals' unequivocal reluctance to extend Brown under the circumstances in Martinez, it would be a further stretch to recognize a claim for damages against the City here, where a damages remedy is readily available in § 1983 for purported violations of the United States Constitution.

Finally, endorsing the view espoused by Housing Works on this issue would require the Court to divest other competent sovereign branches of their statutorily and constitutionally protected areas of authority. First, New York courts are the arbiters of New York law, and to the extent that the Court of Appeals saw fit to imply a right of action for damages against the State for violations of the New York Constitution, the decision on whether or not to further extend Brown to recognize a right of damages against the City rests with that court. It is one thing for New York's Court of Appeals to read the State Constitution as giving rise to a State law cause of action. It is quite another, bordering on presumption, for a federal court to pick up at the point where the State's highest court deliberately paused and to extend a principle of State constitutional law not explicitly articulated or even considered by the State court.

Second, the critics of the majority's opinion in Brown have taken strong issue with the decision in part because it is claimed to represent an exercise of an extra-judicial function. Brown, 674 N.E.2d at 1147 (Bellacosa, J., dissenting) ("Moreover, [the majority's] approach ignores the well-established discipline that subject matter jurisdiction, groundbreaking new remedies and their policy and practical ramifications, are matters appropriately within the legislative purview and, thus, not within some generalized supervisory or inferential adjudicative role of the courts.") (citations omitted). This Court is not prepared to imply new rights by further extension of Brown in the absence of clear indications of the State Legislature or the State's highest court on matters pertaining to the State Constitution.

For these reasons, the City's motion to dismiss all claims seeking damages for alleged violations of the New York State Constitution is granted. However, to the extent that the claims premised on the New York State Constitution form the basis for relief other than damages, those claims survive.<sup>33</sup>

## 209 \*209 **2 Punitive Damages against the City and the Individual Defendants**

<sup>33</sup> For instance, Housing Works seeks both declaratory and injunctive relief which are not precluded or even addressed by Brown. If violations of the State constitution are established, those claims may serve as the basis for declaratory or injunctive relief to the extent not already provided under Housing Works's federal claims.

The City and the individual defendants also move to dismiss all claims for punitive damages against them. As to the City, the Court agrees that punitive damages are barred. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). Punitive damages against some of the defendants acting in their individual capacities, however, may be sustained at this stage in the proceedings if the allegations against them demonstrate sufficiently intentional or extreme misconduct.

In Fact Concerts, 453 U.S. at 271, the Supreme Court held that a municipality is ordinarily immune from liability for punitive damages for the bad-faith actions of its officials. See also Ciraolo v. City of New York, 216 F.3d 236, 238 (2d Cir.), cert. denied, 531 U.S. 993 (2000);<sup>34</sup> Ivani Contracting Corp. v. City of New York, 103 F.3d 257, 262 (2d Cir.), cert. denied, 520 U.S. 1211 (1997). Therefore, any claim for punitive damages against the City is dismissed.

<sup>34</sup> In Ciraolo, plaintiff argued that her case fell into a limited exception to the general rule that punitive damages were not available from a municipality, i.e., that municipalities may be liable for punitive damages where "the taxpayers are directly responsible for perpetrating an outrageous abuse of constitutional rights." Id. This argument was rejected by the Second circuit, and the court finds it similarly inapplicable here.

Defendants, acting in their official capacities, are entitled to the same immunity as the City. Ivani, 103 F.3d at 262. To the extent that Housing Works's claims for punitive damages are based on the official conduct of defendants, those claims for punitive damages are also dismissed. However, Housing Works has brought claims against all of the defendants in their individual as well as official capacities. Individual defendants may be liable for punitive damages when their conduct is intentional, motivated by evil intent, or "when it involves reckless or callous indifference to federally protected rights of others." See Smith v. Wade, 461 U.S. 30, 56 (1983); McCardle v. Haddad, 131 F.3d 43, 52 (2d Cir. 1997).

The Court finds that, at this stage in the litigation, Housing Works has alleged facts sufficient to support intentional conduct, exhibiting reckless or callous indifference to Housing Works's constitutional rights. The allegations, if substantiated, would show that defendants acted with vindictive and retaliatory motives because of Housing Works's vigorous First Amendment

activities. Therefore, while punitive damages are not available from the City, the individual defendants may be liable for punitive damages to the extent that Housing Works can establish that their conduct surpassed the threshold set forth in Smith and McCardle. **FRAUD AND MISREPRESENTATION**

The City also moves to dismiss the seventh claim alleging fraud and misrepresentation. To establish a claim of fraud, plaintiff must show (1) a misrepresentation or a material omission of fact which was false and known to be false by defendant; (2) made for the purpose of inducing plaintiff to rely upon it; (3) justifiable reliance of plaintiff on the misrepresentation or material omission; and (4) \*210 injury proximately caused by the defendant's conduct. See Lama Holding Co. v. Smith Barney, Inc., 668 N.E.2d 1370, 1373 (N Y 1996). The City moves to dismiss on the grounds that: (1) statements, promissory in nature, relating to future actions are not actionable as fraud; and (2) Housing Works's could not have reasonably relied on statements made by those who did not have the authority to effectuate its contracts with the City. The Court agrees and Housing Works's seventh claim alleging fraud and misrepresentation is dismissed.

It is well-settled that allegations of mere promissory statements of future performance are not actionable for fraud. See Wilmoth v. Sandor, 686 N.Y.S.2d 388, 391 (App.Div. 1st Dep't 1999) ("No cause of action for fraud arises from allegations of a lack of intent to perform under a proposed contract . . . nor from expressions of hope for the future performance of entities subject to defendants' control.") (citations and quotations omitted); Haythe Curley v. Harkins, 625 N.Y.S.2d 154, 156 (App.Div. 1st Dep't 1995) ("Nor are allegations claiming only unfulfilled promissory expectations as to future performance actionable.") (citations omitted); P. Chimento Co., Inc. v. Banco Popular de Puerto Rico, 617 N.Y.S.2d 157, 158 (App.Div. 1st Dep't 1994) ("[F]raud cannot be predicated upon statements

which are promissory in nature at the time they are made and which relate to future actions or conduct."') (citations and quotations omitted).

Housing Works's allegations of fraud are based entirely on statements, promissory in nature, expressing the hope that the City would act favorably on the renewal of the Contracts at issue. According to Housing Works, "defendants Barrios-Paoli, Caldwell, Bonamarte and Dereszewski made numerous knowing and material false statements of fact and misrepresentations to Housing Works to the effect that the City would extend the Scattered Site Contract and Ryan White Enhancement Contract for an additional year."<sup>35</sup> The Court regards these statements as unrelated to present circumstances or conditions which could form the basis of a claim for fraud at the time the statements were made.

<sup>35</sup> Giuliani complaint, at ¶ 277 (emphasis supplied).

In assessing Housing Works's allegations in connection with the third element of a fraud claim — justifiable reliance — the Court turns to the applicable law on municipal contracts. In general, municipalities acting in their corporate capacities are held accountable for their contractual obligations in the same manner as private persons, with some legally significant qualifications. Genesco Entertainment v. Koch, 593 F. Supp. 743, 747-48 (S.D.N.Y. 1984). The qualification of central importance here is that a municipality's authority to contract is statutorily restricted. See id at 748. These limitations are not mere inconveniences or technicalities, rather they exist to protect the public at large. See id at 748-49. As the court noted in Genesco,

The power to approve or disapprove a municipal contract entails the power to dispose of public assets. Restrictions as to which city officials may invoke that power are not a mere formality, but are fundamental to "responsible municipal government." Without such restrictions any city official, no matter his position, could dispose of public assets.

Id at 749.

Plaintiffs in Genesco argued that they reasonably relied on the representations of deputy officials of the New York City Department \*211 of Parks and Recreation that they would be entitled to lease Shea Stadium for a concert. See id at 745, 748. The court noted, however, that approval of the alleged contract at issue rested squarely with the Commissioner of the Parks and Recreation Department, who had not issued such an approval. See id at 748. The court dismissed plaintiffs' breach of contract claim as well as their assertions of reasonable reliance, finding that "New York law places the burden of determining the scope of a municipal officer's authority upon those who deal with municipal government." Id at 749. The court further noted that the City cannot be liable under an implied contract which is invalid because of failure to comply with statutory requirements. See id at 750 (citing Seif v. City of Long Beach, 36 N.E.2d 630, 632 (N.Y. 1941)); see also Henry Modell Co., Inc. v. City of New York, 552 N.Y.S.2d 632, 634 (App.Div. 1st Dep't), appeal dismissed, 559 N.E.2d 1288 (N.Y. 1990). The parallels to Housing Works's arguments are obvious: Housing Works also seeks to rely on the statements of various municipal officials who did not have the ultimate authority to approve the contracts at issue because their approval was not final and the agreements were not valid until the contracts were registered by the Comptroller's Office.

The Court of Appeals decision in Garrison Protective Services, Inc. v. Office of the Comptroller, 708 N.E.2d 994 (N.Y. 1999) is also instructive here. In Garrison, plaintiffs had provided security services to the City Department of Environmental Protection (hereinafter "DEP") under a contract that expired in August 1992. See id at 995. DEP exercised its unilateral right to extend the agreement once through October 26, 1992. See id As the October expiration date approached, DEP again exercised its right to extend, and the parties agreed to continue the agreement through May 23, 1993. See id Plaintiff executed a change order to effectuate this second extension, which was approved by DEP in March 1993. See id

Thereafter, the Comptroller's Office determined that the second contract had not been properly registered. DEP resubmitted the form twice (once in June 1993 and again on July 12, 1993) in an attempt to validate the extension. See id at 995-96. While DEP was resubmitting forms in compliance with the registration, DOI had initiated an investigation into alleged fraud by Garrison with regard to several other contracts with the City. See id at 996.

Although plaintiff continued to provide security services to DEP, paralleling Housing Works's allegations here, the court held that the "Comptroller is under no duty to automatically register all contracts which the City and its agencies present. Indeed, section 328(c) of the New York City Charter specifically provides that the Comptroller may object to registration where there is `reason to believe that there is possible corruption in the letting of the contract or that the proposed contractor is involved in corrupt activity.'" Id The discretionary authority of the Comptroller is the same provision upon which the City relies here. Given the Comptroller's independent role in the process, a fact of which Housing Works could not have been unaware, the Court agrees that all of the representations made by the individual defendants named in this action

were insufficient to have created a reasonable belief on Housing Works's part that the City would ultimately renew the contracts at issue.<sup>36</sup> \*212

<sup>36</sup> See Defendant's Memorandum, at 17-18.

Housing Works relies on the New York Court of Appeals's decision in Channel Master Corp. v. Aluminum Ltd. Sales, Inc., 151 N.E.2d 833 (N.Y. 1958), to refute the City's argument that a claim of fraud may not be based on statements of future hope. Particularly, Housing Works restates the following passage, without placing it in its proper factual context: "one `who fraudulently makes a misrepresentation of \* \* \* intention \* \* \* for the purpose of inducing another to act or refrain from action in reliance thereon in a business transaction' is liable for the harm caused by the other's justifiable reliance upon the misrepresentation." Id at 835.

What Housing Works fails to point out is that the misrepresentation at issue in Channel Master was specifically determined by the court to be a misrepresentation as to present circumstances. The defendant had represented to plaintiff that it was capable of delivering a quantity of goods, a statement which was patently false at the time it was uttered because defendant had already committed its productive capacity to other customers. See id at 834-35. Rather than supporting Housing Works's contention, the Channel Master court's analysis carefully distinguishes the misrepresentation of present fact with an unactionable future promise: "As examination of the complaint demonstrates, it contains all the necessary elements of a good cause of action, including statements of existing fact, as opposed to expressions of future expectation." Id at 835. Thus, Channel Master cannot be used to overcome the deficiencies in Housing Works's allegations relating to the fraud claim.

Second, Housing Works's arguments with respect to justifiable reliance are slightly more persuasive, but nevertheless fail to overcome the weight of

precedent. Housing Works claims that it reasonably relied on the representations of individual defendants because non-profit corporations regularly continue to provide services while extensions are being processed and that throughout the entire time that Housing Works continued to provide services, the individual defendants continued to require status reports, proof of services provided and other documentation, all of which contributed to Housing Works's belief that the Contracts in fact would be renewed. The allegations, if true, would show that the City continued to refer clients to Housing Works, demanded that Housing Works remain in compliance with standard operating procedures and simultaneously represented that contract renewals were pending. If so, the City essentially demanded and obtained services for which it later refused to pay. While the Court does not condone the type of conduct alleged, Housing Works asks the Court, in effect, to create an exception to the general rule that all parties contracting with a municipal entity are presumed to know precisely with whom they are contracting. See Genesco, 593 F. Supp. at 749. That Housing Works is a not-for-profit corporation does not change the fact that the alleged misrepresentations came from individuals who were not legally authorized to bind the City to an enforceable contract extension. Moreover, Housing Works's request would also amount to bypassing the City's administrative procedure permitting equitable claims to be filed with and adjudicated by the Comptroller's Office, subject to judicial review pursuant to Article 78 of the State's Civil Practice Law and Rules ("CPLR") to obtain any appropriate relief under these circumstances.

Because Housing Works impermissibly relies on mere statements and hopes of future performance and because it has failed to establish justifiable  
 213 reliance, \*213 Housing Works's seventh claim for relief alleging fraud and misrepresentation is dismissed.

## **F UNJUST ENRICHMENT AND QUANTUM MERUIT**

The City also moves to dismiss Housing Works's eighth claim alleging unjust enrichment and quantum meruit. As one court recently observed, "Quantum meruit is a doctrine of quasi contract . . . [which] are not contracts at all, although they may give rise to obligations more akin to those stemming from contract than from tort. The contract is a mere fiction, a form imposed in order to adapt the case to a given remedy."Aniero Concrete Co., Inc. v. New York City Construction Authority, No. 94 Civ. 3506, 2000 WL 863208, \*9 (S.D.N.Y. June 27, 2000). A party seeking to recover for unjust enrichment has the burden of proving that (1) defendant is holding property, (2) under such circumstances that in equity and good conscience defendant ought not to retain it. Simonds v. Simonds, 380 N.E.2d 189, 194 (N.Y. 1978). Because it is based on a theory of implied contract, Housing Works's eighth claim for relief presents a slightly closer call than the claim for fraud.

Both parties advance ample authority to support their positions. The City relies primarily on a line of cases holding that the general rule is that there can be no recovery against a municipality in quantum meruit where the original contract is void as contrary to statute. Nevens Realty Corp. v. State of New York, 658 N.Y.S.2d 132, 133 (App.Div. 2d Dep't 1997) (the alleged agreement "required an independent approval of the State Comptroller to be valid. Since that approval was not obtained, the State is not liable for the rents now alleged by claimant to be outstanding."); Gill Korff and Associate, Architects and Engineer, P.C. v. County of Onondaga, 544 N.Y.S.2d 393 (App.Div. 4th Dep't 1989); New York State Ass'n of Plumbing-Heating-Cooling Contractors, Inc. v. Egan, 449 N.Y.S.2d 86, 88 (App.Div. 3d Dep't 1982) ("A contractor who has performed work pursuant to a noncomplying contract may be denied recovery, either under its agreement or on the basis of quantum meruit, even when the unit of

government has received the benefit of performance."'). Borrowing from its arguments in its motion to dismiss the fraud claim, the City claims that recovery under an unjust enrichment theory is precluded because of the noncompliance of Housing Works's contract, that is, the lack of the City Comptroller's approval.

For its part, Housing Works cites cases which concede the general rule above, but permit recovery for plaintiffs suing municipalities in very limited instances. See, e.g., Vrooman v. Village of Middleville, Herkimer County, 458 N.Y.S.2d 424 (App.Div. 4th Dep't 1982), appeal dismissed, 449 N.E.2d 427 (1983). In Vrooman, the court held that

A plaintiff is entitled to recover from a municipality where, as here, he has entered into a contract in good faith, the municipality possesses the authority to enter into the contract, the contract is not violative of public policy and the circumstances indicate that if plaintiff is not compensated, the municipality would be unjustly enriched.

Id at 426. Until this point, all of the parties are essentially correct. There is a general prohibition of unjust enrichment claims against municipalities, but narrowly circumscribed exceptions exist.

However, Housing Works fails to persuade the Court that this case presents the kind of compelling situation necessary to depart from the  
214 general rule. For \*214 instance, in Vrooman, the court's analysis emphasized the fact that although the Village of Middleville had not appropriated the funds that plaintiff sought, the Village had requested the engineering services because the State DOH had explicitly ordered the Village to construct sewage treatment facilities and to cease the discharge of sewage into the waters of the State. See *id* at 425. Because the Village would have been required to make the expenditure under

State orders, there was no indication that the taxpayers were adversely affected by plaintiff's claim against the Village.

Similarly, Aniero presents a unique set of facts that are not applicable here. Plaintiff in Aniero was a completion contractor, that is, a contractor who joined an ongoing construction project because the original contractor had backed out in the middle of a project. Furthermore, the plaintiff's involvement was underwritten to an extent by a surety bond secured in connection with the original project. The City claimed that plaintiff could not recover under a theory of quantum meruit because its involvement was not authorized by the competitive bidding process required for such construction contracts. The court found this argument unpersuasive. Specifically, the court noted that in the first instance, the original contract had been awarded through a competitive bidding process and plaintiff was merely stepping in ostensibly to complete the work that the original contractor left behind. In theory, the court sustained the unjust enrichment claim, allowing plaintiff to proceed because "[n]othing in the record or the allegations suggests that the procurement or the performance of Aniero's services implicates the integrity of the process of awarding public construction contracts." Aniero, 2000 WL 863208, at \*16.

Neither of these two cases applies here. Housing Works, rather than providing services at the behest of a higher State authority, was always in an arms-length relationship with the City. Furthermore, it cannot be said that Housing Works was merely stepping in mid-project to complete a contract that had already been approved and registered by another party. In short, the general rule prohibiting unjust enrichment claims against municipalities applies.

The balance of considerations also tips in favor of the City here, where defendants have correctly noted that Housing Works has a remedy in another forum. As the court held in Garrison, Housing

Works should proceed by first filing a notice of claim with the City's Comptroller's Office, detailing its allegations of pecuniary loss. Housing Works claims to have attempted that route. To the extent that it remains unsatisfied with the Comptroller's determination, Housing Works has the option of seeking review in the State Supreme Court pursuant to CPLR Article 78. Garrison, 708 N.E.2d at 996.

For these reasons, the City's motion to dismiss the eighth cause of action is granted.

### **G ACCOUNTANT MALPRACTICE**

In a separate motion, Hiralall moves to dismiss Housing Works's ninth claim for relief in the Giuliani Complaint for accountant malpractice and negligence in connection with the January 1997 audit recommended by Reiter. Housing Works asserts that Hiralall owed it a duty of exercising reasonable care, skill and diligence which Hiralall breached by, inter alia, (1) failing to follow generally accepted accounting principles (hereinafter "GAAP"); (2) failing to follow the Single Audit Guide in conducting the audit; (3) refusing to audit records because of objections to  
 215 format; (4) failing to disclose \*215 material information concerning Hiralall's professional capabilities; and (5) wrongfully concluding that Housing Works owed approximately \$1 million to the City of New York.<sup>37</sup> The Court agrees with Hiralall that these allegations do not state a claim of accountant malpractice and that there are no grounds to recognize a new cause of action in the manner in which Housing Works seeks.

<sup>37</sup> Giuliani complaint, at ¶ 293.

In general, a plaintiff alleging a claim of accountant malpractice must show (1) a departure from accepted standards of practice, and (2) that the departure was the proximate cause of injury. See Sheehan v. City of New York, 354 N.E.2d 832, 834 (N.Y. 1976); Herbert H. Post Co. v. Sidney Bitterman, Inc., 639 N.Y.S.2d 329, 335 (App.Div. 1st Dep't 1996). However, the general

rule, as explained in the time-honored decision of Ultramares Corp. v. Touche, 174 N.E. 441, 444-45, 447 (N.Y. 1931), also posits that direct privity is necessary to maintain a malpractice or negligence claim against an accountant. This Court concludes that Housing Works has failed to allege a set of facts that, if proven, would establish the existence of privity here.<sup>38</sup> Housing Works concedes as much when it declares that the privy party was the City: "Defendant Jack Hiralall, P.C. ('Hiralall') was retained by HRA to conduct an audit of Housing Works books and records."<sup>39</sup> Thus, in order to survive the motion to dismiss, Housing Works must attempt to fit its ninth claim for relief into a narrowly circumscribed category of cases permitting accountant malpractice and negligence actions in the absence of direct privity.

<sup>38</sup> In its Memorandum of Law in Opposition to Defendant Jack Hiralall, P.C.'s Motion to Dismiss, dated Aug. 28, 2000 (hereinafter "Plaintiffs' Opposition"), at 7, Housing Works makes the creative argument that there was privity between it and Hiralall because Housing Works was the subject of the audit. Because it cannot come forward with any conclusive definition of privity supporting its interpretation, Housing Works cites what it believes to be analogous cases in the physician-patient context. For reasons set forth in greater detail in this section, these arguments are unpersuasive, and the court finds no genuine issue of material fact as to the absence of privity.

<sup>39</sup> Id. at ¶ 291.

The seminal case in this regard is Ultramares. In broad strokes, the facts in Ultramares follow a familiar pattern that repeats itself many times over in subsequent cases: plaintiff lent money to a third party in alleged reliance on the representations of an accountant who neglected to convey material facts that would have shown that the borrower was, in fact, insolvent. See id. at 442-43. The plaintiff in Ultramares, however, had no direct

relationship with the defendant, and the latter merely prepared a number of copies of certified financial statements which the borrower distributed to creditors as necessary. Under the circumstances, the court dismissed plaintiff's claim for negligence. See id at 450.

In so holding, the court ruled that the relevant inquiry was whether the relationship between the non-privy parties is a "bond . . . so close as to approach that of privity, if not completely one with it." Id at 445-46 (also referring to an "intimacy of the resulting nexus" between the parties). In evaluating whether the parties had a relationship of near privity sufficient to sustain a claim of negligence, the court found it helpful to distinguish cases where justified reliance by the plaintiff was manifest in its relationship with defendant. For instance, in Glanzer v. Shepard,<sup>216</sup> 135 N.E. 275, 275-76 (N.Y. 1922), \*216 plaintiffs, purchasers of beans, relied on the representations of defendant, a certified weigher of beans, who was retained by a non-party seller. Although the parties to the action were not in direct privity, they were inextricably linked by design: the seller expressly instructed the defendant to certify the weight of goods and furnish a copy of such certification to the purchaser. Id at 275. In fact, the particular certification of weight at issue identified plaintiff-purchaser, which clearly evinced defendant's knowledge of plaintiff's reliance on the report. Id From this, it was also reasonable to infer that defendant knew that plaintiff would rely on the report in order to consummate its purchase of the goods. Thus, the plaintiff in Glanzer presented a "case where the transmission of the certificate to another was not merely one possibility among many, but the end and aim of the transaction." Ultramares, 174 N.E. at 445.

Having failed to allege a relationship closely approximating the bond of privity, plaintiff's claim of negligence in Ultramares was dismissed. The court also expressed its concern that extending

liability for negligence could have the undesirable consequence of exposing any number of professionals to potentially limitless liability:

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class.

Id at 444.<sup>40</sup>

<sup>40</sup> The court also remarked critically at the possibility of extending liability to other professionals:

The extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud. . . . Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were between client and adviser.

Id at 447-48.

More than fifty years later, in two separate cases, the Court of Appeals had occasion to review its decisions in Ultramares and Glanzer. In the more recent context, the problems of and intricacies in an accountant's liability for negligence are made more acute because of the "modern ubiquity of financial statements." See Parrott v. Coopers Lybrand, L.L.P., 702 N.Y.S.2d 40, 43 (App.Div. 1st Dep't), aff'd, 741 N.E.2d 506 (N.Y. 2000).



Nevertheless, the Court of Appeals concluded that changing times did not warrant abandoning precedent: "Inasmuch as we believe that a relationship 'so close as to approach that of privity' remains valid as the predicate for imposing liability upon accountants to noncontractual parties for the negligent preparation of financial reports, we restate and elaborate upon our adherence to that standard today." Credit Alliance Corp. v. Arthur Anderson Co., 483 N.E.2d 110, 115 (N.Y. 1985); see also European American Bank Trust Co. v. Strauhs Kaye, 483 N.E.2d 110 (N.Y. 1985) (companion case).

The elaboration in Credit Alliance consisted of distilling the principles of Ultramares and Glanzer and incorporating them into a three-prong test for determining an accountant's liability for  
217 negligence. The court held that \*217

Before accountants may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, certain prerequisites must be satisfied: (1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes; (2) in the furtherance of which a known party or parties was intended to rely; and (3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

Id. at 118. The court noted that while the criteria permit some flexibility in the application of rigid privity rules, they do "not represent a departure from the principles articulated in Ultramares [and] Glanzer . . . rather, they are intended to preserve the wisdom and policy set forth therein." Id.

Subsequent cases have clarified that the three prongs of the Credit Alliance test, although conceptually related, are distinct requirements, and plaintiffs seeking to impose liability for

accountant malpractice or negligence in the absence of privity must advance allegations sufficient to establish all three to survive a motion to dismiss. See Security Pacific Business Credit, Inc. v. Peat Marwick Main Co., 597 N.E.2d 1080, 1083 (N.Y. 1992) ("The indicia, while distinct, are interrelated and collectively require a third party claiming harm to demonstrate a relationship or bond with the once-removed accountants 'sufficiently approaching privity' based on 'some conduct on the part of the accountants.'") (citations omitted); Parrott, 702 N.Y.S.2d at 44 ("Hence, although there is some conceptual overlap among the showings necessary to establish these requirements, the Court of Appeals has nevertheless set forth three discrete criteria. Evidentiary proof, in admissible form, must be offered in support of all three criteria in order to warrant trial.") (citations omitted). Housing Works has failed to allege facts supporting any of the three criteria of the Credit Alliance test. Accordingly, this Court concludes that Housing Works has not adequately pleaded a relationship with Hiralall sufficiently approaching privity.

The first prong of the Credit Alliance test requires Housing Works to establish that Hiralall must have been aware that the financial reports were to be used for a particular purpose or end aim. See 483 N.E.2d at 118. The Complaints, however, lack any substantial allegations as to Hiralall's awareness of the purpose of the audits. In fact, the bulk of the factual allegations speaks only to the purported knowledge of the City as to Hiralall's qualifications, or lack thereof.<sup>41</sup> The reasonable inferences to be drawn from the sparse allegations do not support the type awareness required by Credit Alliance. The most likely scenario is that Hiralall knew as much as the City was willing to tell it: that an audit of the Scattered Site program was required to ascertain whether Housing Works actually owed money to the City. The facts, as alleged, simply do not support any more than this. If, by merely asserting a claim of accountant malpractice, Housing Works seeks to establish that

Hiralall knew that the purpose of the audit was to either terminate Housing Works as a contractor  
 218 \*218 or to render it ineligible for future contracts, those allegations are not present, explicitly or implicitly, on the face of the Complaints. Therefore, Housing Works fails to establish the necessary showing of awareness on the part of Hiralall as set forth in Credit Alliance

<sup>41</sup> See Giuliani Complaint, at ¶¶ 88-93. Housing Works allegations of knowledge amount to charges that: "HRA defendants knew that an audit firm with a staff as limited as Hiralall could not competently conduct the audit of Housing Works"; "HRA defendants knew or should have known that Hiralall was not truly independent and not qualified to conduct the audit of Housing Works."

The second criterion of the Credit Alliance test requires Housing Works to come forward with allegations that Hiralall knew that Housing Works intended to rely on his audit. See id at 118. Hiralall correctly notes that the true party in reliance here was the City: the City contracted directly with Hiralall for the purpose of obtaining an audit of Housing Works's Scattered Site program, and the City was the only party contemplating any action on the basis of the audit report. Housing Works, in contrast, was merely the subject of the audit. Hiralall also points to these facts in support of his contention that he had no knowledge that Housing Works intended to rely in some direct way on its audit report.

Housing Works's allegations of reliance on the audit report are almost non-existent. Even if the Court draws all reasonable inferences in its favor, the most that can be gleaned is that Housing Works relied, in the broadest sense of term, in a passive manner, merely hoping for a favorable report that would prompt the City to continue contracting with it. The case law applying the Credit Alliance test requires more. A non-privity plaintiff cannot "unilaterally create such an extraordinary obligation, imposing negligence liability of a

significant commercial dimension and consequences by merely interposing and announcing its reliance in this fashion." Security Pacific, 597 N.E.2d at 1085.

The cases which sustain findings of reliance in the context of negligence claims against accountants or other professionals in the absence of privity all have a common strand: the plaintiffs' alleged reliance on the report at issue was manifested in their subsequent actions or outward conduct of which defendants were clearly aware. See, e.g., Ossining Union Free School Dist. v. Anderson LaRocca Anderson, 539 N.E.2d 91, 95 (N.Y. 1989) (in a claim of negligence against engineers, plaintiff sufficiently established that through direct contacts, information transmitted and the nature of the work, defendants were aware that plaintiff would act in reliance on the reports at issue); Glanzer, 135 N.E. at 275-76 (plaintiffs relied on the certifications of weight in making its purchases of beans, which reliance was clearly and objectively understood by defendants); Bernstein v. Arthur Anderson Co., 621 N.Y.S.2d 80, 81 (App.Div. 2d Dep't 1994) (plaintiff who defendant knew was personally guaranteeing a loan in the amount of \$175,000,000 sufficiently alleged reliance in accordance with Credit Alliance test); Ackerman v. Price Waterhouse, 591 N.Y.S.2d 936, 939-40 (Sup.Ct. 1992) (limited partners, although not in privity with defendant accountants, nevertheless established that they relied on tax schedules and opinions prepared by defendant in connection with their annual tax returns), aff'd, 604 N.Y.S.2d 721 (App.Div. 1st Dep't 1993), leave to appeal granted, 608 N.Y.S.2d 69 (App.Div. 1st Dep't), reversed on other grounds, 644 N.E.2d 1009 (1994).

These objective and outward manifestations of active reliance are noticeably absent in Housing Works's allegations. Although Housing Works has established that it stood by, awaiting the final report, the pleadings are devoid of any facts tending to show that the audit report was integral to some use or transaction envisioned by Housing

219 Works and known to \*219 Hiralall, or that Housing Works would actively rely on the report, for instance, by incorporating it into an application for funding, using it to obtain interim financial assistance in the form of debt to continue its operations, or otherwise contemplating action based on the results of the accounting. Therefore, Housing Works also fails on the second prong of the Credit Alliance test.

Housing Works's allegations in connection with the third criterion are similarly insufficient. Credit Alliance, 483 N.E.2d at 118, also requires a showing of "some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance." At the outset, the Court notes that the Complaints are almost devoid of any allegations as to Hiralall's conduct linking it with Housing Works. In Plaintiff's Opposition, Housing Works attempts to cure the factual deficiencies in the Giuliani Complaint by alleging, for the first time, a number of meetings and communications that transpired between Housing Works and Hiralall.<sup>42</sup> Initially, the Court notes that any consideration of these allegations, not present in either the pleadings or affidavits, would be improper in the context of the present motion. See Fort Wayne Telsat v. Entertainment and Sports Programming Network, 753 F. Supp. 109, 113 n. 4 (S.D.N.Y. 1990) ("It is a basic principle that a complaint may not be amended by the plaintiff's brief filed in opposition to a motion to dismiss."). Furthermore, it is highly doubtful that such allegations would matter in the final analysis.

<sup>42</sup> Plaintiff's Opposition, at 7.

Courts have uniformly required more than phone calls, general communications or unacknowledged assertions of reliance in order to establish "linking conduct." See, e.g., Security Pacific, 597 N.E.2d at 1085-86 (one phone call allegedly communicating plaintiff's reliance on defendant's financial statement was not "sufficient conduct . . . evidencing a relationship between [plaintiff] and

the accountants, which Credit Alliance contemplates."); LaSalle National Bank v. Ernst Young, LLP, 729 N.Y.S.2d 671, 675 (App.Div. 1st Dep't 2001) (plaintiff's phone call and subsequent correspondence allegedly conveying reliance on certified financial statement constituted no more than "unilateral conduct by the lenders, and not affirmative conduct by Ernst Young."); Parrott, 702 N.Y.S.2d at 46 ("[T]here is no indication that plaintiff ever met or even communicated with the accountants, or that the accountants were even aware that plaintiff owned company stock, or that the stock would be repurchased by the employer-client at a value fixed by accountants."). If Hiralall in fact understood that Housing Works intended to rely in a meaningful way on its report, Housing Works must come forward with more than its own unilateral perceptions of its reliance or conclusory statements about the significance of meetings between the parties; it must allege, at a minimum, conduct on the part of Hiralall evincing its awareness of Housing Works's contemplated use of the report and reliance. Because Housing Works has failed to do so, it cannot sustain its burden of pleading pursuant to the third criterion of the Credit Alliance test.

Although unable to allege facts sufficient to establish any of the three criteria set forth in Credit Alliance, Housing Works nevertheless urges this Court to abandon the near privity analysis altogether and to recognize an enlargement of professional liability based on 220 decisions in \*220 the personal injury and physician-patient contexts. See, e.g., Santiago v. Greyhound Lines, Inc., 956 F. Supp. 144 (N.D.N.Y. 1997). Alternatively, Housing Works argues that these purportedly analogous cases establish the existence of direct privity between it and Hiralall. After a careful review of the Santiago decision and of the circumstances present here, the Court is persuaded that Housing Works has not advanced sufficient grounds to justify an extension of liability for negligence in the context of municipal accounting.

At the outset, it is worth noting that the present case and Santiago are based on fundamentally distinct conceptual underpinnings. In Santiago, an employee was fired after falsely testing positive for cocaine use, in a test administered by a physician who was hired by plaintiff's employer. See id at 146-47. Although there was no formal, contractual privity between plaintiff and physician, the court nevertheless held that the physician "had a duty to Santiago to collect his specimen with due care . . . [and] that sufficient material factual issues exist that a trial is warranted." Id at 153.

The court's decision in Santiago, however, was driven in part by the unique circumstances present in a physician-patient relationship. See id at 152 n. 7 ("Without flushing out this issue, the court wishes to note one other possibly significant distinction between the instant case and Hall: here, instead of a detective agency performing the exam, we have a physician's office thus begging the question whether a doctor-patient relationship is created in these circumstances.").<sup>43</sup> Thus, it is difficult to apply the limited enlargement of negligence liability in the context of a physician-patient relationship to the context of accountant malpractice or negligence presented here.

<sup>43</sup> In Hall v. United Parcel Service of America, Inc., 555 N.E.2d 273 (N.Y. 1990), the court of Appeals refused to recognize a cause of action for negligence against a detective agency for the allegedly negligent administration of a polygraph test.

The rationales in the accountants cases point toward qualified contraction rather than enlargement of negligence liability. Dating back to the Court of Appeals decision in Ultramares, courts have recognized a distinction in negligence theories based on some aspect of physical force or injury and those based on purely economic, or otherwise abstract, harm. As Chief Judge Cardozo noted, "[i]n either view, however, what is released or set in motion is a physical force. We are now

asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words." Ultramares, 174 N.E. at 445. The court in Ossining was even more emphatic about the continuing relevance of near privity in negligence cases absent this physical force: "in negligent misrepresentation cases, which produce only economic injury, is privity of contract required in order for plaintiff to state a cause of action? Whether defendants are accountants (as in several recent cases) or not (as here), our answer continues to be that such a cause of action requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity." Ossining, 539 N.E.2d at 91 (emphasis supplied). The issue, then, becomes whether Housing Works has advanced sufficient grounds to depart from these unequivocal statements distinguishing physical harm from economic harm and emphasizing the indispensable \*221 requirement of establishing near privity in cases of accountant malpractice or negligence.

Housing Works's arguments are not completely without merit. It is true that Housing Works and other similarly situated non-profit organizations are at risk from negligent or reckless auditors performing services as agents of governmental entities. If accepted as true, the allegations would show that Housing Works has been precluded from contracting with the City and possibly denied State funding, on the basis of an allegedly false audit report which recklessly overstated Housing Works's liability to the City. On this basis, Housing Works may genuinely believe that its future is at stake.

There are, however, countervailing policy considerations which may outweigh Housing Works's interests in advancing a new theory of liability against municipal accountants. The importance of independent auditors to the proper functioning of local governments is difficult to overstate. Their duty as uninterested third parties

is to ensure that the public's trust and the people's purse are well maintained. When they uncover any credible evidence of wrongdoing on the part of those accepting benefits from local governments, auditors must be vocal, persistent and independent. Allowing the subjects of the audits to proceed with claims against the auditors under an expanded theory of liability and in the absence of a direct contractual relationship would work to undermine the critical independence accountants need to perform their duties effectively.

Upon balancing these competing interests against the backdrop of the New York Court of Appeals doctrine enunciated in Ultramares and its progeny, the Court concludes that the enlargement of negligence liability here sought by Housing Works is unwarranted. Therefore, in order to allege a claim of accountant malpractice or negligence, Housing Works must establish the functional equivalent of privity. Having failed to plead facts sufficient to establish any of the three criteria in the Credit Alliance test, Housing Works's ninth claim for relief must fail, and Hiralall's motion to dismiss is granted.

Housing Works has stated its intention to move to amend the complaint to allege an additional claim or to amplify the factual allegations if the Court dismisses its ninth claim. Whether the ninth claim is couched as a general negligence, accountant malpractice, or negligent misrepresentation claim, the requirement of establishing the functional equivalent of privity remains. Because there appears to be no set of facts that could substantiate near privity between Housing Works and Hiralall in the present controversy, leave to amend the complaint as against Hiralall will be denied.

#### **H HOUSING WORKS'S FIFTH AND SIXTH CLAIMS**

Housing Works's fifth and sixth claims allege administrative violations of the New York City Charter and the Procurement Policy Board rules in connection with the non-responsibility findings and the alleged debarment of Housing Works as a

City contractor. Although the City Defendants have moved to dismiss the Giuliani Complaint in its entirety, they have not addressed the fifth and sixth claims in their motion papers. Standing alone, the allegations in these claims sufficiently assert violations of the relevant municipal laws to preclude dismissal of the fifth and sixth claims.

#### **IV ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that the City's motion to dismiss Housing Works's first and second \*222 claims in the Giuliani Complaint (No. 00 Civ. 3561) is denied; and it is further

**ORDERED** that the City's motion to dismiss Housing Works's first and second claims in the Turner Complaint (No. 00 Civ. 1122) is granted; and it is further

**ORDERED** that the City's motion to dismiss Housing Works's third and fourth claims in the Giuliani and Turner Complaints is denied; and it is further

**ORDERED** that the City's motion to dismiss all claims for damages based on the New York State Constitution is granted; and it is further

**ORDERED** that the individual defendants' motion to dismiss on the grounds of qualified immunity is denied; and it is further

**ORDERED** that the motion of defendants Giuliani and Turner to dismiss the claims against them for lack of direct participation is denied; and it is further

**ORDERED** that the motion of defendants Netburn and Hoover to dismiss the claims against them for lack of direct participation and absence of proximate cause is granted; and it is further

**ORDERED** that the motion of defendant Reiter to dismiss the claims against her for expiration of the statute of limitations is granted; and it is further

**ORDERED** that the City's motion to dismiss the seventh and eighth claims in the Giuliani Complaint (No. 00 Civ. 3561) is granted; and it is further

**ORDERED** that Hiralall's motion to dismiss the ninth claim in the Giuliani Complaint (No. 00 Civ. 3561) is granted; and it is further

**ORDERED** that Housing Works's alternative motion to amend the complaint to support the allegations against Netburn is granted and

Housing Works may file an amended complaint within thirty (30) days of this Decision and Order for the sole purpose of amplifying the factual allegations as to defendant Netburn; and it is finally

**ORDERED** that the parties shall appear for a status conference before the Court on December 17, 2001 at 2:00 PM.

**SO ORDERED**

---

THE LONG RUN

## *In Matters Big and Small, Crossing Giuliani Had Price*



Mark Green, left, the former public advocate, with Rudolph Giuliani in December 2000. The two men often clashed, and in 1999, Mr. Giuliani attempted to rewrite the City Charter to prevent Mr. Green from succeeding him as mayor.  
Librado Romero/The New York Times

By Michael Powell and Russ Buettner

Jan. 22, 2008

Rudolph W. Giuliani likens himself to a boxer who never takes a punch without swinging back. As mayor, he made the vengeful roundhouse an instrument of government, clipping anyone who crossed him.

In August 1997, James Schillaci, a rough-hewn chauffeur from the Bronx, dialed Mayor Giuliani's radio program on WABC-AM to complain about a red-light sting run by the police near the Bronx Zoo. When the call yielded no results, Mr. Schillaci turned to The Daily News, which then ran a photo of the red light and this front page headline: "GOTCHA!"

That morning, police officers appeared on Mr. Schillaci's doorstep. What are you going to do, Mr. Schillaci asked, arrest me? He was joking, but the officers were not.

They slapped on handcuffs and took him to court on a 13-year-old traffic warrant. A judge threw out the charge. A police spokeswoman later read Mr. Schillaci's decades-old criminal rap sheet to a reporter for The Daily News, a move of questionable legality because the state restricts how such information is released. She said, falsely, that he had been convicted of sodomy.

Then Mr. Giuliani took up the cudgel.

"Mr. Schillaci was posing as an altruistic whistle-blower," the mayor told reporters at the time. "Maybe he's dishonest enough to lie about police officers."

Mr. Schillaci suffered an emotional breakdown, was briefly hospitalized and later received a \$290,000 legal settlement from the city. "It really damaged me," said Mr. Schillaci, now 60, massaging his face with thick hands. "I thought I was doing something good for once, my civic duty and all. Then he steps on me."



Members of Housing Works, a nonprofit group that had challenged Mr. Giuliani's AIDS policies, marching near City Hall in 1998. The police placed snipers atop City Hall during the march and monitored it by helicopter.  
Chester Higgins Jr./The New York Times

Mr. Giuliani was a pugilist in a city of political brawlers. But far more than his predecessors, historians and politicians say, his toughness edged toward ruthlessness and became a defining aspect of his mayoralty. One result: New York City spent at least \$7 million in settling civil rights lawsuits and paying retaliatory damages during the Giuliani years.

After AIDS activists with Housing Works loudly challenged the mayor, city officials sabotaged the group's application for a federal housing grant. A caseworker who spoke of missteps in the death of a child was fired. After unidentified city workers complained of pressure to hand contracts to Giuliani-favored organizations, investigators examined not the charges but the identity of the leakers.

“There were constant loyalty tests: ‘Will you shoot your brother?’ ” said Marilyn Gelber, who served as environmental commissioner under Mr. Giuliani. “People were marked for destruction for disloyal jokes.”

Mr. Giuliani paid careful attention to the art of political payback. When former Mayors Edward I. Koch and David N. Dinkins spoke publicly of Mr. Giuliani’s foibles, mayoral aides removed their official portraits from the ceremonial Blue Room at City Hall. Mr. Koch, who wrote a book titled “Giuliani: Nasty Man,” shrugs.

“David Dinkins and I are lucky that Rudy didn’t cast our portraits onto a bonfire along with the First Amendment, which he enjoyed violating daily,” Mr. Koch said in a recent interview.

Mr. Giuliani retails his stories of childhood toughness, in standing up to bullies who mocked his love of opera and bridled at his Yankee loyalties. Years after leaving Manhattan College, he held a grudge against a man who beat him in a class election. He urged his commissioners to walk out of City Council hearings when questions turned hostile. But in his 2002 book “Leadership,” he said his instructions owed nothing to his temper.

James Schillaci, top, was arrested after he sought media attention about a police sting in the Bronx. He eventually called The Daily News, which put his complaint on the front page. “The mayor tarred me up,” he says.

Top, William C. Lopez for The New York Times; bottom, The Daily News

“It wasn’t my sensitivities I was worried about, but the tone of civility I strived to establish throughout the city,” he wrote. Mr. Giuliani declined requests to be interviewed for this article.

His admirers, not least former Deputy Mayor Randy M. Mastro, said it was unfair to characterize the mayor as vengeful, particularly given the “Herculean task” he faced when he entered office in 1994. Mr. Giuliani’s admirers claimed that the depredations of crack, AIDS, homicide and recession had brought the city to its knees, and that he faced a sclerotic liberal establishment. He wielded intimidation as his mace and wrested cost-savings and savings from powerful unions and politicians.

“The notion that the city needed broad-based change frightened a lot of entrenched groups,” said Fred Siegel, a historian and author of “The Prince of the City: Giuliani, New York and the Genius of American Life.” “He didn’t want to be politic with them.”

He cowed many into silence. Silence ensured the flow of city money.

Andy Humm, a gay activist, worked for the Hetrick-Martin Institute, which pushed condom giveaways in public schools. When Mr. Giuliani supported a parental opt-out, the institute’s director counseled silence to avoid losing city funds. “We were muzzled, and it was a disgrace,” Mr. Humm said.

### **Picking His Fights**

Mr. Giuliani says he prefers to brawl with imposing opponents. His father, he wrote in “Leadership,” would “always emphasize: never pick on someone smaller than you. Never be a bully.”



As mayor, he picked fights with a notable lack of discrimination, challenging the city and state comptrollers, a few corporations and the odd council member. But the mayor's fist also fell on the less powerful. In mid-May 1994, newspapers revealed that Mr. Giuliani's youth commissioner, the Rev. John E. Brandon, suffered tax problems; more troubling revelations seemed in the offing.



**EDWARD I. KOCH** His ceremonial portrait was removed from the Blue Room at City Hall.  
Sara Krulwich/The New York Times

At 7 p.m. on May 17, Mr. Giuliani's press secretary dialed reporters and served up a hotter story: A former youth commissioner under Mr. Dinkins, Richard L. Murphy, had ladled millions of dollars to supporters of the former mayor. And someone had destroyed Department of Youth Services records and hard drives and stolen computers in an apparent effort to obscure what had happened to that money.

"My immediate goal is to get rid of the stealing, to get rid of the corruption," Mr. Giuliani told The Daily News.

None of it was true. In 1995, the Department of Investigation found no politically motivated contracts and no theft by senior officials. But Mr. Murphy's professional life was wrecked.

"I was soiled merchandise the taint just lingers," Mr. Murphy said in a recent interview.

Not long after, a major foundation recruited Mr. Murphy to work on the West Coast. The group wanted him to replicate his much-honored concept of opening schools at night as community centers. A senior Giuliani official called the foundation a move a former mayoral official confirmed on the condition of anonymity for fear of embarrassing the organization and the prospective job disappeared.

"He goes to people and makes them complicit in his revenge," Mr. Murphy said.

This theme repeats. Two private employers in New York City, neither of which wanted to be identified because they feared retaliation should Mr. Giuliani be elected president, said the mayor's office exerted pressure not to hire former Dinkins officials. When Mr. Giuliani battled schools Chancellor Ramon C. Cortines, he demanded that Mr. Cortines prove his loyalty by firing the press spokesman, John Beckman.

Mr. Beckman's offense? He had worked in the Dinkins administration. "I found it," Mr. Beckman said in an interview, "a really unfortunate example of how to govern."



**MARILYN GELBER** The former Giuliani official says people were marked for destruction.  
Ruby Washington/The New York Times

Joel Berger worked as a senior litigator in the city corporation counsel's office until 1996. Afterward, he represented victims of police brutality and taught a class at the New York University School of Law, and his students served apprenticeships with the corporation counsel.

In late August 1997, Mr. Berger wrote a column in The New York Times criticizing Mr. Giuliani's record on police brutality. A week later, a city official called the director of the N.Y.U. law school's clinical programs and demanded that Mr. Berger be removed from the course. Otherwise, the official said, we will suspend the corporation counsel apprenticeship, according to Mr. Berger and an N.Y.U. official.

"It was ridiculously petty," Mr. Berger said.

N.Y.U. declined to replace Mr. Berger and instead suspended the class after that semester.

### **'Culture of Retaliation'**

The Citizens Budget Commission has driven mayors of various ideological stripes to distraction since it was founded in 1932. The business-backed group bird-dogs the city's fiscal management with an unsparing eye. But its analysts are founts of creative thinking, and Mr. Giuliani asked Raymond Horton, the group's president, to serve on his transition committee in 1993.

That comity was long gone by the autumn of 1997, when Mr. Giuliani faced re-election. Ruth Messinger, the mayor's Democratic opponent, cited the commission's work, and the mayor denounced the group, which had issued critical reports on welfare reform, police inefficiency and the city budget.

So far, so typical for mayors and their relationship with the commission. Mr. Koch once banned his officials from attending the group's annual retreat. Another time, he attended and gave a speech excoriating the commission.



**JOEL BERGER** Ran afoul of Mr. Giuliani after representing victims of police brutality.  
Michelle V. Agins/The New York Times

But one of Mr. Giuliani's deputy mayors, Joseph Lhota, took an unprecedented step. He called major securities firms that underwrite city bonds and discouraged them from buying seats at the commission's annual fund-raising dinner. Because Mr. Lhota played a key role in selecting the investment firms that underwrote the bonds, his calls raised an ethical tempest.

Apologizing struck Mr. Giuliani as silly.

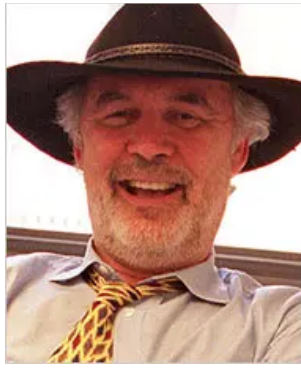
"We are sending exactly the right message," he said. "Their reports are pretty useless; they are a dilettante organization."

Still, that dinner was a rousing success. "All mayors have thin skins, but Rudy has the thinnest skin of all," Mr. Horton said.

Mr. Giuliani's war with the nonprofit group Housing Works was more operatic. Housing Works runs nationally respected programs for the homeless, the mentally ill and people who are infected with H.I.V. But it weds that service to a 1960s straight-from-the-rice-paddies guerrilla ethos.

The group's members marched on City Hall, staged sit-ins, and delighted in singling out city officials for opprobrium. Mr. Giuliani, who considered doing away with the Division of AIDS Services, became their favorite mayor in effigy.

Mr. Giuliani responded in kind. His police commanders stationed snipers atop City Hall and sent helicopters whirling overhead when 100 or so unarmed Housing Works protesters marched nearby in 1998. A year earlier, his officials systematically killed \$6 million worth of contracts with the group, saying it had mismanaged funds.



**RAYMOND HORTON** President of the Citizens Budget Commission, which the mayor denounced.  
Librado Romero/The New York Times

Housing Works sued the city and discovered that officials had rescored a federal evaluation form to ensure that the group lost a grant from the Department of Housing and Urban Development.

Martin Oesterreich, the city's homeless commissioner, denied wrongdoing but acknowledged that his job might have been forfeited if Housing Works had obtained that contract.

"That possibility could have happened," Mr. Oesterreich told a federal judge.

The mayor's fingerprints could not be found on every decision. But his enemies were widely known.

"The culture of retaliation was really quite remarkable," said Matthew D. Brinckerhoff, the lawyer who represented Housing Works. "Up and down the food chain, everyone knew what this guy demanded."

### **The Charter Fight**

The mayor's wartime style of governance reached an exhaustion point in the late 1990s. His poll numbers dipped, and the courts routinely ruled against the city, upholding the New York Civil Liberties Union in 23 of its 27 free-speech challenges during Mr. Giuliani's mayoralty. After he left office, the city agreed to pay \$327,000 to a black police officer who was fired because he had testified before the City Council about police brutality toward blacks. The city also agreed to rescind the firing of the caseworker who talked about a child's death.

In 1999, Mr. Giuliani explored a run for the United States Senate. If he won that seat, he would leave the mayor's office a year early. The City Charter dictated that Mark Green, the public advocate, would succeed him.



**ANDY HUMM** The gay activist says the Hetrick-Martin Institute was muzzled out of fear of losing financing for AIDS programs.  
Michelle V. Agins/The New York Times

That prospect was intolerable to Mr. Giuliani. Few politicians crawled under the mayor's skin as skillfully as Mr. Green. "Idiotic" and "inane" were some of the kinder words that Mr. Giuliani sent winging toward the public advocate, who delighted in verbally tweaking the mayor.

So Mr. Giuliani announced in June 1999 that a Charter Revision Commission, stocked with his loyalists, would explore changing the line of mayoral succession. Mr. Giuliani told The New York Times Magazine that he might not have initiated the charter review campaign if Mr. Green were not the public advocate. Three former mayors declared themselves appalled; Mr. Koch fired the loudest cannonade. "You ought to be ashamed of yourself, Mr. Mayor," he said during a news conference.

Frederick A. O. Schwarz Jr., chairman of a Charter Revision Commission a decade earlier, wrote a letter to Mr. Giuliani warning that “targeting a particular person” would “smack of personal politics and predilections.

“All this is not worthy of you, or our city,” Mr. Schwarz wrote.

Mr. Mastro, who had left the administration, agreed to serve as the commission chairman. He eventually announced that a proposal requiring a special election within 60 days of a mayor’s early departure would not take effect until 2002, after both Mr. Giuliani and Mr. Green had left office. A civic group estimated that the commission spent more than a million dollars of taxpayer money on commercials before a citywide referendum on the proposal that was held in November 1999.

Voters defeated the measure, 76 percent to 24 percent. (In 2002, Mayor Michael R. Bloomberg advocated a similar charter revision that passed with little controversy.)

Mr. Green had warned the mayor that rejection loomed.

“It was simple,” Mr. Green said. “It was the mayor vindictively going after an institutional critic for doing his job.”

None of this left the mayor chastened. In March 2000, an undercover officer killed Patrick Dorismond, a security guard, during a fight when the police mistook him for a drug dealer. The outcry infuriated the mayor, who released Mr. Dorismond’s juvenile record, a document that legally was supposed to remain sealed.

The victim, Mr. Giuliani opined, was no “altar boy.” Actually, he was. (Mr. Giuliani later expressed regret without precisely apologizing.)

James Schillaci, the Bronx whistle-blower, recalled reading those comments and shuddering at the memory. “The mayor tarred me up; you know what that feels like?” he said. “I still have nightmares.”

***A correction was made on Jan. 25, 2008:*** A front-page article on Tuesday about Rudolph W. Giuliani’s tenure as mayor of New York referred incorrectly in a quotation to the former director of a gay advocacy organization, the Hetrick-Martin Institute, who was mentioned in an anecdote about Mr. Giuliani’s power to silence critics. The former director, who was not named in the article, is a woman, not a man. Also, a caption referred imprecisely to Andy Humm, a gay activist and former worker at Hetrick-Martin who supplied the anecdote. He said it was the agency that was muzzled out of fear of losing financing for AIDS programs; he did not say that he muzzled himself.

---

When we learn of a mistake, we acknowledge it with a correction. If you spot an error, please let us know at [nytnews@nytimes.com](mailto:nytnews@nytimes.com). [Learn more](#)

[Real Estate](#)

# Investigators Dressed As Plumbers Spied On Pro-Lucerne Campaigner

An attorney for opponents of The Lucerne homeless shelter sent the spies to the apartment of a former resident known as "Da Homeless Hero."



Gus Saltonstall, Patch Staff

Posted Tue, Mar 23, 2021 at 1:30 pm ET Updated Thu, Mar 25, 2021 at 10:12 am ET



ADVERTISEMENT

An image of "Da Homeless Hero," speaking during a news conference at The Lucerne. (Shutterstock / Steve Sanchez Photos)

UPPER WEST SIDE, NY — The attorney for an Upper West Side group that has spent months pushing to move a temporary homeless shelter in a neighborhood hotel sent private investigators dressed as plumbers to the new home of a former resident and pro-hotel campaigner, according to new court documents.

ADVERTISEMENT

Ramone Buford — otherwise known as "Da Homeless Hero" — has become a central figure and voice in The Lucerne saga that has gripped the Upper West Side since the end of July.

Buford, who lived at the hotel, is also a petitioner urging the city to keep the homeless men on the Upper West Side rather than move them to a permanent shelter in the financial district.

---

Find out what's happening in Upper West Side with free, real-time updates from Patch.

Your email address

Subscribe

---

There are still over 100 men living in the UWS shelter, down from 283 when it

ADVERTISEMENT

Buford's role in the case, along with two other petitioners, is the reason that Attorney Randy Mastro says he sent private investigators to his new Harlem apartment.

ADVERTISEMENT

Mastro's team, along with the de Blasio administration, recently pushed the court to shut The Lucerne shelter, stating that Buford and the two other named petitioners have moved out of the Upper West Side facility and into permanent housing.

Buford had been homeless since the age of 10, before recently landing permanent housing in Harlem through the city at the end of February.

ADVERTISEMENT

Mastro sent the private investigators to Buford's new home to take a picture of him, in their words proving that Buford no longer lived in The Lucerne.

---

ADVERTISEMENT

The private investigators succeeded in taking a photo of Buford shirtless without his knowledge and submitted it in a March 12 legal filing.

"I was just getting to know what it's like to have a good night's sleep," Buford told Gothamist. "To now become a target of them is horrifying...I'm right back on guard. Every little sound I'm jumping up."

Mastro argues in a motion filed on Monday that he needed to hire the private investigators because Buford's attorney, Michael Hiller, continuously declined to acknowledge that Buford had moved out of The Lucerne.

Hiller denies this claim, according to the court documents.

Isaac McGinn, a spokesperson for the Department of Homeless Services, told the Gothamist that Mastro's deployment of disguised investigators was an "absolute egregious invasion of this individual's privacy."

"We are truly disheartened by this violation of Shams DaBaron's privacy and dignity in his own home. Actions like this exacerbate the trauma that people who have experienced homelessness struggle with every day," said Eric Rosenbaum, the CEO of Project Renewal, the organization that runs The Lucerne shelter and others across the city. "DaBaron has been a tireless advocate, mobilizing support for New Yorkers experiencing homelessness and helping to ensure that their voices are heard."

ADVERTISEMENT

The recent filings by Mastro were done so on behalf of the West Side Community Organization, a nonprofit that came out of a Facebook group of Upper West Siders who opposed the new homeless shelter in the neighborhood.

The group raised nearly \$200,000 this past summer to pay for legal fees in the

---

ADVERTISEMENT



The West Side Community Organization did not immediately respond to Patch regarding whether they knew of Mastro's decision to send private investigators pretending to be plumbers to Buford's home.

The story was first reported by the Gothamist.

*Get more local news delivered straight to your inbox. Sign up for free Patch newsletters and alerts.*

♡ Thank (1) ↗ Share

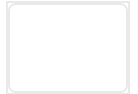


---

## More from Upper West Side

Arts & Entertainment | 1h

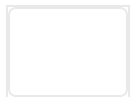
**'Only Murders' Back For Fourth Season On Tuesday**



---

Crime & Safety | 4h

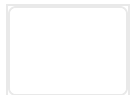
**Man Loses Rolex And More In Violent Midnight Mugging On UWS: Police**



---

Restaurants & Bars | 4d

**New UWS Gnocchi Spot Makes Pasta 'As Easy As Pizza Or A Cheeseburger'**



---

ADVERTISEMENT

---

ADVERTISEMENT

---

Find out what's happening in your  
community on the Patch app

### Corporate Info

[About Patch](#)

[Careers](#)

### Partnerships

[Advertise on Patch](#)

### Support

[FAQs](#)

[Contact Patch](#)

[Community Guidelines](#)

[Posting Instructions](#)



[Terms of Use](#) [Privacy Policy](#)

© 2024 Patch Media. All Rights Reserved.

[Do Not Sell My Personal Information](#)

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X

In the Matter of the Application of,

Index No. 0158550/2020

DOWNTOWN NEW YORKERS INC.;  
CHRISTOPHER BROWN; MEGAN KESSLER;  
and DAEMON O'NEIL,

Petitioners,

**AFFIDAVIT OF IAN ALTERMAN  
IN SUPPORT OF THE PROPOSED  
INTERVENORS/PETITIONERS**

For Judgment Pursuant to CPLR Article 78

-against-

THE CITY OF NEW YORK; BILL DE BLASIO, in  
his official capacity as Mayor of the City of New  
York; THE NEW YORK CITY DEPARTMENT OF  
HOMELESS SERVICES; and STEVEN BANKS, in  
his official capacity as Commissioner of the New  
York City Department of Homeless Services,

Respondents.

-----X

RAMONE BUFORD, LARRY THOMAS, and  
TRAVIS TRAMMELL,

Proposed Intervenors/  
Petitioners.

-----X

State of New York    )  
                          :.ss:  
County of New York  )

**IAN ALTERMAN**, having been duly sworn, deposes and says:

1. I am a non-congregational minister who has been working with Ramone Buford, Larry Thomas, and Travis Trammell, as well as their fellow residents (collectively, the "Lucerne Residents") at the Lucerne Shelter Hotel (the "Lucerne") Lucerne Residents for approximately the past two (2) months. I submit this Affidavit in support of the Lucerne Residents' Order to Show Cause seeking an order preventing the City of New York from forcibly relocating the

Lucerne Residents from the Lucerne on the Upper West Side to the Hotel Radisson (“Radisson”) in the Financial District in Downtown Manhattan (“Forced Relocation”). As discussed below, the Forced Relocation would be detrimental to the Lucerne Residents’ physical, psychological, emotional, and spiritual well-being, and result in increased instability and trauma.

2. My primary ministries are outreach to the homeless and pastoral counseling, most specifically on the Upper West Side of Manhattan. I have been engaged in this ministry since 2003. In the seventeen (17) years that I have been providing outreach to those experiencing homelessness, I have become intimately aware of the issues facing those who are homeless, both on the street and in shelters.

3. I am also a member of Open Hearts Initiative, a volunteer community group on the Upper West Side that provides moral and material support to the temporary homeless residents of the hotels, including a spiritual program called Soulful Walk & Talks (the “Program”). The Program was initially developed for the men at the Lucerne – *i.e.*, the Lucerne Residents. When the Program was first created, the leaders reached out to me to co-lead it with another minister.

4. As co-leader of the Program, I, along with my co-leader and other faith leaders, meet with small groups of the Lucerne residents at the hotel on specific days and times, and walk with them to a local park, where we engage the residents in a "safe space" environment, under strict confidentiality on the part of the faith leaders. This allows the Lucerne Residents to speak completely freely about any spiritual or personal matter that may be affecting them. The sessions last for approximately one hour, after which the faith leaders walk back to the Lucerne with the Lucerne Residents. All of the Lucerne Residents who have participated in the Program have expressed extreme gratitude for it, and the support, nurturing and succor that they are receiving through it is invaluable.

5. As co-leader of the Program, I have attended all sessions since the Program began - a total of at least twenty-five (25) to thirty (30) - and have met with many of the Lucerne residents during those sessions. Lucerne Residents Ramone Buford, Larry Thomas, and Travis Trammell are part of a "core" group of participants in the Program, all of whom have attended several sessions.

6. Without betraying confidentiality, I can state that one of the ongoing concerns of all of the Lucerne Residents with whom I have met has been the instability, havoc, and trauma caused by the several moves they have already made from one shelter to another since the onset of the Coronavirus pandemic. This destabilizing trauma has been cumulative, with each successive move producing an increase in their level of trauma. Note that this was among their greatest concerns even before the instant case.

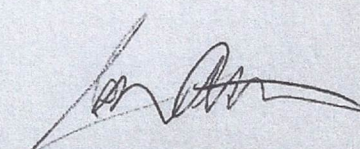
7. During the several sessions after the Lucerne Residents received the news that they were going to be moved yet again, I saw and heard a noticeable increase in their state of concern, in some cases bordering on panic. Some cried, and all were expressing feelings that I recognized as signs of dissociation. Many expressed this openly and verbally, including their fear of relapse, and self-harm: *i.e.*, that the trauma of the impending move could trigger the very issues and/or behaviors for which they are getting help, or are in recovery. While this did not rise to the level of urgent concern at the time, my belief is that these thoughts will be intensified were the move to actually take place, and thus residents would be at imminent risk of irreparable harm.

8. They also expressed fervent concern about losing access to the Program, since it is the only true "safe space" program being offered to them. The Lucerne Residents and other residents of the Lucerne trust me and the other co-leader of the Program – a trust that was initially difficult to establish.

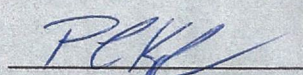
9. As a pastoral counselor who has worked with this population for almost two decades, I can state with a high degree of certainty that if the men – who have not only been successfully acclimated to the Lucerne and the neighborhood, but also have received the formal services provided by Project Renewal at the hotel, along with the many external services provided by Open Hearts Initiative and other groups and individuals - are moved for a fourth time, it will be *severely* detrimental to their physical, psychological, emotional, and spiritual well-being, causing acutely increased instability and trauma, and almost certainly "triggering" many of the men in various ways, including with respect to alcohol and/or drug use, thus setting them back in their recovery and their move toward securing permanent housing, in addition to the risk of potential injuries or deaths from self harm. By this, I mean that one or more men would be at risk for committing suicide.

10. For the reasons discussed above, I support the Lucerne Residents' petition and urge the Court to grant their Order to Show Cause.

Dated: October 18, 2020  
New York, New York

  
\_\_\_\_\_  
(REV.) IAN ALTERMAN

Sworn before me this 18<sup>th</sup> day of October, 2020

  
\_\_\_\_\_  
Notary Public

**PAUL KAMPFER**  
Notary Public, State of New York  
No. 02KA6142705  
Qualified in Westchester County  
Commission Expires March 20, 2022

*Notarization pursuant to Executive order 202.7*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
HOUSING WORKS, INC.,  
Plaintiff, 00 Civ. 3561 (VM)  
- against -

RUDOLPH GIULIANI, et al.,  
Defendants.

-----x  
HOUSING WORKS, INC., et al.,  
Plaintiffs, 00 Civ. 1122 (VM)  
- against -

JASON TURNER, et al.,  
Defendants.

-----x

May 21, 2001  
10:15 a.m.

200 Park Avenue  
New York, New York

DEPOSITION of RANDY M. MASTRO, a  
Defendant in the above entitled matter, taken  
pursuant to Notice, before Suzanne F. Moore, a  
Registered Professional Reporter, Certified Realtime  
Reporter, and a Notary Public of the State of New  
York.

1 RANDY M. MASTRO

2

3 A P P E A R A N C E S :

4

5 EMERY CUTI BRINCKERHOFF & ABADY, PC

6 Attorneys for Plaintiffs

7 545 Madison Avenue

8 New York, New York 10022

9

10 BY: MATTHEW D. BRINCKERHOFF, ESQ.

11

12

13 NEW YORK CITY LAW DEPARTMENT

14 OFFICE OF THE CORPORATION COUNSEL

15 Attorneys for Defendants

16 100 Church Street

17 New York, New York 10007-2601

18

19 BY: LAWRENCE S. KAHN, ESQ.

20

21 ALSO PRESENT:

22 CHARLES KING

23

24

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

RANDY M. MASTRO

IT IS HEREBY STIPULATED AND AGREED  
by and between the attorneys for the  
respective parties hereto, that all  
objections except as to form are reserved  
to the time of trial;

IT IS FURTHER STIPULATED AND  
AGREED, that the sealing and filing of the  
within deposition be waived;

IT IS FURTHER STIPULATED AND  
AGREED, that such deposition may be signed  
and sworn to before any officer authorized  
to administer an oath, with the same force  
and effect as if signed and sworn before  
the officer before whom said deposition  
was taken.

1                                   R A N D Y   M .   M A S T R O  
2   R A N D Y           M .   M A S T R O ,       called as a  
3                   witness, having been first duly sworn by  
4                   the Notary Public, was examined and  
5                   testified as follows:

6

7   EXAMINATION BY MR. BRINCKERHOFF:

8

9           Q           What is your full name?

10          A           Randy M. Mastro.

11          Q           What is your business address?

12          A           200 Park Avenue, New York, New  
13   York.

14          Q           Good morning, Mr. Mastro. We met  
15   off the record, but for the record, my name is  
16   Matthew Brinckerhoff.

17                       I represent the Plaintiffs in two  
18   cases, one of which you are a named Defendant,  
19   both brought by Housing Works and a variety of  
20   other individuals.

21                       Have you ever been deposed in a  
22   civil case before?

23          A           I have.

24          Q           When was the last time you did  
25   that?

1                                   RANDY M. MASTRO

2                   A           A number of years ago.

3                   Q           You also do litigation as an  
4 attorney, do you not?

5                   A           I do.

6                   Q           So I won't spend a lot of time  
7 explaining what's going to happen. You obviously  
8 know if quite well.

9                                   As you might imagine, I do expect  
10 that if for some reason I ask a question that you  
11 have difficulty understanding that you will let  
12 me know and therefore I can rephrase it and make  
13 it more easy for you to understand.

14                                  If you do not indicate to me that  
15 you have a problem understanding a question, I  
16 will assume that you do understand the question  
17 and that any answer that you give is complete and  
18 responsive and truthful.

19                                  Do you understand that?

20                   A           I understand the speech you just  
21 gave. Go ahead.

22                   Q           Do you agree that that is what you  
23 will endeavor to do?

24                   A           If I don't understand one of your  
25 questions I don't propose to answer it. I

1 RANDY M. MASTRO

2 propose to ask you to explain it.

3 Q I appreciate that, and can I  
4 assume that any answer that you give absent that  
5 kind of a request for clarification will be your  
6 best, most truthful, complete and responsive  
7 answer?

8 A I'm here to tell the truth as best  
9 I recall it of circumstances that occurred many  
10 years ago, and I will respond to your questions.

11 Q Thank you. Obviously if you want  
12 to take a break at any time you know you can ask  
13 to do that.

14 I would ask that you not ask to  
15 take a break when there's a question pending that  
16 you haven't answered yet. Is that okay?

17 A Fine.

18 Q Mr. Mastro, when was the first  
19 time that you were employed in city government?

20 A I'm sorry?

21 Q When was the first time you were  
22 employed in city government?

23 A January 1, 1994.

24 Q What position did you assume on  
25 January 1st of 1994?

1 RANDY M. MASTRO

2 A Chief of staff to Mayor Rudolph W.  
3 Giuliani.

4 Q For how long did you hold that  
5 position?

6 A Until sometime during the summer  
7 of 1996.

8 Q What position did you assume  
9 sometime in the summer of 1996?

10 A In the summer of 1996 I became  
11 Deputy Mayor for Operations.

12 Q For how long did you hold that  
13 position, as Deputy Mayor of Operations?

14 A Until June 30, 1998.

15 Q At which point you left city  
16 government, correct?

17 A I did.

18 Q And you became a partner here at  
19 Gibson, Dunn & Crutcher?

20 A I returned to Gibson, Dunn &  
21 Crutcher, where I had been a partner in the early  
22 '90s.

23 Q Actually one other preliminary  
24 question. Did you review any documents to help  
25 refresh your recollection in preparation for

1 RANDY M. MASTRO

2 today's testimony?

3 A Very few.

4 Q What documents did you review?

5 A As best I can recall sitting here  
6 now, my present recollection is that I saw a  
7 handful of documents that appeared to be either  
8 copies of e-mails or excerpts from what were  
9 regular reports that the agencies prepared, the  
10 e-mails being separate from the excerpts from the  
11 regular reports, and I saw one memo that came  
12 from HRA.

13 Q Who was it directed to, this  
14 particular memo from HRA?

15 A I don't recall the specific names  
16 on the memo. It was a memo, I do know it was a  
17 memo from HRA.

18 Q Concerning?

19 A Concerning Housing Works.

20 Q How long ago did you review these  
21 documents?

22 A At various times in the recent  
23 days or weeks.

24 Q Aside from a batch of --

25 A When I say these documents, it was

1                                   RANDY M. MASTRO  
2    a handful of documents, most of them, of the  
3    handful, I mean four or five. They were single  
4    pages, most of them.

5                                   One of them I think was more than  
6    one page, but the rest were single pages, as I  
7    recall, but again, you're asking me for my  
8    present recollection as I sit here today.

9                   Q           Right.

10                   A           It was a very small number, and  
11    that's what I can recall as I sit here today, but  
12    if you would like to show me documents I'd be  
13    happy to tell you whether I recall them and in  
14    what context I recall them.

15                   Q           Aside from e-mail excerpts,  
16    regular reports and this particular memorandum  
17    from HRA that you've identified, is there  
18    anything else that you reviewed to help refresh  
19    your recollection in preparation for today's  
20    testimony?

21                   A           Not that I recall.

22                   Q           Did you review any handwritten  
23    notes at all?

24                   A           Not that I recall, although I  
25    don't recall one way or the other whether there

1 RANDY M. MASTRO

2 were any handwritten notes on any of the  
3 documents that I did see.

4 Q And specifically did you review  
5 any documents that were exclusively handwritten  
6 notes with no typewritten or typefaced  
7 communication whatsoever?

8 A I already answered the question.  
9 I don't have a present recollection of having  
10 reviewed any such documents, but I don't recall  
11 one way or the other whether there were any  
12 handwritten notations on any of the documents in  
13 whole or in part.

14 Q Okay. Now, since you left city  
15 government on June 30th of 1998, have you  
16 received any business from the City of New York?

17 A I don't understand what you mean  
18 by the question.

19 Q Have you represented the City of  
20 New York or any of its officials or officers in  
21 litigation, perhaps?

22 A Well, since I had a case involving  
23 your firm, I guess you already know the answer to  
24 that.

25 Q Yes, I do actually, but obviously



1                                   RANDY M. MASTRO  
2       this is a different exercise that we're engaged  
3       here.

4                                   Aside from the one case that you  
5       know that I am aware of, have you done that in  
6       other instances as well since the summer of 1998?

7                                   MR. KAHN:   Can you clarify what  
8       you mean by that, "have you done that"?

9                                   MR. BRINCKERHOFF:   Sure, I'm  
10       sorry.

11                                  Q       Representing the City of New York  
12       or any of its officials in litigation.

13                                  A       The only matter that I recall as I  
14       sit here today in which anyone in city government  
15       retained me to represent them in connection with  
16       a matter was the representation of Guy Molinari,  
17       the Staten Island Borough President, who retained  
18       me to represent him in connection with a lawsuit  
19       that was brought on behalf of an individual and  
20       represented by your firm, which was later  
21       settled.

22                                  Q       That's the only one?

23                                  A       It's the only matter that I can  
24       recall as I sit here today in which I was  
25       retained to represent anyone in city government.

1                                   RANDY M. MASTRO

2                                   I have on a pro bono basis done a  
3 number of projects in connection with the city,  
4 but in terms of retention of me as counsel and  
5 any fee involved, the only matter that I can  
6 recall as I sit here today is the Staten Island  
7 Borough President, Guy Molinari, retained me and  
8 my firm to represent him in connection with that  
9 one litigation which your firm represented the  
10 Plaintiff.

11                   Q           Expanding the question a little  
12 bit to include any kind of retention, meaning a  
13 situation where you or your firm received money  
14 from the City of New York or any of its employees  
15 or officials, irrespective of whether it included  
16 litigation, are there any other matters that  
17 would fall within that definition since the  
18 summer of 1998 that you're aware of?

19                   A           I don't recall any, and the pro  
20 bono matters which didn't involve a fee that I  
21 referred to in an earlier answer.

22                                   The only matter of any type that I  
23 can recall as I sit here today in which I and my  
24 firm were retained to represent anyone in city  
25 government since I've left city government on



1                                   RANDY M. MASTRO  
2       opinion about the factual allegations that were  
3       contained in that Complaint that you read?

4                   A        I did.

5                   Q        What was your opinion?

6                                   MR. KAHN:  Objection to form.  You  
7       can answer.

8                   A        You're asking me for my legal  
9       conclusion about the sufficiency of the claims in  
10      the Complaint as they related to me?

11                  Q        I'm asking you about your opinion  
12      about the factual allegations that were contained  
13      in the Complaint, not your legal opinion, but  
14      just your opinion, what your reaction to that  
15      was, those allegations?

16                                  MR. KAHN:  Objection to form.  The  
17      question is a very broad one, since the  
18      Complaint contained many, many factual  
19      allegations.

20                                  Perhaps you want to direct the  
21      witness' attention to specific factual  
22      allegations.

23                                  MR. BRINCKERHOFF:  I prefer the  
24      question the way I phrased it.

25                  A        But I'm not sure, what is the

1 RANDY M. MASTRO

2 question that's pending?

3 THE WITNESS: So would you please  
4 read it back for me.

5 (The question requested was read  
6 back by the reporter.)

7 A Well, again, going on my  
8 recollection of, as I sit here now, I have not  
9 reviewed the Complaint or its factual allegations  
10 more recently, and I will limit my answer to the  
11 allegations that related to me, because that's  
12 what I focused on in reviewing the Complaint at  
13 the time, and as both a matter of law and fact,  
14 my recollection is that I considered the  
15 allegations to be unfounded, and that --

16 THE WITNESS: Why don't you read  
17 back what I said and I'll see if there's  
18 anything more I want to add at this time.

19 (The answer requested was read back  
20 by the reporter.)

21 A I'm sure there will be an  
22 opportunity to say more, but as a matter of law  
23 and fact, I considered the allegations to be  
24 unfounded as they related to me.

25 Q Mr. Mastro, is there any reason





1                                   RANDY M. MASTRO  
2    general question about a Complaint that I haven't  
3    reviewed in sometime and told you that I haven't  
4    reviewed it in sometime, so.

5                                   But my present recollection is  
6    that there was such a general allegation about  
7    whether there had been any violation of the  
8    Constitutional rights of Housing Works by me,  
9    others and the city in connection with, in my  
10   case a particular situation involving a  
11   particular contract, and I -- my recollection is  
12   that as a matter of law and fact I found the  
13   allegations that related to me unfounded.

14                               MR. KAHN: Can we take a break for  
15                               one minute?

16                               MR. BRINCKERHOFF: Sure.

17                               (At this point in the proceedings  
18                               there was a recess, after which the  
19                               deposition continued as follows:)

20                               Q       At any time at all, Mr. Mastro,  
21    have you ever reviewed any deposition transcripts  
22    involving any cases where Housing Works was a  
23    party?

24                               A       Not that I recall as I sit here  
25    today. I have no present recollection of having



1 RANDY M. MASTRO

2 reviewed transcripts.

3 Q Of --

4 A But that's my present  
5 recollection. You asked me about ever. I don't  
6 have any present recollection of it.

7 Q Were you informed in 1998, prior  
8 to your leaving city government, that Housing  
9 Works had noticed your deposition in a prior case  
10 related to the one that brings you here today?

11 A Are you referring to the case  
12 where the Appellate Division vacated and granted  
13 a preliminary injunction and remanded to a  
14 different judge?

15 Q Yes.

16 A That specifically centered on the  
17 same allegations in the Complaint here, the  
18 federal case brought here, where I have now been  
19 named, those allegations, is that the one you're  
20 referring to?

21 Q Yes.

22 A I don't recall one way or the  
23 other whether I had a deposition noticed in that  
24 case or not, but I was aware of the pendency of  
25 that other case and the Appellate Division's

1

RANDY M. MASTRO

2 ruling in favor of the city. Yes, I was aware of  
3 that.

4 Q You were aware of that case before  
5 the Appellate Division ruling, were you not?

6 A I was aware of it at each stage,  
7 yes.

8 Q Can you tell me what your job  
9 responsibilities were when you were chief of  
10 staff for the Mayor from '94 to '96?

11 A I'll refer you to something called  
12 the Green Book which is published about city  
13 government and related government offices that  
14 gives a description of the job duties of each  
15 city office, including what my job duties were as  
16 chief of staff, for a fuller explanation of the  
17 job duties of chief of staff.

18 But as chief of staff to Mayor  
19 Giuliani I was responsible for, among other  
20 things, overseeing certain of the offices in City  
21 Hall that were personal to the administration of  
22 the Mayor.

23 That would have been offices like  
24 Fiscal Affairs, for City Hall itself, not for the  
25 entire city government, scheduling, special

1                                   RANDY M. MASTRO  
2 events and special projects, advance.

3                                   Those functions relating to  
4 specifically to the Mayor and the Mayor's  
5 schedule and the Mayor's events.

6                                   I also oversaw personnel and the  
7 processing of personnel appointments and  
8 promotions.

9                                   I also served as a personal  
10 advisor and counsel to the Mayor, sitting in not  
11 only in his larger cabinet, but in his smaller  
12 daily kitchen cabinet.

13                                  And in that role, worked closely  
14 with him and others in city government in the  
15 formulation of certain policy or budget  
16 initiatives, and I personally was responsible for  
17 certain specific initiatives that he would  
18 delegate to me to coordinate.

19                                  I was chief of staff, for example,  
20 on the initiative to root out organized crime  
21 corruption at the Fulton Fish Market, and to  
22 develop a plan to do that.

23                                  Another such example would have  
24 been to develop a plan, a business plan to turn  
25 around the city's Off Track Betting Corporation,



1                                   RANDY M. MASTRO  
2     the way I should have described it, it was really  
3     a regular morning meeting for his senior staff.

4                                   I just meant that to suggest a  
5     smaller subset within the larger cabinet of city  
6     government as a whole.

7                   Q           Cabinet I assume including, when  
8     you're talking about the larger cabinet, all of  
9     the Commissioners, agency heads and --

10                  A           That's what I said, all of the  
11     Commissioners of city agencies attended the  
12     cabinet meetings.

13                  Q           And the regular morning meetings  
14     while you were chief of staff, what level of  
15     official or officer attended those meeting?

16                  A           The Deputy Mayors, chief of staff,  
17     the Mayor's counsel, and several other regular  
18     attendees, like the corporation counsel,  
19     Investigations Commissioner, some other senior  
20     staff members.

21                  Q           Any others that you can think of  
22     who attended regularly aside from the head of  
23     DOI, corp. counsel?

24                  A           At different points in time there  
25     were different people who attended regularly.

1                                   RANDY M. MASTRO

2                                   Nicholas Scarpetta, when he became  
3 Commissioner of Children's Services, it's my  
4 present recollection that he attended those  
5 meetings, as an example.

6                                   So once again, the list is  
7 inclusive, not exclusive.

8                   Q           One of the things that you  
9 mentioned, I think you said something about  
10 advance.

11                                  Is that advance planning,  
12 advance -- do you remember saying that?

13                   A           Yes.

14                   Q           And if so, what did you mean by  
15 that?

16                   A           Every time the Mayor goes to an  
17 event there's an individual who goes in advance  
18 of the Mayor's arrival to make appropriate  
19 preparations, and there's an individual who goes  
20 with the Mayor to the event. It's simply for  
21 planning purposes. That's what advance means.

22                                  And that's typical, to have that  
23 kind of -- elected officials typically have that  
24 kind of staff of that nature, so that someone has  
25 gone ahead in each event and made arrangements

1 RANDY M. MASTRO

2 for the elected official's arrival and someone is  
3 taking the elected official to the event, having  
4 been in touch with the person who has done the  
5 "advance" work.

6 Q When you first started working in  
7 city government for Mayor Giuliani in the  
8 beginning of 1994, was Fran Reiter already a  
9 Deputy Mayor?

10 A Fran Reiter was a Deputy Mayor on  
11 January 1, 1994.

12 Q Prior to working with her in city  
13 government had you ever interacted with her or  
14 worked with her in the past?

15 A I first met Fran Reiter sometime  
16 in 1993. I -- when I was outside counsel to the  
17 Giuliani campaign and she was working on the  
18 Giuliani campaign, but I don't recall  
19 specifically when.

20 Q Do you remember what her position  
21 was in city government in the beginning of '94,  
22 at the time you came on?

23 A I'm sorry, what her position was  
24 on January 1, 1994?

25 Q Or thereabouts.

1 RANDY M. MASTRO

2 A That was the first day of the  
3 Giuliani administration, and she was Deputy Mayor  
4 and I believe she was Deputy Mayor for, among the  
5 areas that she was responsible for were planning  
6 and community development or community relations,  
7 I'm not sure what her exact title was, but those  
8 were among the areas of responsibility that she  
9 had.

10 Once again, these are inclusive,  
11 not exclusive. Among the responsibilities she  
12 had were planning and a community development or  
13 community relations function.

14 Q Are you familiar with a man by the  
15 name of David Klasfeld?

16 A I am.

17 Q When did you first have any  
18 occasion to have interactions or work with  
19 Mr. Klasfeld?

20 A Sometime in 1994, I believe.

21 Q What were the circumstances?

22 A Sometime early on in the Giuliani  
23 administration I recall receiving, and it could  
24 have been late 1993, because after the Mayor was  
25 elected I was part of the transition team, and



1                                   RANDY M. MASTRO  
2       between November and the end of December I was  
3       involved in helping the Mayor elect organize new  
4       government.

5                                   So it could have been late '93,  
6       but my present recollection is that it was early  
7       '94 I received communication from one or more  
8       parties recommending David Klasfeld for a  
9       position within the administration.

10                                  And I forwarded the materials I  
11       had received, including materials about his  
12       background, to Fran Reiter, among others, for  
13       consideration.

14                                  I don't recall as I sit here now  
15       for sure a specific date on which I did that. I  
16       think it was early '94, it could have been late  
17       '93.

18                                  Q       Mr. Klasfeld was subsequently  
19       hired to work on Ms. Reiter's staff, was he not?

20                                  A       That's correct.

21                                  Q       He became her chief of staff, I  
22       believe, is that right?

23                                  A       That's correct.

24                                  Q       Is it fair to say over the years  
25       when you were Mayor Giuliani's chief of staff,

1                                   RANDY M. MASTRO  
2     that you had a fair amount of interaction with  
3     both Ms. Reiter and Mr. Klasfeld, her chief of  
4     staff?

5                   A           I don't know what you mean by a  
6     fair amount of interaction, but I did have  
7     interaction with both Fran and David.

8                                   Fran more often than David, but I  
9     had interaction with both during my tenure as  
10    chief of staff.

11                   Q           When you were chief of staff for  
12    the Mayor, who did you report to?

13                   A           I reported to the Mayor.

14                   Q           And when you became Deputy Mayor  
15    of Operations who did you report to?

16                   A           I reported to the Mayor.

17                   Q           Did there come a point in time  
18    where Mr. Klasfeld changed his job from being  
19    chief of staff for Ms. Reiter and ended up  
20    working as one of your subordinates when you were  
21    Deputy Mayor of Operations?

22                   A           Yes.

23                   Q           Do you remember when that  
24    occurred?

25                   A           I don't recall the specific date.

1                                   RANDY M. MASTRO

2   As best I can recall my present recollection  
3   would be that it was sometime in the summer of  
4   '97, but I'm --

5                                   I don't recall for sure when. It  
6   would have been sometime in '97, but I don't  
7   recall specific what date.

8                   Q           Is it true that Mr. Klasfeld  
9   became a member of your staff at some point after  
10   Ms. Reiter left city government to run Mayor  
11   Giuliani's re-election campaign?

12                   A           Yes.

13                   Q           So that would put it certainly  
14   sometime after the first month or two of 1997?

15                   A           I don't recall specifically when  
16   Fran left city government to run the Mayor's  
17   re-election campaign.

18                                   It was sometime during the early  
19   part of the year, February or March would be my  
20   best recollection, but again, I don't recall for  
21   sure.

22                                   Sometime thereafter, but not  
23   immediately, several months later, as I recall,  
24   David Klasfeld joined my staff. Not immediately.

25                   Q           What was his position when he was

1                                   RANDY M. MASTRO

2       working on your staff?

3                   A           I don't recall the specific job  
4       title. He was involved as a senior advisor in  
5       some capacity and was involved in housing issues,  
6       among others.

7                   Q           Can you tell me what your job  
8       responsibilities and duties were as Deputy Mayor  
9       of Operations, the job that you assumed in the  
10      summer of '96?

11                  A           Once again, there's something  
12      called the Green Book, and the Green Book will  
13      spell out more elaborate detail what the specific  
14      job duties were that I assumed when I became  
15      Deputy Mayor of Operations.

16                                Among the -- among my duties as  
17      Deputy Mayor of Operations were overseeing the  
18      operations of most city agencies, overseeing the  
19      city budget process, overseeing many of the  
20      mayoral offices involved in policy and  
21      operations, such as the Mayor's Office of  
22      Contracts and the Mayor's Office of  
23      Transportation, being the principal person  
24      responsible for intergovernmental relations, at  
25      all levels, city, state and federal, and acting

1                                   RANDY M. MASTRO  
2     on the Mayor's behalf when he was out of the  
3     jurisdiction.

4                                   Those were among the  
5     responsibilities I had as Deputy Mayor of  
6     Operations.

7                                   Once again that list is inclusive,  
8     not exclusive, and it included many other  
9     functions as well, but those were among the  
10    functions I was responsible for at the time.

11                                  And that same time, when I first  
12    became Deputy Mayor of Operations, I had also  
13    served as acting chair of the city's Trade Waste  
14    Commission.

15                                  I was also serving as Deputy  
16    Mayor, because after the Fulton Fish Market  
17    initiative, to weed out organized crime  
18    corruption at the Fulton Fish Market, I had also  
19    spearheaded an effort to root out organized crime  
20    corruption in the private carting industry.

21                                  That resulted in legislation that  
22    created the Trade Waste Commission, and I served  
23    on an acting basis as its first chair while I was  
24    also Deputy Mayor.

25                                  Q           Prior to becoming Deputy Mayor of

1                                   RANDY M. MASTRO

2   Operations, had you had any involvement at all or  
3   worked in any capacity with the Mayor's Office on  
4   Contracts while you were Mayor Giuliani's chief  
5   of staff?

6                   A           Not really, because the role of  
7   chief of staff did not involve overseeing agency  
8   contracts.

9                                   The role, as I explained before,  
10   and as the Green Book elaborates upon, involved  
11   the administration of City Hall of those  
12   particular offices and functions specifically  
13   serving the Mayor and his personal schedule.

14                                   So ordinarily I would not have  
15   been involved in, as chief of staff, in issues  
16   relating to specific agency contracts.

17                   Q           Are you familiar with an  
18   organization called, well, the acronym is HANAC,  
19   I assume you've heard of it, right?

20                   A           Yes.

21                   Q           First of all, let me ask you this,  
22   did you have any involvement at all with issues  
23   related to HANAC while you were chief of staff  
24   for the Mayor?

25                   A           I'm represented by counsel here,



1                                   RANDY M. MASTRO  
2     to inform me. I certainly became aware later,  
3     after a controversy arose about the award of  
4     those contracts, of the controversy, but I was  
5     not involved in any way, shape or form in the  
6     award of the HANAC contracts.

7                   Q           When that controversy arose, were  
8     you Deputy Mayor or chief of staff?

9                   A           I was chief of staff.

10                  Q           Let me ask you this, is it fair to  
11     say given the nature of the controversy when it  
12     did arise, that it was discussed at least in some  
13     way, shape or form in one or more of the daily  
14     meetings that you've referenced so far today?

15                  A           Well, you're asking me about my  
16     recollection of a wholly different contracting  
17     situation than the one that we're here today  
18     supposedly to get my testimony on, but I don't  
19     have specific recollections of specific  
20     conversations about the HANAC contracts. I was  
21     not involved in those contracting decisions.

22                               At the point in time at which I  
23     became aware of issues about those contracts,  
24     such that it had arisen as a public issue, where  
25     there might have been discussion, I don't recall



1                                   RANDY M. MASTRO  
2   having participated in such discussions, so --  
3   because there was a review of the contracts going  
4   out, and therefore there was care taken for there  
5   not to be larger group discussions about the  
6   contract when the issue arose.

7                                   And as I said, I was not involved  
8   in any of the decisions about whether to award  
9   HANAC the contracts, so I'm not aware of whether  
10  there were any discussions at that time in a  
11  larger group or not, but at the time at which I  
12  became aware of the issues regarding HANAC  
13  contracts, it arose as a public issue in a period  
14  after the contracts had already been awarded.

15                                  And as I said, because there was a  
16  review going on of how the contracts were  
17  awarded, there was care taken not to have group  
18  discussions, so that that review would involve  
19  each individual being able to provide whatever  
20  their own recollection was of the situation.

21                                  So I don't recall any specific  
22  group conversations about the HANAC contracts at  
23  that time.

24                                  You're asking for my present  
25  recollection of events that happened five years

1                               RANDY M. MASTRO  
2   ago, almost five years ago that has nothing to do  
3   with this litigation, but my present recollection  
4   is that I don't have a present recollection of  
5   group conversations about HANAC contracts.

6               Q           Correct me if I'm wrong, but you  
7   do have a recollection, do you not, that there  
8   was a specific effort made not to have group  
9   conversations in these daily meetings about the  
10  HANAC related issues, at least once the  
11  controversy arose, as you said.

12              A           I have a specific recollection  
13  that when the public controversy arose, there was  
14  a review done of the HANAC contracts, and that  
15  therefore my recollection is that we did not meet  
16  as a group to discuss it, that's my recollection,  
17  because there was that review going on.

18              Q           In your experience over the years  
19  in city government, has it been your experience  
20  or observation that when there are public  
21  controversies that generate a fair amount of  
22  press, that those controversies or the issues  
23  related to those controversies typically get  
24  discussed in these daily meetings with the Mayor?

25              A           I wouldn't put it that way.

1                                   RANDY M. MASTRO

2    There's a limit to how much one can -- how many  
3    issues one can discuss, how many issues get  
4    raised at a morning meeting with the Mayor.

5                                Some issues of public interest  
6    would get discussed at the morning meeting, some  
7    others would not, and individual Commissioners or  
8    Deputy Mayors would be expected to be on top of  
9    those issues.

10                              Because there are so many issues  
11    that arise during the course of each day that  
12    ultimately rise to the level of a public issue,  
13    that not every issue can be discussed at morning  
14    meetings, and not every issue can be discussed  
15    with the Mayor personally.

16                              So some issues are discussed at  
17    morning meetings, some issues are discussed with  
18    the Mayor personally, many issues are handled  
19    directly by Commissioners and/or Deputy Mayors  
20    that do not rise to the level of being discussed  
21    at the morning meeting or being discussed with  
22    the Mayor.

23                              It depends on the circumstances,  
24    the time constraints, what other issues are going  
25    on at the time.

1 RANDY M. MASTRO

2 Q I assume that aside from the  
3 morning meetings from time to time while you were  
4 chief of staff the Mayor or you working on his  
5 behalf would schedule specific meetings, not  
6 group meetings, but specific meetings to discuss  
7 various issues of public concern. Is that true  
8 or not?

9 A There would be occasions where  
10 there would be separate meetings scheduled to  
11 discuss issues of public interest or public  
12 concern.

13 Q Do you recall attending or  
14 scheduling any such meetings related to the HANAC  
15 controversy at all?

16 A I personally do not. You're  
17 asking me for my present recollection of events  
18 that happened five years ago, almost five years  
19 ago. I don't have any present recollection of  
20 scheduling such meetings.

21 But once again, because when I  
22 became aware of the public issue regarding the  
23 HANAC contracts, which was a period sometime  
24 after the contracts had already been awarded,  
25 there was already a review going forward, so I

1                                   RANDY M. MASTRO  
2    don't recall attending any group meetings  
3    relating to HANAC contracts.

4                   Q           Just so I understand your  
5    nomenclature, when you say a group meeting, that  
6    would include a meeting specifically set up with  
7    the Mayor and anyone else who seemed pertinent at  
8    the time to discuss specifically HANAC.

9                                   That would be a group meeting?

10                   A           I don't recall attending any kind  
11   of specially scheduled meeting of a larger group  
12   of people to review issues relating to how the  
13   HANAC contract was awarded and what should be  
14   done about it.

15                                   I recall I was not involved -- I  
16   recall that I was not involved in the contracting  
17   decision originally on HANAC.

18                                   I recall that I subsequently  
19   learned about it when it became a public issue,  
20   at the time it became a public issue, and I  
21   recall that at that same time a review was to be  
22   conducted of how the contract was awarded, and I  
23   don't have any present recollection of having  
24   participated in any specially scheduled group  
25   meetings about the HANAC -- how the HANAC

1                                   RANDY M. MASTRO  
2       contract came to be awarded, at that time or  
3       thereafter.

4                                   And I'm giving you my present  
5       recollection of events that happened five years  
6       ago, almost five years ago.

7                                   This was not a subject that seemed  
8       to me in any way, shape or form related to this  
9       deposition and certainly wasn't the subject of  
10      any deposition preparation or review, so I'm  
11      giving you my present recollection as I sit here  
12      today.

13                                  If you'd like to show me something  
14      to try and refresh my recollection I'd be happy  
15      to look at it, but I don't have any present  
16      recollection of any, attending any such specially  
17      scheduled meeting.

18                                  Q        You'll be happy to hear I think  
19      this is the last question on this topic, but  
20      aside from your testimony so far about  
21      specifically scheduled meetings and group  
22      meetings related to HANAC after the controversy  
23      arose, did you have any discussions at all with  
24      the Mayor about the HANAC controversy while you  
25      were in city government?

1                                   RANDY M. MASTRO

2                   A           I am sure that there were  
3 occasions when --

4                                   MR. KAHN: I'm just going to  
5 interrupt for one moment to advise the  
6 witness not to answer anything with  
7 regard to the content of any discussion  
8 he might recall, because that is a  
9 privileged discussion.

10                                   THE WITNESS: It's not necessary  
11 for you to give me the instruction.

12                   A           Because I'm sure that there must  
13 have been occasions where there was some mention  
14 of HANAC, including when whatever review or  
15 investigation was done ended, without any finding  
16 adverse to anyone in the administration.

17                                   But I don't recall as I sit here  
18 today the substance of any conversation with the  
19 Mayor about HANAC, I have no present recollection  
20 of it.

21                                   You're talking about events that  
22 go back in some cases five years, but in all  
23 cases, multiple years, and I don't have any  
24 present recollection.

25                   Q           When you were chief of staff for

1                                   RANDY M. MASTRO  
2     the Mayor, were you involved in any way in  
3     setting or planning the agenda for the morning  
4     meetings?

5                   A           The way the morning meetings are  
6     conducted is that the Mayor chairs the meeting,  
7     and literally we go around the room and each  
8     person, if they want to raise something, has the  
9     opportunity to raise it.

10                   Q           So I take it based on your  
11     experience there is no written agenda for these  
12     morning meetings.

13                   A           I don't have any recollection of  
14     written agendas for the morning meetings. As to  
15     whether there ever were any, I don't have any  
16     recollection of it as I sit here now, and my  
17     recollection of the way the morning meetings  
18     occurred was that the Mayor would chair, and in  
19     the Mayor's absence the Deputy Mayor.

20                               When I became Deputy Mayor of  
21     Operations I would chair if he were absent, and  
22     you'd go around the room and each person would  
23     have the opportunity to raise an issue.

24                               That didn't mean given the time  
25     constraints that you raised every issue that may







1                                   RANDY M. MASTRO  
2       Operations I asked her to be my chief of staff,  
3       which she agreed to do.

4                                   So it would have been the summer  
5       of '96, and for a period of time she not only  
6       served as my chief of staff, she continued to  
7       initially also fulfill her old duties as well,  
8       overseeing that mayoral office until a  
9       replacement could be found for her in that  
10      position.

11                               Q       Is it safe to assume that given  
12      the fact that you selected her to be your chief  
13      of staff, that you had confidence in her  
14      abilities and her performance, at least in that  
15      time, in the summer of '96?

16                               A       Given her exceptional background,  
17      as an executive at major investment firms,  
18      overseeing administration of Human Resources, as  
19      a successful Deputy Commissioner of Personnel,  
20      and as a successful director of the Mayor's  
21      Office of Administration and Fiscal Affairs, I  
22      had, it would be fair to say that I had  
23      tremendous confidence in her, not only from my  
24      personal experiences, but from the experiences of  
25      others when I asked her to be my chief of staff

1                                   RANDY M. MASTRO

2       during my tenure as Deputy Mayor.

3                                   MR. BRINCKERHOFF: Did you want to  
4                   take a break? That's fine.

5                                   (At this point in the proceedings  
6                   there was a recess, after which the  
7                   deposition continued as follows:)

8                   Q           When did Ms. Barkan cease  
9       functioning as your chief of staff?

10                   A           Once again, I don't recall the  
11       specific date, but it would have been sometime in  
12       early '98 or the end of '97. Sometime in that  
13       time frame, late '97 or early '98.

14                   Q           So it was before you left city  
15       government, right?

16                   A           Yes.

17                   Q           Why did she leave, if you know?

18                   A           She decided that she wanted to  
19       pursue interests in the private sector. She had  
20       served with distinction for several years in the  
21       public sector, and I think the reasons that she  
22       chose to leave would be best put to her, because  
23       she can explain them better than I can.

24                                   But I certainly missed her,  
25       because I thought she was terrific.

1                                   RANDY M. MASTRO

2                   Q           Who replaced her?

3                   A           A woman named Lisa Parrish, and  
4 she left to be the Deputy Director of OMB  
5 sometime in '98.

6                   Q           Was she your chief of staff until  
7 you left city government?

8                   A           Well, I left not very long after  
9 Luellen left, so Luellen was not my chief of  
10 staff.

11                  Q           I'm sorry, I could have been more  
12 clear. Was Lisa Parrish your chief of staff  
13 until the point at which you left city  
14 government?

15                  A           The few months? I think she was  
16 still the chief of staff at that point in time,  
17 but as I was preparing to leave, I was also  
18 working with people on finding new positions, so.

19                  Q           When is the first time you ever  
20 heard about or became aware of the organization  
21 called Housing Works?

22                  A           I don't recall when the first time  
23 was that I became aware of the organization  
24 Housing Works, but it would have been sometime  
25 during my tenure in City Hall, that I first

1                                   RANDY M. MASTRO  
2 became aware of the organization Housing Works.

3                   Q           It's true, is it not, that  
4 sometime in '94 and/or '95 an issue arose in city  
5 government that received considerable press  
6 attention that involved whether or not the  
7 Giuliani administration was considering  
8 abolishing part of HRA called the Division of  
9 AIDS Services.

10                                   Do you remember that?

11                   A           I do recall the issue.

12                   Q           Was that something you first found  
13 out about as a result of news and press coverage,  
14 or were you involved prior to that?

15                   A           Before the issue arose as a public  
16 issue I was aware of the issue about the status  
17 of the Division of AIDS Services from policy and  
18 budget discussions within the administration in  
19 which I participated.

20                   Q           Those policy and budget  
21 discussions involved discussions about whether or  
22 not the Division of AIDS Services itself should  
23 be abolished, so to speak, and that those  
24 services would be provided by HRA as a general  
25 matter, is that correct?

1                                   RANDY M. MASTRO

2                   A           I'm turning to my counsel now  
3 about whether I'm permitted to testify about  
4 those kinds of policy discussions.

5                                   MR. KAHN: You may answer the  
6 question.

7                   A           They involved a broader range of  
8 alternatives than what you described in your  
9 question.

10                   Q           First of all, let me ask you this,  
11 the one alternative I described, that was one of  
12 the options, was it not?

13                   A           The alternatives ranged from keep  
14 the Division of AIDS Services and continue to  
15 fully fund it, to a variety of intermediate steps  
16 that would have involved restructuring within the  
17 agency.

18                                   And among the possible  
19 alternatives in connection with a restructuring  
20 as I recall sitting here now, six, seven years  
21 later, my present recollection is among the  
22 possible alternatives was a restructuring that  
23 would have involved no longer having a Division  
24 of AIDS Services and having the functions  
25 performed by other parts of that unit.

1                                   RANDY M. MASTRO

2                   Q           In fact, didn't that possibility,  
3 the possibility of not having a Division of AIDS  
4 Services, wasn't that reported in the press and  
5 did it not result in considerable public  
6 controversy?

7                                   MR. KAHN:  Objection as to form.

8                   A           I recall the issue first and  
9 foremost because of internal discussions within  
10 the administration about the Division of AIDS  
11 Services.

12                                   Then subsequently I recall that  
13 there were public issues about the Division of  
14 AIDS Services.

15                   Q           Isn't it true that the genesis of  
16 those public issues about the Division of AIDS  
17 Services were reports in the press that the  
18 Giuliani administration had decided to abolish  
19 that agency?

20                   A           I don't recall the nature of the  
21 specific press reports at the time.  I know they  
22 reported at the time on the ongoing discussion  
23 about the status of the Division of AIDS  
24 Services, but I don't recall whether the way you  
25 characterized the articles was the way they



1                                   RANDY M. MASTRO

2       appeared in the press or not.

3                                   I know and recall the internal  
4       discussions about that and the views that I had  
5       on that subject, but I don't recall as I sit here  
6       now, six, seven, years later, specifically how  
7       the press characterized the situation, prior to  
8       the final decision having been made.

9                   Q           While you were chief of staff for  
10       Mayor Giuliani did you read the local newspapers  
11       on a regular basis?

12                   A           I did.

13                   Q           Were there any ones in particular  
14       that you made it a point to read, or did you read  
15       them all?

16                   A           Time permitting I tried to read  
17       them all. The operative words there being time  
18       permitting.

19                   Q           Did you also receive press  
20       clippings as part of your job that were provided  
21       to you that focused specifically on matters  
22       related to city government?

23                   A           There were daily press clippings  
24       that were distributed, and I was on the  
25       distribution list.

1                                 RANDY M. MASTRO

2                     Q             Did you as a matter of course have  
3 a practice of reading those clippings on a daily  
4 basis?

5                     A             Once again, time permitting I  
6 would either read the newspapers themselves or  
7 the press clippings that were distributed on a  
8 daily basis. Once again the operative words  
9 being time permitting.

10                    Q             Did that practice with the  
11 operative words being time permitting continue  
12 when you became Deputy Mayor of Operations in the  
13 summer of 1996 until you left city government?

14                    A             I certainly attempted to read the  
15 papers throughout my tenure in city government.  
16 Once again, it's a question of time permitting me  
17 to do so.

18                    Q             Was it your experience that as a  
19 general matter you usually managed to at least  
20 get through the clippings on a daily basis?

21                    A             On a daily basis ordinarily I was  
22 able to do some scanning of some papers, not  
23 necessarily the clippings that came around.

24                                 On the trip to the office in the  
25 morning I was usually able to review at least one

1                                   RANDY M. MASTRO  
2 newspaper, but I wouldn't describe any ordinary  
3 practice, because each day had its own unique  
4 challenges.

5                                   But as I said before, I certainly  
6 attempted to review the papers or press  
7 clippings, time permitting.

8                                   I was not always successful and  
9 time did not always permit me to do so.

10                               Q       Is it fair to say that on those  
11 occasions when you were able to review at least  
12 one of the papers that you focused primarily on  
13 issues relating to city government, given the  
14 nature of your job, in conducting that review of  
15 the newspaper or newspapers?

16                               A       It would be fair to say that when  
17 I read the papers during my tenure in city  
18 government, among the things that I would review  
19 were the articles on city government,  
20 particularly as they related to an issue that I  
21 was personally involved in.

22                                   But they were not the only things  
23 I reviewed in the newspapers. I would read for  
24 broader content than just that.

25                               Q       While you were in city government



1                                   RANDY M. MASTRO

2                   was a change in my view at any point, so.

3                                   MR. BRINCKERHOFF: That might make  
4                   it easier.

5                                   THE WITNESS: So the question is  
6                   whether I can answer.

7                                   MR. KAHN: Yes, you can answer.

8                   A           My consistent view was that the  
9                   Division of AIDS Services should be retained.

10                   Q           Did you have a view --

11                   A           And as I recall that was the  
12                   ultimate outcome, and this was in '94, that that  
13                   was the ultimate outcome, the Division of AIDS  
14                   Services was retained.

15                   Q           Did you have a view about how if  
16                   at all it should be restructured, notwithstanding  
17                   retention?

18                   A           I had a view that we should retain  
19                   the Division of AIDS Services in the basic  
20                   structure in which it existed at the time we came  
21                   into city government, meaning when the Giuliani  
22                   administration entered office. That's my  
23                   recollection.

24                   Q           Do you have any recollection about  
25                   whether or not you held a view at any time while

1                                 RANDY M. MASTRO  
2     you were in city government where this was an  
3     issue, restructuring, that is, about specific  
4     ways that the division should be restructured?

5                 A             The recollection that I have was  
6     of the controversy in 1994 of the status of the  
7     Division of AIDS Services and whether to  
8     restructure it or eliminate it, as I testified  
9     about earlier.

10                                There were a number of  
11     possibilities, including eliminating it and  
12     having its functions picked up by others or  
13     maintaining it.

14                                And I recall that I personally  
15     favored retaining it and not restructuring it or  
16     eliminating it at that point in time.

17                                There were subsequent times when I  
18     think the head of the division and other issues  
19     that developed about it subsequently, but the  
20     questions you've been asking about and that I've  
21     been responding to in this regard are my  
22     recollections, specific recollections that I have  
23     as I sit here now years later, are about that  
24     particular public issue that arose early on in  
25     the Giuliani administration's tenure, I believe

1                                   RANDY M. MASTRO  
2     it was in '94, about the status of the Division  
3     of AIDS Services, and I favored maintaining the  
4     Division of AIDS Services.

5                   Q       And --

6                   A       And as I recall, it was  
7     maintained.

8                   Q       At that time, when you held the  
9     view that the Division of AIDS Services should be  
10    retained, what was the Mayor's view?

11                   MR. KAHN:  Objection to the extent  
12                   that your answer would be informed by  
13                   discussions that you had with the Mayor  
14                   as a privileged conversation absent some  
15                   showing of a substantial need for this  
16                   information.

17                   MR. BRINCKERHOFF:  What privilege  
18                   are you claiming?

19                   MR. KAHN:  Deliberation privilege.

20                   MR. BRINCKERHOFF:  The  
21                   deliberative process privilege?

22                   MR. KAHN:  Correct.

23                   A       The ultimate resolution speaks for  
24     itself.  The Division of AIDS Services was  
25     retained at that time, and that's all, given the

1                   RANDY M. MASTRO  
2 instruction of counsel, needs to be said on the  
3 subject at this point.

4                   MR. BRINCKERHOFF: We can mark  
5 that one for a ruling.

6           Q        Can you tell me what Fran Reiter's  
7 view was on the retention of the Division of AIDS  
8 Services at that time?

9                   MR. KAHN: Same objection, same  
10 instruction.

11                  MR. BRINCKERHOFF: Instruction not  
12 to answer?

13                  MR. KAHN: Correct, in light of  
14 the fact that that's a privileged  
15 conversation in the absence of any  
16 demonstration of a substantial need for a  
17 response to that question.

18                  MR. BRINCKERHOFF: We'll mark that  
19 one for a ruling, too.

20           Q        Now, when this issue of the  
21 question of whether or not to retain the Division  
22 of AIDS Services became public, there were a  
23 whole host of different demonstrations and  
24 marches and protests, were there not?

25           A        I recall that there were public



1                                   RANDY M. MASTRO  
2    issues raised, and I recall that there were, some  
3    of those public issues raised involved  
4    demonstrations or group activity.

5                   Q        Was that something you paid  
6    attention to when you were chief of staff for  
7    Mayor Giuliani, large public demonstrations,  
8    marches, sit-ins, civil disobedience, things of  
9    that nature?

10                  A        It is something that I ordinarily  
11    would have become aware of if it were happening  
12    in the proximity of City Hall, City Hall Park,  
13    during the early part of the Giuliani  
14    administration, although not limited to the early  
15    part of the Giuliani administration.

16                                There were a number of such  
17    demonstrations or group gatherings by a variety  
18    of groups on a variety of issues.

19                                So those kinds of demonstrations  
20    or group gatherings during my tenure in City Hall  
21    were not uncommon.

22                                So would I ordinarily have been  
23    made aware of them, particularly in proximity to  
24    City Hall and City Hall Park? I would ordinarily  
25    have been made aware of them, but they were not

1                                   RANDY M. MASTRO

2   uncommon events and not limited to any particular  
3   group or issue.

4                   Q           For instance, if there was a large  
5   march conducted over the Brooklyn Bridge, ending  
6   up with a demonstration in City Hall Park, that  
7   would be the kind of thing that you would  
8   ordinarily be apprised of or aware of while you  
9   were chief of staff, right?

10                  A           Incorporating by reference my  
11   prior answer, there would have been a number of  
12   such demonstrations on a number of issues by  
13   different groups, so while ordinarily I would  
14   have been apprised of such an issue, it would not  
15   have been uncommon for there to be a protest in  
16   or around City Hall or City Hall Park, and a  
17   number of them involved people marching over the  
18   Brooklyn Bridge.

19                  Q           Indeed, there was such a march and  
20   a process involving this issue that we've been  
21   talking about, was there not, the issue of what  
22   was to be done with the Division of AIDS  
23   Services?

24                  A           I don't specifically recall the  
25   specific nature of the demonstrations or the



1                                   RANDY M. MASTRO  
2     were protesting against the Mayor's anticipated  
3     action.  The protesters anticipated that the  
4     Mayor would act in the way of eliminating the  
5     Division of AIDS Services rather than retaining  
6     it.

7                                   And then the protesters learned  
8     that the Mayor had in fact decided to retain the  
9     Division of AIDS Services.

10                   Q            So that's the demonstration you  
11     have a specific recollection of?

12                   A            I do.

13                   Q            Did you observe any of that  
14     demonstration?

15                   A            I may have observed some of it,  
16     and I remember it because upon learning that the  
17     Mayor had decided to retain the Division of AIDS  
18     Services, the protest then changed to a protest  
19     that the Mayor should have given more money to  
20     AIDS services, so that's what I recall about it  
21     at the time.

22                                   That it started off with signs and  
23     placards about eliminating the Division of AIDS  
24     Services, and then, upon learning that he was  
25     going to retain the division, had turned into a

1 RANDY M. MASTRO

2 wholly different protest.

3 Q I take it the announcements took  
4 the wind out of their sails, so to speak?

5 A I don't know what it did to the  
6 protesters, but I know that the decision was to  
7 retain the Division of AIDS Services.

8 Q Tell me if I'm wrong, but being  
9 the chief of staff for the Mayor at the time I  
10 assume it was something that you sort of enjoyed,  
11 seeing the protesters proved wrong about the  
12 assumptions they were making that day?

13 MR. KAHN: Objection.

14 A As the Mayor's chief of staff what  
15 I was pleased about that day was the fact that as  
16 a policy position the Division of AIDS Services  
17 had been retained.

18 As I said before, it was  
19 consistently my view during that period that the  
20 Division of AIDS Services should be retained.

21 So I was pleased to see that as  
22 the policy that the administration embodied in  
23 the budget. That's what I was pleased about.

24 Q Was it not a concern of yours as a  
25 general matter during the time that you were in

1                                   RANDY M. MASTRO  
2    city government how the public perceived what the  
3    administration was doing, just as a general  
4    matter?

5                                   I would assume that would have  
6    been one of the issues that would have concerned  
7    you. Am I right about that, or not?

8                   A        Many issues concerned me when I  
9    was in City Hall.

10                  Q        And that was one of them, was it  
11   not?

12                  A        Such a broad question as that one  
13   is almost impossible to respond to, but if you're  
14   asking about --

15                               MR. KAHN: Well, if you have  
16   difficulty understanding the question I  
17   understand why you do and I'll object to  
18   it as to form.

19                               If you can rephrase it and perhaps  
20   narrow it, and I would hope, I understand  
21   the need for background questions and  
22   general questions, but you would get to  
23   questions about Housing Works  
24   specifically to the extent that they bear  
25   directly on the issues in this case

1                                   RANDY M. MASTRO

2                   fairly soon.

3                                   MR. BRINCKERHOFF: I'm surprised  
4                   you hadn't noticed. I think I'm already  
5                   there, but anyway, we can talk about that  
6                   sometime else.

7                   A            Relating to me, relating to me.  
8                   You haven't asked a single question about the  
9                   allegations in the Complaint relating to me, but  
10                  please, go ahead.

11                  Q            Thank you.  
12                                  My only question was you testified  
13                  I believe that there were a variety of issues  
14                  that concerned you while you were in city  
15                  government, and all I was asking was what I  
16                  thought would be a fairly simple thing for you to  
17                  affirm, and that is, isn't it true that one of  
18                  the variety of issues that concerned you while  
19                  you were in city government was the way the  
20                  public perceived decisions and actions that were  
21                  taken by the Giuliani administration?

22                                  Is that not the case?

23                  A            Once again you ask a very broad  
24                  question and are asking me to extrapolate from a  
25                  wide array of concerns and interested that I had





1                                   RANDY M. MASTRO

2                   question, please.

3                                   (The question requested was read  
4                   back by the reporter.)

5           A           Would I have wanted accuracy in  
6   public reports about the policies of the Giuliani  
7   administration?

8                                   I think anyone in the positions  
9   that I held would have wanted accuracy in the  
10   public reports about the policies of the  
11   administration in which they served.

12           Q           Okay. Do you think there was a  
13   point in time where that was not occurring, where  
14   the public at large and the people who were  
15   demonstrating about these Division of AIDS  
16   Services issues had some inaccurate information?

17           A           As I am not privy to the  
18   information that they had. You best ask them  
19   what information they had at the time.

20                                   So I really couldn't address the  
21   information that they had, other than to the  
22   extent that I recall the one particular instance  
23   of the day the Mayor announced the budget and the  
24   demonstrators that day assumed the Mayor was  
25   going to make a decision to abolish the Division

1                                   RANDY M. MASTRO  
2   of AIDS Services, and he in fact made an  
3   announcement in the context of his budget that  
4   the Division of AIDS Services was being preserved  
5   and retained.

6                                   But that's the extent of what I  
7   recall on that subject.

8                   Q       Do you remember a demonstration  
9   sometime in '94 or '95 where demonstrators who  
10  were demonstrating on behalf of people with HIV  
11  and AIDS blocked various bridges and tunnels,  
12  preventing traffic from flowing in and out of  
13  Manhattan?

14                   A       As I sit here today, seven years  
15  later, I do not have any present recollection of  
16  specific protests.

17                                   I have a general recollection that  
18  there were a number of protests involving AIDS  
19  services, as I said before, but I don't have any  
20  specific recollection as I sit here today about  
21  specific protests at specific times involving  
22  specific events or specific actions involving the  
23  Division of AIDS Services other than as I've  
24  already testified.

25                   Q       Let me ask you this --

1 RANDY M. MASTRO

2 A Just the one instance the day the  
3 Mayor announced his budget in '94.

4 Q Right. Let me ask you this,  
5 you're familiar, are you not, with an  
6 organization that goes by and went by the acronym  
7 Act Up?

8 A I am.

9 Q You knew about that organization  
10 before you even started working in the Giuliani  
11 administration, did you not?

12 A I did.

13 Q By the time these demonstrations  
14 were taking place early on in the Giuliani  
15 administration that involved protests against  
16 this perception that the administration was going  
17 to abolish the Division of AIDS Services, you  
18 were already familiar with Housing Works, were  
19 you not?

20 A I personally?

21 Q Yes.

22 A You mean in the spring of '94?

23 Q Whenever it was that these  
24 demonstrations were occurring.

25 MR. KAHN: Could you reread the

1                                   RANDY M. MASTRO

2                   question, please.

3                                   (The question requested was read  
4                   back by the reporter.)

5           A           As I testified before, I don't  
6           have any specific recollection of when I first  
7           became aware of the organization Housing Works.

8                                   I don't have a specific  
9           recollection ever having been aware of that  
10          organization prior to entering city government on  
11          January 1, 1994, but I'm giving you a present  
12          recollection of events that happened years ago.

13                                  I know that after I entered the  
14          Giuliani administration on January 1, 1994 I  
15          became aware of an organization known as Housing  
16          Works at some point after that.

17                                  I do not recall specifically when  
18          I became aware of that organization.

19          Q           When you became aware of Housing  
20          Works as an organization at some point after  
21          entering city government, you became aware, did  
22          you not, that Housing Works was an aggressive  
23          advocate on behalf of people with HIV and AIDS  
24          who typically engaged in many protest activities  
25          that were critical of the Giuliani

1                                   RANDY M. MASTRO

2       administration.

3                                   That's right, isn't it?

4                                   MR. KAHN:  Objection as to form.

5                   A            You've used a lot of adjectives in  
6       there, so I will respond to your question in the  
7       following way.

8                                   At some point after January 1,  
9       1994 I became aware of an organization known as  
10      Housing Works, and at some point after January 1,  
11      1994 I became aware that Housing Works was  
12      involved in demonstrations or public gatherings  
13      in relation to issues involving housing and AIDS  
14      services.

15                   Q            For all you know sitting here  
16      today you were aware of that sometime in '94 when  
17      these demonstrations were taking place, were you  
18      not?

19                                   MR. KAHN:  Objection as to "for  
20                                   all you know."

21                   Q            That's a possibility, right?  You  
22      can't pinpoint in time when you found this out,  
23      so it's at least possible, is it not, that you  
24      were aware of the things you just testified to in  
25      1994?

1                                   RANDY M. MASTRO

2                                   MR. KAHN:  Objection as to form.

3                   A           I don't have a specific  
4   recollection of when I became aware of the  
5   existence of the organization Housing Works, but  
6   as best I can recall sitting here today, it was  
7   sometime after I joined the Giuliani  
8   administration on January 1, 1994.

9                                   But I don't have a specific  
10  recollection of having been aware of the  
11  organization known as Housing Works in connection  
12  with those demonstrations in the spring of '94  
13  involving the Division of AIDS Services.

14                                  I have no specific recollection of  
15  that.

16                   Q           Do you think it would be logical  
17  to conclude that you probably did know that in  
18  1994 if there are many news accounts and articles  
19  identifying Housing Works as one of the, if not  
20  the most prominent organizations involved in  
21  those demonstrations?

22                                  MR. KAHN:  Objection to form.

23                                  It's speculative.  It's asking for a  
24   legal conclusion.  Don't answer the  
25   question.

1                   RANDY M. MASTRO

2                   MR. BRINCKERHOFF: It's not a  
3                   legal conclusion.

4                   MR. KAHN: You're asking if you  
5                   think it's logical to infer. That's for  
6                   a fact finder to conclude, not Mr.  
7                   Mastro, who is giving you the best of his  
8                   recollection.

9                   MR. BRINCKERHOFF: You're going to  
10                  direct him not to answer that question?

11                  MR. KAHN: I will. Is it logical  
12                  to conclude, that is not a question to  
13                  ask the witness.

14                  Ask him what his recollection was  
15                  and he will tell you, and he has to.

16                  MR. BRINCKERHOFF: Mark that one  
17                  for a ruling.

18                  Q            Another thing you learned at some  
19                  point in time, irrespective of when it might have  
20                  been, is that Housing Works was also involved in  
21                  bringing lawsuits against the city and its  
22                  various arms of government to try to reform the  
23                  way that services were provided to people with  
24                  HIV and AIDS; you did learn about that at some  
25                  point, right?

1                                   RANDY M. MASTRO

2                   A           I don't have any specific  
3   recollection of having been aware of Housing  
4   Works being an organization that brought lawsuits  
5   against the city other than being aware at the  
6   time of the lawsuit that Housing Works brought  
7   involving the HRA AIDS housing contract that is  
8   mentioned in the Complaint in reference to me,  
9   but about which I've yet to be asked a question  
10  at today's deposition.

11                               I don't have any specific  
12  recollection as I sit here today, I don't have  
13  any present recollection years later of what  
14  other lawsuits Housing Works was involved with  
15  against the city -- was involved in with the  
16  city.

17                   Q           Just so I'm clear about your  
18  answer, you're not saying, are you, that you are  
19  confident that you did not know of any lawsuit  
20  that Housing Works was involved in prior to the  
21  one you identified concerning HRA and the  
22  contracts, you're not saying that you're  
23  confident that that's not the case, right?

24                   A           I'm saying I don't have any  
25  specific recollection of Housing Works having



1                                   RANDY M. MASTRO  
2    been involved in lawsuits with the city other  
3    than the one lawsuit first brought in State  
4    Court, later withdrawn and then incorporated in  
5    the federal Complaint that you filed involving  
6    this HRA/AIDS housing contract and in which I am  
7    mentioned in the allegations.

8                                   I don't have any specific  
9    recollection of any other lawsuit.

10                                  I don't have any present  
11    recollection of having been aware of specific  
12    lawsuits one way or the other other than the one  
13    lawsuit that I've already testified about which  
14    was, which became a second lawsuit when the state  
15    lawsuit was withdrawn and was refiled as a  
16    federal suit and incorporated into the federal  
17    suit.

18                   Q           Now, back when these discussions  
19    were taking place within city government about  
20    issues related to changing or abolishing the  
21    Division of AIDS Services, was there any point in  
22    time at any of the meetings or any discussions  
23    that you observed or participated in when there  
24    was a discussion about a lawsuit that had been  
25    filed in Federal Court, actually in the Eastern

1                                   RANDY M. MASTRO  
2     District, but it doesn't matter where,  
3     challenging whether or not the city was actually  
4     providing adequate services to people with HIV  
5     and AIDS in a class action?

6                                   MR. KAHN: Any discussion between  
7                                   whom?

8                                   MR. BRINCKERHOFF: Anyone,  
9                                   anything that he was privy to at all.

10                                  A        I don't have any present  
11     recollection of such a discussion.

12                                  The present recollection I have  
13     sitting here today, years later, not having  
14     reviewed any documents in relation to the issue  
15     you're asking me about now, is about the  
16     discussions about the policy issue of whether to  
17     retain the Division of AIDS Services and the  
18     views that I expressed on that policy issue,  
19     which were that the administration should retain  
20     the Division of AIDS Services.

21                                  And that the ultimate resolution  
22     announced in the spring of '94, that the Division  
23     of AIDS Services would be retained, and of the  
24     one protest I can recall, although generally I  
25     recall that there were a number of protests, the

1 RANDY M. MASTRO

2 protest that day at City Hall.

3 But I don't have specific  
4 recollections, I don't have a present  
5 recollection of any discussions about a lawsuit  
6 at the time or who was involved in the lawsuit.

7 Q In your experience in attending  
8 the daily morning meetings with the Mayor, was it  
9 typical for the corporation counsel to appraise  
10 the group of large lawsuit filings, such as class  
11 actions, seeking reform of city government?

12 MR. KAHN: I'll object to that.

13 That's an attorney-client communication.

14 MR. BRINCKERHOFF: I asked him for  
15 a yes or no. It's not asking for any  
16 substance.

17 MR. KAHN: You're asking as to the  
18 nature of a communication. I'm objecting  
19 on the grounds that it's a privileged  
20 communication.

21 MR. BRINCKERHOFF: What kind of  
22 privilege?

23 MR. KAHN: Attorney-client as well  
24 as deliberation.

25 MR. BRINCKERHOFF: I don't see how



1                                   RANDY M. MASTRO  
2 ultimately involved legal questions or potential  
3 legal challenges, to participate in the  
4 discussion of not only the implications of the  
5 policy, but the legal implications of the policy.

6                   Q           So in your experience, corporation  
7 counsel's role in these meetings was not to  
8 provide information about current filings, for  
9 instance, of lawsuits, but to respond when legal  
10 advice was solicited, is that correct?

11                  A           I think at morning meetings people  
12 felt free to express their views on issues not  
13 necessarily only because it was in their area,  
14 but in the case of the corporation counsel, his  
15 views on legal issues, legal ramifications of  
16 certain policies or potential policies were often  
17 solicited during these discussions.

18                  Q           But I take it from what you're  
19 saying he also felt free to comment upon policy  
20 matters as well, correct, whoever corporation  
21 counsel was at any given time?

22                  A           Anyone at the table was free to  
23 comment on any issue they chose to comment on as  
24 it was raised.

25                  Q           And in your experience did

1                                   RANDY M. MASTRO

2   Mr. Hess or any of his predecessors do so,  
3   comment upon policy matters?

4                   A           There was only one predecessor,  
5   Paul Crotty.

6                                   I think it would be fair to say  
7   that while the corporation counsel's  
8   participating in the morning meetings principally  
9   commented on legal issues, there were also  
10  occasions when he commented on other issues as  
11  well.

12                   Q           Was there any point in time at any  
13  morning meeting that you attended where the  
14  corporation counsel or anyone representing his  
15  office would use that opportunity to inform the  
16  group that a new lawsuit had been filed of any  
17  sort?

18                                   MR. KAHN:  Objection.  Can I  
19                   confer with the witness with respect to  
20                   that, the privileged aspects of this?

21                                   MR. BRINCKERHOFF:  Sure.

22                                   (At this point in the proceedings,  
23                   the witness and counsel conferred.)

24                                   MR. KAHN:  This is essentially the  
25                   same question that was asked earlier.

1                                   RANDY M. MASTRO

2                                   At this time I'm going to allow  
3                                   the witness to answer the question solely  
4                                   with respect to that issue raised and not  
5                                   with respect to content.

6                                   MR. BRINCKERHOFF: That's fine.

7                                   MR. KAHN: You may answer.

8                                   A            While it's my understanding that  
9                                   there are more than 50,000 lawsuits pending  
10                                  against the city, and corporation counsel  
11                                  certainly didn't apprise the group at the morning  
12                                  meetings of every lawsuit, or even most lawsuits,  
13                                  or even the vast majority of lawsuits, there were  
14                                  occasions when the corporation counsel would  
15                                  raise that a lawsuit had been filed.

16                                  Q            Did the corporation counsel ever  
17                                  inform the group at a meeting where you attended  
18                                  that a lawsuit had been filed, a class action  
19                                  lawsuit, challenging the way the city provided  
20                                  services to people with HIV and AIDS?

21                                  A            I have no present recollection of  
22                                  that one way or the other. Again, we're going  
23                                  back many years, and I don't have any present  
24                                  recollection one way or the other.

25                                  Q            I think that's well established in





1                                   RANDY M. MASTRO  
2   involved, because in '94 he was the Deputy Mayor  
3   for Operations, overseeing the budget, so he  
4   would have been involved in the issue in that  
5   role as well, and so generally overseeing  
6   government operations.

7                                   So I think all three of those  
8   Deputy Mayors would have played a role.

9                                   Fran Reiter certainly played a  
10  significant role, but I think all three of them  
11  would have been involved, and as I said, this was  
12  an issue that was discussed, I'm talking about  
13  the status of the Division of AIDS Services in  
14  1994, so a number of us became more familiar with  
15  the issues and expressed views.

16                                  But I'm only recalling my own view  
17  at this point in time, which I've already  
18  expressed on the record, but there were a number  
19  of people involved in those discussions.

20                                  Q       So, for instance, without telling  
21  me what the view was, I understand your counsel's  
22  objection from earlier, did Ninfa Segarra have a  
23  view that you were aware of as to whether or not  
24  the Division of AIDS Services should be retained?  
25  Just yes or no?



1                                   RANDY M. MASTRO

2   I recall the views of some others, not all  
3   others.

4                   Q           So when it comes to former Deputy  
5   Mayor Ninfa Segarra, you do not recall what her  
6   view was or whether she stated a view; is that  
7   correct or not?

8                   A           I recall Fran Reiter expressing  
9   her view, I also have a recollection generally  
10  about Ninfa Segarra's views, but I don't recall  
11  at what point in time they relate to.

12                               So I have a more specific  
13  recollection of Fran Reiter expressing her views  
14  in '94 and a general recollection regarding Ninfa  
15  Segarra's views, but I don't recall specifically  
16  when they were expressed.

17                   Q           Do you recall Peter Powers  
18  expressing a view?

19                   A           I don't have a specific  
20  recollection about Peter Powers' views, but he  
21  would have been among the several people who  
22  would have expressed a view ordinarily.

23                   Q           Did the Mayor express a view on  
24  this issue of whether the Division of AIDS  
25  Services should be retained?

1 RANDY M. MASTRO

2 A Ultimately there was a decision  
3 when the budget was announced that the Division  
4 of AIDS Services was being retained.

5 Q I understand that.

6 A So there was a decision made to  
7 include it in the budget.

8 Q Do you recall him expressing any  
9 views in any discussions prior to that decision  
10 being made? Meaning the Mayor.

11 A I recall the ultimate decision on  
12 an issue that was discussed.

13 Q My question is do you recall him  
14 expressing a view in any of the discussions that  
15 led up to that decision being made? Just yes or  
16 no on that.

17 A I only have a -- I have a specific  
18 recollection of the ultimate resolution, not of  
19 the specific discussions, but of the ultimate  
20 resolution.

21 So I don't have any specific  
22 recollection of specific discussions as to what  
23 he said or didn't say, but I have a specific  
24 recollection as to the ultimate resolution which  
25 reflected the position taken by the

1                                   RANDY M. MASTRO  
2 administration on the issue, which was to retain  
3 the Division of AIDS Services that was expressed  
4 in the announcement of the budget in 1994.

5                   Q           Now it's true, is it not, that  
6 even after that announcement of the budget in  
7 1994, the issue of exactly what character and  
8 shape the Division of AIDS Services would take  
9 going forward remained an issue within the  
10 administration for some time thereafter?

11                   A           The specific issue that I recall  
12 was the issue of whether to retain the Division  
13 of AIDS Services and in what form it arose in  
14 '94.

15                                   I have a general recollection that  
16 there continued to be issues about the Division  
17 of AIDS Services, how it was performing, who  
18 should be heading it, and public issues being  
19 raised about it periodically, but I don't have  
20 specific recollections of specific issues.

21                   Q           Insofar --

22                   A           Please let me finish.

23                   Q           I'm sorry.

24                   A           And then, as I've already  
25 testified about the 1994 budget discussions and

1                                   RANDY M. MASTRO  
2     the decision to retain the Division of AIDS  
3     Services.

4                                   I don't recall, after that I don't  
5     have a present recollection any specific issue  
6     that caused a specific controversy after that  
7     involving the Division of AIDS Services other  
8     than that I recall there continuing to be public  
9     issues about the division and who would head it  
10    and how it was performing and things like that.

11                                  But you're asking me for my  
12    present recollection years later about events  
13    that happened six, seven years ago.

14                                  And I haven't reviewed any  
15    documents to refresh my recollection on those  
16    events relating to the Division of AIDS Services  
17    and deliberations about its status in 1994, so I  
18    can only give you my present recollection.

19                                  Q       Insofar as you recall there being  
20    issues after the decision to retain the Division  
21    of AIDS Services concerning how the Division of  
22    AIDS Services was running and who should be  
23    heading that agency, do you recall that it was  
24    Deputy Mayor Fran Reiter who dealt with those  
25    issues?



1 RANDY M. MASTRO

2 she remained involved in the issue and publicly  
3 identified with the issue.

4 Q Do you remember Ms. Reiter or  
5 people on her staff soliciting or requesting the  
6 advice of a person outside of government on these  
7 issues by the name of Ethan Geto?

8 A I have a recollection, I have a  
9 present recollection of Fran having had a  
10 relationship with Ethan Geto and of Fran  
11 communicating with him on a number of issues.

12 I don't have a specific  
13 recollection of her communicating with him on  
14 this issue, but that's not to say she didn't  
15 communicate with him on that issue.

16 But my present recollection is  
17 that she did have a relationship with Ethan Geto  
18 and they did communicate on a number of issues  
19 during her tenure.

20 I just don't have a specific  
21 recollection of which issues other than a general  
22 sense that Fran had communication with Ethan  
23 Geto.

24 I think there were other issues in  
25 which, I also had at least one issue in which I



1                                   RANDY M. MASTRO  
2     had communications with Ethan Geto involving the  
3     gay and lesbian community.

4                   Q           That had nothing to do with the  
5     Division of AIDS Services, though, did it, your  
6     communication with Mr. Geto?

7                   A           No, my communication with Mr. Geto  
8     had to do with the historic passage of the  
9     domestic partnership legislation in 1998 where  
10    the city codified for the first time domestic  
11    partnership rights and codified throughout city  
12    law that registers domestic partners would have  
13    the same rights as married couples consistently  
14    throughout city law to the extent the city could  
15    do that.

16                                   It was an effort that I  
17    spearheaded and spearheaded the lobbying of  
18    through the City Council, and we were able to  
19    achieve just before my tenure in city government  
20    ended, and I communicated with Mr. Geto about  
21    that through that period of time.

22                   Q           Did anyone ever tell you about or  
23    did you read any news accounts about a meeting  
24    that was held at Ms. Reiter's office in her  
25    conference room that was broken up by various





1                                   RANDY M. MASTRO  
2   presupposing we're talking about a particular  
3   group protest, and we never even established what  
4   group it was that was supposedly doing the  
5   protest, so I don't want to presuppose that we're  
6   talking about the same subject matter, since your  
7   question generally was just about protests.

8                   Q           That's absolutely right. That was  
9   my question. So whatever specific recollection  
10   you have about a protest where Ms. Reiter  
11   communicated to you something about that protest,  
12   please identify it for me.

13                  A           I assume since we've now been here  
14   over three hours that you eventually would ask  
15   questions about Housing Works, so I assumed in  
16   that series of questions you were asking about  
17   protests that involved Housing Works, and I have  
18   already responded that I don't have any specific  
19   recollections of such a protest involving Fran  
20   Reiter and her office, but I have also testified  
21   that I have one specific recollection of Fran  
22   Reiter coming to me to discuss an issue about  
23   Housing Works.

24                  Q           This was coming to you to discuss  
25   an issue about Housing Works that was related to

1                                   RANDY M. MASTRO  
2     some protest activity is what you said before.  
3     Is that correct or not?

4                   A           I'm not sure whether there was any  
5     additional discussion about related protests but  
6     she came to me to discuss a specific issue about  
7     something that she described as an action by  
8     Housing Works.

9                   Q           What action was that, what issue  
10    was that?

11                  A           She told me that there had been  
12    posters put up around the city that she had seen  
13    put up around the city that depicted her face  
14    and, I'm going on my present recollection years  
15    later, but that depicted her face and described  
16    her as an AIDS murderer that she told me had been  
17    put up by Housing Works.

18                               That's the one specific  
19    recollection I have. I don't know if she  
20    described related protests in that regard or not,  
21    but she did describe to me these posters that had  
22    been put up describing her as she related it to  
23    me as an AIDS murderer.

24                  Q           Was it --

25                  A           By Housing Works.

1 RANDY M. MASTRO

2 Q Was it the case that when Ms.  
3 Reiter described this to you that she was upset  
4 about what she believed had happened with these  
5 posters and Housing Works' involvement in that  
6 activity?

7 MR. KAHN: Objection as to form.

8 A I think you'd have to ask Ms.  
9 Reiter what her personal reaction to it was. I  
10 don't think anyone would want to be depicted on  
11 posters put around the city as a murderer in any  
12 context.

13 Q So did you observe her as being  
14 angry or upset about that fact?

15 A Once again, I think you would have  
16 to ask her what her reaction was and let her  
17 words speak for themselves, but again, I don't  
18 think anyone would want to have themselves  
19 described in posters as a murderer.

20 Q All I'm asking for is your  
21 observation about her demeanor when she told you  
22 this.

23 A My observation of her demeanor was  
24 that she was relating this to me, I think that  
25 what I observed in her demeanor was that while

1                                   RANDY M. MASTRO  
2     she's a professional person, and therefore  
3     conducted herself professionally, that she  
4     exhibited both professionalism, but also knowing  
5     my background from the U.S. Attorney's office,  
6     she had some concern about her personal safety  
7     and whether such posters would have motivated or  
8     incited certain kinds of activity that may have  
9     related to her personal safety.

10                                But I think under the  
11     circumstances I found her to be conducting  
12     herself quite professionally.

13                    Q           Just so I understand, so your  
14     observation was that she was professional, would  
15     you say that she was upset or angry based on your  
16     observation of her demeanor?

17                    A           I think it's -- again, you should  
18     ask her what her reaction was.

19                    Q           I appreciate that. I have done  
20     that. I'm asking you.

21                    A           My perception of her demeanor was  
22     that she seemed concerned about the posters as I  
23     think anyone in her circumstance would have been,  
24     but she also seemed to me to be conducting her  
25     self very professionally in raising the issue and

1                                   RANDY M. MASTRO

2   discussing the issue.

3                   Q       Was she calm?

4                   MR. KAHN:  If I can just suggest,  
5                   and it's your question, and I'm not doing  
6                   anything more than suggesting that you  
7                   ask the witness what she said, and  
8                   perhaps that will shed some light on it.

9                   MR. BRINCKERHOFF:  I'll get to  
10                  that.  I appreciate your suggestion.

11                  Q       Was she calm when she told you  
12                  about this?

13                  A       As we sit here today I have more  
14                  of a recollection about the fact that the  
15                  incident of these posters being put up was  
16                  related than I have any specific recollection  
17                  about specific words that were said at the time.

18                  I recall that she seemed concerned  
19                  to me about those posters having been put up  
20                  accusing her of being a murderer, and I at the  
21                  time thought that was perfectly understandable,  
22                  why she expressed such concern.

23                  Those are general impressions I  
24                  have all these years later.  I don't have any  
25                  present recollection of the specific words that



1                                   RANDY M. MASTRO

2       were said at the time.

3                                   And once again, you're asking me  
4       about events that happened many years ago, and I  
5       can only give you my present recollection and the  
6       general impression I had at the time.

7                   Q           Now, when she informed you that it  
8       was Housing Works that was responsible for these  
9       posters, was that an organization that when she  
10      used the name you already had some familiarity  
11      with, you knew who they were, or what they were,  
12      or was that the first time?

13                   A           Once again, I don't have a  
14      specific recollection of when I learned of the  
15      existence or had a conscious recognition of the  
16      existence of an organization called Housing  
17      Works.

18                                   My present recollection is that  
19      that would have been sometime after January 1,  
20      1994.

21                                   Certainly when I had that  
22      conversation with Fran, if I hadn't had a  
23      conscious recognition or specific recollection of  
24      having learned of an organization named Housing  
25      Works before that occasion, I have a present

1                                   RANDY M. MASTRO  
2       recollection today of knowing that it was Housing  
3       Works that she was telling me had put up these  
4       posters.

5                                   But I don't recall when I had that  
6       conversation with Fran or when she came to me and  
7       told me about these posters.

8                   Q           She was in city government, right?

9                   A           She was in city government. So I  
10       don't have a specific recollection of what date  
11       that was, but certainly on that date if I had not  
12       had a specific recollection of who Housing Works  
13       was prior to that date, I certainly knew she was  
14       talking about Housing Works on that occasion.

15                  Q           Do you recall whether you were a  
16       Deputy Mayor or you were still chief of staff for  
17       the Mayor at the time you had that conversation  
18       with her?

19                  A           Again, you're asking for my  
20       recollection of events that happened years ago,  
21       but I believe that I was chief of staff at the  
22       time.

23                  Q           I'm just asking for your best  
24       recollection.

25                  A           That's my present recollection. I

1                                   RANDY M. MASTRO  
2       don't have a specific recollection of the date,  
3       but my present recollection, best recollection as  
4       I sit here today, my present recollection is that  
5       it was when I was chief of staff.

6                   Q       Now, did you advise her at all as  
7       to what options if any she had to deal with or  
8       respond to this information that she was relaying  
9       to you about these posters?

10                  A       Again, I'm not sure whether I was  
11       with her one-on-one or whether there were others  
12       present, but my general recollection was that it  
13       would have been something she also would have  
14       discussed because of concerns and issues that  
15       those posters raised about her personal safety,  
16       so it would have been something that she would  
17       have discussed or raised with the Intelligence  
18       Division, the people who provided security at  
19       City Hall to the Mayor and the Mayor's staff, and  
20       the people in City Hall who communicated with the  
21       Intelligence Division.

22                               So whether anyone else was present  
23       with us when we had the conversation or that was  
24       then something that she separately did, but it's  
25       certainly something that would have happened at

1 RANDY M. MASTRO

2 that point.

3 Q But --

4 A But I don't have a specific  
5 recollection of whether anyone else was present  
6 and whether and how that issue then got addressed  
7 to the appropriate security measures.

8 Q Can you rule out the possibility  
9 that this came up during a regular daily meeting,  
10 a morning meeting?

11 A Since I don't have a specific  
12 recollection of the date and time and place of  
13 the participants when the communication was made  
14 to me, I don't have a present recollection of it  
15 happening at a morning meeting.

16 I have a general recollection of  
17 having talked to Fran in some kind of smaller  
18 setting, but I don't have a specific recollection  
19 of the setting, so my best recollection is that I  
20 don't have a present recollection of that  
21 communication occurring in a morning meeting.

22 Q Now, did you or anyone else,  
23 including Ms. Reiter, to your knowledge, ever  
24 have any conversations with the Mayor about what  
25 had happened with these posters that had been put

1                                   RANDY M. MASTRO  
2   up apparently by Housing Works calling Ms. Reiter  
3   a murderer?

4                   A       Again, I don't have a specific  
5   recollection of what was said on that occasion.

6                                   The general recollection I have is  
7   that I became aware of these posters from Fran.  
8   I have a general recollection that there were  
9   steps taken, communication with appropriate  
10   security personnel about any security issues that  
11   those posters created for Fran Reiter.

12                                   So, but that's my general  
13   recollection. I don't have a specific  
14   recollection of specific discussions, what was  
15   said, who was present, what date, what time.

16                   Q       I was just trying to refresh as  
17   much as I can.

18                                   Did Ms. Reiter say anything about  
19   how it was that she identified Housing Works as  
20   the responsible party when it came to these  
21   posters?

22                   A       I don't recall what she said on  
23   that subject, but I -- my general recollection is  
24   that it was not in dispute, but I don't have any  
25   specific recollection about it --

1                                   RANDY M. MASTRO

2                   Q           Did you ever see those posters?

3                   A           (Continuing) -- about what she  
4                   said at that time.

5                   Q           Did you ever see a poster, a copy,  
6                   any facsimile of it?

7                   A           I may have seen the posters. I  
8                   don't have a specific recollection of the posters  
9                   as I sit here now, but my general recollection is  
10                  that it was some kind of hand drawing, a  
11                  caricature of her, but if I'm wrong, please  
12                  refresh my recollection.

13                                But at the time I lived in the  
14                  Village, so I may well have seen the posters. I  
15                  don't recall specifically. But at the time it  
16                  was first discussed with me, I hadn't seen the  
17                  posters.

18                                So my general recollection is that  
19                  Fran described to me the posters, and I may have  
20                  seen the poster, it may have been a picture of  
21                  her, I don't know.

22                                I don't have a specific  
23                  recollection of specifically seeing the posters  
24                  or not. The only specific recollection I have is  
25                  that I was informed of the posters by Fran at

1 RANDY M. MASTRO

2 some point in time and she described the posters  
3 to me.

4 I had not seen them at that point  
5 in time.

6 Q But it was your understanding that  
7 they had been placed somewhere in the Village, is  
8 that right?

9 A I don't know where they'd been  
10 placed. In recalling the time and places and  
11 locations, I'm not sure if it was the City Hall  
12 area, the Village area, or both. I don't know.

13 Q So a moment ago when you said, "I  
14 did live in the Village at that time," what was  
15 that a reference to?

16 A Fran lived in the Village as well,  
17 and I have a general recollection that she first  
18 saw these posters in the Village, but I could be  
19 wrong. She may have seen them around City Hall.

20 Fran and I lived not very far from  
21 one another.

22 Q When Ms. Reiter informed you of  
23 these posters and Housing Works' responsibility  
24 for those posters, did you have any opinion about  
25 the propriety of the Housing Works' engaging in

1   RANDY M. MASTRO

2 this activity?

3           A       Well, I did have an opinion.

4           Q       What was that opinion?

5           A       I thought that it was beyond the  
6 pale of responsible discourse to accuse someone  
7 of being a murderer, but I've been in city  
8 government at that point long enough to know that  
9 such course discourse would occasionally occur,  
10 and that that was not beyond our experience, even  
11 in the early period in City Hall.

12                                   There are a lot of harsh things  
13 that are said about public officials and the  
14 decisions that they make.

15                           So you asked me for my opinion at  
16 the time, I gave you my opinion at the time, but  
17 that's all that I can recall at this point.

18           Q       Would it surprise you to hear  
19 sitting here today that Housing Works was  
20 actually not responsible for those posters, in  
21 fact had nothing to do with those posters?

22           A       Because my general recollection at  
23 the time was that the posters were attributed to  
24 Housing Works, and that that was undisputed, I  
25 would be surprised if it were the case that



1                                   RANDY M. MASTRO  
2     Housing Works was not involved, but it really  
3     wouldn't matter to me one way or the other at  
4     this point.

5                   Q           Do you think we'd be sitting here  
6     today if you and Fran Reiter or anyone else who  
7     attributed that activity to Housing Works had  
8     known that it did not involve Housing Works?

9                                   MR. KAHN:  Objection.

10                  A           I don't think that I should be  
11     sitting here today in any event, but leaving that  
12     aside, the issues that are actually alleged in  
13     the Complaint pertaining to me personally about  
14     which we have yet to ask any questions, but in  
15     any event, those allegations would have been  
16     resolved in exactly the same manner regardless of  
17     whether anything else had ever occurred that  
18     you're referring to in your prior questions.

19                  Q           You made --

20                  A           So it was irrelevant in the  
21     context of the issues pertaining to the AIDS  
22     housing contract that are alleged in your  
23     Complaint or that involve me whether or not there  
24     were posters put up at some point in time  
25     involving Fran Reiter and whether Housing Works

1                                   RANDY M. MASTRO

2       had anything to do with it.

3                                   It's totally unrelated, and one  
4       has nothing to do with the other, and that's why  
5       I said it is irrelevant to me about the posters  
6       and who put up the posters.

7                   Q           But you made the decision to  
8       reject Housing Works' request for an extension of  
9       their scattered site contracts.

10                                You know about that, right? That  
11       was your decision, wasn't it?

12                                MR. KAHN:  Objection, there's been  
13       no foundation laid for that.  You can  
14       answer if you want, but objection as to  
15       form.

16                                MR. BRINCKERHOFF:  You wanted me  
17       to ask these questions, I'm asking them.

18                   Q           You were the one who made that  
19       decision, right?

20                   A           The issues involving the AIDS  
21       housing scattered site contract and whether to  
22       extend it, in the first instance there would be  
23       agency review of that question.

24                                In the second instance, the  
25       Mayor's Office of Contracts reviewed that



1 RANDY M. MASTRO

2 Mayor's Office on Contracts and my chief of staff  
3 as to whether there should be a renewal of the  
4 contract, and after repeated efforts to give  
5 Housing Works' repeated opportunities to address  
6 where at least half a million dollars had gone  
7 and the inadequacy of the record keeping and the  
8 commingling of funds at Housing Works relating to  
9 this contract, was eventually presented to me  
10 that the agency, HRA, the Mayor's Office of  
11 Contracts and my chief of staff unanimously  
12 agreed that the contract could not be extended.

13 Q So what was your decision when you  
14 were presented with that unanimous agreement?

15 A Well, we're asking the questions  
16 somewhat out of sequence, but by the time it was  
17 presented to me, that the agency had concluded  
18 based on Housing Works' failure to respond to  
19 repeated opportunities to explain, to reconcile  
20 its books and explain where this half a million  
21 dollars or more had gone, that the agency is  
22 saying that this contract no longer could be  
23 extended, that the Mayor's Office of Contracts  
24 was saying this contract could no longer be  
25 extended and my chief of staff was saying this

1                                   RANDY M. MASTRO  
2       contract could no longer be extended, I could not  
3       disagree with that which the agency was prepared  
4       to do, the Mayor's Office of Contracts concurred  
5       and my chief of staff concurred.

6                   Q       Are you saying you were not  
7       inclined to disagree or are you saying you were  
8       powerless to disagree?

9                   A       Again, you're going out of  
10       sequence, but at some point I'm sure you'll want  
11       to go through the whole sequence.

12                               There were points, earlier points  
13       in time when I had been briefed on this issue,  
14       and Housing Works had been extended multiple  
15       opportunities to explain where half a million  
16       dollars or more of city money had gone but that  
17       weren't accounted for in its books and records,  
18       and where there had been commingling of funds,  
19       where Housing Works couldn't come up with proper  
20       documentation to explain at least half a million  
21       dollars or more of city money had gone.

22                               Yet the city had extended  
23       opportunity after opportunity for Housing Works  
24       to reconcile its books, try to explain where the  
25       money had gone, try and explain or reconcile the



1                                 RANDY M. MASTRO  
2     Housing Works had failed to provide that  
3     information or had ignored city deadlines for  
4     providing that information, the agency, HRA, the  
5     Mayor's Office of Contracts and my chief of staff  
6     all unanimously concluded that the contract  
7     should not be extended, and they had all decided  
8     that that was the proper approach, so I did not  
9     alter their decision and recommendation.

10                    Q         You approved of the decision.

11                    A         The issue was presented to -- the  
12     decision and recommendations were presented to me  
13     and I allowed the decision to stand, only after  
14     Housing Works had repeatedly been given  
15     opportunities to explain where the missing half a  
16     million dollars or more in money had gone, to  
17     reconcile its books, to explain where they had  
18     done commingling of funds, and to account for  
19     this half a million dollars or more, had been  
20     given multiple opportunities to do that.

21                                 And I'd been made aware at those  
22     earlier points in time of this outstanding  
23     dereliction and their failure to account for the  
24     more than half a million, half a million or more  
25     of city funds on Housing Works' part, and I had

1

RANDY M. MASTRO

2 supported and encouraged giving Housing Works  
3 additional time on prior occasions.

4                   But having now repeatedly failed  
5 to meet the deadlines and failed to provide that  
6 information and reconciliation, and having been  
7 presented with the unanimous decision and  
8 recommendation of the agency, HRA, the Mayor's  
9 Office of Contracts and my chief of staff, I let  
10 their decision and recommendations stand at that  
11 point, only after that history on the latitude  
12 and courtesies and opportunities that had been  
13 extended to Housing Works to correct or address  
14 where this half a million dollars or more had  
15 gone that they couldn't account for.

16                   And only after they had repeatedly  
17 failed to account for that half a million dollars  
18 or more and provide the reconciliation and the  
19 documentation and the explanation concerning the  
20 commingling of funds and to assure the city that  
21 there would be proper record keeping procedures  
22 in place in the future, there was a failure to  
23 explain where the half a million dollars or more  
24 had gone, and a failure to have proper procedures  
25 in place.



1                                   RANDY M. MASTRO

2                                   Therefore, the agency, the Mayor's  
3 Office of Contracts and my chief of staff had  
4 made a decision and recommendation, and I let the  
5 decision and recommendation stand only after that  
6 history.

7                   Q           I think you've made the record  
8 very clear about the rationale for your decision,  
9 but my question wasn't about your rationale.

10                               My question was did you approve  
11 the decision?

12                   A           It's been asked and answered and  
13 I'll repeat my answer.

14                   Q           Well, I'm confused then, because  
15 from what you said I cannot tell -- as far as I  
16 know you let a decision stand.

17                               Does that mean you approved it or  
18 not?

19                   A           An agency decision on whether to  
20 extend a contract did not necessarily require in  
21 the making of that decision my personal approval  
22 at the point in time at which the agency made the  
23 decision, although in many instances ultimately I  
24 may have had to sign a contract in my role as  
25 Deputy Mayor for Operations.

1                   RANDY M. MASTRO

2                   So the way you have asked the  
3 question proceeds on an incorrect factual basis  
4 about what the role would necessarily have been.

5                   However, in this instance, as  
6 would have been the instance as to a number of  
7 contracts or renewals of contracts, those issues  
8 coming to the Mayor's Office of Contracts would  
9 sometimes also be raised with my office through  
10 my chief of staff and sometimes might also be  
11 raised with me personally.

12                  So I was aware of the decision, I  
13 was aware of the recommendation, I was aware that  
14 HRA had made a decision not to renew, that the  
15 Mayor's Office of Contracts concurred, and that  
16 my chief of staff concurred.

17                  I was made aware of that, and  
18 while I would have had the authority to take a  
19 contrary view, I did not take a contrary view.

20                  I let the decision and  
21 recommendation of the agency, the Mayor's Office  
22 of Contracts and my chief of staff stand.

23                  Q       Mr. Mastro, are you aware of the  
24 fact --

25                  A       But only after the history that I

1                                   RANDY M. MASTRO  
2   described of prior occasions where Housing Works  
3   had been afforded repeated opportunities to  
4   explain where this half a million dollars or more  
5   in city, government money had gone, only after I  
6   had supported and encouraged that they be allowed  
7   that extra time to reconcile their books, to try  
8   and explain where this money had gone, to explain  
9   the commingling of funds, and to come up with  
10  proper procedures in going forward for their  
11  record keeping.

12                                But only after they had repeatedly  
13  missed such deadlines or failed to respond to the  
14  city's legitimate requests for that information  
15  when there was half a million dollars or more of  
16  unaccounted for city money that had gone to  
17  Housing Works that Housing Works couldn't explain  
18  what the money had been used for, only with that  
19  backdrop and on that history was the decision  
20  made by HRA, concurred in by the Mayor's Office  
21  of Contracts and my chief of staff, and that I  
22  let stand.

23                           Q           Do you concur with Luellen  
24  Barkan's testimony that the decision ultimately  
25  to not renew Housing Works' scattered site

1                                   RANDY M. MASTRO

2   contract was made by you and her jointly?

3                   A           Well, of course, as I testified  
4   earlier, I have not seen the testimony or  
5   depositions of others, so I will assume for  
6   purposes of answering this question that you've  
7   accurately represented the record of that  
8   deposition and that testimony, but her testimony  
9   would have been perfectly consistent with that  
10  which I have already testified to from her  
11  perspective.

12                               It would have been wholly  
13  consistent with what I've already testified to,  
14  which is that the agency makes a decision and  
15  recommendation in the first instance, it's  
16  reviewed by the Mayor's Office of Contracts, and  
17  in certain circumstances that's then presented to  
18  the Deputy Mayor's chief of staff for review, and  
19  certainly in more limited instances then to me  
20  for review.

21                               So could the decision, as I  
22  testified previously, had been altered by me or  
23  my chief of staff?

24                               I've already testified that it  
25  could have been, but I let that decision stand.

1                                   RANDY M. MASTRO

2                                   So from Luellen's perspective in a  
3 review process, while not every contract or  
4 contract renewal rises to the level of the, every  
5 layer of review that I have described, some do,  
6 particularly where there's an adverse decision,  
7 from the contractor's standpoint, and therefore  
8 what you've described as Luellen's testimony  
9 would be wholly consistent with the testimony  
10 I've already given about how the process unfolded  
11 in this instance.

12                               Q           Did you brief the Mayor at all  
13 about this particular decision?

14                               A           Not that I recall. I have no  
15 present recollection of having briefed the Mayor,  
16 and in this situation, involving the renewal of  
17 the Housing Works AIDS housing contract, I have  
18 no present recollection of having done that.

19                               Q           You mentioned before that one of  
20 the things that you reviewed in preparation for  
21 today's testimony to help refresh your  
22 recollection were some regular reports that were  
23 generated while you were the Deputy Mayor of  
24 Operations, correct?

25                               A           Actually those regular reports go

1                                   RANDY M. MASTRO  
2     back to an earlier point in time, but there were  
3     regular reports generated, some of them on a  
4     weekly basis, some of them on a monthly basis,  
5     for city agencies to apprise responsible  
6     officials in City Hall of upcoming events in the  
7     agencies that would be of public interest, so  
8     that there would be proper coordination in that  
9     event, what events were going on in the agency,  
10    what public events, what upcoming decisions might  
11    occur that might involve decisions of public  
12    interest or concern, and those reports were  
13    shared early on in the Giuliani administration  
14    and continued through my tenure as Deputy Mayor.

15                                I don't know whether they still  
16    continue now since I haven't been in city  
17    government for a period of years.

18                                But there would be regular weekly  
19    or monthly reports from agencies that would come  
20    into the chief of staff's office or the Deputy  
21    Mayor responsible for overseeing that particular  
22    agency, and they would be routed immediately to,  
23    during my tenure as Deputy Mayor, the staff  
24    member responsible for that agency or that office  
25    for that staff member's review.

1                                   RANDY M. MASTRO

2                                   And I would hold regular staff  
3 meetings or meet with individual staff members,  
4 and they would apprise me of a subset of issues  
5 within those reported within the weekly or  
6 monthly reports that they thought should come to  
7 my attention as an issue of public review or  
8 concern.

9                   Q           Who were responsible for the  
10 reports generated by the Mayor's --

11                   A           Well, I didn't prepare those  
12 reports, but the head of the Mayor's Office on  
13 Contracts during the period when this issue  
14 involving Housing Works' AIDS housing contract,  
15 the renewal of that contract was at issue, was  
16 someone named Beth Kaswan.

17                                   She was the head of the Mayor's  
18 Office on Contracts at the time.

19                   Q           When her reports would come in and  
20 they would be assigned to the staff person in  
21 your office who was responsible for MOC, who was  
22 that person?

23                   A           That would have been Luellen  
24 Barkan. There may have been other staff members  
25 of mine who also would have gotten those reports,

1                                   RANDY M. MASTRO  
2     but certainly Luellen would have, depending upon  
3     which contracts were at issue, but Luellen would  
4     have gotten those reports.

5                   Q        Would these reports --

6                   A        For sure.

7                   Q        (Continuing) -- get forwarded to  
8     the Mayor and the Mayor's chief of staff?

9                   A        The weekly reports were compiled  
10    originally, I can't speak to what it was after I  
11    ceased to be chief of staff, but they were  
12    originally compiled in the chief of staff's  
13    office.

14                                They were also circulated to the  
15    appropriate Deputy Mayors whose offices were  
16    involved.

17                                But the reports and the  
18    information were so voluminous coming from every  
19    city agency and the appropriate mayoral offices  
20    each week or each month, that it was the job of  
21    the Deputy Mayors and their staffs, the chief of  
22    staff's office, to distill information, address  
23    as many of the issues as possible under their  
24    various jurisdiction, and for that very limited  
25    subset that required the Mayor's attention, to



1                                   RANDY M. MASTRO

2    see that those issues were raised with the Mayor  
3    at a morning meeting or otherwise.

4                                   But the reporting mechanism was  
5    not to give the Mayor a huge volume of paper each  
6    week.

7                                   It was to set in place, reporting  
8    agency heads to Deputy Mayors, or in the case of  
9    an agency or office that reported to the chief of  
10   staff, to the chief of staff, have the Deputy  
11   Mayors' staffs work on those issues and work  
12   through as many of them as possible themselves,  
13   or where necessary to bring it to the Deputy  
14   Mayor's attention.

15                                  Then, in a very limited number of  
16   instances to, where they needed to be raised  
17   further, to raise them with the Mayor.

18                                  That would have been a very  
19   limited number that were raised, to answer your  
20   question.

21                   Q           And the reports that you reviewed,  
22   whichever ones those were, I take it those  
23   reports contained some kind of notation or  
24   information involving Housing Works, right?

25                   A           Again, as Deputy Mayor --

1                                   RANDY M. MASTRO

2                   Q           I'm talking about the ones that  
3 you reviewed in preparation for today's  
4 testimony. I'm sorry in case I was unclear.

5                   A           Oh, I'm sorry, the few that I saw  
6 had notation entries on Housing Works, and once  
7 again, the procedure would have been -- I don't  
8 have any specific recollection of having reviewed  
9 those reports at the time I was Deputy Mayor.

10                               Staff members in my office,  
11 Luellen or others would have reviewed them in the  
12 first instance and picked out of those reports a  
13 limited subset to raise with me personally for my  
14 input.

15                               So I don't recall reading those  
16 specific paragraphs, but at some point in time  
17 they did raise with me the -- Luellen raised with  
18 me the issue that is addressed in those summaries  
19 from the weekly or monthly reports that, those  
20 few summaries from those weekly or monthly  
21 reports that I saw, in preparation for my  
22 deposition.

23                   Q           During the period where you were  
24 involved in this process of repeatedly giving  
25 Housing Works extensions and new opportunities to

1                                   RANDY M. MASTRO  
2     account for missing money, was Mr. Klasfeld  
3     working in your office, and if so, was he  
4     involved in this decision-making?

5                   A           My present recollection is, again,  
6     going back a number of years, that was he still  
7     on my staff at this point in time, which would  
8     have been late summer or early fall of '97, and  
9     into the fall of '97.

10                                But I don't recall any specific  
11     discussions with him about the subject, about the  
12     subject of the AIDS housing contract extension  
13     for Housing Works.

14                   Q           When did you first find out that  
15     Luellen Barkan had taken a note during this  
16     period where the first thing she wrote down on  
17     two pages of notes was a notation, "Housing  
18     Works, Fran hates them"? When did you first find  
19     out about that?

20                                MR. KAHN:  Objection as to form.

21                   A           When Dan Barry, a reporter from  
22     The New York Times, came to interview me I think  
23     sometime in '98.

24                                Once again, I don't have a present  
25     recollection of a specific date, came to

1                                   RANDY M. MASTRO  
2   interview me about an article relating to Housing  
3   Works, and he had a copy of the document or he  
4   told me about it, I can't remember which.

5                   Q           Were you surprised that Ms. Barkan  
6   had taken such a note during this period?

7                   A           I didn't have any recollection of  
8   such a note being taken or such a conversation  
9   that would have involved any such note, so I  
10   don't have any present recollection or specific  
11   recollection about any particular circumstance or  
12   conversation where such a note would have been  
13   taken.

14                               So I was unaware that such a note  
15   had been taken, so I was not aware of it until  
16   the time that Dan Barry showed me the note.

17                   Q           But you would agree with me, would  
18   you not, during the period where this decision  
19   was being made in the Mayor's Office of  
20   Contracts, the agency and your office, that any  
21   information about Fran Reiter hating Housing  
22   Works really had nothing to do with any  
23   appropriate decision-making?

24                               You would agree with that, right?

25                   A           It was, as I said before in my

1                                   RANDY M. MASTRO  
2       testimony, it was irrelevant to me what  
3       relationship Fran Reiter had with Housing Works,  
4       it was irrelevant to me whether Housing Works had  
5       been involved in any posters calling Fran Reiter  
6       an AIDS murderer.

7                                   All of those things were  
8       irrelevant to me in reviewing the AIDS housing  
9       contract extension for Housing Works.

10                   Q           But when you heard about or even  
11       perhaps read this note by Luellen Barkan, didn't  
12       it become clear to you that it wasn't irrelevant  
13       to her?

14                                   MR. KAHN:  Objection as to forum.

15                   A           You would have to ask Luellen  
16       Barkan whether and why she would have made such  
17       handwritten notation, because I don't have any  
18       recollection of any conversation which would have  
19       caused her to make such a notation in connection  
20       with any discussion with me.

21                   Q           You must have talked to her about  
22       this since then, haven't you, Ms. Barkan?

23                   A           No, I have not had a discussion  
24       with her about my testifying in this case.

25                   Q           That wasn't what I asked you.



1                                   RANDY M. MASTRO  
2     your conclusion that you would have no idea why  
3     she would take such a note, you might inquire a  
4     little bit.

5                   A           I testified, and I want the record  
6     to be perfectly clear, that I didn't have any  
7     idea why she would have written such a notation  
8     in connection with anything that she and I had  
9     ever discussed, because I don't recall any  
10    discussion with her ever about -- I have no  
11    specific recollection or present recollection of  
12    any discussion with her ever about Fran or Fran's  
13    views of Housing Works.

14                                So you would have to ask her why  
15    she wrote such a notation.

16                   Q           And you --

17                   A           But it certainly wasn't in my  
18    recollection, anything that she and I had  
19    discussed.

20                                As to whether she had a discussion  
21    with anyone else about Fran and Housing Works and  
22    Fran's history with Housing Works, you'd have to  
23    ask Luellen.

24                   Q           Did you have any concern at all  
25    when you found out about that note as to why it

1                                   RANDY M. MASTRO  
2       was that your chief of staff would make such a  
3       note during the period where a decision was being  
4       made about Housing Works' contracts?

5                   A           I did not have any concern about  
6       the integrity of the contracting process and the  
7       decision that had been made as to Housing Works  
8       and whether it should get an extension on its  
9       AIDS housing contract, because I was personally  
10      familiar with the issues involved, including the  
11      missing half a million dollars or more and  
12      Housing Works' failure repeatedly to provide  
13      documentation and a reconciliation of its books  
14      and records, an explanation of its commingling of  
15      funds, that it would put in place procedures  
16      going forward so that there would be proper  
17      accounting in the future.

18                               I wasn't concerned about it,  
19      because I know that the issue had been reviewed  
20      by HRA, that the issue had been reviewed by the  
21      Mayor's Office on Contracts, and the issue had  
22      also been reviewed by Luellen, who concurred in  
23      the decision and recommendation that had already  
24      been made by HRA and the Mayor's Office of  
25      Contracts.



1   RANDY M. MASTRO

2   And regardless of the notation, I  
3 knew Luellen Barkan to be a person of great  
4 integrity, as to whom any such thing would not  
5 have entered into her decision-making process as  
6 to whether to extend the contract.

7   So for all of those reasons I  
8 thought it was totally irrelevant that there was  
9 such a handwritten notation, the source or  
10 origins of which I don't know how that came about  
11 or where that came about.

12                                       Q           Has anyone ever told you that it  
13 was David Klasfeld who provided this information  
14 to Luellen Barkan?

15                                       A           No, not that I'm aware of. I have  
16 no recollection of anyone ever telling me that.

17                                       Q           But given his position as chief of  
18 staff to Ms. Reiter, up until some point in time  
19 before he came on to your staff, you wouldn't be  
20 surprised to hear that he would have full  
21 knowledge about Ms. Reiter's feelings towards  
22 Housing Works, would you?

23                                       A           Again, it was totally irrelevant  
24 to me, my staff, the Mayor's Office of Contracts  
25 and HRA, who is the party that made the decision

1                                   RANDY M. MASTRO  
2     and recommendation in the first place, what Fran  
3     Reiter's views were of Housing Works, totally  
4     irrelevant to the determination whether to extend  
5     Housing Works' AIDS housing contract when Housing  
6     Works couldn't account for half a million dollars  
7     or more of city money, when it had commingled  
8     funds, when it couldn't do an reconciliation,  
9     where it had no explanation for where that money  
10    had gone and had no adequate bookkeeping and  
11    record procedures, and when it had been  
12    repeatedly afforded opportunities to address  
13    where that half a million or more had gone and it  
14    had repeatedly failed to provide that information  
15    or miss those deadlines.

16                   Q           That's my question, though. It is  
17    irrelevant. Why was it part of what was going on  
18    during that period? That's what I want to know.  
19    Do you know?

20                                   MR. KAHN: Objection to form.

21                   A           I have answered --

22                                   MR. KAHN: He's already answered  
23    the question as to whether it's relevant  
24    or not. He's told you whether or not it  
25    was relevant to his decision-making.





1                                   RANDY M. MASTRO  
2     Division saw it exactly that way as well,  
3     unanimously reversing and remanding to a new  
4     judge.

5                   Q           So these repeated instances where  
6     you were involved in granting these extensions  
7     and giving these repeated opportunities to  
8     Housing Works, what was it that you kept on  
9     telling them you wanted them to provide and  
10    giving them extensions on?

11                  A           Again, so that my testimony is  
12    perfectly clear, and I incorporate by reference  
13    the testimony I have now repeatedly given into  
14    this answer.

15                               I testified that I became aware of  
16    issues that Housing Works could not account for  
17    at least \$500,000 or more in city funds that it  
18    had been given in connection with its AIDS  
19    housing contract, that it didn't have books and  
20    records sufficient to explain where the money had  
21    gone, that it had commingled funds, it couldn't  
22    account for these funds.

23                               That that was something first that  
24    DOI had found in an investigation that it had  
25    done, and that the agency, HRA, had been

1                                   RANDY M. MASTRO  
2 tracking, and that Housing Works did not have in  
3 place proper procedures to account for where city  
4 money was going, and this was brought to my  
5 attention.

6                                   There was discussion about --  
7 there were recommendations during the discussions  
8 on how to proceed.

9                                   I supported, and there were others  
10 who had made such affirmations to me affording  
11 Housing Works additional opportunities to explain  
12 where this \$500,000 or more had gone, to try to  
13 reconcile their books and to try and come up with  
14 proper accounting procedures going forward, to  
15 give them more time to do that.

16                                   I supported and encouraged that on  
17 at least two occasions, and they, even before the  
18 issue came to my attention, they had been  
19 afforded such opportunities.

20                                   And they nevertheless missed those  
21 deadlines or failed to respond when given those  
22 opportunities, and therefore when HRA, the  
23 Mayor's Office of Contracts and my chief of staff  
24 were unanimous in their view that this AIDS  
25 housing contract could not be extended for

1 RANDY M. MASTRO

2 Housing Works, I let that decision stand.

3 Q And the two occasions, let's stick  
4 with the first one first, the first occasion when  
5 you were consulted about Housing Works and these  
6 accounting issues and you approved of or --

7 A I supported giving them that  
8 opportunity.

9 Q Who presented you with the issues?

10 A I don't have a specific  
11 recollection as I sit here now, years later, of  
12 the specific exchanges with specific individuals.

13 But I have a general recollection  
14 of having discussed this issue with Luellen  
15 Barkan and Beth Kaswan.

16 It is also possible, although I  
17 am -- I don't have a specific recollection of any  
18 specific conversation, but I also may have  
19 discussed this issue with Lilliam Barrios-Paoli,  
20 who was the Commissioner of HRA at the time, but  
21 I do have specific recollections that I would  
22 have discussed this issue with Luellen Barkan and  
23 Beth Kaswan.

24 This issue being whether to extend  
25 the AIDS housing contract that Housing Works had

1 RANDY M. MASTRO

2 with HRA.

3 Q Did you consult with Fran Reiter  
4 at all in any of this decision-making during the  
5 period involving Housing Works and extensions of  
6 time to produce materials and extensions of  
7 contracts?

8 A No.

9 Q Never once?

10 A No. By that time Fran was no  
11 longer in city government. She was outside of  
12 city government, running the Mayor's re-election  
13 campaign.

14 Q But isn't it true that during that  
15 period she was consulted about governmental  
16 decision-making?

17 MR. KAHN: Did he have discussions  
18 with her during that period, is that the  
19 question, about governmental --

20 MR. BRINCKERHOFF: The question  
21 would include any discussions he had or  
22 any that he was aware of.

23 Q I'm saying isn't it true that  
24 occurred? That would include both.

25 A I'm not sure what you mean, that



1 RANDY M. MASTRO

2 what occurred?

3 Q That Ms. Reiter was consulted  
4 about decisions that were being made in the  
5 Giuliani administration, governmental decisions,  
6 while she was doing the re-election campaign?

7 A While there were occasions while  
8 Fran was running the Mayor's campaign where I  
9 would have discussions with Fran, particularly as  
10 they related to political issues involving the  
11 campaign, I never had a discussion with Fran  
12 about whether to renew the AIDS housing contract  
13 that Housing Works had with HRA.

14 That's my present recollection,  
15 that's my specific recollection. I don't recall  
16 ever having discussed that subject with Fran  
17 Reiter.

18 Q Do you have any reason to believe  
19 that Fran Reiter was regularly updated on the  
20 status of Housing Works' contract and audit  
21 related issues during 1997 leading up to the  
22 Mayor's re-election?

23 A I'm sorry, could you repeat the  
24 question.

25 (The question requested was read



1                                   RANDY M. MASTRO  
2       communication with Fran Reiter, you would have to  
3       ask them, but I don't have any specific  
4       recollection or present recollection of having  
5       any such communication with Fran myself or of  
6       anyone else having such communication at my  
7       behest.

8                   Q           Do you have an opinion as to  
9       whether it would be improper for someone on your  
10      staff to be regularly updating Fran Reiter about  
11      progress in the decision-making on whether or not  
12      to extend Housing Works' contract during that  
13      period in 1997?

14                  A           I don't have a view on that  
15      subject one way or the other, because I wasn't  
16      aware, as I said before, of whether it occurred.

17                               And the decision-making process  
18      that was involved here involving the agency, MOC,  
19      my chief of staff and myself, based on the record  
20      before us, that was a process of -- that I had  
21      great confidence in the integrity of and based on  
22      the facts as they existed at the time, that  
23      Housing Works had been unable to account for half  
24      a million dollars or more in city money and had  
25      been repeatedly given opportunities to account

1                                   RANDY M. MASTRO  
2     for those funds, provide proper documentation, do  
3     a reconciliation, explain why it had commingled  
4     funds and to explain what procedures it would put  
5     in place in the future to ensure proper  
6     accounting and they repeatedly failed to do so,  
7     the decision that was made had the unanimous  
8     support of those who were involved in the  
9     decision-making process, HRA in the first  
10    instances, the Mayor's Office of Contracts, and  
11    my office.

12                               MR. KAHN:  If this is a good time  
13                               to break for a very short period of time  
14                               I'd appreciate that.

15                               MR. BRINCKERHOFF:  No problem.

16                               (At this point in the proceedings  
17                               there was a recess, after which the  
18                               deposition continued as follows:)

19                               Q       Mr. Mastro, you said that there  
20     were two separate occasions where you were  
21     briefed on Housing Works related issues and  
22     approved of giving them additional opportunities  
23     to provide information to satisfy the city about  
24     their findings, correct?

25                               A       Yes.



1

RANDY M. MASTRO

2

have in place adequate procedures for how to

3

maintain its record keeping to explain where the

4

money it was receiving from the city was going.

5

And that on that basis there was

6

an ongoing review about whether to extend the

7

contract or not, the contract, as I recall,

8

having already recently expired at that point.

9

And I also recall Housing Works

10

had retained an outside accounting firm to, one

11

of the big accounting firms, I don't recall the

12

name specifically, but it had retained an outside

13

accounting firm to -- and represented that the

14

outside accounting firm was helping them

15

reconcile their books and records.

16

And I was apprised of these

17

developments by either Luellen or Beth Kaswan or

18

both, and expressed at that time that I -- my

19

support for giving them the time to provide that

20

information, Housing Works, that is, giving

21

Housing Works the time to provide that

22

information.

23

As I recall, they were supposed to

24

provide that information by the end of September

25

at that point, after which time the agency and

1                                   RANDY M. MASTRO  
2     the city would make a decision on whether to  
3     extend, and I recall being briefed on the issue  
4     and supporting giving them time to provide the  
5     additional information until the end of  
6     September.

7                   Q           Was everyone who briefed you about  
8     this issue or whose opinion you knew at the time  
9     of the same opinion as you, that this time should  
10    be provided?

11                  A           Again, I don't have a specific  
12    recollection of the specific conversations and he  
13    said/she said.

14                               I have a general recollection  
15    sometime in the late summer or early fall of 1997  
16    of learning about the issue and supporting,  
17    giving Housing Works the time until the end of  
18    September to provide the additional information  
19    and to work with the outside accounting firm to  
20    try and provide and reconciliation and come up  
21    with proper procedures in going forward, because  
22    there was at least half a million in city funds  
23    that were unaccounted for.

24                               And I -- so I recall there was  
25    concern expressed about the city contractor, in

1                                   RANDY M. MASTRO  
2    this case Housing Works, having half a million  
3    dollars or more in city funds unaccounted for,  
4    and resolving their status as quickly as  
5    possible, because of concern about what may have  
6    happened to the funds, and not being in a  
7    position of having a city contractor who couldn't  
8    account for city funds that had been provided to  
9    the contractor and what the ramifications of that  
10   were.

11                                But I also recall that I supported  
12   giving more time to explain themselves, even  
13   though they had been unable, Housing Works, that  
14   is, to do such reconciliation, even though they  
15   had been unable up to that point in time to  
16   explain where the half a million dollars of city  
17   funds had gone.

18                    Q        Did anybody at that time take a  
19   contrary view to the one that you just described  
20   that you held, which was that they should be  
21   given the time?

22                    A        I only have a general  
23   recollection. At the time I remember, my  
24   recollection is that there was concern expressed  
25   about how much more time to extend to a



1                                   RANDY M. MASTRO  
2 contractor under these circumstances, where half  
3 a million dollars or more in city funds was  
4 unaccounted for.

5                                   But I recall supporting giving  
6 more time, until the end of September, to try to  
7 account for those funds and provide proper  
8 documentation.

9                                   And I recall that that was a  
10 recommendation that was made to me at the time,  
11 to do that, and I supported that recommendation.

12                                  Q           There was no downside to that  
13 recommendation, was there? It wasn't as if the  
14 city was paying Housing Works money while it  
15 waited for this reconciliation, right?

16                                  A           There was a concern that agencies  
17 and the Mayor's Office of Contracts and city  
18 officials have about doing business with  
19 contractors who may have misappropriated funds or  
20 who cannot account for the funds that they  
21 receive from the city.

22   And a vendor or a contractor who  
23 cannot account for a half a million dollars or  
24 more in city funds that are provided to it, that  
25 raises the specter of very significant problems



1                                   RANDY M. MASTRO  
2     that outside accounting firm on establishing  
3     procedures for going forward and how to account  
4     for city funds, that they be given the additional  
5     time until the end of September to provide that  
6     information.

7                                   But this had been an issue  
8     outstanding for quite some time. The contract  
9     had already expired, there had already been a DOI  
10    report about this, and there hadn't been any  
11    explanations forthcoming as to, satisfactory  
12    explanations forthcoming from Housing Works about  
13    where this half a million dollars or more had  
14    gone.

15                   Q           It was your understanding at the  
16    time you concurred with this initial  
17    recommendation to give them the opportunity to  
18    provide this reconciliation along with the big  
19    accounting firm, as you said, it was your  
20    understanding at the time that Housing Works was  
21    still operating under a contract, or not?

22                   A           Again, you're asking me for my  
23    recollection of events that go back several  
24    years, but, so I don't have a specific  
25    recollection of a specific conversation, but I

1                                   RANDY M. MASTRO  
2    have a general recollection that I was apprised  
3    of the issue, and at the time I was apprised of  
4    the issue I was apprised of the fact that Housing  
5    Works was up for renewal, that their contract had  
6    expired and they were up for renewal, and that  
7    there had been a DOI investigation as well as an  
8    agency review where there was still half a  
9    million dollars or more unaccounted for of city  
10   funds that --

11                               MR. KAHN:   Excuse me just a  
12                               second.  You're asking whether or  
13                               notwithstanding the fact the contract had  
14                               expired Housing Works was continuing to  
15                               provide services during that time, just  
16                               so --

17                               MR. BRINCKERHOFF:  That's one  
18                               formulation, sure.

19                               MR. KAHN:  Whether he was aware  
20                               whether or not Housing Works was or was  
21                               not continuing to provide services.

22                               MR. BRINCKERHOFF:  I know that  
23                               he's aware of there being \$500,000 more  
24                               or everything else that we've had about  
25                               twenty-five times.

1 RANDY M. MASTRO

2 Q My question is are you aware of  
3 whether Housing Works was performing as if there  
4 was a contract in place?

5 A Other than my recollection of  
6 several years ago that I don't have a specific  
7 recollection or present recollection of specific  
8 conversations, but I have a general recollection  
9 that its existing contract had expired, Housing  
10 Works' existing contract with the city had  
11 expired, that it was requesting renewal of its  
12 contract, that during this period it was  
13 continuing to provide services while that review  
14 process, whether to renew the contract, was going  
15 on.

16 And that serious issues had arisen  
17 about Housing works inability to explain where  
18 half a million dollars or more in city funds it  
19 had received in connection with this AIDS housing  
20 contract had gone and that was being reviewed,  
21 that DOI had reviewed it the agency had reviewed  
22 and Housing Works had represented that it had  
23 brought in an outside large accounting firm to  
24 try and reconcile its books and records, and to  
25 try and establish procedures going forward and



1                                   RANDY M. MASTRO  
2       that time and any recommendations that had been  
3       made about renewal or not renewing, I can only  
4       tell you when I first recall getting involved in  
5       the process.

6                   Q           Did you understand that you were  
7       approving that housing works be paid for t,he  
8       services it was rendering up to and including the  
9       date at which they were supposed to provide these  
10      materials at the end of September?

11                  A           I don't have a specific  
12      recollection one way or the other whether that  
13      issue was even discussed at the time.

14                               I have a specific recollection of  
15      generally discussing or generally being briefed  
16      on whether -- on the status of, consideration of,  
17      renewal, the outstanding issue that existed  
18      involving the missing \$500,000 or more, the  
19      unaccounted for \$500,000 or more and the record  
20      keeping deficiencies at Housing Works and  
21      supporting giving housing works until the end of  
22      September, working with an outside accounting  
23      firm to provide additional information, the  
24      reconciliation and the new procedures that it  
25      would follow to see if it could account for where

1                                   RANDY M. MASTRO  
2     the \$500,000 or more had gone that it had  
3     received from the city and couldn't account for.

4                                   MR. BRINCKERHOFF: For the record,  
5             I just want to suggest that if there's  
6             any hope that we're going to be really  
7             able to conclude finally by 4:15 --

8                                   THE WITNESS: Why don't you  
9             proceed with questions.

10                                  MR. BRINCKERHOFF: I just want to  
11             make it clear for the record that I don't  
12             think I'm going to be able to do that if  
13             I continue to get the same answer  
14             repeatedly, over and, over again, along  
15             with the actual answer to my question, so  
16             I would suggest and encourage you both to  
17             endeavor not to do that, but that's your  
18             choice.

19                                  MR. KAHN: I think the answers  
20             have been responsive to the questions.

21                                  MR. BRINCKERHOFF: Okay.

22                                  MR. KAHN: But why don't you  
23             proceed.

24             Q             Then there was a second time where  
25             you were consulted and you suggested again that



1                                   RANDY M. MASTRO  
2   housing works be provided yet another, a second  
3   opportunity to take care of this issue, right?

4                   A           The end of September came and  
5   went, and Housing Works failed to respond by the  
6   end of September period with information  
7   explaining where the half a million dollars or  
8   more had gone, the reconciliation of its records  
9   and with an explanation of how its procedures  
10  would change in the future.

11                                So I was again briefed sometime  
12  around or after September 30th on the situation  
13  and the status, it probably would have been in  
14  early October, but I don't have a specific  
15  recollection of the date in 1997.

16                                No, it could have been at the very  
17  end of September or early October, but I think,  
18  it was early October, 1997.

19                   Q           Who provided the briefing and what  
20  was the recommendation?

21                   A           Once again, I would either have  
22  been briefed by Luellen Barkan or Beth Kaswan, or  
23  both, and I don't have a specific recollection  
24  about the specifics of any specific conversation,  
25  but I have a general recollection that I was,

1                                   RANDY M. MASTRO  
2       briefed on the fact that the deadline had passed  
3       at the, end of September, that Housing Works had  
4       not provided documentation explaining, where the  
5       \$500,000 or more in city funds had gone and they  
6       hadn't provided documentation to reconcile its  
7       accounts, and that it hadn't provided the city  
8       with information on the new procedures that it  
9       would be following to make sure that this problem  
10      didn't occur again.

11                                So the question arose what action  
12      to take at that point.

13                    Q        What was the recommendation and  
14      what was your decision?

15                    A        Again, I don't recall the  
16      specifics of the conversations and who  
17      specifically expressed what views.

18                                I do recall that, being told that  
19      the agency and Beth and Luellen were concerned  
20      about the status, and I suggested at the time or  
21      recommended at the time that steps be taken to  
22      reach out to, Housing Works one more time to see  
23      if there was anything, any additional information  
24      that they could provide to give them some short  
25      period of time to do that before we took final

1                                   RANDY M. MASTRO  
2    action in terms of determining whether to renew  
3    the contract for AIDS housing, give them one more  
4    opportunity to provide the information, if they  
5    were able, to about the status of the missing  
6    \$500,000 and the reconciliation, the  
7    documentation, the procedures they'd, follow in  
8    the future.

9                   Q        Is it your understanding that your  
10   recommendation was followed or implemented?

11                  A        Again, I don't have a specific  
12   recollection of specific conversations with  
13   specific individuals.

14                            I have a general recollection that  
15   what I suggested or recommended was to give them  
16   some short period of time to provide the  
17   information, even though they already missed the  
18   September 30th deadline, but that was  
19   communicated to Housing Works.

20                            That's my general recollection at  
21   the time. I'm not sure who would have  
22   communicated that, someone at the agency, or  
23   whether that would have been someone from the  
24   Mayor's Office on Contracts.

25                  Q        Did you learn what the result of



1                                   RANDY M. MASTRO  
2     and it may differ for each of the two situations,  
3     the end of September and then the early October  
4     request, it's my present recollection that  
5     whatever was provided by the end of September or  
6     early October, either didn't address certain of  
7     the issues or was insufficient to address the  
8     issues, but I don't have specific recollections  
9     of what was or was not provided, or on specific  
10    issues.

11                                But in any event, I know that it  
12    was the conclusion of the agency, the Mayor's  
13    Office of Contracts and my chief of staff, that  
14    the information that the city required, the  
15    reconciliation that the city required and the new  
16    procedures that the city would have required to  
17    be able to go forward in the future, there wasn't  
18    a satisfactory response by Housing Works to any  
19    of those issues, either in September or in early  
20    October, when they were given yet another  
21    opportunity to provide those responses and having  
22    not provided them by the end of September.

23                                Q           It was sometime on or after that  
24    date when you learned that this second  
25    opportunity, in whatever fashion, had proved to

1                                   RANDY M. MASTRO  
2       be unavailing, that you, along with everyone else  
3       that you've described, your chief of staff, the  
4       Mayor's Office of Contracts and the agency all  
5       decided, unanimously, that Housing Works should  
6       not be granted an extension of the scattered site  
7       contract, correct?

8                   A           That is correct, that there was  
9       unanimous agreement in October that the AIDS  
10      housing contract that Housing Works had with the  
11      city could actually not be extended.

12                  Q           Is that when you asked the agency,  
13      specifically, Ms. Barrios-Paoli, for a memo  
14      outlining all of the problems with Housing Works  
15      and all the reasons why its contract should not  
16      be extended?

17                  A           There again, after the end of  
18      September, the beginning of October, I remember a  
19      discussion with Luellen and/or Beth Kaswan about  
20      their concern that we should not be extending the  
21      Housing Works AIDS housing contract at that  
22      point.

23                               I recommended giving Housing Works  
24      an additional opportunity to respond, and that  
25      they did not respond in early October.

1                                   RANDY M. MASTRO

2                                   So by mid to late October certain  
3 events unfolded, and in that context there was a  
4 request of Lilliam Barrios-Paoli to provide such  
5 a memo.

6                   Q           And those certain events, correct  
7 me if I'm wrong, were that everyone found out  
8 that Housing Works was about to hold a  
9 demonstration criticizing the fact that they  
10 hadn't gotten this extension yet, anyway, right?

11                  A           At some point in late October I  
12 was apprised by either Luellen Barkan or Beth  
13 Kaswan that HRA had advised that there was going  
14 to be some sort of public statement or press  
15 conference or gathering coordinated by Housing  
16 Works about the status of their AIDS housing  
17 contract and whether it should be renewed.

18                  Q           That's when the decision was made  
19 not to renew it, and you asked Ms. Paoli for a  
20 memo outlining all of the reasons why it should  
21 not be renewed, right?

22                               MR. KAHN: Objection as to form.

23                  A           As I've already testified, by  
24 early October, when the September 30th deadline  
25 had passed for Housing Works to provide the

1                                   RANDY M. MASTRO  
2 additional information that the city had  
3 requested and the reconciliation that the city  
4 had requested, Luellen Barkan and/or Beth Kaswan  
5 had expressed to me their concerns and the  
6 concern of the agency that Housing Works' AIDS  
7 housing contract should not be extended, and I  
8 had recommended at that time that Housing Works  
9 be given a last opportunity to provide the  
10 information, and the information once again had  
11 not been forthcoming when Housing Works had been  
12 provided that additional opportunity in early  
13 October.

14                                   So the agency, the Mayor's Office  
15 of Contracts and my chief of staff were all in  
16 agreement, had all decided and were recommending  
17 that Housing Works' AIDS housing contract not be  
18 extended and when an issue of Housing Works  
19 organizing some kind of public event about the  
20 city not renewing its contract was then brought  
21 to my attention, and it was also brought to my  
22 attention that there had been no satisfactory  
23 response or additional information responsive to  
24 the city's requests from Housing Works concerning  
25 the unaccounted for \$500,000 or more and the



1                                   RANDY M. MASTRO  
2 reconciliation of its books and records and the  
3 procedures that it, new procedures it would have  
4 to implement to account for city funds in going  
5 forward, and that that last opportunity had also  
6 had gone by for Housing Works, I let stand the  
7 unanimous recommendation of the agency, the  
8 Mayor's office of Contracts and my chief of,  
9 staff and felt that I could no longer justify any  
10 further time for Housing Works to respond to what  
11 had now been an extended period of time to  
12 provide the information that the city had  
13 legitimately requested, and I therefore let stand  
14 the unanimous decision and recommendation of the  
15 agency the Mayor's Office of Contracts and my  
16 chief of staff that the agency be permitted to  
17 respond and explain why it was not going to renew  
18 Housing Works' AIDS housing contract.

19                   Q            You would agree with me, would  
20 you not, that the fact that there was this  
21 demonstration that had been announced and planned  
22 had nothing to do with your decision to let these  
23 other decisions stand, as you said?

24                                   THE WITNESS: Can you read back  
25 the question, please.



1                               RANDY M. MASTRO  
2       wanted to do and I felt that I would let stand  
3       what the agency wanted to do and could no longer  
4       justify what I had repeatedly done at this point,  
5       which was to give Housing Works additional time,  
6       additional deadlines, additional opportunities to  
7       address the serious issues about what had  
8       happened to half a million dollars or more in  
9       city money that Housing Works could not account  
10      for and its lack of documentation to explain what  
11      had happened to those funds, its commingling of  
12      those funds and its lack of proper procedures in  
13      place in going forward with the city.

14                               So that was the context.

15               Q           So at that point in time when you  
16      decided to let this stand and to not continue to  
17      advocate for giving more extensions and more  
18      extensions and more opportunities, that was a  
19      decision based on the merits, it had nothing to  
20      do with the demonstration; is that right or not?

21               A           It was a decision based solely on  
22      the merits, and it is also the case that the  
23      agency requested the opportunity to be able to  
24      respond and explain its position and the reasons  
25      for its position.

1                                 RANDY M. MASTRO

2                                 And I therefore permitted the  
3     agency to be able to do that and explain its  
4     position publicly, because its position on the  
5     merits was that it could not and would not renew  
6     a contract with a contractor who could not  
7     account for the half a million dollars or more in  
8     city funds, did not have proper documentation or  
9     books and records to explain what it had done  
10    with those funds, had commingled funds, and did  
11    not have in place proper procedures in going in  
12    how to account for funds that it was receiving.

13                    Q         Did anyone ever tell you that  
14    Housing Works had offered in October of 1997 to  
15    escrow the full amount of all money that was in  
16    dispute in exchange for having an extension go  
17    forward for even a limited period of time so it  
18    could be paid for the months of work it had  
19    already done?

20                    A         Again, I don't have specific  
21    recollections of specific contracts. I don't  
22    recall if that subject was discussed with me.

23                                 I don't have a recollection,  
24    present recollection of that subject having been  
25    discussed with me or whether such an offer was

1                                   RANDY M. MASTRO

2     made.

3                                   So as I sit here today, years  
4     later, I don't have any present recollection of  
5     anyone having said anything like that to me at  
6     the time.

7                   Q           When you decided to let the  
8     agency's, MOC's and the chief of staff's decision  
9     stand and allow the agency to respond to the  
10    public event, did you suggest to anyone that it  
11    might be a good idea to communicate with Housing  
12    Works and let that organization know what the  
13    final decision was, namely, that there would be  
14    no extension of their contract, period?

15                               Did you suggest that to anyone?

16                   A           I don't recall whether I had  
17    specific discussions about how this information  
18    should be communicated to Housing Works one way  
19    or the other.

20                               I don't have any present  
21    recollection of that years later. I may have, I  
22    may not have, I don't recall one way or the  
23    other.

24                               The agency was responsible for  
25    disseminating the information and would have been



1                                 RANDY M. MASTRO

2                 the editorializing, but we don't have a  
3                 lot of time, so I'd like an answer.

4                 A           I don't -- as I sit here today, I  
5                 don't come with a particular view as I sit here  
6                 today, and as I said, I don't have any specific  
7                 recollections or present recollection about  
8                 reference to the communication that occurred at  
9                 the time, but the agency was responsible for  
10                those communications.

11                Q           Now, it's true, isn't it, this  
12                wasn't just about the Housing Works' AIDS housing  
13                contract, there was also a Department of Health  
14                contract that you found out about around the same  
15                time, that you were informed of and it was  
16                directed that that contract not be registered,  
17                right?

18                A           Again, you're asking me for my  
19                recollection about events that happened several  
20                years ago, but I do have a present recollection  
21                that there was at least one other contract with  
22                the Department of Health that was brought to my  
23                attention at the time, or potential contract that  
24                Housing Works would have with the Department of  
25                Health that was brought to my attention at the

1                                   RANDY M. MASTRO

2     time.

3                                   Issues relating to a renewal of  
4     this AIDS housing contract might also have had  
5     relevance to that other contract.

6                   Q           And so once that was brought to  
7     your attention, you directed that that contract  
8     be withdrawn from registration with the  
9     Controller, right?

10                  A           I have a general recollection that  
11     the decision and recommendation that came to me  
12     at the time was because the renewal, the issue of  
13     renewal of the AIDS housing contract may relate  
14     or be relevant to the DOH contract as well, that  
15     that contract also should not go forward while  
16     the situation was being further reviewed.

17                  Q           And you accepted that  
18     recommendation, right?

19                  A           I let stand and accepted that  
20     recommendation which came from MOC in the first  
21     instance, as well as my chief of staff.

22                               MR. BRINCKERHOFF: Let's mark  
23     these.

24                               (The above described documents were  
25     marked Mastro Exhibits 1 through 16 for



1                                   RANDY M. MASTRO

2                                   identification, as of this date.)

3                   Q           Mr. Mastro, I want to show you a  
4 document that's been marked as Mastro Exhibit 1  
5 for purposes of this deposition.

6                                   It is a memorandum dated August  
7 20, 1997 to Randy M. Mastro from Lilliam  
8 Barrios-Paoli, along with a number of  
9 attachments.

10                                   The best way to identify it, it  
11 has page numbers on the top from the appellate  
12 appendix that go from 970 to 978.

13                                   Mr. Mastro, have you ever seen  
14 this memorandum before?

15                   A           Not that I recall.

16                   Q           Is this one of the documents you  
17 reviewed to help refresh your recollection in  
18 preparation for today's testimony?

19                   A           No.

20                   Q           Was it common for you to get  
21 memoranda from agency heads recommending contract  
22 extensions or modifications while you were Deputy  
23 Mayor in charge of operations?

24                   A           It was common for such memoranda  
25 to be addressed to me, but uncommon for me to



1                                   RANDY M. MASTRO  
2     the document, the following three pages called,  
3     "Determination of Contractor Responsibility," is  
4     not a document that you've ever seen before?

5                   A           I don't recall ever having seen  
6     any part of this document, personally having  
7     reviewed any part of this document previously.

8                                   I don't have any present  
9     recollection of having done it.

10                  Q           Did HRA ever inform you at any  
11     time in August of 1997 or the months thereafter  
12     that it was their opinion that Housing Works was  
13     actually a responsible contractor, and that the  
14     issues that were identified by DOI in a report  
15     from 1996 had been corrected?

16                                   Did anyone ever tell you that?

17                  A           Again, as I testified previously,  
18     by the time this issue came to my personal  
19     attention sometime in late summer or early fall  
20     of 1997, I was made aware of some of the more  
21     recent history and some of the differing views on  
22     how to proceed, but I don't recall --

23                  Q           So, for instance --

24                  A           I'm not finished with my answer.

25                  Q           Okay.

1                                   RANDY M. MASTRO

2                   A           I don't recall anyone saying to me  
3 anything like what you just asked me in the  
4 question.

5                                   I do recall a discussion about  
6 whether the agency wanted for some brief period  
7 of time to have a contract extension while an  
8 investigation continued.

9                                   I also recall some discussion  
10 about what DOI had found and what agency auditors  
11 had found, and I do recall at the time I first  
12 learned of this, in late summer or early fall  
13 1997, strong views, and I believe by that point  
14 in time the consensus view of certainly MOC and  
15 my chief of staff, but also the highest levels of  
16 the agency, that Housing Works was working on  
17 providing this additional information by the end  
18 of September that the city had requested, and I  
19 supported that recommendation.

20                   Q           So the issues that are discussed  
21 here in points 1, 2, 3 and 4, actually A and B as  
22 well, the first two pages of this document, 976  
23 and 977, all of which indicate that HRA thinks  
24 that everything has been resolved satisfactorily,  
25 that was something it's your recollection must

1                                   RANDY M. MASTRO  
2    have changed dramatically from August 20th of  
3    1997 to when you first started hearing about this  
4    in September, right?

5                                   MR. KAHN:   First, I object to the  
6                                   question as to form; second, I think  
7                                   you've mischaracterized what the  
8                                   memorandum says; and third, if I may  
9                                   finish, I'm not sure that the witness has  
10                                  had a full opportunity to read the  
11                                  document before responding.

12                                 Q           Take your time.  
13                                   I'm going to ask a different  
14    question.

15                                  Mr. Mastro, do you have any  
16    recollection of anyone from HRA ever subscribing  
17    to the view that Housing Works was a responsible  
18    contractor who had instituted a corrective action  
19    plan and put in new accounting systems and should  
20    therefore receive a contract extension?

21                                 A           That doesn't accurately  
22    characterize what the document says, but as I  
23    have already testified, I recall that when I was  
24    first apprised of this issue sometime in the late  
25    summer or early fall of 1997, I was apprised that

1                                   RANDY M. MASTRO  
2    there was consideration within HRA of a brief  
3    contract -- a brief period of contract extension  
4    while these issues continued to be reviewed.

5                                   And there was also the view of MOC  
6    that, as well as my chief of staff, that there  
7    should be the review and additional information  
8    provided by Housing Works before any  
9    determination was made about whether to extend  
10   the contract for any period of time.

11                                  And that that was in process, with  
12   Housing Works expected to provide that additional  
13   information with an outside accounting firm  
14   involved in helping them compile the information  
15   and put in place new procedures, and Housing  
16   Works was supposed to provide that information by  
17   the end of September, 1997, which it did not do.

18                                  There weren't satisfactory  
19   responses to the city on these issues by that  
20   time.

21                                  Q        You mentioned a number of times  
22   today, Mr. Mastro, that one of the issues was  
23   whether or not Housing Works had presently, while  
24   your decisions were being made, had the kind of  
25   accounting systems that could accurately keep

1 RANDY M. MASTRO

2 track of its finances, right?

3 That was one of the issues, was it  
4 not?

5 A It was one of several issues.

6 Q But one of them, nonetheless.

7 A In addition to the missing  
8 \$500,000 or more that was one of them, yes.

9 Q Are you confident that that had  
10 not been satisfactorily answered by Housing  
11 Works, that they had not by that point in time,  
12 when you concurred with the decision of all the  
13 other people that you testified to, are you  
14 confident that that was still an open question,  
15 the issue of their accounting systems in 1997?

16 A Again, you're asking me for my  
17 recollection of events that happened years ago,  
18 but my present recollection is that the agency,  
19 MOC and my chief of staff were not satisfied with  
20 the information they had received on the  
21 procedures that Housing Works proposed to have in  
22 place to properly account for the programs for  
23 which it was receiving money under city  
24 contracts, in this case the AIDS housing  
25 contract.

1 RANDY M. MASTRO

2 Q Now I want to show you another  
3 document that's been marked as Mastro Exhibit 4  
4 for purposes of today's deposition. It is a two  
5 page document containing handwritten notes.

6 Do you recognize the handwriting  
7 on this document, Mr. Mastro?

8 A I don't recognize the handwriting.

9 Q It doesn't look like Luellen  
10 Barkan's handwriting to you?

11 A I wouldn't, years later, since  
12 Luellen and I haven't worked together for several  
13 years, recognize her handwriting.

14 So I didn't recognize the  
15 handwriting when you gave me the document, but if  
16 you want to represent that's her handwriting and  
17 then ask me questions about it --

18 Q I'm happy to do that. I think  
19 that Mr. Kahn will agree with me that this is  
20 Luellen Barkan's handwriting.

21 Do you remember being shown this  
22 document by Mr. Barry from The New York Times or  
23 anyone else?

24 A I do not recall that. As I  
25 testified previously, I recall Dan Barry asking



1                                   RANDY M. MASTRO  
2   me about a particular handwritten notation that  
3   he attributed to Luellen Barkan.

4                                   I didn't recall specifically, I  
5   don't have a present recollection whether she  
6   showed me this document or not, and I don't have  
7   any present recollection of having seen this  
8   document previously.

9                   Q           If you accept for the moment that  
10   this document dated September 26th was written by  
11   Luellen Barkan at a time when she first was  
12   learning about the Housing Works situation and  
13   the fact that there was a contract renewal  
14   potential, things of that nature, does that in  
15   any way help you place in time when you first got  
16   briefed on Housing Works related issues by either  
17   Ms. Barkan or Ms. Kaswan?

18                   A           It doesn't refresh my recollection  
19   as to the specific date I would have been  
20   informed of these issues, other than to the  
21   extent there's a notation on this document of  
22   September 26th, which would have been late summer  
23   or early fall 1997, which is what I previously  
24   testified to as my present recollection of when  
25   this issue would have first come to my attention.

1                                   RANDY M. MASTRO

2                                   But this particular document and  
3 these notes, now having had the opportunity to  
4 review the notes, would not have been in my view  
5 a reflection of any communication between Luellen  
6 and me, because there is information handwritten  
7 on this document which I don't recall ever having  
8 had any awareness.

9                   Q           And Luellen Barkan never briefed  
10 you and told you that it was her understanding  
11 that Housing Works was involved in AIDS advocacy  
12 and that they had something to do with Act Up and  
13 that Fran Reiter hated them?

14                               She never told you any of those  
15 things I take it, right, from what you've said so  
16 far today?

17                   A           Well, actually what I was  
18 referring to in what I just said was it says Pam  
19 Breyer and Stan B.

20                               I wasn't aware of any affiliation  
21 that they had with Housing Works. That's what I  
22 was referring to when I was giving that answer,  
23 but do I have any recollection of discussing with  
24 Luellen any of the things you just recited?

25                   Q           That was my question.

1                                   RANDY M. MASTRO

2                   A           I don't have any recollection of  
3 having discussed any of those things with Luellen  
4 Barkan. I don't have any present recollection of  
5 that.

6                   Q           You'll agree with me, right, these  
7 issues, Housing Works, Fran hates them, Act Up,  
8 AIDS advocacy, at least up until that point those  
9 issues are completely irrelevant to any  
10 decision-making about whether Housing Works  
11 should get an extension on their contract; you  
12 agree with that, right?

13                  A           They were totally irrelevant to  
14 me. To the extent I was even aware of the litany  
15 of things that she wrote, and I'm not saying that  
16 I was, because I don't have any recollection of  
17 ever having discussed any of these things with  
18 Luellen ever, they were irrelevant and they would  
19 have been irrelevant to any consideration of  
20 whether to renew the contract.

21                  Q           And they should have been  
22 irrelevant to her too, right, your chief of  
23 staff, Ms. Barkan?

24                               MR. KAHN: Objection. You can  
25                               answer.

1   RANDY M. MASTRO

2                         A                 I think you should direct the  
3 question to Luellen Barkan as to what she  
4 considered relevant or not relevant.

5                         Q                 I have. I'm asking you.

6                         A                 In my working with Luellen Barkan  
7 I think those notations at the top of the page  
8 would have all been irrelevant to any  
9 determination of whether to extend the Housing  
10 Works contract, and these handwritten notes  
11 appear to be sort of random notes, not  
12 necessarily in any way, shape or form connected  
13 to any analysis or determination of whether to  
14 extend the contract.

15                         Q                 Is that something she told you  
16 about these notes, or is that just your  
17 observation sitting here today?

18                         A                 It's my observation sitting here.

19                         Q                 Let me show you another document  
20 that we've marked as Mastro Exhibit 6.

21   Am I correct in assuming that this  
22 is the memorandum that you referred to that you  
23 reviewed in preparation for today's testimony?

24                         A                 I did review this memorandum prior  
25 to today's testimony.

1                                   RANDY M. MASTRO

2                   Q           This is the memorandum that Ms.  
3 Paoli produced to you in advance of this  
4 demonstration that we talked about earlier,  
5 right?

6                   A           I don't have a specific  
7 recollection of whether it was in advance or on  
8 or about the same time, but this is the  
9 memorandum that she produced of the chronology of  
10 events leading up to this decision and her  
11 agency's proposed statement.

12                  Q           Was it the case that the purpose  
13 of this memo was for you to take a look at the  
14 public response that HRA was intending to make  
15 both of details that exist in the memo and the  
16 proposed press release on the last page, to  
17 approve all of that?

18                               Was that the purpose of it?

19                  A           No. The purpose of it was so that  
20 I would be fully apprised of the factual  
21 background and that there would be a summary of  
22 the factual background in case there were any  
23 inquiries about this issue which was about to be  
24 a public issue.

25                  Q           Okay, and --

1   RANDY M. MASTRO

2                    A           And this would have been typical  
3 of the types of memos that agencies would have  
4 prepared when there was going to be a public  
5 issue about something involved with their  
6 agencies.

7   That would have been common for  
8 the agency to prepare some kind of chronology or  
9 summary of what was going to -- of the background  
10 and what was going to transpire.

11                  Q           The last page of this document, it  
12 has Page 5 on the fax legend on top, that's  
13 proposed language for a press release, is it not?

14                  A           I believe it's proposed language  
15 for a public statement.

16                  Q           That was also common, I take it,  
17 when you would receive these kinds of memos, that  
18 part of the memo would be proposed language on a  
19 public statement?

20                  A           A public statement for the agency  
21 to release?

22                  Q           Yes.

23                  A           On a public issue? It would have  
24 been common for the agency, either working with  
25 an office in City Hall or the Mayor's press

1                                   RANDY M. MASTRO  
2 office, to prepare such statements and to provide  
3 them to the appropriate office in City Hall or  
4 the Mayor's press office before their release.

5                   Q           Who has the final say on the  
6 language and the content of the public statement,  
7 is it the press office, the Mayor, yourself, how  
8 does that work?

9                                   MR. KAHN: I think the witness was  
10                               referring to separate press offices in  
11                               his previous answer.

12                   A           I was. I wasn't referring to a  
13 uniform rule as to every press release or public  
14 statement, but I was referring to the fact that  
15 it would be common for the agency to work with an  
16 office in City Hall or the Mayor's press office  
17 in releasing public statements and press  
18 releases.

19                   Q           So would you have any knowledge at  
20 all about what the source of any changes in this  
21 proposed statement between the one that appears  
22 in front of you on Mastro Exhibit 6 and the one  
23 that was actually released, where they might have  
24 come from, the changes?

25                   A           No, and to my recollection I was

1                                 RANDY M. MASTRO  
2     not involved in any change to the statement that  
3     was released.

4                 Q             This memo, at least from your  
5     perspective, was for you to use in case you  
6     needed to respond to any kind of public inquiries  
7     or press inquiries about the Housing Works  
8     matter, right?

9                 A             For me or the Mayor's press office  
10    to be able to use in responding to any inquiries  
11    from the press or otherwise about this issue that  
12    was about to become a public issue.

13                Q             I want to show you another  
14    document, Mastro Exhibit 10.

15                               Is this the e-mail that you  
16    referenced earlier that you reviewed to help  
17    refresh your recollection in preparation for  
18    today's testimony?

19                A             I did see this e-mail in  
20    preparation for my testimony.

21                Q             Just so I understand, I take it  
22    Linda Carr was somebody in your office, in the  
23    Deputy Mayor of Operations' office?

24                A             She was a person who for a time  
25    was responsible for organizing correspondence and



1                                   RANDY M. MASTRO  
2   disseminating it, the correspondence that came  
3   in, the documentation that came in for me and my  
4   staff.

5                   Q           The forwarding date is October  
6   22nd and the original text -- do you know who EV  
7   is at contracts, the initial two at the very top?

8                   A           I don't know. I don't know, I  
9   have no recollection of who that might be.

10                  Q           Do you know when this item  
11   references, it says, "Housing Works -- Lilliam is  
12   faxing over a briefing, including a chronology,"  
13   do you know if that briefing including a  
14   chronology is what we just looked at as Mastro  
15   Exhibit 6, I believe?

16                  A           I don't have any present  
17   recollection of having seen this e-mail at the  
18   time, so you'd have to ask Beth or Luellen to  
19   what that refers, but you just showed me  
20   something dated October 27, 1997 that is a  
21   chronology and briefing.

22                  Q           Do you remember Tony Coles getting  
23   involved in this matter around the time that it  
24   was announced in the press release that Housing  
25   Works would not be getting a renewal and these

1                                   RANDY M. MASTRO  
2 other activities were taking place after you had  
3 let this decision stand?

4                   A           I don't.

5                   Q           He was a Deputy Mayor as well,  
6 Tony Coles, right?

7                   A           Not during my tenure.

8                   Q           Maybe I'm confused. What was his  
9 position in the fall of 1997, if you know?

10                  A           I don't specifically recall what  
11 his title was. It was something like senior  
12 advisor or senior policy advisor, something like  
13 that, to the Mayor.

14                  Q           To the Mayor, okay.

15                                So to the extent that he was being  
16 provided with information about Housing Works and  
17 the decision to not renew their contract, is it  
18 fair to say that the purpose of giving things to  
19 Tony Coles during this period was so that the  
20 Mayor himself would be advised and apprised of  
21 information?

22                  A           No.

23                                As senior policy advisor, one of  
24 Tony Coles' principal functions was to oversee  
25 aspects of programs within HRA, predominantly

1                                   RANDY M. MASTRO  
2   involving welfare reform and workfare, but also  
3   other programs within HRA.

4                                   And therefore, he would have been  
5   apprised of elements within HRA in the normal  
6   course, given the role that he played in  
7   overseeing policy initiatives in social, welfare  
8   and other programs.

9                   Q           But you have no recollection of  
10   him being involved in any way with Housing Works  
11   in the fall of 1997, do you?

12                   A           I don't. I don't have any  
13   recollection of it. I don't have a present  
14   recollection of it as I sit here now.

15                   Q           Did you talk to the Mayor at all  
16   in September or October of 1997 to give him the  
17   kind of briefing that you'd gotten from the  
18   various people you testified to to solicit his  
19   opinion about what should be done with Housing  
20   Works and its contract?

21                   A           I did not. I don't have any  
22   present recollection of having talked to the  
23   Mayor about those issues in the fall.

24                                   I do have a recollection about  
25   there being a subsequent protest at campaign

1                                   RANDY M. MASTRO  
2       headquarters, and that having been known to me  
3       and the Mayor.

4                                   But I don't recall discussing -- I  
5       have no present recollection of discussing with  
6       the Mayor any of the issues relating to whether  
7       to extend the contract, and it would have been  
8       the rare case where I would have discussed with  
9       the Mayor or brought to the Mayor contract  
10      renewal issues for any contractor.

11                                  Q       But certainly by the end of the  
12      month, or very shortly after this time frame,  
13      October 21st, October 22nd, you did talk to the  
14      Mayor about the demonstration that Housing Works  
15      had at Giuliani re-election campaign  
16      headquarters, right?

17                                  A       I have a present recollection that  
18      we were all aware at City Hall, myself, the  
19      Mayor, others, that there was such a  
20      demonstration at campaign headquarters.

21   That comes subsequent to HRA's  
22      public statement and the decision not to renew  
23      Housing Works' AIDS housing contract.

24   I don't have any specific  
25      recollection of discussing the contract issue



1                                   RANDY M. MASTRO  
2     time that you were apprised of it, did the Mayor  
3     in any way express any doubts about who Housing  
4     Works was, this group that had organized this  
5     demonstration that was being discussed?

6                   A           Since I don't recall specifically  
7     who I was with and what was discussed at the  
8     time, other than the fact that I know I was made  
9     aware and I know the Mayor was made aware,  
10    because we would have been made aware in the  
11    normal course of protests such as that at  
12    campaign headquarters, where, as I recall, there  
13    were people who had to be removed from the  
14    campaign headquarters, I know that we would have  
15    each been apprised of that development.

16                               It was not uncommon to have  
17    protests, as I said before, at City Hall. It  
18    was -- the protest at the campaign headquarters  
19    I'm sure each one of us would have been apprised  
20    of, and I don't recall any specific discussions.

21                   Q           Was it your understanding while  
22    you were Deputy Mayor of Operations that part of  
23    MOC's responsibilities was to try to keep track  
24    of all the demonstrations that were taking place  
25    or protests that were taking place as they



1                                   RANDY M. MASTRO  
2       have is that the Mayor and I would both have been  
3       informed that such a thing took place.

4                   Q       Now, you have seen him, have you  
5       not, get upset in the past over issues related to  
6       Housing Works? At any time prior to today would  
7       be included. You've seen that, right?

8                   A       I don't have any specific  
9       recollection of any specific reaction the Mayor  
10      had to any specific issue regarding Housing  
11      Works.

12                  Q       You never saw him get upset about  
13      the litigation that Housing Works was involved in  
14      in trying to get access to City Hall steps? That  
15      was something you never saw?

16                  A       I don't have any specific  
17      recollection about the Mayor's specific reaction  
18      to any issue involving Housing Works, and until  
19      you just mentioned that Housing Works was the  
20      group involved in litigating the issues relating  
21      to City Hall steps, I didn't have any present  
22      recollection up 'til that point in time of  
23      Housing Works even being involved in that.

24                  Q       That's why I'm trying to help  
25      refresh your recollection, actually.



1                                   RANDY M. MASTRO

2                                   Do you remember the Mayor being  
3 extremely upset about Housing Works releasing a  
4 report that was very critical of the city's SROs  
5 and the way that they provided services to people  
6 with HIV and AIDS, even going so far as to say  
7 that HRA were dealing drugs and ripping off  
8 clients?

9                                   Do you recall him being upset  
10 about that and responding in the press?

11                                  A           Again, I don't have any specific  
12 recollection about the Mayor's reaction to that  
13 specific report. I don't have any present  
14 recollection of it.

15                                  Q           Do you remember a Housing Works  
16 demonstration on City Hall steps in the summer of  
17 1998 where they held up signs with Mayor  
18 Giuliani's face on it and they all said, "AIDS  
19 criminal"?

20   Do you have any recollection of  
21 that?

22                                  A           I don't, and by the summer of 1998  
23 I was no longer at City Hall.

24                                  Q           Well, it depends on how you define  
25 summer. Let's say it was before you June 30th of

1 RANDY M. MASTRO

2 1998.

3 A I don't have any specific  
4 recollection such a protest or the Mayor's  
5 reaction to it one way or the other.

6 It's not to say there wasn't such  
7 a protest, and it's not to say that there may not  
8 have been views one way or the other. I just  
9 don't have any specific recollection.

10 I have no present recollection as  
11 I sit here today of either that protest or the  
12 Mayor's reaction to it.

13 Q Did you talk to the Mayor at all  
14 since you found out you were a Defendant in this  
15 case, at all, on any issues regarding Housing  
16 Works where it even just came up, just the word?

17 A No.

18 Q Never?

19 A I have not discussed with the  
20 Mayor this case or the fact that I'm a Defendant  
21 in the case, no.

22 Q Did you talk to him at all after  
23 Judge Schwartz' decision was reported on the  
24 front page of The New York Times? About Housing  
25 Works, obviously, not just generally.

1 RANDY M. MASTRO

2 A No, I did not.

3 Q Has anyone ever, anyone in city  
4 government ever told you about his reaction to  
5 being apprised of the status of that case by  
6 Mr. Hess?

7 A No, not that I recall.

8 Q Nobody has ever told you that?

9 A And I was long out of city  
10 government by the time that was decided, but I  
11 have no recollection of any discussions with  
12 anyone about the Mayor's reaction to Judge  
13 Schwartz' decision.

14 Q When was the last time you had any  
15 communication with the Mayor that involved  
16 Housing Works?

17 MR. KAHN: Objection to form. You  
18 can answer.

19 A As I previously testified, I'm  
20 sure we had some communication, but I don't  
21 recall the specifics of it, the day of the  
22 protest at the campaign headquarters in late  
23 October 1997, where individuals had to be removed  
24 from the campaign headquarters, and I may have  
25 had some discussion with the Mayor at some point

1                                   RANDY M. MASTRO  
2    after that when a newspaper article or two  
3    appeared in The New York Times about Housing  
4    Works, but I don't recall any specific  
5    conversation with the Mayor about that.

6                                   I don't recall any specific  
7    conversations with the Mayor about Housing Works  
8    other than I know we were both aware at the time  
9    and both knew each other were aware at the time  
10   of the protest at the campaign headquarters in  
11   late October 1997 where people had to be removed  
12   from the campaign headquarters.

13                   Q       Did the Mayor know about the  
14   posters that got put up with Fran Reiter's  
15   caricature or face and Housing Works' alleged  
16   responsibility for that act?

17                   A       Again, I don't recall specific  
18   conversation and whether the Mayor was in a  
19   specific conversation with me about that.

20                               In response to your last question,  
21   which was the last conversation I can recall with  
22   the Mayor about Housing Works, and I would date  
23   that as late October 1997, because I'm sure we  
24   mentioned to each other about the protest at  
25   campaign headquarters.

1                                   RANDY M. MASTRO

2                                   I'm just as sure that the Mayor  
3 was aware of the posters involving Fran Reiter,  
4 particularly since they involved security issues  
5 about her personal safety and whether they posed  
6 any safety risk for her, but I don't recall any  
7 specific conversation with the Mayor about those  
8 posters.

9                                   MR. KAHN: Mr. Brinckerhoff, it's  
10 now 4:15. As we previously discussed,  
11 Mr. Mastro has a commitment that he has  
12 to make at 5:00, and he has to wrap it up  
13 here at 4:15.

14                                   Are you pretty much finished?

15                                   MR. BRINCKERHOFF: No.

16                                   MR. KAHN: How much longer do you  
17 think you have?

18                                   MR. BRINCKERHOFF: I could get it  
19 done in about a half an hour or so, but  
20 it sounds like you don't have that time,  
21 so.

22                                   THE WITNESS: I don't have any  
23 choice, I've got a court date. If I  
24 thought we could finish in the next 15  
25 minutes I could try, but if you're

1                   RANDY M. MASTRO  
2           telling me you don't think you could  
3           finish in the next 15 minutes, I should  
4           get ready to go to court.

5                   MR. BRINCKERHOFF: Well, we'll get  
6           closer to finishing.

7                   THE WITNESS: I'm going to have to  
8           come back anyway, so --

9                   MR. KAHN: Do you think it's a  
10          foregone conclusion that if you ask 15  
11          more minutes of questioning that you  
12          can't wrap it up?

13                  MR. BRINCKERHOFF: Let me talk to  
14          Charles for one minute and see whether or  
15          not I think I can finish.

16                  (At this point in the proceedings  
17          there was a recess, after which the  
18          deposition continued as follows:)

19                  MR. BRINCKERHOFF: I have a  
20          proposed resolution. My preference would  
21          be to schedule just one other hour at  
22          some point in the next eight, or nine  
23          days or even outside the discovery  
24          cutoff. It doesn't matter if we all  
25          agree to it.

1                   RANDY M. MASTRO

2                   I can commit to getting done in an  
3 hour's time, so that's my proposal.

4                   If you're not willing to do that,  
5 then I'll take my 15 minutes, because it  
6 may be a while until I get an order from  
7 a judge directing you to come back.

8                   MR. KAHN: You're pretty sure you  
9 won't wrap it up in 15 minutes?

10                  MR. BRINCKERHOFF: Yes.

11                  THE WITNESS: I don't have any  
12 choice, but my court hearing won't last  
13 very long. It's at 5:00. I should be  
14 done by 5:30.

15                  I could be back here between 6:00  
16 and 6:30. We can wrap this up tonight.  
17 I want us to conclude this.

18                  We went many hours before we got  
19 to the actual allegations in the  
20 Complaint as they pertain to me, and I  
21 would prefer to wrap this up this  
22 evening, so I have no problem with people  
23 staying here until 6:00, 6:30, I'll be  
24 back, and we can conclude.

25                  (At this point in the proceedings

1                                   RANDY M. MASTRO

2                   there was a recess, after which the  
3                   deposition continued as follows:)

4           (E V E N I N G                   S E S S I O N)

5                   MR. KAHN: For the record, it is  
6                   now 6:30 and we are reconvening for what  
7                   the parties have agreed will be the final  
8                   hour of Mr. Mastro's deposition, or more  
9                   precisely, that the deposition will last  
10                  no longer than an hour.

11                  MR. BRINCKERHOFF: That's true.  
12                  That is the agreement. I just will add  
13                  the caveat for the record that if any  
14                  documents are supplied or information  
15                  comes up after this deposition is  
16                  concluded today, I will reserve my right  
17                  to recall Mr. Mastro for further  
18                  testimony.

19                  MR. KAHN: And we of course will  
20                  reserve our right to decline.

21                  THE WITNESS: All right. Let's go  
22                  ahead.

23

24                  CONTINUED EXAMINATION BY MR. BRINCKERHOFF:

25



1 RANDY M. MASTRO

2 Q Mr. Mastro, do you know an  
3 individual by the name of David Karnovsky?

4 A Yes.

5 Q Did he work in your office when  
6 you were Deputy Mayor of Operations?

7 A For part of that time, yes.

8 Q Did he have anything to do with  
9 Housing Works, to your knowledge?

10 A During the final months of my  
11 tenure as Deputy Mayor in 1998, David Karnovsky  
12 was my counsel, and after Luellen Barkan left,  
13 among his responsibilities was to review issues  
14 relating to city contracts and to be the person  
15 on my staff who worked with the Mayor's Office of  
16 Contracts.

17 So I recall that that was part of  
18 his responsibilities when he served as my counsel  
19 in the final months of my tenure as Deputy Mayor  
20 in 1998.

21 I don't have specific  
22 recollection, as I think sit here now, I don't  
23 have a present recollection of what specifically  
24 he did in connection with Housing Works'  
25 contracts, but it would have been within his

1                                   RANDY M. MASTRO  
2 areas of responsibility to review contract issues  
3 and be the contact person on my staff with the  
4 Mayor's Office of Contracts.

5           Q           Prior to Luellen Barkan leaving  
6 your staff, did Mr. Karnovsky have any  
7 responsibility for MOC related issues?

8           A           I think I already just testified  
9 about that, that he did.

10          Q           I'm sorry, I must have missed it.  
11                        So he assisted Luellen Barkan on  
12 those issues prior to her leaving?

13          A           Oh, I'm sorry, I thought you meant  
14 after she left.

15          Q           No, I was asking before.

16          A           I don't -- I don't recall,  
17 although he may have. I don't recall  
18 specifically when he started on my staff, so I  
19 don't recall the extent to which he overlapped  
20 with Luellen or not on my staff, so I don't have  
21 a recollection one way or the other, but if you  
22 ask Luellen or David, I'm sure they could tell  
23 you.

24          Q           Do you remember Mr. Karnovsky or  
25 anyone else on your staff being involved in

1                                   RANDY M. MASTRO  
2       decisions related to the language and structure  
3       of an RFP that was released in September or  
4       October of 1997 for scattered site housing,  
5       similar to the contract that Housing Works had?

6                   A           I don't have any present  
7       recollection of that one way or the other.  If  
8       you'd like to show me a document to help refresh  
9       my recollection, that will be fine, but I don't  
10      have any present recollection as I sit here today  
11      of what you've asked me about one way or the  
12      other.

13                  Q           Okay.  I want to show you a  
14      document that's been marked as Mastro Exhibit 16  
15      for purposes of this deposition.

16                                It is a multi-page document  
17      without any page numbers, all photocopies of  
18      handwritten notes some on 8 1/2 x 14 paper, other  
19      pages on 8 1/2 x 11.  Aside from that there is no  
20      real way to identify it.

21                               MR. BRINCKERHOFF:  Perhaps to move  
22      things along, would you agree that these  
23      are notes that were taken by Beth Kaswan,  
24      who was the head of the Mayor's Office of  
25      Contracts?

1 RANDY M. MASTRO

2 MR. KAHN: Yes.

3 Q Specifically, Mr. Mastro, I want  
4 to direct your attention to the sixth page of  
5 this document, which starts with a heading that's  
6 underlined, that says, "Per Luellen-David  
7 Klasfeld."

8 Do you see that?

9 A I see that.

10 Q Now, earlier today you testified  
11 that you had no specific independent recollection  
12 of Mr. Klasfeld being involved in issues relating  
13 to Housing Works.

14 A I said I didn't have a present  
15 recollection one way or the other.

16 Q Yes.

17 A Of his involvement or lack of  
18 involvement.

19 Q You wouldn't be surprised if he  
20 had been involved in the back and forth that was  
21 going on in September and October of 1997 between  
22 your office and the Mayor's Office of Contracts  
23 and HRA, would you?

24 A As I testified earlier, he was  
25 involved in housing issues generally, so I don't

1                                   RANDY M. MASTRO  
2    have any present recollection of his involvement  
3    in connection with Housing Works, but I do have a  
4    general recollection that he was involved in  
5    housing issues during the period when he was on  
6    my staff.

7                   Q           There's a reference here, I'm  
8    going to read it into the record as I comprehend  
9    it anyway, that says, "Housing Works-Ernst &  
10

11                   Young has come in. Their conclusions are  
12                   otherwise. Won't be able to submit by  
13                   9/30/97."

14                   Then there's a parenthetical phrase that  
15                   says, "Came up in staff meeting with  
16                   Randy."

17                   Does that in any way help refresh  
18    your recollection as to whether or not issues  
19    related to Housing Works might have come up in a  
20    staff meeting that you had at some point in  
21    September of 1997?

22                   A           I don't have any recollection of  
23    these notes, and I don't recognize the  
24    handwriting as to who wrote them, so it doesn't  
25    affect my recollection.

1                                   RANDY M. MASTRO

2                                   What I testified previously to was  
3   that I had a general recollection during this  
4   period that there were certainly discussions.

5                                   Whether or not that came up at a  
6   staff meeting or not I don't have a present  
7   recollection one way or the other.  May have, may  
8   not have.

9                   Q           Did you have regular staff  
10   meetings as part of your practice as Deputy Mayor  
11   of Operations?

12                   A           Yes.

13                   Q           Were they scheduled at a  
14   particular interval?

15                   A           Yes.

16                   Q           How frequently?

17                   A           Once a week.

18                   Q           Any particular day of the week  
19   that you typically had those meetings on?

20                   A           Typically on Fridays.

21                   Q           Would it be the case that when it  
22   came to the staff meetings, whenever possible you  
23   expected Luellen Barkan, your chief of staff, and  
24   Mr. Klasfeld, who was part of your staff, to  
25   attend those meetings?

1                                   RANDY M. MASTRO

2                   A           Luellen typically attended them.  
3 I don't recall the frequency with which David  
4 attended them, but Luellen did typically attend  
5 them.

6                   Q           Who else on your staff typically  
7 attended your weekly staff meetings?

8                   A           My staff changed over time, but  
9 David Klasfeld -- strike that. David Karnovsky  
10 would typically have attended them when he was on  
11 my staff.

12                               Someone named Jake Menges would  
13 typically have attended them. Someone named Seth  
14 Kay would typically have attended them. One Jose  
15 Nicot was on my staff, and he typically would  
16 have attended them.

17                               Someone named Debbie Montefinesse  
18 would typically have attended them.

19                               There were others who would have  
20 participated. David Gmach, before he left city  
21 government, would typically have attended them.  
22 Lisa Parrish, after she joined my staff, would  
23 typically have attended them.

24                               That list is inclusive, not  
25 exclusive. There may have been others who

1                                   RANDY M. MASTRO  
2       occasionally or typically attended the meetings.  
3       Those are among the people who during the periods  
4       when they were on my staff would have attended  
5       the staff meetings.

6                   Q           You'll note on the same entries  
7       they're a parenthetical at the bottom that says,  
8                    "This is scattered site housing. Also  
9                    there's another facility built with HUD,"  
10                   it looks like a dollar sign, "no city  
11                   contract."

12                               Do you remember being made aware  
13       at all in 1997 of there being some issue related  
14       to housing that was run by Housing Works in a  
15       facility that was built at least in part with HUD  
16       dollars?

17                   A           I don't have a present  
18       recollection. I don't know if that subject, one  
19       way or the other, I don't know if you'd like to  
20       show me some documents to help refresh my  
21       recollection. I'd be happy to look at them.

22                               I don't have a present  
23       recollection as I sit here now seven years later  
24       one way or the other on that subject.

25                   Q           Were you ever at any point



1                                   RANDY M. MASTRO  
2 informed of or did you participate in discussions  
3 about whether or not Housing Works would be  
4 financially able to continue existing if a  
5 decision were made to not renew its scattered  
6 site contract and other contracts with HRA?

7                   A           I don't have any present  
8 recollection of having discussed that issue at  
9 the time, but a decision was made about  
10 continuing the contract that's at issue in this  
11 Complaint.

12                                   I don't have any present  
13 recollection of that subject having been  
14 discussed one way or the other.

15                   Q           Wasn't a decision made not to  
16 enter into any contracts with Housing Works at  
17 that time, in October of 1997, at the time that  
18 you let stand the decision as you've described it  
19 that was made by the three other entities or  
20 individuals?

21                   A           That would not be an accurate  
22 description of the situation.

23                   Q           But it was the case, was it not,  
24 that there was a contract with the Department of  
25 Health that was withdrawn from being registered

1                                   RANDY M. MASTRO  
2     with the Controller at almost exactly the same  
3     time as this other decision with respect to AIDS  
4     housing, right?

5                   A           My present recollection is that  
6     there was at least one other contract issue  
7     relating to a DOH contract of Housing Works that  
8     at or about that time was also pulled back for  
9     further review.

10                  Q           Now I want to show you again  
11     Mastro Exhibit 6, which was the memorandum that  
12     was provided to you by Ms. Paoli on October 21,  
13     1997.

14                               The final page, the proposed  
15     statement, the second paragraph, I believe, that  
16     begins, "Based on the latest audit," at the end  
17     says, "'HRA could not renew the Housing Works  
18     scattered site contract which expired on June 30,  
19     1997 or enter into new contracts." Correct? It  
20     certainly says that, right?

21                  A           You've just quoted from the  
22     proposed statement.

23                  Q           Do you remember that being part of  
24     the decision, that HRA could not enter into any  
25     new contracts with Housing Works as a result of

1                                   RANDY M. MASTRO  
2 its decision and the decision that you let stand?  
3                   A           What I recall is what I previously  
4 testified to, which is that there was a decision  
5 not to renew this AIDS housing contract with  
6 Housing Works, and because of the issues that had  
7 been raised about Housing Works' inability to  
8 account for \$500,000 or more in city funds and  
9 reconcile its books and records and provide  
10 adequate documentation and explain the procedures  
11 that they would have in effect going forwards,  
12 and that that failing on Housing Works' part  
13 meant that the city could not renew that  
14 particular contract, and that issue unresolved,  
15 without satisfactory explanation related to or  
16 had relevance to potentially other contracts that  
17 Housing Works may attempt to obtain with the  
18 city, and that there would have to be review in  
19 those other contexts, including the DOH contract  
20 that I testified I was aware of at or about that  
21 time, was pulled back for further review.

22                                   And HRA, having made the  
23 determination in this, as to this renewal of this  
24 contract, would have to have considered these  
25 circumstances in connection with any new

1 RANDY M. MASTRO

2 contracts as well.

3 Q If you could look at Mastro  
4 Exhibit 16 again, the page following the one that  
5 we've been looking at, which is the document  
6 that's right there, the following page.

7 Just so you know, we have agreed,  
8 myself and Mr. Kahn, that these are the notes of  
9 Beth Kaswan, so that much is established.

10 So I ask you to accept that as  
11 being the truth for the purposes of these  
12 questions.

13 There's a note here on the page  
14 dated October 20th that says, "Housing Works has  
15 filed a notice of claim for nonpayment.  
16 DOI has an auditor there for last week."

17 Do you remember either of these  
18 issues coming up prior to you deciding to let  
19 stand this decision about Housing Works'  
20 scattered site contract, either the issue of a  
21 notice of claim being filed by Housing Works or  
22 DOI sending an auditor in around or about that  
23 time?

24 MR. KAHN: I'm not sure whether or  
25 not the record reflects this. This is

1                                   RANDY M. MASTRO

2                   dated October 20th. You may have said  
3                   that already.

4                   MR. BRINCKERHOFF: Yes, I did.

5                   A           I don't have any present  
6                   recollection of whether Housing Works had filed a  
7                   notice of claim on or about October 20th, which  
8                   is the handwritten notation on the upper left  
9                   corner of that page.

10                               And I don't have any present  
11                   recollection about the specific timing of DOI  
12                   auditors being at Housing Works, other than I  
13                   have a general recollection, as I previously  
14                   testified to, that there had been DOI review and  
15                   a DOI report issued concerning the deficiencies  
16                   and the failure of Housing Works to be able to  
17                   account for at least \$500,000, as much as a  
18                   million dollars well prior to this time.

19                               The Department of Investigation  
20                   had been involved with these issues and reporting  
21                   on them long prior to October 20th.

22                   Q           Mr. Mastro, do you have any reason  
23                   to believe at all that any of the sources of your  
24                   information about Housing Works during September  
25                   and October of 1997, which certainly included

1                                   RANDY M. MASTRO  
2     your chief of staff, people on your own staff,  
3     the Mayor's Office of Contracts, and the agency,  
4     meaning HRA, do you have any reason to believe  
5     that any of those people did not provide you with  
6     all of the relevant information in briefing you  
7     on decisions that were being made that you  
8     ultimately approved of when it came to Housing  
9     Works?

10                           THE WITNESS: Can you read back  
11                           the question.

12                           (The question requested was read  
13                           back by the reporter.)

14                   A        I did not then and I do not now  
15     have any reason to believe that they provided me  
16     with anything other than what they perceived to  
17     be accurate information relevant to what I needed  
18     to know.

19                           I have to add that obviously my  
20     time was limited, and therefore they presented me  
21     with information in summary fashion.

22                           So obviously there was information  
23     of which the agency, the Mayor's Office of  
24     Contracts and my chief of staff would have spent  
25     time assessing, and then information would have

1                                   RANDY M. MASTRO  
2    been presented to me in some summary fashion.  
3                                   And as I have already testified, I  
4    don't have any reason to believe and I didn't  
5    have any reason to believe then that those  
6    sources, my chief of staff, Beth Kaswan at the  
7    Mayor's Office of Contracts, to the extent I  
8    received the recommendations from the agency,  
9    that those sources provided me with anything  
10   other than what they perceived to be accurate  
11   information relevant to the decision-making  
12   process.

13                   Q           Sitting here today, do you believe  
14   that knowing that Housing Works had offered to  
15   escrow all money in dispute in exchange for being  
16   provided the opportunity to provide additional  
17   accounting information and the opportunity to  
18   continue the contract, do you think that that  
19   fact, assuming it to be true, would have changed  
20   your decision back in October of 1997?

21                                   MR. KAHN:  Objection as to form.

22                                   You may answer.

23                   A           I don't want to speculate or  
24   answer hypotheticals, and as I previously  
25   testified, I don't have any present recollection





1 RANDY M. MASTRO

2 Q Now I want you to go forward three  
3 pages to an undated entry. The first one says,  
4 "Per Richard." Do you see that? It follows  
5 "Strong rumor that Housing Works would be  
6 marching in or on City Hall tomorrow."

7 A Yes.

8 Q Then it says, "Per Mastro, he  
9 spoke to Lilliam. He needs a report on  
10 all they (HW) did wrong." It says, "Me  
11 and Lilliam to start to work on memo to  
12 Randy explaining sequence with --

13 MR. KAHN: Accounting.

14 Q "Accounting firms re: \$1 million.  
15 Lilliam must be prepared to respond on  
16 camera tomorrow. Refuse to provide info  
17 that would enable us to identify what  
18 happened to the \$1 million."

19 You see all that, right?

20 A I do.

21 Q Does that, given that these are  
22 Ms. Barkan's notes, refresh your recollection at  
23 all as to any interaction you might have been  
24 having with Lilliam Barrios-Paoli about Housing  
25 Works around the time that Mastro Exhibit 6 was

1                   RANDY M. MASTRO  
2 drafted, meaning October 21st of 1997?

3                   MR. KAHN: Could you reread the  
4 question, please.

5                   (The question requested was read  
6 back by the reporter.)

7  
8                   MR. KAHN: I believe you meant  
9 given that these are Ms. Kaswan's notes.

10                  MR. BRINCKERHOFF: Yes. I didn't  
11 even catch it the second time, sorry.

12                  Q       Ms. Kaswan's notes, I apologize.

13                  A       As I previously testified, I  
14 recall speaking to Luellen Barkan and Beth Kaswan  
15 on the subject, and that I thought I also thought  
16 I may have spoken to Lilliam Barrios-Paoli, but I  
17 couldn't specifically recall the substance of  
18 such a conversation.

19                  So these notes reflect that what I  
20 thought -- what I testified about earlier, that I  
21 may have spoken to Lilliam, they seem to reflect  
22 that I did at some point speak to Lilliam, which  
23 is consistent with what I said previously.

24                  Q       Does this refresh your  
25 recollection, not specifically, but generally

1

RANDY M. MASTRO

2 speaking, about directing Lilliam Barrios-Paoli  
3 to give you a report on all that Housing Works  
4 had done wrong and to be prepared to respond on  
5 camera?

6 A As I previously testified, I had  
7 requested such a summary and background and  
8 history, and these notes reflect that I made such  
9 a request.

10 And as I also previously  
11 testified, it was anticipated that the agency  
12 would be responding to the public issue that  
13 would occur.

14 So these notes reflect that  
15 Lilliam Barrios-Paoli was going to do that. So  
16 these notes reflect many of the things that I  
17 previously testified about, questions such as the  
18 summary and that the agency would be responding  
19 publicly.

20 Q Two more pages on, there are three  
21 entries dated October 21st.

22 The one I'm interested in asking  
23 you about is the middle one that says, "Per  
24 Gabe/Lilliam" and says, I'm actually skipping the  
25 first sentence, but I can certainly help you read





1                                   RANDY M. MASTRO

2    about October 24th of 1997?

3                    A           I don't have any present  
4    recollection of that subject one way or the  
5    other, or whether that was discussed in any way  
6    with me at the time one way or the other.

7                                   I have a general recollection,  
8    present recollection now generally of issues  
9    relating to a DOH contract at the time being  
10   pulled back and reviewed, but I don't have any  
11   specific present recollection of the particulars  
12   of what occurred at that time, or I have no  
13   present recollection of the issue that you just  
14   asked me about, or the notes you just asked me  
15   about.

16                   Q           Do you know if Luellen Barkan had  
17   regular meetings with personnel or even any one  
18   individual from MOC as part of her job as your  
19   chief of staff?

20                   A           You would have to ask Luellen  
21   about her regular meeting schedule, but I have a  
22   general recollection that she was in regular  
23   communication with Beth Kaswan, who was the head  
24   of the Mayor's Office of Contracts, a former  
25   Assistant U.S. Attorney, formerly, I believe, in

1 RANDY M. MASTRO

2 the Justice Department, with an accounting  
3 background, and she communicated on a regular  
4 basis, Luellen and Beth communicated on a regular  
5 basis, as I recall.

6 Q If you could flip one more page,  
7 it says, "10/29, Luellen meeting." It says,  
8 "Housing Works broke into campaign headquarters,"  
9 and trust me on this, the testimony is, "and  
10 chained themselves to desks."

11 You referred to this earlier  
12 today, right, the demonstration by Housing Works  
13 at re-election campaign headquarters?

14 I need a verbal response.

15 A Yes.

16 Q Does it refresh your recollection  
17 at all that that demonstration by Housing Works  
18 occurred within about a week of your decision to  
19 let the decision on not renewing Housing Works'  
20 scattered site contract stand?

21 MR. KAHN: Objection, you may  
22 answer.

23 A It doesn't refresh my recollection  
24 one way or the other. I previously testified  
25 that I recalled a demonstration at campaign





1                                   RANDY M. MASTRO  
2     and audits occurred over time, and their  
3     investigation continued, because there hadn't  
4     been satisfactory responses or explanations from  
5     Housing Works addressing the issues and the areas  
6     of concern about missing city funds and Housing  
7     Works' inability to account for half a million  
8     dollars in city funds, its inability to produce  
9     records and reconcile its books and records as to  
10    those funds, its commingling of funds and the  
11    like.

12                   Q           Earlier today you mentioned that  
13    one of the things you might have talked to Mayor  
14    Giuliani about would have been issues related to  
15    Housing Works and their lawsuit when there were  
16    news accounts of that lawsuit in The New York  
17    Times.

18                                   Do you remember that?

19                   A           No, that was not my testimony. My  
20    testimony was that I don't have any specific  
21    recollection of a conversation with the Mayor,  
22    but there was at least one longer piece in The  
23    New York Times that I can recall seeing sometime  
24    in 1998, which because the piece ran, it may have  
25    been something that I or he commented upon, since



1                                   RANDY M. MASTRO  
2 specifically about a specific conversation, but  
3 do you remember the Mayor being asked questions  
4 about Housing Works and this contract decision by  
5 reporters on camera in the spring of 1998 on or  
6 about the same time as the Dan Barry piece came  
7 out that you just mentioned?

8                                   Do you recall that happening, and  
9 if so, were you in any way involved in briefing  
10 the Mayor and preparing him to respond to such a  
11 question?

12                                  A           Again, I don't have any present  
13 recollection of that. As I previously testified,  
14 such a press report is the kind of thing where I  
15 may have had an exchange with the Mayor about the  
16 press report or questions he might have gotten  
17 publicly about that press report in the spring of  
18 1998.

19                                   I don't have any specific  
20 recollection of such a conversation with the  
21 Mayor.

22                                  Q           Are you aware of anyone in city  
23 government having any interactions or contact  
24 with people in the Department of Investigation or  
25 the HRA's IG's office about work that they did on

1                                   RANDY M. MASTRO  
2     Housing Works from October of 1997, when the  
3     decision was announced about the contract, until  
4     sometime in the spring of 1998 when they issued  
5     yet another critical report?

6                                   Are you aware of any such  
7     communications or interactions?

8                   A           Between who and who?

9                   Q           Anyone in city government,  
10    excluding for the moment DOI and the HRA IG, and  
11    anyone in DOI or the HRA IG?

12                   A           There would likely have been  
13    communication between --

14                                   MR. KAHN: I think the question  
15    was do you recall, are you aware of any  
16    such discussions.

17                   A           I don't have any present  
18    recollection of any specific discussions in that  
19    regard, other than you've shown me certain  
20    documents that, about DOI reports and ongoing  
21    work, and ongoing findings.

22                                   But I don't have, as I testified  
23    previously, a present recollection of any such  
24    discussions.

25                   Q           But you wouldn't be surprised to

1 RANDY M. MASTRO

2 hear that that was occurring, right?

3 A City agencies and offices --

4 MR. KAHN: Objection to form.

5 A (Continuing) -- communicate with  
6 one another about issues that affect city  
7 government, but I don't have any present  
8 recollection of having been made aware of  
9 specific communications that may have occurred  
10 between specific agencies or offices.

11 Q Are you aware of anyone in city  
12 government attempting to influence the outcome of  
13 the DOI investigation that was ongoing with  
14 Housing Works starting in October of 1997 and  
15 concluding in March of 1998?

16 THE WITNESS: Could you read back  
17 the question, please.

18 (The question requested was read  
19 back by the reporter.)

20 A No.

21 Q That wouldn't be appropriate,  
22 would it? You'd agree with me on that?

23 A Not only would I not expect that  
24 to happen, but also I would not expect the  
25 Department of Investigation to be affected in any

1 RANDY M. MASTRO

2 way by it if such a thing had happened, which did  
3 not happen.

4 Q Were you informed at any point in  
5 time after the memo from Lilliam Barrios-Paoli  
6 and the demonstration on October 22, 1997, were  
7 you made aware at all of any preliminary  
8 conclusions that had been reached by DOI that  
9 were actually favorable to Housing Works?

10 A You're asking about the period  
11 after --

12 Q Yes.

13 A (Continuing) -- Lilliam  
14 Barrios-Paoli's memo dated October 21, 1997?

15 Q That's exactly right.

16 A As I testified previously, I  
17 recall certain DOI reports and findings prior to  
18 Lilliam Barrios-Paoli October 21, 1997 memo, well  
19 prior to that memo, and I generally recall that  
20 DOI continued to do its work and continued to  
21 investigate and audit and continued to produce  
22 additional information.

23 While I have a general  
24 recollection that there was some further adverse  
25 findings from DOI subsequent to that October 21,

1

RANDY M. MASTRO

2 1997 memo, I don't have specific recollections of  
 3 DOI's reports or findings and whether any of them  
 4 may have been positive compared to my general  
 5 recollection that some of the findings I  
 6 generally recall were negative, even after this  
 7 period of time, October 21, 1997.

8

Q Earlier today you testified that

9 even after, going back a little further, even  
 10 after the decision was made and announced in the  
 11 Mayor's budget that the Division of AIDS Services  
 12 would be retained, there remained issues that  
 13 Fran Reiter in particular dealt with which  
 14 included, among other things, who would be the  
 15 appropriate person to run the Division of AIDS  
 16 Services.

17

Do you recall that testimony this

18

morning?

19

A I recall the testimony I gave

20 earlier today and that testimony will stand, so I  
 21 won't attempt to correct each part of the way you  
 22 phrased the question that mischaracterized the  
 23 testimony.

24

Q That's fine.

25

A Including whether, how I

1                                   RANDY M. MASTRO  
2       characterized Fran's role compared to other  
3       people.

4                                   But leaving that aside, my prior  
5       testimony speaks for itself.

6                                   I do recall mentioning that one of  
7       the subsequent issues that arose with the  
8       Division of AIDS Services was who would head the  
9       agency, the division, I should say.

10                   Q           Were you informed of, made aware  
11       of, or did you participate in any way in the  
12       decision to relieve Stephen Fisher of his  
13       responsibilities for the Division of AIDS  
14       Services sometime in 1995?

15                   A           If you had asked me to name who  
16       headed the Division of AIDS Services at that time  
17       I would not have recalled the name of the  
18       individual.

19                                   My only recollection in that  
20       regard as I sit here today is that at some point  
21       someone named Caldwell became the head of the  
22       Division of AIDS Services, and I do recall that  
23       that change was made at some point.

24                   Q           Were you --

25                   A           But I don't recall the specific



1                                   RANDY M. MASTRO

2       date when it was made.

3                   Q           Were you involved in any way in  
4       approving of the decision to retain Mr. Caldwell  
5       as the head of the Division of AIDS Services?

6                   A           This was during the period when I  
7       was chief of staff, I believe, so I was aware  
8       that the change was made and Mr. Caldwell became  
9       the head of the Division of AIDS Services.

10                               I was not personally responsible  
11       for making that decision, but I was aware that  
12       such a decision was made and that Greg Caldwell  
13       had been asked to head the Division of AIDS  
14       Services.

15                   Q           Do you know if Fran Reiter or  
16       David Klasfeld were involved in that decision, to  
17       have Mr. Caldwell head the Division of AIDS  
18       Services?

19                   A           My present recollection is that  
20       there were a number of people involved in that  
21       decision, and that among the people involved in  
22       that decision were Fran Reiter, but there were  
23       others involved in that decision as well, and I  
24       couldn't speak to what role if any Mr. Klasfeld  
25       played in that decision.

1                                   RANDY M. MASTRO

2                                   Fran was among a number of people  
3 who were involved in making that decision.

4                   Q           Who else was involved in making  
5 the decision aside from Ms. Reiter?

6                   A           It was a position within HRA, so  
7 it would likely also have involved whoever the  
8 Commissioner of HRA was at the time, and Deputy  
9 Mayor Segarra, and there would have been others  
10 of us in city government who would have been  
11 aware of the change that was being made, and as I  
12 said previously, I was aware that such a change  
13 was being made.

14                  Q           Were you aware that he replaced a  
15 woman by the name of Jeannette Colon?

16                  A           I don't -- now that you have -- I  
17 wouldn't have recalled Jeannette Colon's name at  
18 the time you raised it. It refreshes my  
19 recollection that I recall the name.

20                               I don't have a recollection of,  
21 present recollection of her other than recalling  
22 the name.

23                               So as I said previously, I  
24 wouldn't have been able to name the director of  
25 the Division of AIDS Services based on my present

1 RANDY M. MASTRO

2 recollection without having reviewed any records  
3 about these events that go back several years,  
4 not until you've started mentioning names, but  
5 the only present recollection I have that now  
6 some of these names refreshed my recollection  
7 that I may have heard the names before, but the  
8 only present recollection I have specifically  
9 about who the head of Division of Aids Services  
10 was, was that at some point Mr. Caldwell became  
11 the head of the Division of AIDS Services.

12 Q Does it refresh your recollection  
13 at all to hear that Ms. Colon has testified that  
14 she was forced out of her position as the head of  
15 the Division of AIDS Services and told that the  
16 reason she was being asked to leave was because  
17 individuals within the city government above her  
18 were unhappy with the testimony that she had  
19 given in a deposition in a case, a class action  
20 lawsuit that was brought by Housing Works trying  
21 to reform the Division of AIDS Services?

22 Does any of that refresh your  
23 recollection as to the circumstances surrounding  
24 her leaving that post?

25 A It doesn't refresh my

1                                   RANDY M. MASTRO  
2    recollection, because as I said, I didn't have a  
3    present recollection of Mr. Fisher or Ms. Colon,  
4    other than when you mentioned their names I had a  
5    recollection that I had heard their names  
6    previously, but I don't have any present  
7    recollection of them personally.

8                   Q           Over the years since Mr. Caldwell  
9    has become the head of the Division of AIDS  
10   Services, have you ever had any occasion to  
11   interact with him at all?

12                  A           I'm sure that I've met Mr.  
13   Caldwell, but I'm not sure I would recognize him  
14   if he walked into the room right now.

15                               So I remember his name, I recall  
16   that he became the head of the Division of AIDS  
17   Services, and I have a present recollection that  
18   I've met him, I've spoken with him, but I don't  
19   have a recollection of what he looks like or  
20   anything other than what I've already testified  
21   about.

22                  Q           So I take it you would certainly  
23   not have a recollection of having spoken to him  
24   either in person or over the phone about anything  
25   related to Housing Works?

1 RANDY M. MASTRO

2 A As I said, I'm sure that I've  
3 spoken to him at some point in time or met him at  
4 some point in time.

5 I don't have any present  
6 recollection about what, when, where, anything  
7 about the interactions I had with him.

8 I have a recollection that he  
9 became the head of the Division of AIDS Services,  
10 and in that capacity I probably met him at some  
11 point or had some conversation with him at some  
12 point, but I don't have any present recollection  
13 of any of those conversations or meetings.

14 Q Were you consulted at all by the  
15 new Commissioner for HRA starting in 1998, Jason  
16 Turner, or his subsequent First Deputy, Mark  
17 Hoover, about decisions that one or both of those  
18 two individuals were making about retaining  
19 various higher level officials within HRA in the  
20 spring and summer of 1998?

21 A At some point I recall they made a  
22 number of changes in personnel at HRA. By that  
23 time I was Deputy Mayor, so the personnel  
24 functions that I used to perform as chief of  
25 staff were not part of my portfolio as Deputy

1 RANDY M. MASTRO

2 Mayor.

3 But I do recall at some point  
4 having been made aware of a number of changes  
5 that Jason Turner made and wanted to make among  
6 executives within HRA.

7 Q Did any --

8 A In the spring of 1998.

9 Q Did any of those decisions involve  
10 Greg Caldwell?

11 A I don't specifically recall  
12 whether they involved Greg Caldwell or not.

13 Q Do you know a representative to  
14 the United States Congress, specifically the  
15 House of Representatives, by the name of Townes,  
16 from New York City?

17 A Yes.

18 Q Did you ever receive any inquiry  
19 from his office about the decision that you were  
20 involved in with Housing Works in deciding not to  
21 renew or extend its scattered site contract?

22 A Once again, as I previously  
23 testified, as my office was the principal liaison  
24 with elected officials at all levels, my office  
25 often got inquiries from elected officials on

1                                   RANDY M. MASTRO  
2 various topics, but I don't have a specific  
3 recollection of any inquiry from Congressman  
4 Townes' office on that subject.

5                                   I just don't have a present  
6 recollection of it one way or the other.

7                   Q           Isn't it true that you actually  
8 attended a meeting with Commissioner Turner to  
9 discuss potential personnel changes within HRA in  
10 the spring of 1998?

11                   A           Again, as I previously testified,  
12 I was made aware of a number of personnel changes  
13 that Commissioner Turner wanted to make in the  
14 spring of 1998.

15                                   I don't recall whether those were  
16 communicated in a meeting at which I attended  
17 with others or whether I was informed of the  
18 proposed changes by others, but I do recall  
19 having been informed that he wanted to make a  
20 number of personnel changes among executives in  
21 HRA.

22                                   So I have that general  
23 recollection. I don't have a present  
24 recollection of the manner in which I learned  
25 about it, whether that was communicated in a

1 RANDY M. MASTRO

2 meeting in which I attended.

3 MR. KAHN: Mr. Brinckerhoff, it is  
4 now 7:30. It is one hour after we  
5 commenced this deposition, and pursuant  
6 to our agreement, the deposition is now  
7 over.

8 MR. BRINCKERHOFF: Okay. Just for  
9 the record, I think I said it before, but  
10 I will reserve my right to recall Mr.  
11 Mastro if any additional testimony or  
12 documents warrant that recall.

13 MR. KAHN: And I'll stand on my  
14 earlier statement.

15

16

17

---

18

RANDY M. MASTRO

19

20 Subscribed and sworn to before me

21 this \_\_\_\_\_ day of \_\_\_\_\_, 2001.

22

23

---

24

NOTARY PUBLIC

25



1 RANDY M. MASTRO

2

3 E X H I B I T S

4

5 MASTRO FOR IDENT.

6	1	Memorandum dated August 20, 1997 to	170
		Randy M. Mastro from Lilliam	
7		Barrios-Paoli with attachments	
	4	Two page document containing	170
8		handwritten notes	
	6	Memorandum	170
9	10	E-mail	170
	16	Handwritten notes	170

10

11

12 DIRECTIONS NOT TO ANSWER

13		PAGE	LINE
----	--	------	------

14

15		57	11
		58	9
16		72	22
		77	12

17

18

19

20

21

22

23

24

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

RANDY M. MASTRO

C E R T I F I C A T E

I, SUZANNE F. MOORE, a Shorthand Reporter and Notary Public of the State of New York, do hereby certify:

That, RANDY M. MASTRO, the witness whose deposition is hereinbefore set forth, was duly sworn, and that such deposition is a true and accurate record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

\_\_\_\_\_  
SUZANNE F. MOORE, RPR, CRR





# Archives of the Mayor's Press Office

FOR IMMEDIATE RELEASE

Date: August 28, 1996

## Release #410-96

Contact: Jack Deacy (212) 788-2958 or Dwight Williams (212) 788-2972

---

### **MAYOR GIULIANI NAMES CHIEF OF STAFF RANDY MASTRO AS DEPUTY MAYOR FOR OPERATIONS**

Mayor Rudolph W. Giuliani today announced the appointment of Randy M. Mastro as Deputy Mayor for Operations. Mr. Mastro will assume the operational responsibilities now carried out by First Deputy Mayor Peter J. Powers. His appointment becomes effective September 3, 1996.

The Deputy Mayor for Operations oversees the day-to-day operations of City government, directing the City's relations with Federal, state and local agencies and acts as the Mayor's chief liaison with elected officials. In the Mayor's absence, Randy Mastro will have the authority to act on the Mayor's behalf.

"Randy Mastro has been an outstanding Chief of Staff in my administration," Mayor Giuliani said. "Not only has Randy been involved in all aspects of the daily operations of the Mayor's Office, but he has gone above and beyond the call of duty by overseeing important economic initiatives to reform the City's wholesale food markets and private carting industry. We have all benefited from Randy's tireless efforts and look forward to continuing to work with him in this new role."

The Mayor added, "Randy will bring years of expertise and leadership to his new role as Deputy Mayor for Operations. He will now have the larger responsibility of supervising the daily operations of City agencies."

As Chief of Staff, Mr. Mastro supervised many vital departments in the Mayor's Office, including scheduling, correspondence, special events, advance, citywide services and fiscal and administrative functions. He was responsible for recruiting top level talent for the Administration and the Mayor's Cabinet and also served as an advisor to the Mayor on policy, personnel and legal issues.

At the request of the Mayor, Mr. Mastro led the City's efforts to clean up and regulate operations at the Fulton Fish Market, the City's other wholesale food markets, the private carting industry and the San Gennaro Festival. He also directed the dramatic turnaround of the City's Off-Track Betting Corporation, now a profitable money making entity. In addition to his duties as Chief of Staff, Mr. Mastro has served as the Acting Chairman of the Trade Waste Commission.

Randy Mastro has been the Mayor's Chief of Staff since January 1, 1994, after serving as outside counsel to the Mayor's campaign and Deputy Executive Director of Mayor-elect Giuliani's transition team. Mr. Mastro began his legal career in 1981, serving as a law clerk to Justice Alan B. Handler of the New Jersey Supreme Court, and then from 1982 to 1985, he was a litigation associate at Cravath, Swaine & Moore. From 1985 to 1989, Mr. Mastro was an Assistant United States Attorney and Deputy Chief of the Civil Division in the U.S. Attorney's Office for the Southern District of New York, where he specialized in organized crime cases. After working with the Federal government, Mr. Mastro became a partner at Gibson, Dunn & Crutcher, one of the nation's oldest and largest law firms. From 1988 to 1993, Mr. Mastro was an adjunct associate professor at Fordham University Law School, teaching complex civil litigation and legal writing.

Randy Mastro is a cum laude graduate of Yale University (B.A. 1978) and the University of Pennsylvania Law School (J.D. 1981). Mr. Mastro is married to Dr. Jonine Bernstein, Assistant Professor of Epidemiology at the Mount Sinai School of Medicine. They are the proud parents of a new daughter, Arianna. They live in the West Village with their dog, Bogart, a champion bearded collie.

---

Go to [Press Releases](#) | [Giuliani Archives](#) | [Mayor's Office](#) | [NYC.gov Home Page](#)  
[Contact Us](#) | [FAQs](#) | [Privacy Statement](#) | [Site Map](#)

OPINION

SUBSCRIBER ONLY

# Randy Mastro is a bad pick for NYC's top lawyer



Getty

Randy Mastro is Eric Adams's possible pick to be the city's corporation counsel. (Getty)



By **CHARLES KING**

April 30, 2024 at 5:00 a.m.

As soon as it was reported that [Mayor Adams is considering nominating Randy Mastro](#) to serve as New York City's corporation counsel, I was shocked and outraged.

As CEO of [Housing Works](#), a healing community of people living with and affected by HIV/AIDS, I've seen firsthand how vindictive and uncaring Mastro can be toward vulnerable New Yorkers. And I'm not alone: Mastro's uniquely toxic career, from his time as a high-ranking Giuliani administration official to his subsequent corporate work, has already prompted the City Council's LGBTQ Caucus and Black, Latino, and Asian Caucus to [oppose his nomination](#).

Housing Works' experience shows clearly why Mastro cannot be allowed to serve in this critical public role.

In the 1990s, while HIV/AIDS devastated New York City at now-unthinkable levels, Mastro served as chief of staff and later deputy mayor to Mayor Rudy Giuliani. In response to our city, state, and federal elected officials largely neglecting the HIV/AIDS epidemic, I co-founded Housing Works with other members of the housing committee of ACT UP NY. Housing Works' mission was, and continues to be, to end the twin epidemics of HIV/AIDS and homelessness.

We also committed to continuing our relentless advocacy while providing essential services, like health care, dignified housing, and syringe exchange services.

When Giuliani attempted to cut and restrict essential services and benefits for low-income people with HIV and AIDS, Housing Works used demonstrations and litigation to instead call for improvements to the city's critical [HIV/AIDS Services Administration](#).

In response to our heartfelt advocacy, Mastro orchestrated a campaign against Housing Works that was so malicious that two federal court decisions found it to be "vindictive and retaliatory." As part of this campaign, the Giuliani administration terminated contracts with Housing Works that provided housing and other essential services to more than 200 individuals and families living with HIV. It didn't stop there: The Giuliani administration also prevented our agency from securing any additional funding under municipal, state, or federal grants.



The city [eventually paid \\$4.8 million to settle our lawsuit](#), asserting facts the federal court found were sufficient to support our claims that the Giuliani administration “acted with vindictive and retaliatory motives because of Housing Works’ vigorous First Amendment activities.” Significantly, had the case not settled, the court found that Housing Works “had alleged facts sufficient to support intentional conduct” by individual plaintiffs, including Mastro, that might leave them liable for punitive damages.

The New York Times reported at the time that we were but one of “a series of settlements, including a limousine driver, a police inspector and a jail warden, who said that senior officials in the Giuliani administration illegally retaliated against them for criticism.”

More recently, Mastro and his corporate law firm have opposed Housing Works in two cases against landlords who discriminated against tenants utilizing housing vouchers. Unsurprisingly, Mastro represented landlords who engaged in discriminatory conduct. Fortunately, we successfully asserted the rights of these potential tenants, but New Yorkers deserve better than a hired gun unconcerned by the impacts of his actions on the public.

Mastro’s toxic record against the public’s interest is not limited to New York. He also served as an attorney for former New Jersey Gov. Chris Christie in the “Bridgagate” scandal, in which the former governor was accused of orchestrating traffic congestion on the George Washington Bridge as political retaliation. Mastro also represented Chevron, helping the company avoid a billion-dollar judgment in a pollution case against the Ecuadorian government despite evidence of environmental damage.

Mastro’s involvement and tactics in these cases, from spitefully undermining Housing Works to defending environmental exploitation, raise serious concerns about his ethics and integrity.

The public must also question why Adams would revert back to the Giuliani administration for recruitment choices. The current corporation counsel, Sylvia Hinds-Radix, is stepping down, reportedly due to clashes with Adams administration officials. The mayor and his administration are struggling to govern while contending with several significant legal challenges, from a sexual harassment allegation to the ongoing investigations into his campaign’s fundraising.

The corporation counsel has a Charter-mandated responsibility to act as the chief legal officer of the City of New York, representing dozens of city agencies and the hundreds of thousands of municipal workers they employ. This official is not appointed to be an attack dog for the mayor’s personal legal woes and vendettas.

Throughout his career, Randy Mastro has shown a shocking disregard for the public's interests. Our representatives in the City Council must do their duty and reject Mastro's nomination should it come to before them.

*King is the co-founder and CEO of Housing Works.*

**2024 > April > 30**

# State Court Rejects Giuliani's Policy On AIDS Benefits

By Raymond Hernandez

Oct. 20, 1999

See the article in its original context from October 20, 1999, Section A, Page 1 [Buy Reprints](#)

[VIEW ON TIMSMACHINE](#)

TimesMachine is an exclusive benefit for home delivery and digital subscribers.

New York's highest court ruled today that the administration of Mayor Rudolph W. Giuliani had created illegal obstacles for people with H.I.V. or AIDS to obtain public assistance.

In a 7-to-0 ruling, the Court of Appeals said the city must stop requiring people with H.I.V. or AIDS to submit to the rigorous screening process that it imposed on other people applying for welfare, food stamps and Medicaid.

While the city maintained that its requirements for eligibility were procedural and not onerous, the court decided that the city's policies for determining benefits violated a city law intended to make it simpler for poor people with AIDS or H.I.V. to receive assistance.

The decision is the latest in a series of rebukes by the courts and the Federal Government to Mr. Giuliani's attempts to make it more difficult for the poor to obtain government benefits.

The ruling also represents a setback for the administration's campaign to overhaul the city's welfare program, which among other things has required all applicants to undergo stringent background checks that include interviews with city investigators charged with verifying applicants' income, assets and residency.

The city instituted the verification policy, known as the Eligibility Verification Review, in 1995 as a way to insure that only qualified people receive all types of public assistance benefits. The administration contended that the policy weeded out thousands of recipients who were receiving public assistance fraudulently, and said it had discouraged others from trying to bilk the system.

But critics, including Democratic lawmakers and advocates for the poor, have argued that the city policy unfairly denied public assistance benefits to thousands of New Yorkers, and discouraged thousands more from going through the process, even when they had legitimate claims. In particular, advocates for people with H.I.V. said the administration had made it unreasonably difficult for those people to obtain benefits, sometimes delaying the start of assistance by three months.

In addition to instituting the background checks, Mr. Giuliani tried to do away with the Division of AIDS Services, which provides some form of public assistance to 25,000 people.

In response, the City Council passed a bill in 1997 that made the agency permanent, and required it to provide a variety of benefits, including food stamps, welfare grants and Medicaid coverage, to low-income New York City residents with AIDS or H.I.V. who request assistance. Mr. Giuliani signed the measure into law.

The ruling issued today involved a lawsuit brought by Daniel Hernandez, an H.I.V.-positive man who applied for public assistance from the Division of AIDS Services in July 1997. As part of his application, he was interviewed, and he submitted all the documents, including medical records, required by the city, according to court records. Later, he was told by the city that he would have to undergo another screening in the Human Resources Administration's Brooklyn office. The city told him that if he did not attend the second screening, he would not be eligible for public assistance. He sued instead.

Under city procedures, low-income residents with H.I.V. apply to the Division of AIDS Services for public assistance, and that agency determines their eligibility. But the administration has required that the applicants go through the second screening, the verification review, as other welfare applicants do.

It is this second screening that the Court of Appeals said violated the 1997 city law. In their decision, the judges ruled that the law was intended to eliminate bureaucratic hurdles like this review for people with AIDS, because they were among the most vulnerable low-income New Yorkers.

Writing for the court, Judge George Bundy Smith said the 1997 law "was enacted to facilitate access to necessary public benefits and services for individuals suffering from clinical/symptomatic H.I.V. illness and AIDS in New York City."

He added that "nothing in this decision should be taken as prohibiting efforts or procedures to prevent or eliminate fraud."

Deborah Sproles, a spokeswoman for the city's Human Resources Administration, said the city would accommodate the ruling by having the Division of AIDS Services conduct a more in-depth initial eligibility review. She said the city would not be dissuaded from doing thorough background checks.

Housing Works, a group that assists people with AIDS and aided the plaintiffs in the lawsuit, called the ruling an important victory. "I think this is a big defeat for the Giuliani administration," said Michael Kink, legislative coordinator for the group. "The unanimous decision shows the court will not tolerate mistreatment of people with disabilities in the name of welfare reform."

Under the administration's screening program, all H.I.V.-positive applicants for public assistance had been required to report to the eligibility review center at 330 Jay Street in Brooklyn. They were interviewed by investigators wearing badges, and were asked questions about income, assets and residency. (Once the suit was filed, however, the city stopped requiring applicants to go to Brooklyn and instead sent investigators to their homes.) If the applicant was not home, investigators questioned neighbors or landlords to verify information.

But the administration's policy drew protests from Democratic lawmakers and advocates for the poor, who said that the Division of AIDS Services already subjected clients applying for public assistance to a rigorous review process before granting them benefits.

That process requires the applicant to provide the city with his or her medical records, proof of income and identity and other personal information.

More than that, though, critics of the policy said it was especially hard on people with AIDS, because it required them to make several trips to different city offices to establish eligibility.

The critics noted that the 1997 law explicitly required the city to provide benefits to people with AIDS or H.I.V. at a single location.

# THE MAYOR LOSES FREE SPEECH CASE

By Benjamin Weiser

Nov. 13, 1999

See the article in its original context from November 13, 1999, Section A, Page 1 [Buy Reprints](#)

[VIEW ON TIMSMACHINE](#)

TimesMachine is an exclusive benefit for home delivery and digital subscribers.

In another First Amendment defeat for the Giuliani administration, a federal judge in Manhattan ruled yesterday that city officials had improperly retaliated against an AIDS service organization that had been critical of the mayor by moving to make it ineligible for millions of dollars in federal money.

The group, called Housing Works, has been a relentless opponent of Mayor Rudolph W. Giuliani's policies on AIDS, using guerrilla protest tactics like blocking rush-hour traffic on bridges and tunnels, interrupting the news conferences of city officials and conducting sit-ins in city offices.

The group operates two homes -- in Lower Manhattan and in the East New York section of Brooklyn -- for homeless people with AIDS, mental illness or drug addiction. The homes are supported through federal grants, which are distributed by the United States Department of Housing and Urban Development to nonprofit groups through a ranking system developed by the city. The agency has allocated \$54 million this year for such programs in New York City.

Housing Works said in a lawsuit in August that the Giuliani administration had initially given it a favorable rating, making it likely to qualify for a share of the federal money. But the suit says top city officials, upset with the group's antagonistic stance toward the mayor, downgraded its score, effectively blocking it from obtaining \$2.4 million to cover three more years of operating expenses for the two residences.

Yesterday, Judge Allen G. Schwartz of Federal District Court in Manhattan ruled that Housing Works had established a pattern of antagonism by city officials and had shown that they had acted with "retaliatory intent."

"The court acknowledges that any mayoral administration might reasonably resent activities such as those engaged in," Judge Schwartz said, "particularly the militant kind seemingly favored by plaintiff."

He added that Housing Works' "right to continue to express that criticism, however, is protected by the First Amendment."

The decision comes less than two weeks after a federal judge in Brooklyn found that Mayor Giuliani had violated the First Amendment by withholding payments to the Brooklyn Museum of Art over an exhibition that the mayor deemed to be offensive.

The mayor has had a mostly losing record in a series of First Amendment cases, winning in one suit last month involving restrictions on a march by the Ku Klux Klan, but losing in recent cases ranging from the temporary renaming of streets in the city to last summer's so-called Million Youth March. Mr. Giuliani faces another First Amendment case brought by Housing Works over access to City Hall steps.

In his ruling yesterday, Judge Schwartz issued an injunction ordering the city to restore the earlier score Housing Works had received from the city, and not punish it for its "criticism of the Giuliani administration or its advocacy on behalf of persons with H.I.V. or AIDS."

In issuing that injunction, he said that Housing Works had met the legal standard of showing that it would prevail in a future trial on the issue.

The city's corporation counsel, Michael D. Hess, said last night that the city would appeal. "We're disappointed in the outcome," Mr. Hess said, adding that the city denies all allegations of retaliation in the suit.

Keith D. Cylar, a co-executive director of Housing Works, said the ruling "means we will be able to continue to serve people living with AIDS and H.I.V., who otherwise would not have been able to continue to be housed."

"Clearly, the judge ruled that the mayor was using his office for political retribution and that he was attempting to silence us for criticizing him," Mr. Cylar said.

State Senator Thomas K. Duane of Manhattan praised the decision, saying that Housing Works was "one of the only groups that was willing to stand up to the mayor" because "everyone was so afraid of retribution."

Matthew D. Brinckerhoff, who along with David H. Gans had represented the group in federal court, said Housing Works would battle any appeal by the city, particularly because the federal housing agency is expected to distribute the money soon.

Mr. Brinckerhoff said, "I'm extremely confident on the appeal -- given the seriousness with which Judge Schwartz treated this entire case -- they will respect his decision and affirm it."

The city, in denying it had retaliated against Housing Works, which was founded in 1990 as an off-shoot of Act Up, contended that its assessment of the organization was a response to its troubled financial history, Judge Schwartz said.

City investigators who examined the group's books in 1996 found poor record-keeping and commingling of money, testimony showed. But the city later concluded that Housing Works had taken appropriate steps to tighten its financial operations, the judge noted.

In 1997, Housing Works sued the city in state court, contending that the Giuliani administration had killed about \$6 million in contracts it had with the city because of its criticism of the mayor. That suit is still pending.

The two homes run by Housing Works initially received scores that translated into ranks of 30th and 33rd, out of a total of 71 projects in New York, records show. Later, the city lowered their rankings to 57th and 60th.

Because the first 56 ranked projects had requested a total of \$53.9 million from the federal agency, which had allocated a total of \$54 million for New York City, Housing Works was almost certainly cut out, the judge noted.

In his 69-page opinion, Judge Schwartz, who once served as corporation counsel for New York under Mayor Edward I. Koch, gave a detailed history of the organization's protests against Mayor Giuliani, and he said the group had established it would be able to show at trial that its criticism was the cause of the re-ranking decision.

"Here not surprisingly, given the nature and aggressiveness of plaintiff's protest activities," the judge said, "there is a clear showing of a pattern of antagonism by the Giuliani administration towards plaintiff."



# Upper West Side Anti-Homeless NIMBYs Raise Money, Threaten to Go to Court

*One group has hired Giuliani-crony Randy Mastro, and the Legal Aid Society threatened to sue the city if the homeless are moved out.*

By Valeria Ricciulli | Aug 28, 2020, 3:30pm EDT



On the night of August 24, the ongoing fight over the temporary homeless shelters on the Upper West Side moved to the public square of the pandemic era: a Zoom call. Over 1,000 New Yorkers tuned into Community Board 7's virtual meeting to confer on the three hotels in the neighborhood that have been housing homeless New Yorkers since earlier this summer. While the 25 onscreen panelists included elected officials like Manhattan Borough President Gale Brewer and Senator Brad Hoylman, there were also representatives from two new neighborhood groups: one that supports and welcomes the temporary sheltering of the homeless, and another that adamantly opposes their presence in the area — and is now threatening to go to court.

Dr. Megan Martin, one of the Upper West Side residents who has been vocally against the homeless individuals staying in the area and has become the face of the newly formed West Side Community Organization, said during the call that the neighbors have “witnessed in a very short period ... open and illicit drug use, needles on our playgrounds, aggressive panhandling, and public masturbation.” In an interview with the New York Post she described the community as being “terrified, angry and frightened.”

The conflict between residents has played out on the UWS for weeks. Some in the neighborhood have supported the homeless hotel residents with donations and other gestures of welcome, while others have complained loudly, in tabloid stories and on Facebook, about the “astounding deterioration” of the neighborhood, as one neighbor put it in the Zoom call. The latter group, which officially formed a nonprofit organization called the West Side Community Organization, has so far raised over \$110,000 through a GoFundMe account, and hired lawyer Randy Mastro (who was Deputy Mayor under Rudolph Giuliani), to represent them in a potential lawsuit against the city.

On Thursday, Mastro sent a letter to Mayor Bill de Blasio saying that the group would sue the city to transfer the homeless residents out of Upper West Side hotels — and only Upper West Side hotels — if the administration didn't provide a timeline to do so within 48 hours.

Mayor Bill de Blasio said in a press conference earlier this month that the city would start figuring out a plan to reduce the “reliance on hotels” as COVID-19 transmission rates continue to decline. But the Department of Homeless Services (DHS) has not yet said



that it's safe to move the approximately 10,000 people currently staying in 139 hotels across the boroughs back into the shelter system.

Meanwhile, the neighbors that have expressed their support to those staying temporarily in the shelters have formed a group called the UWS Open Hearts Initiative (not an official nonprofit, one of the organizers says). Its members have also penned a letter to Mayor de Blasio, which they plan to deliver on August 28, asking the administration to allow unhoused residents to remain in hotels around the city and on the Upper West Side until it's deemed safe for them to go back to shelters.

“Giving in to this political-pressure campaign would endanger the lives of not just shelter residents but of all New Yorkers, because if we have an outbreak of COVID-19 in a shelter, then that exposes everybody,” says Corinne Low, one of the group's organizers.

The nonprofit Legal Aid Society has also said that if the Mayor decides to move homeless residents out of hotels, its lawyers would also file a lawsuit on behalf of The Coalition for the Homeless and the thousands of DHS clients who sleep in shelters every night.

Open Hearts is now gearing up for a Saturday, August 29 “sleep out” and art protest in front of the Lucerne hotel on West 79th Street. They're also forming a “housewarming committee” to help shelter residents moving into permanent housing find items for their new homes, like sheets, pots and pans, etc.

Low encourages other residents to join their cause and help the hotel residents directly: “If the problem that you are having is visible poverty in your neighborhood, then take your resources and help solve that problem, instead of just trying to move people someplace else.”

SOCIETY

# Upper West Side residents furious, considering suing city over homeless increase

Tuesday, August 25, 2020





Lucy Yang reports on the homeless issue on the Upper West Side.

---

UPPER WEST SIDE, Manhattan -- A group of residents are furious and are considering suing New York City because scores of homeless people were resettled in hotels on the Upper West Side. The homeless were moved to the hotels from homeless shelters because of coronavirus.

Michelle Benvenisti was walking home on the Upper West Side last Saturday night when someone started heckling her. She claims a man tried to follow her into her building, then loitered outside for several hours. It has destroyed her sense of safety.

**ALSO READ** | [Homeless ruining quality of life on Upper West Side, residents say](#)

"Completely unnerving that I have purchased a sound alarm for keychain, and I'm signing up for self-defense. Changing the way I do every day activities," Benvenisti says.

Many in the neighborhood have now joined 'Upper West Siders for Safer Streets.' They fear it has become downright dangerous after Mayor de Blasio filled three

luxury hotels with those experiencing homelessness.

Residents cite an increase in random violence, drugs, public urination and open prostitution. They claim sex offenders were also moved into the streets. Now, the residents have hired an attorney to sue the city to transfer those experiencing homelessness back into shelters where they can get help.

"What the city has to do legally is house this vulnerable population in proper shelters, where they will get support and supervision and social services they will need," says attorney Randy Mastro, who represents the West Side Community Organization.

On Monday, there was a Zoom meeting between the community board, residents and homeless advocates. The city admits they moved ten thousand vulnerable New Yorkers from shelters to 60 private hotels in New York during the height of COVID.

Despite the complaints and the exorbitant hotel bills, the city stands by the decision.

"We know that by moving into hotels, we were able to save lives," said Erin Drinkwater from the Dept. of Social Service.

**ALSO READ** | [Sex offenders at Upper West Side hotel will likely extend their stay](#)

The Department of Homeless Services issued a statement saying,

*"New Yorkers experiencing homelessness are our neighbors - and the notion that they are not welcome in some neighborhoods for any reason is an affront to basic decency."*

"When they're not wearing masks, congregating, sleeping on the street or sharing bottles, it's hard to see how that's helpful. What was the goal of that?" says Upper West Side Resident Alison Morpurgo.

Morpurgo says a homeless man grabbed her a few weeks ago, trying to take her phone.

City officials admit the hotels were never meant to be a permanent solution, but they refuse to say when this will end.

-----

\* [Get Eyewitness News Delivered](#)

\* [More Manhattan news](#)

\* [Send us a news tip](#)

\* [Download the abc7NY app for breaking news alerts](#)

\* [Follow us on YouTube](#)

**Submit a News Tip**



[Report A Correction Or Typo](#)

## Related Topics

SOCIETY

UPPER WEST SIDE

NEW YORK CITY

MANHATTAN

SAFETY

HOMELESS

CORONAVIRUS

LAWSUIT

COVID 19

FROM THE WEB

Promoted Links by Taboola

**Amazon's Worst Nightmare: Thousands Canceling Prime for This Clever Hack**  
Online Shopping Tools

**These Barefoot Shoes are Leaving Neuropathy Experts Baffled**  
Barefoot Vitality

**Seniors Can Now Fly Business Class For The Price Of Economy Using This Hack**  
Coupon Code Finder

**COVID-19 Frontline workers say they were promised but never paid bonuses**

**Vance, Walz agree to vice presidential debate on Oct. 1 in New York City**

**North Castle homeowner voices frustration over rat infestation in neighborhood**



**Chuck Norris: Do This Once A Day If You're Over 60 And You'll Feel Years Younger**  
Roundhouse Provisions

**Doctors: Sleep Apnea Treatment Without CPAP (It's Genius)**  
Noctivio

**These Never-Driven Trucks In New York Are Selling For Dirt Cheap**  
Unsold Trucks | Search Ads

Home

---

AccuWeather

---

Traffic

---

Local News

---

Categories

---

Station Info

---

Shows

---

Apps

---

WABC-TV



Follow Us:

[Privacy Policy](#) [Do Not Sell or Share My Personal Information](#)  
[Children's Privacy Policy](#) [Your US State Privacy Rights](#) [Terms of Use](#)  
[Interest-Based Ads](#) [Public Inspection File](#) [FCC Applications](#)

Copyright © 2024 ABC, Inc., WABC-TV New York. All Rights Reserved.

# *Money Maven and Friend of the Mayor; Can Howard Koeppel, a Queens Car Dealer, Give Giuliani a Lift to the Senate?*

By Glenn Collins

Jan. 3, 1999

---

See the article in its original context from January 3, 1999, Section 14, Page 1 [Buy Reprints](#)

[VIEW ON TIMESMACHINE](#)

TimesMachine is an exclusive benefit for home delivery and digital subscribers.

---

IT was quite the evening for Howard Koeppel, the Queens car dealer who is a top fund-raiser for Mayor Giuliani -- as well as the Mayor's close pal. There he was at the "Friends of Giuliani" banquet on a recent Sunday, presiding over 11 guests at the much-watched Table 24, holding forth under the puffy painted-on-plaster clouds of the St. Regis Roof.

"I can't sell anything I don't believe in, be it cars or people in public office," Mr. Koeppel insisted to an interloper with a notebook who encountered him in mid-schmooze with the lawyer Sheldon Lobel. Mr. Lobel and the others whom Mr. Koeppel had helped assemble at the table paid \$1,500 for the privilege of staring at a red poinsettia centerpiece and having a moment of face time with the newly sleek Mr. Giuliani. The Mayor worked the room between the arrival of the grilled portobello mushroom salad and the tournedos of beef.

Only minutes before, at the pre-dinner cocktail reception, Mr. Koepfel's domestic partner of seven years, Mark Hsiao, was the volunteer playing the Steinway. While Mr. Koepfel, 61, hiya-ed friends and mayoral aides and chatted his way across the Versailles Room, the Juilliard-trained Mr. Hsiao, 38, played his way from Bach's Goldberg Variations to "Bewitched, Bothered and Bewildered."

"Why don't we smoke a cigar together later?" Mr. Giuliani said to Mr. Koepfel as the Mayor traveled his great circle route from mogul to mogul. And they did. In a post-dinner tete-a-tete with friends and aides, Mr. Giuliani and Mr. Koepfel puffed premium cigars and drank cognac. By midnight, Mr. Koepfel and Mr. Hsiao were the only ones who had hung in there; the Mayor's chauffeur drove them all home.

A former Democrat whose father was once a leader in the Kings Highway Democratic Club, Mr. Koepfel is a self-described take-no-prisoners businessman. He and Mr. Giuliani met in 1988, the year before Mr. Giuliani lost his first mayoral bid. Mr. Koepfel was drawn to Mr. Giuliani's anti-crime platform, he said, because automobile break-ins and thefts were cutting into sales at his three car dealerships on Northern Boulevard.

A look at their relationship is a window into the realpolitik of campaign financing, with its mutually beneficial dance of politicians and wealthy individuals.

Since 1989, Mr. Koepfel has contributed about \$22,000 to Mr. Giuliani's campaigns. More important for the Mayor, Mr. Koepfel has also raised hundreds of thousands of dollars from others. For the 1997 campaign, for example, he brought in \$170,160 from individual donors, mostly his friends and business acquaintances, making him the Mayor's leading fund-raiser. He has also informally advised the Mayor on gay-rights issues, including the domestic-partnership law signed last summer.

Mr. Koepfel is not part of Mr. Giuliani's inner circle of political advisers, and his name rarely appears in newspaper buzz pages. But it is clear that he has been given a special dispensation to have, well, fun, with a Mayor viewed by many as a rigid Savonarola.

How else to explain the impulse that led Mr. Giuliani to give Mr. Koepfel a tango lesson one day in Gracie Mansion? The moment is memorialized in a picture on Mr. Koepfel's office wall. Or that night in September 1996 when the Mayor gleefully took Mr. Koepfel up on his suggestion that Mr. Giuliani drive the 100 miles back to Gracie Mansion from a Southampton fund-raiser in a 1935 red Ford street hot rod, valued at \$30,000.

"It was a Jewish hot rod," Mr. Koepfel said, "with power windows, air-conditioning and a CD player.

"It's not bad enough that Rudy is blasting opera the whole way," he added, deadpan, "but he's explaining all about opera the whole way."

### Moynihan's Message Brings Out the Moguls

These days, fund-raising for Mr. Giuliani is once again in high gear. The take from the event at the St. Regis, held Dec. 6, was a bit north of \$400,000 before expenses of about \$50,000 were deducted, according to the Mayor's campaign staff. That was far more than the proceeds from his last Regis Roof fund-raiser, in October, thanks to the generosity of Senator Daniel Patrick Moynihan, the dean of New York Democrats, who announced in November that he would retire when his term expires in the year 2000.

Mr. Giuliani has not said whether he plans to run for the Senate, and he declined several requests to be interviewed for this article. But the treasurer of his fund-raising committees, John H. Gross, said the Mayor was weighing "all possibilities, including a Presidential or Vice-Presidential draft."

The way Mr. Koepfel sees it, "Just the possibility of the Senate is bringing people out." His own name appeared on the invitations to the St. Regis soiree along with those of such gala eminences as Henry A. Kissinger, Dina Merrill, John Kluge, Nicole Miller and Donald Trump, who have previously lent their support to Giuliani events.

Though Mr. Koepfel enjoys relative anonymity, he likes to point out that many New Yorkers know his name (pronounced kah-PELL). "People associate me with a license-plate frame," he said, referring to the ubiquitous black-and-white "Koepfel Motors" plate-holders that populate the city's no-longer-so-mean streets. Mr. Koepfel said his three dealerships -- Volkswagen, Nissan and Mitsubishi -- sell about 8,000 cars a year and bring in revenues of \$150 million.

His friends describe him as an irrepressibly likable "What? Me Worry?" kind of guy, even though his mother died of cancer when he was 9, he was shot at during a robbery attempt, and he watched in horror as Galina Komar, 32, a finance manager for his dealerships, was shot to death in his Volkswagen dealership in 1996 by her obsessed ex-boyfriend, Benito Oliver. After killing Ms. Komar, Mr. Oliver turned the gun on himself with a fatal shot to the head. (Mr. Koepfel was among many people who later successfully campaigned for the removal of Criminal Court Judge Lorin Duckman, who had questioned the severity of Mr. Oliver's earlier beatings of Ms. Komar.)

Mr. Koepfel's detractors, none of whom would speak publicly, call him "a true believer" who finds no fault with the Mayor.

If Mr. Giuliani does decide to seek Mr. Moynihan's Senate seat, he will find Mr. Koepfel in an alert state of readiness, eager to help Mr. Gross, the campaign treasurer, fulfill his promise that the Mayor's team "will raise all the money we need to run a significant Senatorial campaign." And how much is that? "Ten million dollars," Mr. Gross said, "enough for a candidate with such a fantastic record, who is well known."

People who have dealt with him say Mr. Koepfel's fund-raising style is low-key. Mr. Lobel, a lawyer who works for developers and other clients around the city and has given about \$10,000 to Mr. Giuliani's campaigns, describes it this way: "Howard calls me and asks if I want to contribute. There is no arm-twisting. He says, 'This isn't going to get you anything with Rudy, but we need you.' And I usually do it, because I think Rudy has done a marvelous job."

Things have not always gone so smoothly for Mr. Koepfel. In 1997, the city's Campaign Finance Board ordered the Giuliani campaign to return several thousand dollars that Mr. Koepfel had raised. Since 1989, Mr. Koepfel has given the legal maximum to Mr. Giuliani's campaign fund, the amount varying from year to year, as well as \$5,000 to the State Republican Party in 1994 and \$5,000 to the Liberal Party in 1996.

Mr. Koepfel was not implicated in a case involving a cousin, William Koepfel, a Manhattan developer who was indicted in 1995 on charges that he illegally demanded contributions for the Giuliani campaign from tenants seeking rent-stabilized apartments. After pleading guilty, William Koepfel paid fines and did community service.

### A Passion for Politics And Wearing Honorary Hats

Ambling about his Volkswagen showroom in Woodside on a recent afternoon, Howard Koepfel is an avuncular presence in a chalk-striped gray suit, kibbitzing with customers during their pas de deux with his sales people.

For the chief executive of the Koepfel Automotive Group, the showroom seems to be a natural habitat, a quiet oasis of cool blue neon and gray stone on the Northern Boulevard strip of car dealerships with their "Drive It Away Today" banners and parking lots topped by razor wire.

Mr. Koepfel took over the business from his father, Nathan, who died in 1977. These days he is battling with his younger brother, Daniel, as they seek to dissolve their partnership in various dealerships. The brothers have filed claims and counterclaims in lawsuits before justices in State Supreme Courts in Manhattan and Nassau County. Daniel Koepfel says he no longer has a relationship with his brother "because he has done things that are irreparable."

Their older brother, Jerry, 70, a doctor in Baltimore, called the matter "a personal thing between Howard and his brother," adding, "I'm not taking sides."

Though Howard Koeppel obviously loves to sell cars, he says politics has been a passion for him since he met Mr. Giuliani 10 years ago. "We hit it off, and I began to go campaigning with him," Mr. Koeppel said. Although Mr. Giuliani lost that race, he gained a buddy.

"The Mayor is proud to be his friend," said Mr. Giuliani's communications director, Cristyne F. Lategano, "and values his friendship so much he likes to keep that private."

The Mayor's fiercest guardians insist that the relationship isn't about money. "The Mayor doesn't talk about fund-raising to anyone but me," Mr. Gross contended.

Ms. Lategano agreed. "The fund raising is completely separate," she said. "There is a line that is drawn."

The city's Parks Commissioner, Henry J. Stern, pointed out that mayors "need friends who aren't in government."

"Remember Ed Koch and his buddies," Mr. Stern said. "You can't have a friendship that's a relationship of dependency. Howard is independently wealthy, and there is some sort of bond there."

Over the last decade, Mr. Koeppel has been a fixture at Mr. Giuliani's tightly restricted election-night gatherings, including the one in the 44th-floor suite of the New York Hilton last Nov. 3. Mr. Koeppel and Mr. Hsiao have attended the opera with the Mayor and his wife, Donna Hanover, on several New Year's Eves, and Mr. Koeppel has trekked to baseball games with Mr. Giuliani and his son, Andrew.

And what has Mr. Koeppel gained from his relationship with the Mayor? Most visible is his collection of civic posts -- similar to ambassadorships bestowed on major fund-raisers by successful Presidential candidates. Mr. Koeppel occupies Mr. Giuliani's seat as chairman of the Mayor's Committee on City Marshals, represents the Mayor on Carnegie Hall's board and is a member of the Taxi and Limousine Commission's advisory board. All are unpaid posts.

He is also an honorary Police Commissioner and an honorary Deputy Fire Commissioner. In the last five years he has donated four vans to the city, used to transport families of injured and dead firefighters and police officers to hospitals and funerals. "These are honorary titles that give Howard the authority to do nothing but be helpful with the police and fire department," said Police Commissioner Howard Safir. "And that is what Howard has been. We have never asked Howard for anything that he has not given us."

Fire Commissioner Thomas Von Essen said Mr. Koeppel is a friend, adding, "Howard has truly earned our respect."

Mr. Koeppel says he seeks these badges because he enjoys being at the center of things. "A lot of people play golf and tennis," he said. "I chase fires."

### Not Welcome In the Front Pew

On one memorable occasion, though, his performance of his civic responsibilities earned him reproof. On Oct. 23, 1996, during a funeral service for Police Lieut. Federico Narvaez in St. Paul the Apostle Church in Corona, Queens, Mr. Koeppel, at his first funeral as an honorary Police Commissioner, mistakenly joined Mayor Giuliani and Police Commissioner Howard Safir in the front pew. By longtime custom, that row is reserved for the Mayor and police officials. Witnesses, including Public Advocate Mark Green, said the Chief of Department, Louis R. Anemone, gave Mr. Koeppel an expletive-rich tongue-lashing for breaching department protocol and usurping Chief Anemone's rightful place at the Commissioner's side.

The Chief and Mr. Koeppel -- who both happen to be members of the department's Courtesy, Professionalism and Respect Committee -- declined to comment about the incident, although at the time of the incident the Chief said, "I'm not giving him an apology."

If Mr. Koeppel's honorary positions have filled his wallet with fancy embossed cards, he insists that he has benefited in no other way. "I don't sell any cars to the city," he said. "There is no conflict of interest." Does he influence the Mayor? "I've



never asked him for anything," Mr. Koepfel says.

Commissioner Safir said: "I am unaware of any business relationship he has with the city. If there was, then that would change my relationship with Howard."

Which is? "Howard is my friend," the Commissioner said. "I enjoy his company."

If Mr. Koepfel walks a tightrope in his roles as mayoral fund-raiser and stand-in, he has managed to steer clear of scandal. Although a spokesman for the city's Department of Investigation, Kevin Ryan, declined to say whether it had looked into Mr. Koepfel's background, a person with knowledge of the investigation said that his business activities, tax returns and credit arrangements were scrutinized, as is routine, before Mr. Giuliani named him head of the Mayor's Committee on City Marshals.

Mr. Koepfel's influence, though subtle, is real. Randy M. Mastro, who was Mr. Giuliani's Deputy Mayor for Operations before resigning last July to practice law, said that like any friends, Mr. Giuliani and Mr. Koepfel talk about issues that are on their minds. "And Howard," he said, "has no lack of opinions."

'How Many Car Dealers Are Gay Activists?'

Mr. Koepfel has pressed the Mayor to give public support to gay rights, and administration officials say that by persuasion and example he helped push the domestic-partnership legislation passed by the City Council and signed by the Mayor last July.

"Howard was very effective in going to the gay community to show them that Rudy was their person as well," said Peter J. Powers, a lawyer who ran Mr. Giuliani's campaigns for mayor and was a top aide.

Jeff Soref, a co-chairman of the board of the Empire State Pride Agenda, the state's largest gay and lesbian lobbying group, called Mr. Koepfel an unlikely warrior. "How many car dealers are gay activists?" he said. "Many gay men of his generation aren't open about it, and there are few who are as actively involved in trying to advance gay issues by using their personal relationships."

Mr. Soref and others credit Mr. Koepfel with getting Mr. Giuliani to address the 1996 fund-raising dinner of the Pride Agenda, a bipartisan, 5,000-member group that supported David N. Dinkins for mayor in 1993.

"Howard felt that the Mayor would be well received at ESPA, and indeed he was," Mr. Mastro said. In the 1997 mayoral race, the group was neutral.

Mr. Koepfel said that his being gay "has never come up" in his friendship with Mr. Giuliani. While acknowledging that many homosexuals still see the Mayor "as homophobic, and they think of Republicans as homophobes," he insisted, "It is far from true now, and it's certainly not true of Rudy.

"Why would he take Mark and me into his family, with his kids, if he had any prejudice?" Mr. Koepfel asked.

Mr. Soref said Mr. Koepfel's relationship with Mr. Hsiao was important in selling the domestic-partnership legislation to resistant members of the Giuliani administration. "Rudy and Howard and Mark go to baseball games together, they go to the opera, and Mark gets called to play piano for dinners," Mr. Soref said. "They have helped to personalize the gay community. It's been a way of bringing home to City Hall that we were not talking about objects here."

Mr. Koepfel and Mr. Hsiao are registered domestic partners, and Mr. Hsiao is a deputy director of the New York City Department of Transportation, managing construction and street-closing permit operations. He has also been an administrator for the Department of Cultural Affairs and deputy director of the city's Art Commission.

"Mark's jobs had nothing to do with my fund-raising," Mr. Koepfel said when asked if patronage played a role in Mr. Hsiao's hiring. "Mark got these positions on his own initiative and on his own merits, and he works hard at what he does."

Neither sees their relationship as posing any conflict-of-interest issues. "I don't seek permission to dig up streets," Mr. Koepfel said, and Mr. Hsiao noted, "I have nothing to do with buying cars."

## Brushes With Violence And a Mayor's Consolation

It was outside one of his dealerships on a spring evening in 1992, Mr. Koeppel said, that he opened the door of his Infiniti and was met by a man who had leaped from a white Lexus. Brandishing a .45 automatic, the man demanded his Rolex watch.

Mr. Koeppel told the police that although he handed over the watch and \$40, the robber threatened to kill him, then fired and missed. Mr. Koeppel, who had received a Police Department gun permit in the early 1970's because he carried money from his dealerships, said he fired his own .38 Smith & Wesson at the mugger as he fled in the Lexus, which was driven by another man. "I was very lucky," Mr. Koeppel said, "but I think I got him." The police later found the car, abandoned, with blood in the front seat.

According to a report by Detective Mike Rosenbluth, the lead investigator, the case was an armed-robbery attempt, "where a weapon was being pointed at Mr. Koeppel and he fired in self defense."

Four years later, the violence Mr. Koeppel encountered was more deadly. He remembers walking into Galina Komar's office to talk about a letter he had received and seeing her ex-boyfriend, Mr. Oliver, with her. "Benito said, 'If I can't have her, no one will,' " Mr. Koeppel said. "And then he took a gun out of his pocket. She grabbed a book and put it in front of her chest. He shot three bullets through the book. He pointed his gun at me, then said, 'My Galina, my Galina.' And then he turned around and blew the top of his head off." After it was over, "I got hysterical," Mr. Koeppel said. "After calling the police I called Rudy. I guess Rudy heard something in my voice. The Mayor told me: 'Compose yourself, calm down. I'll be there in 20 minutes.' "

Mr. Giuliani took Mr. Koeppel to lunch at Trieste Restaurant, on Northern Boulevard and 74th Street, and consoled him. "Rudy convinced me Benito was a stalker and that this was a horrible thing that had nothing to do with me," Mr. Koeppel said. "Then he called me every day for the next four days. That's how you know you have a friend."

## LIFE OF A SALESMAN

Howard Koepfel

Born -- March 30, 1937, Kings Highway Hospital, Brooklyn

Hometown -- Flatbush

Education graduated James Madison High School, 1955; attended United States Military Academy at West Point, 1956-57.

Career highlights -- Named honorary deputy fire commissioner, 1994; honorary police commissioner, 1996.

Favorite politician (aside from Mayor Giuliani) -- Richard M. Nixon

Favorite reading -- Biographies

Favorite leisure activities -- Power boating in Palm Beach, motorcycling

Favorite recent movie -- "Saving Private Ryan"

Favorite music -- Show tunes

Most successful fund-raising strategy -- "I remind people of all the ways Rudy saved New York City."

---

A version of this article appears in print on , Section 14, Page 1 of the National edition with the headline: Money Maven and Friend of the Mayor; Can Howard Koepfel, a Queens Car Dealer, Give Giuliani a Lift to the Senate?