

<b>Matter of Mastro v City of New York</b>
2017 NY Slip Op 00130 [146 AD3d 497]
January 10, 2017
Appellate Division, First Department
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[\*1]

<p><b>In the Matter of Randy M. Mastro, Appellant,</b></p> <p style="text-align: center;">v</p> <p><b>City of New York et al., Respondents.</b></p>
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Gibson, Dunn, & Crutcher LLP, New York (Gabriel K. Gillett of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Daniel Matza-Brown of counsel), for respondents.

Judgment, Supreme Court, New York County (Jennifer G. Schecter, J.), entered December 4, 2015, which denied the CPLR article 78 petition seeking to annul respondents' determination, dated July 31, 2014, upholding the decision of the Administrative Law Judge, dated April 30, 2014, which imposed a fine pursuant to a notice of violation (NOV), for failure to prevent two unnecessary and/or unwarranted fire alarms, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The NOV citing petitioner for two false fire alarms at his residence required

that petitioner submit a Certificate of Correction supported by "proof of compliance" by March 14, 2007. Among other things, petitioner was required to "[s]ubmit documentation detailing cause of alarm(s) and corrective measures taken." Petitioner was also informed that "[f]irst offenders whose proof of correction is accepted by the Fire Department by such date will avoid a hearing and penalty." A week before the deadline, petitioner submitted a Certificate of Correction, attesting that he had "corrected all said violations as ordered by the Commissioner," and two supporting documents—a work order from petitioner's alarm company, indicating that petitioner "needs tech to check zone 16 basement falsing, smoke det," and a work order summary indicating that the company had "replaced Z16 smoke detector." The documents did not specifically state the cause of the two false alarms.

In a letter dated March 14, 2014, respondent Fire Department of the City of New York (FDNY) disapproved petitioner's Certificate of Correction, explaining that he had "failed to submit a letter stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms." Several weeks later, petitioner submitted a letter from the alarm company stating that the company had "replaced the battery on zone 15 smoke detector" and had also "replaced your zone 16 smoke detector," and that "[w]e believe that these steps have addressed the false alarm." Petitioner was ultimately given a reduced fine based on the conclusion that his post-deadline submissions were satisfactory. He unsuccessfully challenged the imposition of any fine administratively and in the instant article 78 proceeding.

While it was not unreasonable for petitioner to expect that his initial submission would suffice to avoid a fine, we agree with the court below that the more exacting standard applied by the FDNY did not amount to irrationality. The FDNY's action was not "without sound basis in reason" or "taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231

[1974]). Further, FDNY's request for a "letter stating the cause of the two unnecessary [\*2]alarms and what action was taken to prevent future alarms" was not, as petitioner argues, an improper post hoc engrafting of a new requirement, but an explanation of how the standard set forth in the NOV could be fulfilled. Concur —Andrias, J.P., Moskowitz, Kapnick, Webber and Kahn, JJ.

To Be Argued By:  
Gabriel K. Gillett

New York County Clerk's Index No. 101274/2014

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# New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

—◆◆◆—  
In the Matter of the Application of,  
RANDY M. MASTRO,

*Petitioner-Appellant,*

—against—

CITY OF NEW YORK; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; FIRE DEPARTMENT OF THE CITY OF NEW YORK; DANIEL A. NIGRO, in his Official Capacity as Fire Commissioner; CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS; SUZANNE A. BEDDOE, in her Official Capacity as Chairperson of the Environmental Control Board, and Commissioner & Chief Administrative Law Judge of the Office of Administrative Trials and Hearings,

*Respondents-Respondents.*

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## BRIEF OF PETITIONER-APPELLANT

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## TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT .....	1
QUESTIONS PRESENTED.....	7
STATEMENT OF THE CASE.....	8
I.    Mr. Mastro Receives The Notice Of Violation And Instructions For Avoiding A Fine. ....	8
II.   The FDNY Rejects Mr. Mastro’s Certificate Of Correction Because He Did Not Submit A Letter From His Alarm Service Company. ....	9
III.  The Agency Fines Mr. Mastro And Says It Lacks Power To Review The FDNY’s Purported Basis For Rejecting Mr. Mastro’s Certificate.....	12
IV.  The Supreme Court Denies Mr. Mastro’s Article 78 Petition Challenging The FDNY’s Rejection Of His Certificate. ....	14
JURISDICTION AND STANDARD OF REVIEW .....	15
ARGUMENT .....	16
I.    The Supreme Court Erred By Upholding The Agency’s Arbitrary And Capricious Fine On Mr. Mastro. ....	16
A.   The Supreme Court Incorrectly Found Mr. Mastro Had Not Satisfied All Stated Requirements For Avoiding A Fine.....	17
B.   The Supreme Court Improperly Allowed The FDNY To Reject The Certificate For Failing To Satisfy The Fictitious Letter “Requirement.”.....	20
II.   The Supreme Court Elided That Respondents Acted Contrary To Law By Fining Mr. Mastro.....	23
A.   Respondents Breached Their Agreement With Mr. Mastro By Imposing A Fine After He Had Accepted Their Offer. ....	24
B.   Respondents Violated Mr. Mastro’s Due Process Rights By Rejecting His Certificate Without Notice And An Opportunity To Be Heard. ....	26
CONCLUSION .....	28

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Alan B. Greenfield. M.D., P.C. v. Long Beach Imaging Holdings, LLC,</i> 114 A.D.3d 888 (2d Dep't 2014).....	26
<i>Baez v. Blum,</i> 91 A.D.2d 994 (2d Dep't 1983).....	27
<i>Briglio v. City of N.Y.,</i> 2012 WL 2148907 (Sup. Ct. Qns. Cnty. June 14, 2012).....	23
<i>Einhorn v. Mergatroyd Prods.,</i> 426 F. Supp. 2d 189 (S.D.N.Y. 2006) .....	24
<i>Emunim v. Fallsburg,</i> 78 N.Y.2d 194 (1991).....	22
<i>Era Steel Constr. Corp. v. Egan,</i> 145 A.D.2d 795 (3d Dep't 1988).....	21
<i>Gallo v. City of N.Y.,</i> 2012 WL 2434967 (Sup. Ct. Qns. Cnty. June 27, 2012).....	22
<i>Harner v. Cnty. of Tioga,</i> 5 N.Y.3d 136 (2005).....	27
<i>Kalman v. Lyles,</i> 2008 N.Y. Misc. LEXIS 7540 (Sup. Ct. N.Y. Cnty. Oct. 21, 2008).....	5, 21
<i>Kubiszyn v. Terex Div. of Terex Corp.,</i> 201 A.D.2d 974 (4th Dep't 1994).....	15
<i>Kurcsics v. Merchants Mut. Ins. Co.,</i> 49 N.Y.2d 451 (1980).....	22
<i>Lefkowitz v. Great Mpls. Surplus Store, Inc.,</i> 86 N.W.2d 689 (Minn. 1957) .....	25

<i>Leonard v. Pepsico, Inc.</i> , 88 F. Supp. 2d 116 (S.D.N.Y. 1999) .....	25
<i>Love v. Ameruso</i> , 125 Misc. 2d 688 (Sup. Ct. N.Y. Cnty. 1984) .....	21, 27
<i>Mamaroneck Beach &amp; Yacht Club, Inc. v. Zoning Bd.</i> , 53 A.D.3d 494 (2d Dep't 2008) .....	21
<i>Mullane v. Central Hanover Bank &amp; Trust Co.</i> , 339 U.S. 306 (1950) .....	27
<i>Oparaji v. City of N.Y.</i> , 2011 WL 6738696 (Sup. Ct. Qns. Cnty. Dec. 12, 2011) .....	23
<i>Paramount Film Distrib. Corp. v. State of New York</i> , 30 N.Y.2d 415 (1972) .....	26
<i>Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1</i> , 34 N.Y.2d 222 (1974) .....	16
<i>Pro Home Builders, Inc. v. Greenfield</i> , 67 A.D.3d 803 (2d Dep't 2009) .....	22
<i>Rock v. Rock</i> , 100 A.D.3d 614 (2d Dep't 2012) .....	26
<i>Scanlan v. Buffalo Pub. Sch. Sys.</i> , 90 N.Y.2d 662 (1997) .....	18
<i>Schulder v. City of N.Y.</i> , 2010 WL 5553300 (Sup. Ct. Qns. Cnty. Dec. 10, 2010) .....	23
<i>Trager v. Kampe</i> , 99 N.Y.2d 361 (2003) .....	5, 21
<i>Verus Pharm., Inc. v. AstraZeneca AB</i> , 427 F. App'x 49 (2d Cir. 2011) .....	17
<i>Visiting Nurse Serv. of N.Y. Home Care v. N.Y.S. Dep't of Health</i> , 5 N.Y.3d 499 (2005) .....	15

**Statutes**

C.P.L.R. § 5501(c) ..... 15  
C.P.L.R. § 5511 ..... 15  
C.P.L.R. § 5513 ..... 15  
C.P.L.R. § 5701(a)(2) ..... 15  
C.P.L.R. § 7803(3) ..... 15, 22

**Regulations**

3 R.C.N.Y. § 109-01 ..... 20  
3 R.C.N.Y. § 109-01(c) ..... 21  
3 R.C.N.Y. § 907-01 ..... 8

**Other Authorities**

22 N.Y. Jur. 2d, Contracts § 9 ..... 24  
22 N.Y. Jur. 2d Contracts § 47 ..... 24  
22 N.Y. Jur. 2d Contracts § 49 ..... 24  
22 N.Y. Jur. 2d Contracts § 60 ..... 25



## PRELIMINARY STATEMENT

This appeal seeks to hold New York City and its agencies to their word. If a City resident is told what steps to take to avoid a fine, and the resident actually completes those steps, then it is arbitrary, capricious, and an abuse of discretion for the City to nonetheless impose a fine. Yet, that is exactly what happened here.

Petitioner Randy M. Mastro received a Notice of Violation (“NOV”) after the fire alarm at his home twice malfunctioned. The NOV said that, because he was a first-time offender, he “will avoid a hearing and penalty” by timely correcting the violations and completing a Certificate of Correction according to its instructions. A62. Those instructions in turn directed him to “correct the violation(s),” to “certify correction” by completing the Certificate and having it notarized, to “attach legible copies of any and all bills, receipts and/or other proof of compliance,” and to timely provide the materials to the FDNY. A62-63.

Mr. Mastro followed those detailed instructions in every respect. A full week *before* his deadline to cure, Mr. Mastro had his alarm service company fix the cause of the violations. He then sent the FDNY the executed and notarized Certificate, and attached “work order” documents from his alarm service company—his “receipt,” and “acknowledgement and acceptance of the completed work”—reflecting that the alarm service company had, in fact, “replaced” the “falsing” smoke detector and that the problem have been “resol[ved].” A69, 70.

*But Mr. Mastro's Certificate was rejected. Why?* In the FDNY's own words, because Mr. Mastro had "*failed to submit a letter* stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms." A72 (emphasis added).

That was a surprise to Mr. Mastro: he had no reason to think that he was required to submit such a letter, as opposed to the "receipt" he submitted consistent with the Certificate's express instructions. The NOV and the Certificate did not instruct him to submit a "letter." The applicable regulations do not mention one, either. The FDNY's decision to reject Mr. Mastro's Certificate for "fail[ure] to submit a letter" was the *first* time that this additional unwritten "requirement" was ever stated—to him, or to anyone, as far as he could tell. Indeed, Respondents have never pointed to any authority or precedent for this fabricated "requirement"; and this appears to be the first time that a letter "requirement" has ever been invoked to justify rejecting an otherwise properly completed Certificate.

Yet, the City's administrative tribunals let the FDNY run amok. An Administrative Law Judge ("ALJ") with the City's Office of Administrative Trials and Hearings ("OATH") allowed the FDNY's rejection of Mr. Mastro's Certificate to serve as the predicate for imposing a fine on him—even *after finding that he timely corrected the violations*—claiming that the FDNY had absolute, unbridled discretion to reject Mr. Mastro's timely submitted Certificate and confirming

documentation, regardless of whether it complied with the plain language of the FDNY's own instructions in the NOV and the Certificate. (The FDNY, after admitting at the hearing that Mr. Mastro had in fact timely cured the violations, agreed to reduce the fine to \$375, totally missing the point that Mr. Mastro should have been absolved of any fine whatsoever.) And the Environmental Control Board ("ECB") then upheld that fine on appeal, finding it had no "authority" to hold the FDNY accountable for its gross abuse of discretion. So Mr. Mastro, who as a former Deputy Mayor was shocked by this sequence of events—being fined after he timely swore that he had corrected the problem and submitted the very "receipts ... and/or other proof of compliance" that the City had requested—filed a petition under Article 78 to challenge Respondents' illegal conduct. The Supreme Court (Schechter, J.) denied the petition, however, finding that the FDNY was within its discretion in rejecting Mr. Mastro's Certificate and, therefore, upheld the imposed fine.

That decision was wrong. If it stands, the City will have carte blanche to arbitrarily change the rules after the game has been played or to fine residents even when they follow the City's express instructions. Local government cannot treat its citizens so cavalierly and duplicitously—and then have its administrative tribunals profess to lack "authority" to stop it. It is a Kafkaesque scenario unworthy of our great City. And this Court should put a stop to it now.

This Court should reverse the Supreme Court’s denial of Mr. Mastro’s Article 78 petition on three independent grounds:

*First*, the Supreme Court erred by finding that Mr. Mastro had not satisfied the requirements for avoiding a fine (which never included any letter “requirement”). Mr. Mastro timely corrected the violations, submitted a sworn and notarized Certificate, and included ample “receipts ... and/or other proof of compliance” from his alarm service company that explained the reason for the false alarms and how they were fixed—which is exactly what the NOV and the Certificate’s instructions called for. Because Mr. Mastro followed those instructions in every respect and therefore satisfied the requirements to avoid a fine, it was arbitrary and capricious for Respondents to impose a fine nonetheless.

*Second*, the Supreme Court erred by failing to acknowledge that the FDNY abused its discretion when it belatedly added, after the fact, a new letter “requirement” for first-time offenders to avoid a fine. The newfound “requirement”—which is nowhere to be found in the NOV or in the Certificate’s instructions, and was conjured up by the FDNY after Mr. Mastro’s time to cure had already expired—was entirely without basis. It does not appear anywhere in the City-provided documents explaining how to avoid a fine, in the applicable regulations, or in the case law. To be sure, the FDNY and City agencies have some discretion to adjudicate enforcement matters and to decide whether to accept

or reject a certificate of correction. That discretion must always be exercised rationally and reasonably, however. It was not rational or reasonable for the FDNY to reject Mr. Mastro's Certificate (which attached confirming documentation from the alarm service company that timely resolved the problem) for failing to satisfy a letter "requirement" that did not exist. And it was not rational or reasonable for the agency and the Supreme Court to refuse to hold the FDNY to its word. These were classic abuses of discretion. *See, e.g., Trager v. Kampe*, 99 N.Y.2d 361, 365 (2003) (rejecting county's attempt to add a new requirement on job applicants that was not grounded in applicable regulations or laws); *Kalman v. Lyles*, 2008 N.Y. Misc. LEXIS 7540, at \*8-10 (Sup. Ct. N.Y. Cnty. Oct. 21, 2008) (voiding penalty imposed by agency because it had failed to follow its own written rules).

*Third*, Respondents acted contrary to law. By issuing the fine after Mr. Mastro had already performed the agreed-upon steps for avoiding a fine—as delineated in the NOV and the Certificate—Respondents breached their agreement to forego fining Mr. Mastro if he followed their directions. This is a textbook case of "offer and acceptance" that the City is now bound by. And the FDNY's after-the-fact imposition of a letter "requirement" also violated Mr. Mastro's constitutional right to due process.

Some may say that this is only a \$375 fine, so it's no big deal. They are missing the point. This is a matter of principle. It is a question of right and wrong, and what the government did here was unquestionably wrong. It was wrong to make Mr. Mastro jump through hoops and comply with every instruction, only to tell him later, "It wasn't good enough, you should have given us something else that we never told you about before, so we're fining you anyway." And it was wrong for the City's administrative tribunals to turn a blind eye to this charade, claiming that they lacked any "authority" to intervene, but that Mr. Mastro should be grateful that the FDNY voluntarily agreed to reduce the fine (after it admitted that Mr. Mastro had timely cured the violation). Our government officials should not be allowed to abuse the citizens they are obligated to serve, and to obstinately refuse to recognize the error of their ways, in pursuit of more dollars for the government's coffers. Fortunately, Mr. Mastro is someone who cares enough about local government—and who has the will and the resources—to challenge this government abuse. Because this case is not just about this \$375 fine. It is about the next fine, issued to someone who is not in a position to contest it. And the next one. And fortunately, our courts are a beacon to address and remedy such abuses.

The Supreme Court's decision, if left intact, would leave Respondents free to act with impunity. It would allow them to impose new requirements on City

residents any time they please, and to arbitrarily levy fines (and arbitrarily deny relief from those fines) at their whim. The decision below also effectively insulates those fines—and Respondents’ arbitrary actions—from meaningful judicial review. This Court should therefore reverse the decision below, and annul and vacate the fine imposed on Mr. Mastro.

### QUESTIONS PRESENTED

1. Did Respondents act arbitrarily and capriciously, and abuse discretion, by claiming that Mr. Mastro had not satisfied the open-ended requirement of providing any “bills, receipts, and/or other proof of compliance” when he gave Respondents documents from his alarm service company explaining that it had fixed the “falsing” smoke detector by replacing it?

The Supreme Court *incorrectly* answered No.

2. Did Respondents abuse discretion by refusing to accept Mr. Mastro’s Certificate of Correction for purportedly failing to comply with the FDNY’s unwritten letter “requirement,” and imposing a fine on that basis, without giving him any notice about the fictitious “requirement” until after his time to cure had already passed?

The Supreme Court *incorrectly* answered No.

3. Did Respondents act contrary to law by imposing a fine on Mr. Mastro, despite being bound by the “offer and acceptance,” after they offered to

forego fining him if he complied with their detailed instructions, and he accepted that offer by fully and completely performing his end of the bargain by following those instructions in every respect?

The Supreme Court *incorrectly* answered No.

## STATEMENT OF THE CASE

### **I. Mr. Mastro Receives The Notice Of Violation And Instructions For Avoiding A Fine.**

On February 7, 2014, Mr. Mastro received a Notice of Violation from the Environmental Control Board. The NOV charged Mr. Mastro with two violations of the New York City Administrative Code, because the fire alarm system at his home had unnecessarily activated. A62 (citing 3 R.C.N.Y. § 907-01). It was the first NOV Mr. Mastro had ever received.

The NOV ordered Mr. Mastro to correct the violations, and to certify, “in accordance with the instructions” on an accompanying Certificate of Correction, that the corrections had been made. A62. The NOV also directed Mr. Mastro to “[s]ubmit documentation detailing cause of alarm(s) and corrective measures taken.” *Id.* If Mr. Mastro did not timely complete these tasks, the NOV threatened that he must appear at a hearing and might be subject to civil penalties of up to \$10,000. But, if he did, the NOV said that “[f]irst offenders whose proof of correction is accepted by the Fire Department ... will avoid a hearing and penalty.” A62.



The Certificate instructed Mr. Mastro to (1) “correct the violation(s)”; (2) complete the Certificate, have it notarized, and attach it to the NOV; (3) “[a]ttach legible copies of any and all bills, receipts and/or proof of compliance” to the Certificate; and (4) return the completed Certificate, “with all appropriate documentation,” to the Fire Department’s Bureau of Legal Affairs by March 14, 2014. A63. The Certificate also repeated the same out offered to first-time offenders in the NOV: if Mr. Mastro “properly certif[ies] that all violations have been corrected, and the Certificate of Correction is accepted by the Fire Department ... no penalty will be imposed.” *Id.*

On February 18, 2014, the Fire Department mailed Mr. Mastro a Notice of Violation and Hearing. The notice again ordered Mr. Mastro to correct the violations and to certify the corrections using the Certificate of Correction. It directed Mr. Mastro to provide “all proof of compliance.” Like the Certificate’s instructions, the notice did not specify the form or content of that “proof of compliance.” A65. It also reiterated that “first offenders who properly certify correction shall avoid a hearing and penalty.” *Id.*

**II. The FDNY Rejects Mr. Mastro’s Certificate Of Correction Because He Did Not Submit A Letter From His Alarm Service Company.**

On March 7, 2014, one week before his deadline to cure, Mr. Mastro submitted a completed, signed, and notarized Certificate of Correction. A68. He

attached to the Certificate two documents from ADT, his alarm service company: a Work Order, and a Work Order Summary.

The Work Order, dated March 7, 2014, was for a “resi-service” job at Mr. Mastro’s residence. A70. Specifically, the job called for a “tech to check zone 16 basement falsing, smoke det.” *Id.* The Work Order said the assigned employee was “on site” at Mr. Mastro’s home from 11:49 to 12:08 on March 7. *Id.*

The Work Order Summary, which is an “on-site generated receipt,” provided corroborating detail. The Summary listed an appointment at Mr. Mastro’s address on March 7, 2014. A69. The document described “System Status” as “Service Call Resolution,” with the comment “replaced Z16 smoke detector.” *Id.* Under “Parts,” the document listed one “smoke detect, wireless.” *Id.* A legend at the bottom of the Work Order Summary said that the document “represents [Mr. Mastro’s] acknowledgement and acceptance of the completed work.” *Id.*

On Friday March 21, 2014, Mr. Mastro received a Certificate of Correction Disapproval Letter, dated March 14, 2014 (his last day to cure the violations). A72. The letter said the FDNY disapproved Mr. Mastro’s Certificate because he “failed to submit a letter stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms.” *Id.* The Disapproval Letter did not cite any basis for requiring an explanatory letter. *Id.* It also did not acknowledge that

Mr. Mastro had attached the Work Order and Work Order Summary to his Certificate, or explain why those documents were not sufficient proof of compliance. *See id.*

Mr. Mastro responded by sending a letter to the FDNY on the following Monday, March 24. Mr. Mastro explained that he had completed the Certificate according to its instructions, and that neither the Certificate nor the Notice had required him to “submit a letter” from his alarm service company. A74-80. Nonetheless, he explained that the documents from ADT that he had attached to the Certificate showed that ADT came to his home, “did a complete assessment,” “identified potential causes” of the false alarms, “fixed the problems identified,” and that there have been no further problems. A74.

The FDNY ignored Mr. Mastro’s letter. So Mr. Mastro called the FDNY to obtain an answer. He spoke with an official who informed Mr. Mastro that he was required to appear at a hearing before OATH. The official also reported that Mr. Mastro “needed a letter from [his] alarm system service provider, ADT, stating when the false alarms occurred, what steps were then taken to remedy them, and whether the alarm system is now working properly.” A82. Mr. Mastro obtained that letter from ADT on April 23, 2014. A83. He provided it to the FDNY the next day. A82. The ADT letter essentially narrated the content of the ADT Work Order and Work Order Summary—the proof of compliance that Mr. Mastro had

already timely submitted along with his executed Certificate—explaining as follows:

According to our records, on January 8th 2014 and January 15th 2014 ADT notified your local authorities of multiple fire alarm signals at 161 E. 62nd St. [Manhattan], NY 10021-7605. A service [technician] came out to your residence at your request on January 16, 2014 and replaced the battery on zone 15 smoke detector on the 1st floor. A [technician] again came out at your request on March 7, 2014 and replaced your zone 16 smoke detector as well. We believe that these steps have addressed the false alarms and there have been no problems with the alarm system since.

A83.

**III. The Agency Fines Mr. Mastro And Says It Lacks Power To Review The FDNY's Purported Basis For Rejecting Mr. Mastro's Certificate.**

An OATH ALJ held a hearing on April 30, 2014. A150. There, Mr. Mastro testified that he had followed the instructions on the Certificate by timely submitting an executed Certificate and attaching proof of correction from ADT. A154-55. Therefore, based on the documents that he had received from the FDNY explaining how he could avoid a fine, he believed that he was entitled to avoid a hearing and penalty. Whether he provided a letter from ADT was irrelevant, he argued, because the instructions on the Certificate did not require him to also submit such a letter. A155. "It's not a question of dollars," he said, "it's a question of fairness and rightness and how we treat our citizens" in New York City. A157.

The FDNY's representative responded. He did not identify any authority for the FDNY's requirement that Mr. Mastro produce a letter from ADT in order to avoid a fine. Instead, he noted that the "Remedy" line in the middle of the NOV says "submit documentation detailing cause of alarms and corrective measures taken." A158. The representative conceded that Mr. Mastro's letter from ADT says "they came out in a timely fashion" and "addresses each alarm and what was done to correct the condition." A158.

The ALJ found that Mr. Mastro's April 24 letter and the ADT letter "both fulfilled [the FDNY's] requirements, and that Mr. Mastro had corrected the violations in a timely manner." A85. However, the ALJ found that Mr. Mastro's "original submission was a work order and did not state what caused the alarms or what ADT did in response to the alarms." *Id.* The ALJ did not identify the FDNY's basis for requiring Mr. Mastro to provide a letter from ADT instead of a work order, when the Certificate required "any and all bills, receipts, and/or other proof of compliance." Instead, the ALJ declared herself without jurisdiction to address the propriety of the FDNY's practices and its rejection of Mr. Mastro's Certificate. *Id.* She then issued Mr. Mastro a fine for \$375. *Id.*

Mr. Mastro paid the fine and timely appealed to the ECB. A91. Mr. Mastro again argued that he was entitled to avoid a fine because he followed the Certificate's instructions and timely submitted the Certificate, "along with the

documentation showing that he corrected the violat[ion].” A93-95. The ECB did not address Mr. Mastro’s arguments. Instead, the ECB held that it lacked “authority to review” the FDNY’s disapproval of Mr. Mastro’s Certificate because “[t]he approval or disapproval of a certificate of correction is solely within the purview of the Fire Department.” A117.

**IV. The Supreme Court Denies Mr. Mastro’s Article 78 Petition Challenging The FDNY’s Rejection Of His Certificate.**

Mr. Mastro then brought an action under C.P.L.R. Article 78, challenging the FDNY’s rejection of his Certificate and the subsequent imposition of a fine. *See* A30. The Supreme Court denied the petition on November 12, 2015. A6-16. It found that “[i]t was not arbitrary, capricious or an abuse of discretion for the FDNY to conclude that the work-order summary and work order that Mr. Mastro submitted did not adequately detail the cause of the alarms and, therefore, that there was insufficient proof of compliance.” A14 (slip op. 8). In the court’s view, “[g]iven the complete absence of documentation detailing the cause of the alarm, which was required, there is no basis to annul the determination.” A15 (slip op. 9).

The court did not meaningfully address Mr. Mastro’s contract and quasi-contract arguments. Instead, the court found that the FDNY was free to reject Mr. Mastro’s Certificate, and penalize him, because it chose to reject the proof he offered along with his Certificate. A15 (slip op. 9).

The court also found no “constitutional infirmity” because it disagreed with Mr. Mastro’s argument that the “FDNY ‘impermissibly engrafted’ a superfluous-letter requirement” onto the NOV and the Certificate. *Id.* (slip op. 9). The court insisted that it was upholding the fine “not because of form—the absence of a letter—but because of substance—the absence of proof in any form of the cause of the alarm before the March 14 deadline.” A15 (slip op. 9). This appeal followed. A4-5.

### **JURISDICTION AND STANDARD OF REVIEW**

This Court has jurisdiction over Mr. Mastro’s appeal from the Supreme Court’s final judgment denying his petition on the merits. *See* C.P.L.R. § 5701(a)(2); *see also* C.P.L.R. § 5511.<sup>1</sup> This Court “shall review questions of law and questions of fact.” C.P.L.R. § 5501(c).

Under Article 78, an agency decision is properly set aside if it was “made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.” C.P.L.R. § 7803(3). Government action is

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<sup>1</sup> Respondents did not take a cross-appeal from the Supreme Court’s Decision and Judgment, and their time to do so has long passed. *See* C.P.L.R. § 5513. Accordingly, Respondents have waived any right to challenge any of the Supreme Court’s holdings below. *See Visiting Nurse Serv. of N.Y. Home Care v. N.Y.S. Dep’t of Health*, 5 N.Y.3d 499, 507 (2005) (“VNS, however, did not cross-move to appeal and therefore may not obtain affirmative relief in this Court.”); *Kubiszyn v. Terex Div. of Terex Corp.*, 201 A.D.2d 974, 974 (4th Dep’t 1994).

arbitrary or capricious if it lacks a “rational basis,” is “without sound basis in reason,” and “without regard to the facts.” *Pell v. Bd. of Ed. of Union Free Sch. Dist. No. 1*, 34 N.Y.2d 222, 231 (1974).

## ARGUMENT

### I. **The Supreme Court Erred By Upholding The Agency’s Arbitrary And Capricious Fine On Mr. Mastro.**

The Supreme Court upheld the FDNY’s rejection of Mr. Mastro’s Certificate, and the subsequent fine that was imposed, “not because of form—the absence of a letter—but because of substance—the absence of proof in any form of the cause of the alarm by the March 14 deadline.” A15 (slip op. 9). This was error. Mr. Mastro timely provided the FDNY with “bills, receipts and/or proof of compliance” from his alarm service company that detailed the cause of the false alarms and how they were remedied. The only thing he did not provide (before his cure deadline) was a *letter* from his alarm service company narrating the substance of those documents. But, as the FDNY candidly admitted in its disapproval letter, that “fail[ure] to provide a letter” from his alarm service company was precisely the reason it rejected Mr. Mastro’s Certificate. In doing so, it abused discretion, as a matter of law: an agency must follow its own regulations, honor its word, and act according to its articulated bases for decisions.



**A. The Supreme Court Incorrectly Found Mr. Mastro Had Not Satisfied All Stated Requirements For Avoiding A Fine.**

The Supreme Court erred by finding that Mr. Mastro had provided “insufficient proof of compliance.” A14 (slip op. 8). Indeed, Mr. Mastro provided exactly what was asked of him.

There is no dispute that Mr. Mastro met the NOV’s demand that he certify correction “in accordance with the instructions on the Certificate.” A62. He timely corrected the violations, submitted a signed and notarized Certificate so swearing, and attached “any and all bills, receipts, and/or other proofs of compliance”—the Work Order and Work Order Summary from ADT—corroborating that the corrections had been made.

The Supreme Court misread these ADT documents as not satisfying Mr. Mastro’s supposed obligation to “[s]ubmit documentation detailing cause of alarm(s) and corrective measures taken.” A62. That language—buried in the middle of the NOV, separated from the directions for curing a violation, and not repeated in the actual Certificate—did not impose any independent obligation on Mr. Mastro. *See Verus Pharm., Inc. v. AstraZeneca AB*, 427 F. App’x 49, 52 (2d Cir. 2011) (interpreting the effect of contractual language by reviewing its placement relative to other provisions). Indeed, that language is not meaningfully different from the numerous other statements that directed Mr. Mastro to provide

supporting documentation to corroborate that he had in fact cured all violations.

*See* A62, A63, A65.

Regardless, the documents Mr. Mastro provided *did* “detail[] [the] cause of alarm(s) and corrective measures taken.” A62. The Work Order directed a “tech to check zone 16 basement falsing, smoke det[ector]” at Mr. Mastro’s residence. A70. The Work Order Summary says the service call was resolved, noting that the technician “replaced Z16 smoke detector” and used one part, a W3-ADT “smoke detect[or], wireless.” A69. In other words, the “cause” of the alarms was a “falsing” smoke detector, and the “corrective measure[] taken” was to “replace[]” it.

In the Supreme Court’s mistaken view, the ADT documents were inadequate because “[i]t was always clear that a smoke detector was ‘falsing.’” *See* A14, 15 (slip op. 8, 9). The FDNY did not make this argument before the agency (*see* A150-166), so it could not serve as the basis for the Supreme Court’s decision. *Scanlan v. Buffalo Pub. Sch. Sys.*, 90 N.Y.2d 662, 678 (1997) (“It has ... long been the rule that judicial review of an administrative determination is limited to the grounds presented by the agency at the time of its determination.”). In any event, the Supreme Court’s finding elides the logical conclusion that “falsing” *was* the cause of the unnecessary alarms. Mr. Mastro was not required to provide detailed expert testimony explaining exactly how and why the machine had malfunctioned,

when the malfunction was the cause of the false alarms. His failure to provide such an explanation cannot be the basis for rejecting his properly completed Certificate.

ADT's April 23 letter confirms that the Supreme Court failed to properly infer the "cause" of the false alarms from the Work Order and Work Order Summary. The FDNY conceded, and the ALJ found, that the ADT letter "fulfilled" the FDNY's requirements. A85, A158:7-20. That letter explains that a service technician "replaced" Mr. Mastro's "zone 16 smoke detector." A83. The letter does not provide any additional explanation about why the smoke detector had malfunctioned (*i.e.*, the *cause*) or about how the issue was resolved (*i.e.*, the corrective measures taken). It merely says in prose what the Work Order and Work Order Summary say in sentence fragments. As a result, the FDNY's admission that the letter was sufficient proof of correction puts the lie to the FDNY's fiction that the Work Order and Work Order Summary were insufficient.

This evidence directly refutes the Supreme Court's misconception that there was a "complete absence of documentation detailing the cause of the alarm." A15 (slip op. 9). On the contrary, Mr. Mastro provided ample documentation and met all of the FDNY's stated requirements for avoiding a fine. Therefore, the decision to fine him anyway was arbitrary and capricious. This Court should vacate that fine.

**B. The Supreme Court Improperly Allowed The FDNY To Reject The Certificate For Failing To Satisfy The Fictitious Letter “Requirement.”**

If this Court finds that Mr. Mastro provided sufficient supporting documentation, and that the FDNY’s rejection of his Certificate was therefore arbitrary and capricious, it need not go any further. But if this Court does proceed, it should reverse the decision below for an independent reason: as a matter of law, the FDNY abused discretion by rejecting Mr. Mastro’s Certificate because he “*failed to submit a letter*” from his alarm service company. A72 (emphasis added); *see also* A74 (recounting that the FDNY official told Mr. Mastro that he “needed a letter from [the] alarm system provider”).

The documents provided to Mr. Mastro do not say that he must submit a letter from his alarm service company to avoid a fine. The NOV requests “all proof of compliance” and “documentation detailing cause of alarm(s) and corrective measures taken.” A62; *see also* A65 (requiring “all proof of compliance”). The Certificate of Correction requests “any and all bills, receipts and other proofs of compliance” and “all appropriate documentation.” A63. These broad, unspecified categories of acceptable information make clear that Mr. Mastro was not required to submit any particular type of proof. The applicable regulations similarly do not require any specific form of proof, and say nothing of a letter “requirement.” *See* 3 R.C.N.Y. § 109-01 (establishing “procedures for the

certification of correction and adjudication of violations” returnable before the ECB). If a first-time offender is required to provide a letter to avoid a fine, the FDNY’s directions and the underlying regulations should say so explicitly. Their failure to do so precludes the imposition of a fine on that basis.

Courts have repeatedly granted Article 78 petitions in circumstances like the one presented here. For example, the Court of Appeals rejected Nassau County’s attempt to impose an additional requirement on job applicants that was not in the applicable laws or regulations. *Trager*, 99 N.Y.2d at 365. The appellate divisions have similarly struck down agency action that “engraft[s] ... requirements” onto applicable regulations, *Mamaroneck Beach & Yacht Club, Inc. v. Zoning Bd.*, 53 A.D.3d 494, 498 (2d Dep’t 2008), or that “fails to conform to its own rules and regulations,” *Era Steel Constr. Corp. v. Egan*, 145 A.D.2d 795, 799 (3d Dep’t 1988). The Supreme Court’s decision here to allow the FDNY to reject Mr. Mastro’s Certificate for failing to satisfy the additional, extra-regulatory letter “requirement” cannot be squared with this precedent.<sup>2</sup>

To be sure, the FDNY had discretion to decide whether to accept Mr. Mastro’s Certificate and supporting documentation. *See* 3 R.C.N.Y. § 109-

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<sup>2</sup> *See also, e.g., Kalman*, 2008 N.Y. Misc. LEXIS 7540, at \*8-10 (annulling discipline where “the record shows that respondents acted arbitrarily by failing to follow their own rules”); *Love v. Ameruso*, 125 Misc. 2d 688, 688 (Sup. Ct. N.Y. Cnty. 1984) (annulling parking ticket because the ticket failed to mention a procedure for curing violations).

01(c)(5), (7). But the FDNY could only exercise its discretion consistent with, and not in conflict with, existing law. *See Emunim v. Fallsburg*, 78 N.Y.2d 194, 204 (1991). The FDNY was not permitted to abuse its discretion, or to reject the Certificate and documentation for an arbitrary or capricious reason. *See* C.P.L.R. § 7803(3). Just as the FDNY obviously could not reject a certificate simply because the violation involved a house number that ended in nine, or because the certificate was received on a Tuesday, it was not permitted to reject Mr. Mastro’s Certificate because he purportedly failed to satisfy a letter “requirement” that did not exist.

The FDNY may also be entitled to some deference in interpreting the scope of its regulatory and enforcement authority. That deference, however, cannot and does not immunize the FDNY’s actions from meaningful review. The FDNY is not entitled to any deference at all if its interpretation of its own regulations is, as here, irrational. *Kurcsics v. Merchants Mut. Ins. Co.*, 49 N.Y.2d 451, 459 (1980); *see also Pro Home Builders, Inc. v. Greenfield*, 67 A.D.3d 803, 805 (2d Dep’t 2009). That is why numerous courts have closely scrutinized agency administrative determinations and rejected decisions rendered without adequate consideration—like the ALJ and the ECB decisions here. *See. e.g., Gallo v. City of N.Y.*, 2012 WL 2434967, at \*4-5, \*8-9 (Sup. Ct. Qns. Cnty. June 27, 2012) (granting Article 78 petition and remanding to the ECB where respondents rejected petitioner’s appeal without considering whether he was on notice of requirements);

*Briglio v. City of N.Y.*, 2012 WL 2148907, at \*3-6 (Sup. Ct. Qns. Cnty. June 14, 2012) (denying motion to dismiss Article 78 petition where respondents disregarded documents provided by petitioner in challenging his notice of violation); *Oparaji v. City of N.Y.*, 2011 WL 6738696, slip op. 8-9 (Sup. Ct. Qns. Cnty. Dec. 12, 2011) (granting Article 78 petition where respondents failed to consider whether they had complied with their own stated requirements); *Schulder v. City of N.Y.*, 2010 WL 5553300, slip op. 7-8 (Sup. Ct. Qns. Cnty. Dec. 10, 2010) (same).

The very purpose of an Article 78 proceeding is to protect the public from arbitrary and capricious government action. Allowing the FDNY to reject Mr. Mastro's Certificate, allowing the ALJ to impose a fine based on that rejection, and allowing the ECB to affirm without consideration would render Article 78 meaningless. The trial court failed to hold Respondents accountable for their unconscionable conduct. This Court should reverse.

**II. The Supreme Court Elided That Respondents Acted Contrary To Law By Fining Mr. Mastro.**

The court below further erred by ignoring that Respondents acted contrary to law in two different ways when they issued the fine to Mr. Mastro. First, because Mr. Mastro had already fully performed under his agreement with Respondents to avoid a fine, Respondents' fine was a breach of that agreement. Second, Respondents violated Mr. Mastro's constitutional right to due process by failing to

give Mr. Mastro adequate notice before imposing the letter “requirement” and fining him for not satisfying it.

**A. Respondents Breached Their Agreement With Mr. Mastro By Imposing A Fine After He Had Accepted Their Offer.**

The Supreme Court blithely rejected Mr. Mastro’s contract-based arguments. Without explanation, the court held that the FDNY was not “under any obligation, contractual or otherwise,” to forego fining Mr. Mastro. A15 (slip op. 9). That holding was in error.

It is bedrock law that a contract is formed by offer, acceptance, and consideration. *See* 22 N.Y. Jur. 2d, Contracts § 9. All three elements were established here.

*First*, Respondents offered Mr. Mastro a deal allowing him to avoid a fine if he timely corrected all violations, filed an executed Certificate, and provided “legible copies of any and all bills, receipts and/or other proof of compliance” (A63). *See Einhorn v. Mergatroyd Prods.*, 426 F. Supp. 2d 189, 193 (S.D.N.Y. 2006) (“No particular form is necessary to make an offer. All that is required is conduct that would lead a reasonable person in the other party’s position to infer a promise in return for performance.” (internal quotation marks omitted)). *Second*, Mr. Mastro accepted Respondents’ offer by performing in full within the prescribed time period. *See* 22 N.Y. Jur. 2d Contracts §§ 47, 49 (describing validity of timely acceptance by act or conduct). *Third*, Respondents’ promise to



forego imposing a fine, and Mr. Mastro's performance, constituted sufficient consideration. 22 N.Y. Jur. 2d Contracts § 60 ("Consideration may take the form of either a promise or performance.").

The Supreme Court did not dispute that Mr. Mastro had shown all the required elements for a breach of contract claim. Instead, that court found that the FDNY absolved itself of its duty to perform because it had chosen not to accept Mr. Mastro's proof of correction when it did not include a letter from his alarm service company. A15 (slip op. 9). No matter how much it regretted that Mastro accepted its offer, the FDNY could not avoid its obligations by simply revising its offer, or inventing a new condition on that offer, *after* the offer was accepted by full performance. *See Leonard v. Pepsico, Inc.*, 88 F. Supp. 2d 116, 123-24 (S.D.N.Y. 1999) (citing *Lefkowitz v. Great Mpls. Surplus Store, Inc.*, 86 N.W.2d 689, 691 (Minn. 1957) (rejecting after-the-fact argument that an offer to sell fur coat for \$1 was in fact only open to women, according to unpublished "house rules"))).

Even if a contract had not been formed, the Supreme Court erred by failing to recognize that Mr. Mastro was entitled to relief under a quasi-contract theory. Promissory estoppel applies here: the FDNY made "a clear and unambiguous promise"—that Mr. Mastro could avoid a fine if he followed its instructions—Mr. Mastro reasonably and foreseeably relied on that promise by expending significant

effort to perform, and Mr. Mastro sustained an injury as a result. *Rock v. Rock*, 100 A.D.3d 614, 616 (2d Dep't 2012) (internal quotation marks omitted). Unjust enrichment applies here as well: “[I]t is against equity and good conscience to permit [Respondents] to retain” the funds they improperly coerced from Mr. Mastro. *Alan B. Greenfield, M.D., P.C. v. Long Beach Imaging Holdings, LLC*, 114 A.D.3d 888, 889 (2d Dep't 2014) (quoting *Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972)). Therefore, this Court should reverse the decision below, grant Mr. Mastro's petition, and annul the fine.

**B. Respondents Violated Mr. Mastro's Due Process Rights By Rejecting His Certificate Without Notice And An Opportunity To Be Heard.**

The Supreme Court also erred by refusing to appreciate that Mr. Mastro's due process rights were violated when the FDNY imposed the fictitious letter “requirement” without notice, and when he was deprived of a fair forum for adjudicating his case. The court below found no “constitutional infirmity” because it rejected “Mr. Mastro's argument that the FDNY ‘impermissibly engrafted’ a superfluous letter requirement” onto the NOV and Certificate. A15 (slip op. 9). That finding was wrong as a matter of law. It also completely ignored Mr. Mastro's additional argument that he was deprived of a fair hearing because the ALJ and the ECB claimed to be utterly without “authority” to remedy the FDNY's improper action.

Under the United States and New York State Constitutions, due process requires “notice ... reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Harner v. Cnty. of Tioga*, 5 N.Y.3d 136, 140 (2005) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Mr. Mastro did not receive either aspect of due process before he was fined.

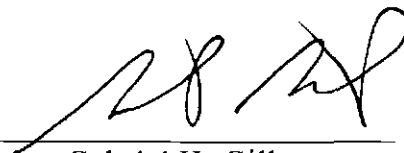
As explained above, Mr. Mastro had absolutely no notice whatsoever, until after his deadline to cure, that he was supposedly required to “submit a letter” from his alarm service company to avoid a fine. *See supra* Part I.B. Therefore, the FDNY violated Mr. Mastro’s due process rights by imposing a fine on that basis. *See, e.g., Baez v. Blum*, 91 A.D.2d 994 (2d Dep’t 1983); *see also Love v. Ameruso*, 125 Misc. 2d 688, 688 (Sup. Ct. N.Y. Cnty. 1984) (finding due process violation where City’s written notice of violation failed to inform recipient of a procedure for curing violation). The due process violation is especially egregious here: Respondents did not even try to timely notify Mr. Mastro of the newfound letter “requirement” or provide him an opportunity to satisfy it. On these particular facts, that was unreasonable as a matter of constitutional due process. *See Harner*, 5 N.Y.3d at 140 (“Due process is a flexible concept, requiring a case-by-case analysis that measures the reasonableness of a municipality’s actions in seeking to provide adequate notice.”).

The Supreme Court entirely ignored that Mr. Mastro's due process rights were also violated because he was not given a fair hearing before the administrative agency. Both the ALJ and the ECB found that they were powerless to question "the Fire Department Enforcement Unit's practices." A85, A116-17. In their view, the FDNY had unfettered power to reject an otherwise flawless certificate on any basis whatsoever. That is nonsense. The agency's vision of the administrative appeal process—where the City ostensibly has complete control over the outcome of the challenge to their conduct—suits a Kafka novel, not New York City government. That vision, like the fine challenged here, cannot abide Article 78; other City residents must not be subjected to this charade in the future.

### CONCLUSION

This Court should reverse the Supreme Court's denial of Mr. Mastro's Article 78 petition and annul and vacate the fine imposed upon him.

Dated: New York, New York  
June 10, 2016



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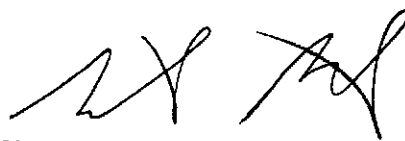
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Gabriel K. Gillett

To Be Argued By:  
Gabriel K. Gillett

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# New York Supreme Court

## APPELLATE DIVISION—FIRST DEPARTMENT

—◆—◆—◆—

In the Matter of the Application of,

RANDY M. MASTRO,

*Petitioner-Appellant,*

—against—

CITY OF NEW YORK; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; FIRE DEPARTMENT OF THE CITY OF NEW YORK; DANIEL A. NIGRO, in his Official Capacity as Fire Commissioner; CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS; SUZANNE A. BEDDOE, in her Official Capacity as Chairperson of the Environmental Control Board, and Commissioner & Chief Administrative Law Judge of the Office of Administrative Trials and Hearings,

*Respondents-Respondents.*

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### REPLY BRIEF OF PETITIONER-APPELLANT

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## TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT .....	1
ARGUMENT .....	6
I.    Substantial Evidence Review Is Inapplicable, And The City Has Waived Any Arguments To The Contrary.....	6
II.   The Supreme Court Erred By Permitting The City To Abuse Discretion By Arbitrarily Rejecting The Certificate And Imposing A Fine.....	8
A.   Mastro Timely Followed All Instructions For First-Time Offenders To Cure A Violation And Avoid A Fine. ....	9
B.   The City Improperly Fined Mastro For Failing To “Submit A Letter” When He Was Not Required To Do So.....	17
III.  The Supreme Court Wrongly Disregarded The Violation Of Mastro’s Due Process Rights And The City’s Breach Of Contract. ....	23
CONCLUSION .....	25

## TABLE OF AUTHORITIES

Page(s)

### Cases

<i>Blackman v. Perales</i> , 188 A.D.2d 339 (1st Dep’t 1992) .....	23, 24
<i>Calenzo v. Shah</i> , 112 A.D.3d 709 (2d Dep’t 2013) .....	14
<i>Crawford v. Jonesville Board of Fire Commissioners</i> , 229 A.D.2d 773 (3d Dep’t 1996) .....	21
<i>Figueroa v. New York City Hous. Auth.</i> , 141 A.D.3d 468 (1st Dep’t 2016) .....	14, 18
<i>Kostika v. Cuomo</i> , 41 N.Y.2d 673 (1977) .....	6, 7
<i>Leader v. Maroney, Ponzini &amp; Spencer</i> , 97 N.Y.2d 95 (2001) .....	19
<i>Murphy v. New York State Div. of Hous. &amp; Cmty. Renewal</i> , 21 N.Y.3d 649 (2013) .....	14
<i>Matter of Peckham v. Calogero</i> , 12 N.Y.3d 424 (2009) .....	13, 14, 16
<i>Pell v. Bd. of Educ.</i> , 34 N.Y.2d 222 (1974) .....	7
<i>Scanlan v. Buffalo Pub. Sch. Sys.</i> , 90 N.Y.2d 662 (1997) .....	4, 12, 13, 16

### Rules

C.P.L.R. 5526 .....	7
C.P.L.R. 7803(3) .....	6
Uniform Rule 600.10(c) .....	7



**TABLE OF AUTHORITIES  
(continued)**

Page(s)

**Other Authorities**

N.Y. Jur. 2d Administrative Law § 185.....19

## **PRELIMINARY STATEMENT**

The core of this appeal presents two important questions that go to the heart of our local democracy and the City government's obligation to honor its commitments to its residents. First, should Respondents (the "City") be permitted to fine a resident after its agency arbitrarily and capriciously rejects his timely, sworn Certificate of Correction, which complied with all stated instructions and attached required proof of that correction, because he failed to also "submit a letter" from his alarm service company that did the work, when such a letter was not required or even mentioned in those instructions or underlying regulations? Second, should the City be permitted to provide a resident with one rationale for its rejection of his Certificate, only to later claim on appeal here that the Certificate was rejected for another reason entirely? The answer to both questions must be no, and the lower court erred by holding otherwise. This Court must send a strong message that the City Government cannot engage in such duplicity and double-speak just to wring a few more dollars from its residents or to avoid acknowledging the error of its ways.

As Petitioner-Appellant Randy Mastro explained in his opening brief, he was issued a Notice of Violation ("NOV") after two false fire alarms at his home on January 8 and 15, 2014. A62. As the City concedes, it offered in the NOV and the accompanying Certificate of Correction to waive any fine resulting from the two inadvertent alarms if Mastro timely swore he corrected the problem and submitted

“bills, receipts, and/or other proof of compliance.” A63. Mastro did just that. He timely submitted a signed Certificate, swearing before a notary that he had corrected all violations. He also attached a Work Order and Work Order Summary from his alarm service company describing the problem and what they did to fix it, just as the City requested.

But the City fined Mastro anyway, in a sequence of events that can only be described as Kafkaesque. Although the FDNY had never asked Mastro to provide a letter from his alarm service company, and although the City’s documents and regulations say nothing about such a letter, the FDNY rejected Mastro’s Certificate because he “failed to submit a letter” from his alarm service company describing what caused the false alarms and how it fixed the problem. Mastro had never been told to submit such a letter, however, and he was not required to do so. A72. Shortly thereafter, a FDNY official confirmed to Mastro that he “needed a letter from ADT,” his alarm service company, which he promptly provided, even though it contained the same substantive information as the documents Mastro had already provided. A156; *see also* A82. When Mastro challenged the denial, the City’s administrative apparatus turned a blind eye and fined him anyway.

That was arbitrary, capricious, and an abuse of discretion. Mastro’s submission fully complied with the City’s express instructions in the Certificate, the NOV, and the applicable regulations—none of which required him to “submit a

letter” from his alarm service company. The City simply had no basis to impose the belated “letter requirement,” especially after Mastro’s time to cure had already run.

What makes the City’s opposition brief here even more remarkable is that it introduces yet another new rationale to try to explain away the FDNY’s improper-but-explicit rejection of Mastro’s Certificate of Correction and detailed confirming documentation for failing to satisfy the fictitious “letter requirement.” Before the ALJ, the “FDNY urged that Mr. Mastro’s original submission was insufficient because the work order did not state what caused the alarms or what ADT did in response to them.” A11. The FDNY’s representative assiduously avoided Mastro’s argument that the FDNY had told him—in its Disapproval Letter and over the phone—that it rejected his Certificate because he “failed to submit a letter” from his alarm service company. Yet the FDNY representative conceded that Mastro’s “March and April submissions ‘both fulfilled the requirements of the Department.’” A11 (quoting A85). Then, before the lower court, the City argued that Mastro had failed to exhaust administrative remedies, although the “FDNY never informed him that he could appeal disapproval of the Certificate” and Mastro carefully followed the City’s own instructions about how to appeal. A13-A14; *see* A86.

Now, before this Court, the City serves up yet another post-facto justification for the FDNY’s arbitrary determination. The City contends, for the first time on appeal, that the FDNY rejected Mastro’s submission because he did not “submit

documents” or “information” to “identify the causes of the two false alarms” that occurred one week apart in January 2014. The City’s new position is essentially that Mastro's submitted paperwork was insufficient because the documents only mention one smoke detector, one cause, and one service call in March. Opp. 15; *see id.* 2. The City hammers away at this point, repeatedly faulting Mastro for not identifying the plural “causes of the” alarms, and repeatedly contending that Mastro needed “to submit” qualifying “documents” or “information.” But that is not what the FDNY said in its Disapproval Letter or afterward. The FDNY expressly directed Mastro to “*submit a letter* stating the cause” of the alarms. A72 (emphasis added); *see also* A82 (letter recounting FDNY guidance), A156 (hearing before ALJ).

Until now, the City said nothing at all about Mastro’s Certificate being rejected because his supporting documentation did not specifically mention both false alarms and what was done to correct both (falsely suggesting for the first time that the violations stemmed from multiple smoke detectors, not one). And the City has never before claimed that when it told Mastro “to submit a letter” from his alarm service company, it meant that “documents” or “information” would have been acceptable. (Nor has the City ever before conspicuously characterized the “letter” that Mastro obtained from his alarm service company as an “ADT document” (Opp. 10).) The City is brazenly attempting to invent on appeal an entirely new rationale for its actions. This Court should completely disregard the City’s new arguments

and “limit[]” its review “to the grounds presented by the agency at the time of its determination.” *See Scanlan v. Buffalo Pub. Sch. Sys.*, 90 N.Y.2d 662, 678 (1997).

The City’s brand-new contrived justification is not a valid basis for rejection, anyway. The City contends that Mastro needed to detail that his alarm service company made two service calls after the two false alarms. But the City’s own forms obligated Mastro to provide “bills, receipts, and/or other proof of compliance” (A68), not a full history of his alarm system’s maintenance. So why would Mastro have specifically told the FDNY about the first call, which *did not* fix the problem, when he documented the second service call that *did*? It is only on appeal, as the City continues to fumble for a way to explain the FDNY’s plainly improper actions, that it contends that the FDNY reasonably rejected Mastro’s documentation because the FDNY learned *more than a month after the rejection* about a prior attempt to fix a different smoke detector months earlier.

This Court should reverse the Supreme Court’s decision denying Mastro’s Petition. As explained below, the FDNY’s rejection of Mastro’s March 7, 2014 submission was arbitrary, capricious, and an abuse of discretion because that submission satisfied every one of the City’s stated requirements—Mastro timely submitted a completed, signed, and notarized Certificate, and attached “proof[] of correction” from his alarm service company showing the cause of the false alarms and what was done to fix them. As a matter of New York State law and

constitutional due process, the FDNY was barred from rejecting Mastro’s Certificate for “fail[ure] to submit a letter” from his alarm service company, when he was never required or requested to do so. For Mastro, a former New York City Deputy Mayor and long-time lawyer, this is not about the fine amount; it’s about the principle that it is unjust for our local government to treat its citizens in this capricious, abusive manner. This Court cannot permit that kind of injustice to stand.

## **ARGUMENT**

### **I. Substantial Evidence Review Is Inapplicable, And The City Has Waived Any Arguments To The Contrary.**

The City’s lead argument on appeal is that Mastro’s fine is valid so long as it is not “clearly disproportionate to the offense and completely inequitable in light of the surrounding circumstances.” Opp. 14 (quoting *Kostika v. Cuomo*, 41 N.Y.2d 673, 676 (1977)). In the City’s view, this argument is so strong that it “largely ends the inquiry.” *Id.* The City is demonstrably incorrect.

The City’s argument misconstrues this case as about whether there is substantial evidence to support the City’s actions. The sentence before the portion of *Kostika* that the City selectively quotes explains that “where ... the administrative agency’s determination *is based upon substantial evidence*, the penalty imposed is a matter of discretion to be exercised solely by the agency.” *Kostika*, 41 N.Y.2d at 676 (emphasis added). But that is not the question here. The question here—as the Supreme Court explained and the Petition makes clear—is whether the FDNY’s

rejection of Mastro’s Certificate and confirming documentation, and the resulting fine imposed by the City, was “affected by an error of law or was arbitrary and capricious or an abuse of discretion.” A14 (quoting C.P.L.R. 7803(3)); *see also* A40-A47 (bringing claims under C.P.L.R. 7803(3)); Pet’r’s Br. 15-16 (citing C.P.L.R. 7803(3)). In other words, the “clearly disproportionate” standard that the City trumpets from *Kostika* (which *Kostika* borrowed from *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974)) has no application here.

Oddly, the City presses this argument on appeal without even acknowledging that the Supreme Court squarely rejected it below. *See* A14 (“Nor is there any issue of whether OATH’s determination is supported by ‘substantial evidence.’”); *compare* Opp. 14 (citing *Kostika*, 41 N.Y.2d at 676, which in turn cites *Pell* as the basis for substantial evidence review), *with* A190-A194 (claiming substantial evidence review applies, also citing *Pell*).<sup>1</sup> Nor does the City dispute that its failure to “take a cross-appeal” from the Supreme Court’s decision has “waived any right to challenge” that holding before this Court. Pet’r’s Br. 15 n.1 (citing cases). As a

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<sup>1</sup> Pages A168-A225 appear in the Reply Appendix that has been filed and served simultaneously with Petitioner-Appellant’s Reply Brief, for the convenience of the Court. The Reply Appendix contains the City’s Memorandum of Law in Opposition to the Verified Petition, which became independently significant when the City’s brief raised arguments that were rejected below and not appealed (*see supra* Part I), and arguments that were not made below and have not been preserved (*see infra* Part II). The memorandum was properly omitted from Petitioner-Appellant’s Appendix. *See* C.P.L.R. 5526; Uniform Rule 600.10(c).



result, far from “largely end[ing] the inquiry,” the City's reliance on *Kostika* reveals the weakness of its arguments on appeal and how susceptible the Supreme Court’s decision is to reversal.<sup>2</sup>

## **II. The Supreme Court Erred By Permitting The City To Abuse Discretion By Arbitrarily Rejecting The Certificate And Imposing A Fine.**

The Supreme Court’s decision should be reversed because the City’s rejection of Mastro’s March 7 submission was arbitrary, capricious, and an abuse of discretion. Mastro, a first-time offender, timely complied with all of the instructions to avoid a fine. His submission should have been accepted because it was substantively identical to the March 24th submission that the FDNY conceded “fulfilled the requirements of the Department.” A85. And, as a matter of law, the FDNY was not allowed to reject Mastro’s submission for “fail[ing] to submit a letter” from his alarm service company, because the relevant instructions and applicable regulations never required Mastro to provide such a letter, and the FDNY did not inform Mastro until after his time to cure that it supposedly “needed” one. The City may not tell residents to jump through hoops to avoid a fine, only to add

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<sup>2</sup> The City attempts to garner sympathy by attempting to sneak in references to Petitioner’s wealth and the weather in January 2014. In addition to being irrelevant, those facts are not in the record and the City has not sought judicial notice. They should be disregarded, along with the City’s self-serving citation to a website drafted by the FDNY (*see* Opp. 4).

additional “required” hoops after the fact. In doing so here, the City acted unlawfully. The decision below failed to recognize that, and should be reversed.

**A. Mastro Timely Followed All Instructions For First-Time Offenders To Cure A Violation And Avoid A Fine.**

The Supreme Court upheld Mastro’s fine because it believed there was an “absence of proof in any form of the cause of the alarm by the March 14 deadline.” A15. That was error. Mastro timely fulfilled every one of the FDNY’s stated requirements for avoiding a fine. As the City concedes, a week before his deadline to cure, Mastro submitted a completed Certificate, signed before a notary, swearing that he had corrected the false alarms. *See* Opp. 8, 19. The City further acknowledges that Mastro attached a Work Order and a Work Order Summary from his alarm service company, which constituted “bills, receipts, and/or other proofs of correction.” A76; *see* Opp. 8-9. That should have been enough for Mastro, a first-time offender, to avoid a fine. The Supreme Court erred in finding that it was not.

1. The City tries to brush aside Mastro’s signature and sworn-and-notarized statement certifying that he timely cured all violations as merely his “say-so.” Opp. 19. If the City means to suggest that the signature and sworn statement they make light of is unimportant, that would be ironic. It is their *own requirement* for properly completing a Certificate, and it is seemingly important enough that FDNY’s *own form* Certificate of Correction Disapproval Letter lists “fail[ing] to sign the Certificate” and “fail[ing] to have a notary sign the Certificate” as the top two

reasons for rejection. *See* A75. If they mean to suggest that Mastro would flippantly sign and swear to correction, they are way off base. In Mastro’s more than 30 years of practicing law—including service as a federal prosecutor in the Southern District of New York, as a federal court-appointed Special Master who conducted administrative proceedings, as Deputy Mayor of New York City, as Chair of two Mayoral Charter Revision Commissions, and currently, as co-chair of Gibson Dunn’s Litigation Group—he has a well-deserved reputation for integrity and distinguished public service. He takes the oath very seriously, as every lawyer and officer of this Court should, and he told the truth when swearing the oath on the Certificate. Moreover, Mastro did not ask the FDNY to rely on his word alone: he backed up his sworn statement by submitting the very confirming documentation that the FDNY requested in its instructions. *See* A68-A70.

2. The City’s primary remaining argument is that the confirmatory documentation Mastro timely supplied was not sufficiently detailed. The City repeatedly contends on appeal that the Work Order and the Work Order Summary from Mastro’s alarm service company did not “state[e] the causes of the two false alarms.” *E.g.*, Opp. 21 (quoting A72). The City’s argument is wrong.

The Work Order indisputably states that an ADT representative made a service call at Mastro’s home on March 7, 2014. It identifies the problem as “zone 16 basement falsing, smoke det.” A70. The accompanying Work Order Summary

describes the “Service Call Resolution”—that the service representative “replaced Z16 smoke detector.” A69. The documents demonstrate that the “Resolution” of the problem was “replace[ment] of the “zone 16 basement falsing[] smoke det[ector].” A69-A70. Therefore, by attaching them to his signed Certificate and swearing that the violations had been corrected, Mastro had provided “bills, receipts, and/or other proof of compliance” and “[s]ubmit[ted] documentation detailing [the] cause of the alarm(s) and corrective measures taken.” A62-A63.

In arguing that Mastro’s confirming documentation was insufficiently detailed, the City attempts to hold him to an artificially high standard that he is not required to meet. The City attacks the Work Order and Work Order Summary for failing to “provide any details about how or why the zone 16 smoke detector might have triggered false alarms on two consecutive Wednesday afternoons (*i.e.*, a particular repeated mechanical failure, recurring innocuous smoke, *etc.*).” Opp. 9; *see also id.* 17. That granular level of detail was never required, however. *See* Pet’r’s Br. 18-19. Mastro was only required to provide “proof of compliance” (A68) and an undefined amount of detail about the “cause of [the] alarm(s) and corrective measures taken” (A62). He did that—his documentation said ADT “replac[ed the] Z16 smoke detector” that was “falsing” (A69-A70)—and so he satisfied his burden.

The FDNY’s admission that Mastro’s “March and April submissions ‘both fulfilled the requirements of the Department’” (A11 (quoting A85)) proves that the

City's newly articulated standard does not apply. Neither of Mastro's submissions explains exactly what triggered either of the false alarms or offers technical minutiae about how either was remedied. *See* A74-A83. Those submissions do not mention anything such as "mechanical failure" or "innocuous smoke." *Id.* Yet the FDNY said they were sufficient, offered to mitigate Mastro's fine as a result, and the ALJ did so. *See* A85. In other words, the FDNY admitted during the hearing before the ALJ that it was perfectly acceptable for Mastro to provide documentation saying that his zone 16 smoke detector was "falsing" and that it was "replaced," without providing any additional detail about why. So the City cannot now claim—when the FDNY never did—that Mastro was actually required to provide such detail when he originally submitted his Certificate. *See Scanlan*, 90 N.Y.2d at 678. The fact that Mastro's confirming documentation did not provide more detail cannot possibly have been a valid basis for it to reject his Certificate and impose a fine.

3. The City repeatedly argues in its brief—for the first time, at any stage in this case—that Mastro's Certificate was properly rejected because it did not specifically delineate the causes of each false alarm and the particular corrective measure that was used each time. The City's position before this Court is that "[t]he deficiency in his submission was that it did not purport to identify the causes of the two false alarms," and that the March 7 submission improperly required FDNY to

infer “that a broken zone 16 smoke detector—the only piece of equipment mentioned in the submission—was the cause of both false alarms.” Opp. 15-16.

This Court may not entertain that argument because it was not presented by the agency when it denied Mastro’s Certificate. The FDNY’s Disapproval Letter informed Mastro that his March 7 submission was disapproved because he “failed to submit a letter stating *the cause* of the two unnecessary alarms.” A72 (emphasis added); *accord* A82. Before the ALJ, the FDNY representative repeated that the issue related to Mastro’s need to “submit documentation detailing cause of alarms and corrective measures taken.” A158. At no point did the FDNY argue that Mastro had failed to describe *multiple* causes for the alarms or suggest that Mastro’s confirmatory documentation was deficient because it did not refer to *two* smoke detectors. The ALJ and the Environmental Control Board did not interpret the FDNY as making that argument, either. *See* A85, A116-A117.<sup>3</sup> Accordingly, this Court may not consider the City’s two-causes/two-alarms argument now. *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 430 (2009) (“[I]t is well settled that an argument” not presented to the agency “may not be raised for the first time before the courts in an article 78 proceeding.”) (citation omitted)); *Scanlan*, 90 N.Y.2d at

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<sup>3</sup> In fact, the ALJ and ECB flatly refused to inquire into the FDNY’s basis for rejection, instead rubber-stamping the FDNY’s determination due to a purported lack of “authority to review the disapproval.” A117; *see also* A85.

678 (“It has ... long been the rule that judicial review of an administrative determination is limited to the grounds presented by the agency at the time of its determination.”); *see also Calenzo v. Shah*, 112 A.D.3d 709, 712 (2d Dep’t 2013) (refusing to consider the Government’s “rationale” that “was not relied upon by” the agency” and “not raised at the administrative level”).<sup>4</sup>

The City’s improperly presented argument is also wrong on the merits. In the City’s view, the FDNY was not required to read Mastro’s supporting documentation as indicating one “falsing” smoke detector caused both alarms, and one “resolution” cured both alarms. *See* Opp. 16. But the FDNY *was* required to be reasonable. *Figueroa v. New York City Hous. Auth.*, 141 A.D.3d 468, 469 (1st Dep’t 2016) (“In reviewing an agency’s application of its own regulations, courts ‘must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case.’” (quoting *Murphy v. New York State Div. of Hous. & Cmty. Renewal*, 21 N.Y.3d 649, 655 (2013))); *see also* Pet’r’s Br. 21-22 (describing limits on FDNY discretion and deference). It was *unreasonable* for the FDNY to believe that Mastro’s sworn statement that the violations had been cured, and the

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<sup>4</sup> Although it would not have made a difference (*see Peckham*, 12 N.Y.3d at 430), the City also did not make the two-causes/two-alarm argument in trial court. Rather, the City focused on Mastro’s alleged failure to exhaust inapplicable administrative remedies and FDNY’s apparently limitless discretion to reject Certificates on a whim on any basis whatsoever. *See* A168-A200.

confirming documents that he provided—which described a service call “resolution” to “replace[]” a “falsing” smoke detector after both false alarms had occurred—did not show that *both* false alarms were remedied. A68-A70.

The City further contends for the first time on appeal that ADT’s service to Mastro’s Zone 15 smoke detector in January 2014 supports rejecting his March 7 submission, because accepting it “would have led the FDNY to the wrong conclusion” (Opp. 16)—*i.e.* that the violations had been cured when they actually had not been. The City has no basis for that incorrect belief. There is no dispute that the violations were in fact cured as of March 7—the date that Mastro swore they had been corrected. That the City learned in April 2014 that Mastro’s alarm service company had also visited his home back in January 2014 does not show otherwise. First, the fact that ADT came back in April, and that Mastro did not immediately swear that the violations had been cured when he got the NOV and Certificate in February, demonstrates that the January visit did not actually fix the problem. Therefore, evidence of that visit was not “proof of compliance,” and Mastro was not required to submit it to the FDNY. Second, even if the January service to the Zone 15 smoke detector were relevant to showing the violations were cured (which it is not), the FDNY did not learn about the service until more than a month after it had already rejected Mastro’s submission. *Compare* A72 (Disapproval Letter dated March 14, 2014), *with* A82-A83 (Mastro letter dated April 24, 2014, attaching ADT



letter dated April 23). So there is absolutely no way that the January visit could have played any role whatsoever in the FDNY's decision to reject Mastro's submission.<sup>5</sup>

Regardless of the information that the City might deem relevant today, its decision to reject Mastro's submission must be judged by its stated basis for the rejection, the information it had available at the time, and the arguments it made before the agency. *See, e.g., Peckham*, 12 N.Y.3d at 430; *Scanlan*, 90 N.Y.2d at 678. Mastro's March 7, 2014 submission was timely and complete. It included a signed Certificate, swearing before a notary that all violations had been cured, and "proof[] of compliance" from his alarm service provider showing it had "replaced" a "falsing" smoke detector. To the extent the Supreme Court found that the FDNY rejected Mastro's submission because it failed to state in sufficient detail "the cause" of the alarms and "what action was taken to prevent future alarms," that contention is belied by the record. The FDNY's rejection was arbitrary, capricious, and an abuse of discretion, and the Supreme Court's decision to the contrary should be reversed.

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<sup>5</sup> The City tries to have it both ways by contending that "[e]ven ADT ... was not in a position to make conclusions about the false alarms' causes when Mastro filed his Certificate of Correction on March 7" because ADT did not "express its view" that its work was complete until April 23. Opp. 18. That has the record backwards. It was not that ADT waited to write a letter until it thought the problem was fixed, but rather that Mastro did not need ADT to write a letter until the FDNY fabricated the "letter requirement." If the Certificate's instructions had actually directed Mastro to get a letter, he would have done so immediately.

**B. The City Improperly Fined Mastro For Failing To “Submit A Letter” When He Was Not Required To Do So.**

The Supreme Court recognized that the FDNY’s Disapproval Letter stated that Mastro’s submission was rejected because he ““failed to submit a letter stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms.”” A9 (quoting A72). In upholding the fine imposed on Mastro, however, the Supreme Court erred because it disregarded the FDNY’s clear statement that it denied Mastro’s Certificate because he “failed to submit a letter,” when it had no basis for imposing that requirement.

The City faults Mastro for “attack[ing] the FDNY and Supreme Court for the precise manner in which they described the deficiencies in his March 7 submission.” Opp. 20. The FDNY’s and Supreme Court’s “precise” descriptions of the purported deficiencies is *exactly* the problem here, and makes all the difference. It was the sole basis for Mastro to understand why his Certificate was rejected, and why he was fined despite the City’s statements that he would not be. None of the City’s post-hoc explanations for this belated requirement pass muster.

*First*, the City contends that “the Disapproval Letter did not impose any requirements. Rather, it explained the FDNY’s rationale for rejecting Mastro’s initial submission.” Opp. 20-21. That makes no sense; as a matter of law, the FDNY’s “rationale for rejecting” the submission must have been failure to comply with one of its requirements. As Petitioner explained, and the City does not address,

the FDNY’s “rationale” for rejecting a submission must flow from its own rules and regulations. *See* Pet’r’s Br. 21-22 (collecting cases rejecting agency actions that do not comport with their regulations). To allow the agency to do otherwise would endow it with the unfettered discretion that (much to the City’s chagrin) the agency most certainly does not have. *See id.* 20-23.

*Second*, the City asserts that the FDNY’s Disapproval Letter was acceptable because it was “[t]racking the Notice of Violation requirement that Mastro timely submit ‘documentation detailing cause of alarm(s) and corrective measures taken.’” Opp. 21 (quoting A62). That cherry-picked reading of the Disapproval Letter entirely ignores the first twenty-five percent of the FDNY’s stated “rationale” for rejecting his submission—that Mastro “failed to submit a letter” (A72). Those words do not appear in the NOV, Certificate, or any other City authority. For the City to say that the Disapproval Letter is “[t]racking” the NOV because the last three-quarters of the letter are *similar* (not even identical) to the NOV is akin to the City saying that it honors the Bill of Rights by following the last seven Amendments to the United States Constitution but ignoring the first three. Both propositions obviously fail the straight-face test.

The City simply cannot dispute that the language in the Disapproval Letter is materially different than the relevant language that appears everywhere else in the record. That must mean something. The fictitious “letter requirement” was not

created by Mastro’s “cramped reading of the Disapproval letter,” as the City claims. Opp. 21. The “letter requirement” was created by the City’s own words, which are to be “construed in their natural and most obvious sense without resort to subtle or forced construction,” to be given “free, full, fair, and correct meaning” appropriate in the particular context, and to not be rendered superfluous. 2 N.Y. Jur. 2d Administrative Law § 185; *see also Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001); *Figueroa*, 141 A.D.3d at 469. The City’s (mis)reading of the Disapproval Letter—which excises the words “failed to submit a letter” from its stated “rationale” for rejecting Mastro’s Certificate—cannot meet this standard.

Realizing that the belated imposition of a “letter requirement” was unjustifiable, the City’s next argument is when the Disapproval Letter said “letter” it actually meant “any ‘written or printed message’ or any ‘communication in writing from one person to another at a distance.’” Opp. 21 (citation omitted). In other words, the City didn’t so much impose a “letter requirement” after the fact as require that proof of correction be given in writing. That is absurd. First, the City’s words must be interpreted according to their plain meaning—so “letter” means “letter”—in a way that gives effect to every word and makes sense in context. *See, e.g.*, 2 N.Y. Jur. 2d Administrative Law § 185. Second, the City’s interpretation does not explain why the Disapproval Letter uses “letter” in place of “documentation” (which is the language used in the NOV, Certificate, and elsewhere) (*see* A62-A63), why

ADT’s self-styled “letter” was acceptable but ADT’s written Work Order and Work Order Summary were not (*see* A83), or why a FDNY official specifically told Mastro that he “needed to submit a letter” (A156; *see* A82).<sup>6</sup> Third, Mastro’s submission *satisfies* the City’s oddball interpretation of the “letter requirement”—it was a “written or printed message” sent “at a distance” that provided the same substantive information as the “March and April submissions” that “fulfilled the requirements of the Department.” *See* A11 (quoting A85).

In the name of precision, the FDNY need not subject every one of its rejection letters to an exhaustive review before it is sent to a City resident. But each communication must be accurate; it must not mislead a resident into thinking the agency acted for one reason when in fact it was another. The FDNY could have sent Mastro a rejection letter that repeated the language featured on the NOV—stating that he had failed to “[s]ubmit documentation detailing cause of alarm(s) and corrective measures taken.” A62.<sup>7</sup> But the FDNY *chose* not to. Instead, it *chose* to

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<sup>6</sup> The City’s erroneous interpretation of the Disapproval Letter truly jumps the shark when the City characterizes the “letter” from ADT as a “document” (Opp. 10), despite the fact that it has all the traditional hallmarks of a letter and that ADT itself describes the supposed document as a “letter.” A83.

<sup>7</sup> The City creates a strawman in arguing that “the FDNY was not required to list in its Disapproval Letter every form of written communication Mastro could have used to satisfy the substantive requirements.” Opp. 21. This argument, which Mastro did not make, completely (and perhaps willfully) misses the point. Mastro would have never thought a letter was required if the City had not used

inform Mastro that his Certificate had been disapproved because he “failed to submit a letter.” Having decided to provide Mastro with a tailored explanation for its actions, the City was absolutely required to ensure that tailored explanation was accurate and not misleading.

Even so, the problem here goes beyond the language of the rejection letter. When Mastro called FDNY to clarify how to correct the supposed deficiency, a FDNY official told Mastro that he “needed a letter from [his] alarm system service provider.” A82. The City has never denied that. *See, e.g.*, A156. In fact, it has never even addressed it, although Mastro has repeatedly reminded that he was specifically told he “needed a letter.” *Compare* Pet’r’s Br. 11 (recounting that an FDNY official “reported that Mr. Mastro ‘needed a letter from [his] alarm system service provider.’” (quoting A82)), *with, e.g.*, Opp. 9-10 (ignoring FDNY official’s statement). This whole dispute might have been avoided if FDNY had just told Mastro in that call that, despite what its rejection letter said, it needed some additional information but not that it necessarily “needed a letter from [his] alarm service company.”

The City’s citation to *Crawford v. Jonesville Board of Fire Commissioners*, 229 A.D.2d 773, 774 (3d Dep’t 1996) does not change this analysis. *See* Opp. 23.

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that language. Indeed, if the City *had* tracked the NOV and Certificate, it would *not* have specified the type of proof that would be acceptable. *See* A62, A63.

In *Crawford*, the petitioner knew he was required to attend sexual harassment training, even though the notice he received misidentified the basis for that requirement. *Id.* In addition, the notice in *Crawford* actually tracked the applicable regulation, so the petitioner understood that he was required to attend training and that he would be penalized if he did not, so he had no basis to complain when he was punished for not attending. *Id.* Those facts are in stark contrast to this case. The Disapproval Letter included language that was materially different from the instructions Mastro received and the underlying regulations, Mastro was not aware of any “letter requirement” until he received the Disapproval Letter, and to this day the City has never pointed to a legal basis for that phantom requirement.

Mastro understood that he was required to timely correct the violations and certify correction by properly completing the Certificate, and he did so. But Mastro cannot be faulted for “fail[ing] to submit a letter” from his alarm service company when he was not told he needed to do so until after his deadline to cure expired, and when to this day there is literally no other source indicating that such a letter was required. *See, e.g.,* Pet’r’s Br. 20-23 (citing cases granting Article 78 petitions where the agency punished a resident based on additional or different rules that were not previously disclosed). As a result, this Court should reverse the Supreme Court’s denial of Mastro’s Article 78 petition and vacate the fine that the City imposed.

### **III. The Supreme Court Wrongly Disregarded The Violation Of Mastro's Due Process Rights And The City's Breach Of Contract.**

In defense of the Supreme Court's drive-by due process holding, the City argues that Mastro received due process because "the FDNY gave him notice of his rule violation, and afforded him the opportunity to contest that violation at a hearing." Opp. 25. That mischaracterizes Mastro's argument, and does not answer the fundamental defect underlying Mastro's fine.

The issue is not whether Mastro had an opportunity "to contest [the] violation at a hearing." Rather, as Mastro articulated in his opening brief, the issue is that he "had absolutely no notice whatsoever, until after his deadline to cure, that he was supposedly required to 'submit a letter' from his alarm service company to avoid a fine." Pet'r's Br. 27; *see also Blackman v. Perales*, 188 A.D.2d 339, 340 (1st Dep't 1992) (requiring "notice of the specific reasons for the denial of [an] application"). As a result, by the time Mastro appeared for the hearing to contest the violation, it was already too late. At that point the City had rejected his Certificate and confirming documentation, and (at least in the City's view) therefore Mastro would need to pay his penance. It is true that the FDNY agreed to reduce the penalty from \$1,000 to \$375, but that is beside the point. This is a matter of principle, a question of right and wrong. The City should not be permitted to take advantage of its residents by imposing fines on them without first giving them an opportunity to



understand and to comply with the stated rules (especially those that offer exceptions that permit first-time offenders to avoid being fined).

The City completely fails to address the lack of a fair hearing. For a hearing to be fair, Mastro had receive a chance to secure meaningful relief. Although Mastro was able to present his arguments during the hearing, the hearing was meaningless because the ALJ concluded that “the Fire Department Enforcement Unit’s practices are outside of the jurisdiction of ECB.” A85, A94. It is not enough that the ALJ heard the sound of Mastro’s arguments if the ALJ did not (and could not) possibly find them convincing. A hearing where one party can decide the outcome is not a fair hearing, even if the other side gets to put on a show.

Regarding breach of contract, the City does not seriously refute that, even when an offer is contingent on the City-offeror’s acceptance, its acceptance or rejection must be reasonable. The City made an offer to Mastro that, as a first-time offender, he would be able to avoid a fine if he timely corrected all violations, filed a completed and notarized Certificate, and provided “legible copies of any and all bills, receipts and/or other proof of compliance.” A68. Mastro accepted this offer by performing according to the City’s instructions. *Id.* The requirement that the Certificate be accepted by FDNY cannot be read as permitting FDNY full discretion to reject Certificates arbitrarily and capriciously; otherwise, any party to a contract could write in a conditional acceptance and revoke deals when they become

inconvenient. That cannot be the law. The Supreme Court thus erred by finding that the FDNY was not “under any obligation, contractual or otherwise, to accept” Mastro’s Certificate and confirming documentation.

### CONCLUSION

This Court should reverse the Supreme Court’s denial of Mastro’s Article 78 petition and annul and vacate the fine imposed upon him.

Dated: New York, New York  
October 5, 2016

*s/ Gabriel K. Gillett*

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## **PRINTING SPECIFICATIONS STATEMENT**

I hereby certify pursuant to 22 N.Y.C.R.R. § 600.10(d)(1)(v) that this brief was prepared, using Microsoft Office Word 2010, to the following specifications:

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To be argued by:  
DANIEL MATZA-BROWN

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**New York Supreme Court  
Appellate Division: First Department**

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In the Matter of the Application of

RANDY M. MASTRO,

*Petitioner-Appellant,*

For Judgment Pursuant to CPLR Article 78

*against*

CITY OF NEW YORK; CITY OF NEW YORK ENVIRONMENTAL CONTROL BOARD; FIRE DEPARTMENT OF THE CITY OF NEW YORK; DANIEL A. NIGRO, in his Official Capacity as Fire Commissioner; CITY OF NEW YORK OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS; SUZANNE A. BEDDOE, in her Official Capacity as Chairperson of the Environmental Control Board, and Commissioner & Chief Administrative Law Judge of the Office of Administrative Trials and Hearings,

*Respondents-Respondents.*

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**BRIEF FOR RESPONDENTS**

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## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF AUTHORITIES .....	iii
PRELIMINARY STATEMENT .....	1
QUESTION PRESENTED .....	3
STATEMENT OF THE CASE .....	4
A. Fines for False Alarms .....	5
B. Mastro’s Violation of the City’s Rule Prohibiting Multiple False Alarms in a Single Quarter .....	7
1. The FDNY’s disapproval of Mastro’s only timely submission .....	8
2. Mastro’s late submissions of additional information .....	9
3. The ALJ’s imposition of a reduced fine following a hearing .....	10
C. The Dismissal of Mastro’s Article 78 Petition .....	11
ARGUMENT .....	13
<b>SUPREME COURT CORRECTLY DISMISSED MASTRO’S PETITION</b>	
A. Supreme Court Properly Upheld the FDNY’s Disapproval Determination .....	14
1. The FDNY’s disapproval was rational .....	15
2. Mastro has failed to show any error in Supreme Court’s decision to uphold the FDNY’s determination as rational .....	20

**TABLE OF CONTENTS (cont'd)**

	<b>Page</b>
B. Mastro Received Due Process.....	25
C. The FDNY Neither Made nor Broke a Promise Not to Fine Mastro.....	28
CONCLUSION.....	30
PRINTING SPECIFICATIONS STATEMENT.....	31

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Arif v. N.Y. City Taxi &amp; Limousine Comm'n</i> , 3 A.D.3d 345 (1st Dep't 2004) .....	25
<i>Matter of Beck-Nichols v. Bianco</i> , 20 N.Y.3d 540 (2013) .....	25, 27
<i>Bing v. Sun Wei Ass'n</i> , 205 A.D.2d 355 (1st Dep't 1994) .....	27
<i>Calloway v. Glass</i> , 203 A.D.2d 800 (3d Dep't 1994) .....	22
<i>Cerra v. Syracuse Univ.</i> , 273 A.D.2d 942 (4th Dep't 2000) .....	28, 29
<i>Crawford v. Jonesville Bd. of Fire Comm'rs</i> , 229 A.D.2d 773 (3d Dep't 1996) .....	22, 23
<i>Farkas v. Farkas</i> , 209 A.D.2d 316 (1st Dep't 1994) .....	27
<i>Kostika v. Cuomo</i> , 41 N.Y.2d 673 (1977) .....	14
<i>Lake Minnewaska Mt. Houses v. Rekis</i> , 259 A.D.2d 797 (3d Dep't 1999) .....	29
<i>People v. Satterfield</i> , 66 N.Y.2d 796 (1985) .....	27
<i>Trager v. Kampe</i> , 99 N.Y.2d 361 (2003) .....	22

**TABLE OF AUTHORITIES (cont'd)**

**Page(s)**

**Other Authorities**

3 RCNY § 109-01(c) ..... 27

3 RCNY § 109-01(c)(2) ..... 6, 14, 19, 22

3 RCNY § 109-01(c)(4) ..... 6, 14

3 RCNY § 109-01(c)(5) ..... 6, 22, 27

3 RCNY § 109-01(c)(7) ..... 6, 14, 22

3 RCNY § 907-01(c)(1) ..... 5

3 RCNY § 907-01(c)(2) ..... 5

3 RCNY § 907-01(c)(3) ..... 5, 6, 22

48 RCNY § 3-106 ..... 6

NYC Fire Code § 902.1 ..... 5



## **PRELIMINARY STATEMENT**

Petitioner-appellant Randy Mastro seeks to avoid a \$375 fine for two false fire alarms that summoned the New York City Fire Department (FDNY) to his four-story house on the Upper East Side. Despite admitting that his alarm system produced the two false alarms, and despite having secured a reduction in the fine from \$1000 to \$375, Mastro sued the respondents (collectively, the “City”). In Mastro’s view, he should not have been fined at all.

The law permits the City to fine property owners whose false alarms, like Mastro’s, unnecessarily divert and waste the FDNY’s emergency-response resources. There is no dispute that Mastro broke the rule against multiple false fire alarms in a single quarter, or that his two false alarms could have triggered a \$1000 fine. Nor does Mastro, an experienced law-firm litigator, contest his ability to pay the reduced \$375 fine. The only question is whether the FDNY reasonably determined that Mastro failed to do what was required to take advantage of the law’s narrow reprieve for first-time offenders.

To avoid a fine entirely, Mastro needed to submit documents detailing the causes of the false alarms and the corrective measures

taken, and he needed to submit those documents before the March 14 deadline. The FDNY reasonably rejected Mastro's pre-deadline submission as insufficient to escape the fine, because it failed to detail the causes of the multiple false alarms or the corrective measures taken.

Mastro obtained a substantial reduction in the amount of the fine by submitting adequate documentation after the deadline but before an administrative hearing. His post-deadline submission revealed that alarm company ADT had "addressed" his two false alarms by servicing two separate smoke detectors in Mastro's house, on two separate dates. In contrast, Mastro's pre-deadline submission mentioned only one of these two smoke detectors, and failed to state whether that smoke detector had caused either of the false alarms.

Unable to show that his timely submission was adequate, Mastro resorts to attacking the FDNY's use of the word "letter" in its notice rejecting his submission, reading it to impose a previously unannounced requirement for the form of his submission. But he ignores that his core failing was not formal but *substantive*—he failed to provide information about the causes of the false alarms, as the rejection notice indicated. In

upholding the FDNY's determination, Supreme Court correctly noted that Mastro's shallow attack on the word "letter" elevated form over substance.

Finally, Supreme Court properly rejected Mastro's due process and contract-based arguments. He received due process because he received notice and the opportunity to respond: he was informed of—and received—an opportunity to detail the causes of the alarms if he wanted to avoid a fine. His contract-based claims likewise fail because the FDNY broke no "promise" not to fine him: the text underlying the alleged "promise" made clear that Mastro would avoid a fine only if the FDNY accepted his paperwork as adequate. Because the FDNY rationally rejected his only timely submission as inadequate, the \$375 fine was proper.

In its thorough and well-reasoned decision, Supreme Court (Schechter, J.S.C.) correctly dismissed the Article 78 petition. This Court should affirm.

### **QUESTION PRESENTED**

Did the Fire Department reasonably reject Mastro's efforts to avoid the imposition of a \$375 fine where (1) Mastro's fire alarm system

twice summoned the FDNY with false alarms; (2) Mastro could have avoided a fine by timely submitting documents detailing the cause or causes of the alarms and the corrective measures taken; and (3) the only documents Mastro submitted to the FDNY on time failed to explain the causes of the false alarms, or whether sufficient corrective measures had been taken?

### **STATEMENT OF THE CASE**

The FDNY, the largest fire department in the United States, is one of the world's busiest and most highly skilled emergency response agencies.<sup>1</sup> It responds to more than a million emergencies each year.<sup>2</sup> False alarms needlessly drain the department's resources and interfere with its ability to help people in need. Responding "to a large number of [false] alarms ... jeopardize[s] public safety and increase[s] response time to actual emergencies."<sup>3</sup>

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<sup>1</sup> NYC Fire Department, "Overview," *available at* <http://www1.nyc.gov/site/fdny/about/overview/overview.page> (last visited July 27, 2016).

<sup>2</sup> *Id.*

<sup>3</sup> City Record, March 12, 2010, at 593, *available at* <http://www.nyc.gov/html/dcas/downloads/pdf/cityrecord/cityrecord-3-12-10.pdf> (last visited July 27, 2016).

## A. Fines for False Alarms

The FDNY has promulgated rules aimed at deterring false alarms and compensating the City for the wasted time and expense of responding to them. The applicable rule in this case addresses property owners who, like Mastro, have chosen to use a fire alarm system that “automatically transmits signals to [the FDNY] or a central station.” 3 RCNY § 907-01(c)(1). Property owners who rely on automated fire alarm systems are “responsible for preventing the transmission” of false alarms to the FDNY (*id.*). Under this rule, false alarms include both “unwarranted” alarms (*i.e.*, those caused by a fire alarm system malfunction due to improper installation, improper maintenance, *etc.*) and “unnecessary” alarms (such as those caused by innocuous smoke—*e.g.* from a fireplace, cigarette or pan-fried steak—not warranting an emergency response). *Id.*; NYC Fire Code § 902.1.

The City may fine property owners who transmit multiple false alarms to the FDNY over a three-month period. 3 RCNY § 907-01(c)(2), (3). There is no fine imposed for a single false alarm, and property owners who subject the FDNY to multiple false alarms in a single quarter may be able to avoid a fine if it is their first offense. 3 RCNY §

907-01(c)(2), (3). To avoid a fine for multiple false alarms in one quarter, a first-time offender must timely submit, within 35 days of the violation date, satisfactory proof that he has successfully corrected the causes of each false alarm—*i.e.*, “all documentation necessary and appropriate to demonstrate correction of the violations.” 3 RCNY §§ 109-01(c)(2), (4), (5), 907-01(c)(3).

The FDNY reviews such submissions and decides “whether to accept them as [a] satisfactory certification of correction.” 3 RCNY § 109-01(c)(7). If the FDNY accepts the timely paperwork as adequate, the offender will “avoid the imposition of a penalty” for his first violation. 3 RCNY § 109-01(c)(5). If the FDNY disapproves the submission, however, the offender is subject to a fine. *Id.*; 3 RCNY § 907-01(c)(3); 48 RCNY § 3-106. A first-time offender whose timely submission was disapproved by the FDNY may nevertheless earn a fine reduction of \$625—from \$1000 down to \$375—if he can provide adequate documentation of correction before his hearing date. 48 RCNY § 3-106.

## **B. Mastro's Violation of the City's Rule Prohibiting Multiple False Alarms in a Single Quarter**

On two consecutive Wednesday afternoons during a very cold January 2014, Mastro's fire alarm system transmitted false alarms to the FDNY (A62). Based on these alarms, the New York City Environmental Control Board ("ECB") sent him a Notice of Violation (*id.*). The Notice stated that the required remedy for the violation was to (1) maintain or repair the fire alarm system and/or correct or repair the condition that caused the false alarms, and (2) "[s]ubmit documentation *detailing cause of alarm(s)* and corrective measures taken" (*id.*) (emphasis added). The Notice also stated that the "Certificate of Correction and all proof of compliance **MUST BE RECEIVED ... [by] 03/14/2014**" (*id.*). First offenders whose proof of correction is "accepted by the Fire Department by [the March 14 deadline]," the Notice stated, will avoid a hearing and penalty (*id.*).

The Notice of Violation included a form entitled Certificate of Correction, whose instructions directed Mastro to return the completed form "with all appropriate documentation ... **on or before the return date specified on the Notice of Violation**" (A63) (bold in original). The instructions explained that "[i]f you properly certify that all

violations have been corrected, and the Certificate of Correction is accepted by the Fire Department, you will be excused from appearing at the scheduled ECB hearing and no penalty will be imposed” (*id.*). The instructions informed Mastro that he would be notified by mail if the FDNY disapproved his submission (*id.*).

On February 18, the FDNY mailed Mastro a Notice of Violation and Hearing (A65). This notice enclosed another copy of the Certificate of Correction form, which emphasized that Mastro would be excused from a hearing and penalty only if “the Certificate of Correction is accepted by the Fire Department” (A68) (underlining in original).

**1. The FDNY’s disapproval of Mastro’s only timely submission**

Mastro submitted a Certificate of Correction and two supporting documents on March 7, one week before the deadline (A68-70). In his Certificate of Correction, Mastro admitted the violations, but indicated that he had “corrected all said violations as ordered by the Commissioner” (A68). The only supporting documents Mastro submitted were a Work Order detail from alarm company ADT stating, on March 3, “needs tech to check zone 16 basement falsing, smoke det”



(A70), and a Work Order Summary indicating that ADT “replaced Z16 [zone 16] smoke detector” on March 7 (A69). Neither document stated that the zone 16 smoke detector had (by itself or in combination with other factors) triggered either of Mastro’s two false alarms. Nor did the documents provide any details about how or why the zone 16 smoke detector might have triggered false alarms on two consecutive Wednesday afternoons (*i.e.*, a particular repeated mechanical failure, recurring innocuous smoke, *etc.*).

On March 14, the FDNY disapproved Mastro’s Certificate of Correction, explaining that he had “failed to submit a letter stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms” (A72). The Disapproval Letter instructed Mastro to attend a hearing on his violation (*id.*).

## **2. Mastro’s late submissions of additional information**

In response to the FDNY’s Disapproval Letter, Mastro sent a letter saying that ADT had come to his home, “identified potential causes” of the false alarms, and “fixed the problems identified” (A74). Without elaborating on the “potential causes” or “problems” that ADT

had supposedly “identified” or “fixed,” Mastro enclosed the same two ADT documents regarding replacement of the zone 16 smoke detector that he had previously submitted (A74, A77-78).

About a month later, Mastro sent a letter to the FDNY enclosing an additional document from ADT regarding the false alarms (A82). This document revealed that in addition to replacing the zone 16 smoke detector on March 7, ADT had also replaced the battery in the zone 15 smoke detector on January 16, the day after Mastro’s second false alarm (A83). The new document from ADT stated “[w]e believe that these steps [*i.e.*, replacing a battery in zone 15 and a smoke detector in zone 16] have addressed the false alarms and there have been no problems with the alarm system since” (*id.*).

### **3. The ALJ’s imposition of a reduced fine following a hearing**

At the April 30 hearing before the ALJ, Mastro testified that he corrected the violation by replacing both a battery and a smoke detector in his basement (A117). The attorney for the FDNY explained that Mastro’s only submission before the deadline for avoiding a fine altogether—the March 7 submission—did not contain “documentation

detailing cause of alarms and corrective measures taken,” and did not “explicitly address the [false] alarms” (A158). Nevertheless, because Mastro’s April 24 submission appeared to “address[] each alarm and what was done to correct the condition,” the FDNY attorney recommended a reduced fine, in accordance with the agency’s rules (*id.*).

The ALJ found that she lacked authority to review the FDNY’s disapproval of Mastro’s initial submission, as that determination was outside ECB’s jurisdiction (A85). Concluding that Mastro’s submissions after the March 14 deadline were adequate, the ALJ imposed a reduced fine of \$375 (*id.*). ECB affirmed this ruling following Mastro’s administrative appeal (A117).

### **C. The Dismissal of Mastro’s Article 78 Petition**

Mastro challenged the \$375 fine in an Article 78 proceeding that is the subject of this appeal. He argued in his petition that the FDNY arbitrarily and capriciously disapproved his certificate of correction, and that the ALJ and ECB arbitrarily and capriciously imposed a fine based upon the FDNY’s disapproval (A40-47). He also argued that the FDNY broke a “promise” not to fine him, that the City was “unjustly enriched”

by his \$375 payment, and that his due process rights were violated (A47-55).

In its Answer and accompanying Memorandum of Law, the City explained that the FDNY had properly rejected Mastro's March 7 submission because it failed to provide required information—documents detailing the causes of the false alarms and corrective measures taken—before the deadline to do so had expired (*see* A144-45; City Mem. at 16-18). The City further explained that Mastro's contract-related claims were meritless because the FDNY had no contractual obligation not to fine him (A146), and his due process claim failed because he received notice and an opportunity to be heard (A145).

Supreme Court denied Mastro's Article 78 petition and dismissed the proceeding. "It was not arbitrary, capricious or an abuse of discretion," the court determined, "for FDNY to conclude that the work-order summary and work order that Mr. Mastro submitted [on March 7] did not adequately detail the cause of the alarms and, therefore, that there was insufficient proof of compliance" (A14). The court noted that Mastro's March 7 submission suffered from a "complete absence of documentation detailing the cause of the alarm[s]" (A15). Also rejecting

Mastro’s contract-related claims, the court explained that the Notice of Violation “ma[de] plain that Mr. Mastro would only avoid a hearing and penalty if his proof of correction was accepted by the Fire Department by March 14, 2014” (A15). Finally, the court rejected Mastro’s due process claim because that claim rested on the erroneous premise that the FDNY had imposed an improper “letter requirement” (A15).

## **ARGUMENT**

### **SUPREME COURT CORRECTLY DISMISSED MASTRO’S PETITION**

There is no dispute that the FDNY may fine property owners who—like Mastro—transmit two false alarms to the FDNY in a single quarter. To avoid the fine altogether, Mastro would have had to submit documents showing that his purported “fixes” addressed the underlying source(s) of the false alarms, and he would have had to submit those documents on time. Because Mastro failed to provide the required documents on time, he could not avoid the fine entirely. As Supreme Court correctly held, that fine was proper because the FDNY’s disapproval decision was rational, Mastro received due process, and the FDNY did not break any “promise” not to fine him.

### **A. Supreme Court Properly Upheld the FDNY's Disapproval Determination**

Where, as here, the underlying violation has been admitted by the offender, the fine imposed by an administrative agency “is not to be disturbed unless it is clearly disproportionate to the offense *and* completely inequitable in light of the surrounding circumstances.” *Kostika v. Cuomo*, 41 N.Y.2d 673, 676 (1977) (emphasis added). Mastro does not contend that the \$375 fine was “clearly disproportionate” to his offense—nor could he—and this largely ends the inquiry.

For Mastro to avoid a fine entirely, the governing rules required him to submit “all documentation necessary and appropriate to demonstrate correction of the violations” within 35 days of the violation date, 3 RCNY § 109-01(c)(2), (4). As Mastro concedes (App. Br. at 5-6), FDNY had discretion to determine whether to accept his submission as satisfactory. 3 RCNY § 109-01(c)(7). The FDNY properly exercised that discretion by rejecting Mastro’s timely submission, which failed to provide the required information.

## **1. The FDNY's disapproval was rational**

The FDNY's instructions were clear: Mastro was to submit "legible copies of any and all bills, receipts, and/or other proof of compliance," including "documentation detailing cause of alarm(s) and corrective measures taken" (A62-63). Mastro tacitly concedes that it was reasonable for the FDNY to interpret the governing rules as requiring information "detailing" the causes of the two false alarms (App. Br. at 17-18 (admitting that the requirements set forth in the Notice of Violation were "not meaningfully different from the numerous other statements" describing what was required to avoid a fine)). Indeed, the FDNY needed that information to assess whether his purported corrective steps actually addressed the underlying problems.

All that Mastro submitted on time to the FDNY, however, was a form stating that he had corrected the violations and a work detail from ADT indicating that, on March 7, a technician had visited Mastro's house to "check zone 16 basement falsing" and replaced the zone 16 smoke detector (A68-70). The deficiency in his submission was that it did not purport to identify the causes of the two false alarms that unnecessarily summoned the FDNY in January (A72). Because of this

deficiency, Mastro's initial submission left the FDNY unable to determine whether ADT's replacement of the zone 16 alarm actually addressed and resolved the underlying cause(s) of either false alarm.

Mastro nevertheless asserts that his March 7 submission "explained the reason for the false alarms and how they were fixed" (App. Br. at 4) and "*did* 'detail[] [the] cause of alarm(s) and corrective measures taken'" (*id.* at 18). Contradicting these incorrect assertions, Mastro later argues that the March 7 submission permitted an "infer[ence]" that a broken zone 16 smoke detector—the only piece of equipment mentioned in the submission—was the cause of both false alarms (App. Br. at 19). But Mastro cannot show that the FDNY acted irrationally by not drawing the suggested "inference."

As a threshold matter, drawing the proposed inference would have led the FDNY to the wrong conclusion. More than a month after Mastro's submission deadline expired, ADT described *both* of the steps it had taken to "address[] the false alarms": replacing the battery in the zone 15 smoke detector in January and replacing the zone 16 smoke detector in March (A83). Having failed to timely disclose the work ADT had performed in January to address the false alarms, Mastro can



hardly criticize the FDNY for failing to draw an incorrect inference from his incomplete initial submission.

In any event, the FDNY reviewed Mastro's incomplete March 7 submission and reasonably declined to "infer" that a broken zone 16 smoke detector was the only cause of both false alarms. As Supreme Court recognized, Mastro's proposed inference was far from clear, and certainly was not required by the rule of rationality (A14-15). Indeed, to draw that inference, the FDNY would have had to make at least four separate assumptions, none of which were substantiated by Mastro's sparse documentation: (1) that both false alarms in January were caused by a mechanical malfunction, rather than by actual smoke; (2) that the zone 16 smoke detector was the sole cause of that mechanical malfunction, as opposed to part of a larger mechanical problem; (3) that both false alarms, one week apart, were caused by the same mechanical problem, not different malfunctioning smoke detectors or other causes; and (4) that the zone 16 smoke detector was indeed "falsing," and was not replaced by ADT simply out of an abundance of caution. The FDNY was not required to "infer," based upon the incomplete and ambiguous supporting documents Mastro provided on

March 7, that he had adequately addressed the cause or causes of the two false alarms.

Even ADT, the alarm system maintenance company, was not in a position to make conclusions about the false alarms' causes when Mastro filed his Certificate of Correction on March 7. Mastro himself later conceded that, as of March 7, ADT could only identify "potential" causes of the false alarms (A74). During the six weeks following ADT's March 7 maintenance work, ADT observed "no problems with the alarm system" (A83). Only then, on April 23, did ADT express its view that the *two* "steps" it had taken—namely, replacing the zone 15 smoke detector's battery on January 16 (the day after the second false alarm) and replacing the zone 16 smoke detector on March 7—had addressed the two prior false alarms (*id.*). Moreover, even if ADT could have made that assessment back on March 7 (which it did not), it could not have done so based solely on the documents Mastro submitted to FDNY on March 7, because those documents said nothing about the zone 15

smoke detector (A69-70).<sup>4</sup> Thus, as Supreme Court held, Mastro's inadequate March 7 submission did not compel the FDNY to draw an "inference," favorable to Mastro, about the causes of the alarms (A14-15). The FDNY acted well within its discretion by disapproving that submission.

Mastro seems to realize that even a revisionist interpretation of his initial submission cannot cure its defects. Taking a different tack, Mastro suggests that his initial submission contained sufficient documentation "to corroborate" his signed certification that he had corrected all of the violations (App. Br. at 17-18). But he was required to provide "all documentation necessary ... to demonstrate correction of the violations," 3 RCNY § 109-01(c)(2), not merely some papers that only arguably "corroborate[d]" his own say-so.

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<sup>4</sup> Mastro claims that ADT's April 23 letter "merely says in prose what the [March 7] Work Order and Work Order Summary say in sentence fragments" (App. Br. at 19). That is not true. The April 23 letter addressed two separate smoke detectors, while the March 7 Work Order and Work Order Summary addressed only one. And in its April 23 letter, ADT stated that it had addressed both false alarms, but in its March 7 Work Order and Work Order Summary, ADT neither mentioned the two false alarms from January nor made any representation that ADT's replacement of a single smoke detector had "addressed" any past alarms.

**2. Mastro has failed to show any error in Supreme Court's decision to uphold the FDNY's determination as rational**

Unable to demonstrate that he provided the required information to the FDNY on time, Mastro instead attacks the FDNY and Supreme Court for the precise manner in which they described the deficiencies in his March 7 submission. First, he faults the FDNY for using the word "letter" when informing him that his March 7 submission had been disapproved. Second, he faults Supreme Court for the way in which it explained its rationale for rejecting one of his arguments. Neither argument shows the FDNY's determination to be irrational.

In its Disapproval Letter, the FDNY informed Mastro that it had disapproved his submission because he "failed to submit a letter stating the cause of the two unnecessary alarms and what action was taken to prevent future alarms" (A72). Mastro claims that, by using the word "letter," the FDNY belatedly imposed a requirement that his March 7 submission, or its supporting documentation, be in the form of a letter (App. Br. at 2, 20-23). This argument fails for multiple reasons.

As an initial matter, the Disapproval Letter did not impose any requirements. Rather, it explained the FDNY's rationale for rejecting

Mastro's initial submission (A72). Tracking the Notice of Violation requirement that Mastro timely submit "documentation detailing cause of alarm(s) and corrective measures taken" in order to avoid a fine (A62), the FDNY explained that Mastro had failed to "stat[e] the cause of the two unnecessary alarms and what action was taken to prevent future alarms" (A72). Mastro's omission of that information provided a rational basis for the FDNY to reject his initial submission.

Having identified the substantive deficiency in Mastro's initial submission, the FDNY also stated that Mastro had failed to supply the missing information in a "letter" (A72). Contrary to Mastro's cramped reading of the Disapproval Letter, the word "letter" is broad enough to encompass any "written or printed message" or any "communication in writing from one person to another at a distance."<sup>5</sup> And regardless of the precise scope of the word "letter," the FDNY was not required to list in its Disapproval Letter every form of written communication Mastro could have used to satisfy the substantive requirements. As such, the FDNY's selection of the word "letter" does not call into question the

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<sup>5</sup> Black's Law Dictionary, 2d Ed., *available at* <http://thelawdictionary.org/letter/> (last visited August 18, 2016).

reasonableness of its substantive grounds for rejecting Mastro's March 7 submission. *See Calloway v. Glass*, 203 A.D.2d 800, 802 (3d Dep't 1994) (incorrect listing of charges in certificate of conviction was inconsequential because other portions of the record indicated what petitioner had pled guilty to).

In arguing that the FDNY belatedly imposed a "letter requirement," Mastro cites a number of irrelevant cases in which an agency imposed a new requirement outside its regulatory authority (App. Br. at 21). *See, e.g., Trager v. Kampe*, 99 N.Y.2d 361, 363 (2003) (holding that agency cannot establish residency requirement for police officer examination simply by including that requirement in examination notice). Here, the FDNY merely exercised its authority to disapprove a submission which did not sufficiently demonstrate that the underlying causes of the false alarms had been fixed. 3 RCNY § 109-01(c)(2), (5), (7); 3 RCNY § 907-01(c)(3). Unlike the agencies in the cases cited by Mastro, the FDNY reasonably determined that he had failed to comply with pre-existing rules, not new requirements.

The Third Department's decision in *Crawford v. Jonesville Bd. of Fire Comm'rs*, 229 A.D.2d 773 (3d Dep't 1996), demonstrates why

Mastro is not entitled to a free pass based on the FDNY’s word choice. In *Crawford*, the petitioner was penalized for failing to attend mandatory sexual harassment training, even though the training notice had misidentified the relevant rule creating the training requirement. *Id.* at 773-74. Likewise, Mastro was fined for failing to submit information regarding the cause of his false alarms, even though the Disapproval Letter used the word “letter” instead of a broader term. In both cases, what mattered was the petitioner’s substantive conduct—not attending the required training in *Crawford*, and not submitting required information about the alarms’ causes here—rather than the exact language the agency used to describe that conduct. In both cases, the petitioners elevated form over substance by quibbling with an agency’s word choices to try to avoid the consequences of their admitted misconduct (A15; *Crawford*, 229 A.D.2d at 774). The Third Department rejected the petitioner’s hypertechnical efforts to avoid a penalty in *Crawford*. Similarly here, this Court should reject Mastro’s complaints about the word “letter” as insufficient to evade the fine imposed for his admitted rule violation.

Finally, there is no merit to Mastro’s argument that Supreme Court upheld the FDNY’s determination based upon arguments not made by the FDNY in the administrative proceedings (App. Br. at 18). In particular, Mastro faults Supreme Court for explaining that “the ADT documents were inadequate because ‘[i]t was always clear that a smoke detector was falsing’” (*id.* (citing A14-15)). Mastro’s criticism misses the point. The FDNY found his submission facially inadequate because it did not contain the information it was supposed to contain: “the cause of the two unnecessary alarms and what action was taken to prevent future alarms” (A72). Upholding the FDNY’s determination as rational, Supreme Court agreed that Mastro failed to timely submit any “documentation detailing the cause of the alarm[s]” (A15).

In its decision, Supreme Court also addressed an argument that Mastro had made in his petition and supporting papers: that the FDNY should have inferred, from the March 7 ADT documents and their opaque mention of “falsing,” the causes of the multiple alarms and corrective steps taken (A37; Mastro Reply Mem. at 7). Rather than reject Mastro’s meritless argument without analysis, Supreme Court explained—using the language Mastro now attacks—why the presence



of the word “falsing” was insufficient to compel the inference Mastro demanded (A14-15). There is no legal basis for Mastro’s contention that Supreme Court was somehow out of line in including this explanation in its decision.

Because the FDNY rationally determined that Mastro did not timely submit the required information in order to avoid a fine, Supreme Court properly dismissed his petition. *See Arif v. N.Y. City Taxi & Limousine Comm’n*, 3 A.D.3d 345, 346 (1st Dep’t 2004) (Article 78 review is limited to whether administrative action was arbitrary and capricious or lacks a rational basis). This Court should affirm.

### **B. Mastro Received Due Process**

Due process mandates notice and some opportunity to respond. *Matter of Beck-Nichols v. Bianco*, 20 N.Y.3d 540, 559 (2013). Mastro received both: the FDNY gave him notice of his rule violation, and afforded him the opportunity to contest that violation at a hearing. He admitted the violation.

Mastro maintains that he was also entitled to due process when seeking to avoid a fine for his admitted rule violation. But he offers no authority for his apparent belief that the relevant FDNY rules created a

constitutionally protected property interest in avoiding a fine. Even if they did, however, Mastro received adequate due process here as well. He received notice when the FDNY instructed him from the outset that, in order to remedy his violation and avoid a fine, he needed to submit information detailing the false alarms' causes and the corrective steps taken (A62; App. Br. at 8). And he had the opportunity to respond: he could avoid a fine if he provided the required information before the deadline. He failed to do so.

Mastro concedes that he received adequate notice of the underlying substantive requirement—to submit information detailing the causes of the alarms by March 14 (*see* App. Br. at 8). He nevertheless claims that he received inadequate notice of the purported procedural requirement to submit the required information in letter form (App. Br. at 27). But, as explained above (at pages 20 to 21), there was no “letter requirement”; rather, Mastro simply failed to submit the required information on time. For this reason, Supreme Court correctly rejected Mastro’s argument that he received inadequate notice (A15).

There is also no merit to Mastro’s argument that he was denied due process because he was not given a “fair hearing” regarding the

FDNY's disapproval of his March 7 submission (App. Br. at 28). As a threshold matter, Mastro actually presented his arguments regarding the FDNY's disapproval during the ALJ hearing. At that hearing, the FDNY explained why, despite Mastro's arguments, his March 7 submission was inadequate (A158).

Moreover, due process requires only an opportunity to respond, not an in-person hearing. *Beck-Nichols*, 20 N.Y.3d at 559. The governing regulation described a process to be completed in writing. 3 RCNY § 109-01(c).<sup>6</sup> Because the sufficiency of Mastro's March 7 submission could be reviewed on a paper record, due process did not require an in-person hearing to address that issue. *See People v. Satterfield*, 66 N.Y.2d 796, 799 (1985) (claim based upon paper record may be adjudicated without hearing); *Farkas v. Farkas*, 209 A.D.2d 316, 318 (1st Dep't 1994) (hearing not required if factual disputes can be resolved on the papers alone); *Bing v. Sun Wei Ass'n*, 205 A.D.2d 355, 355 (1st Dep't 1994) (no hearing required before imposition of \$1000 fine).

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<sup>6</sup> Indeed, this written process is intended to serve as a substitute for an in-person hearing if the FDNY approves the paper submission. 3 RCNY § 109-01(c)(5).

### **C. The FDNY Neither Made nor Broke a Promise Not to Fine Mastro**

Mastro’s contract-based arguments are meritless because the City did not make, let alone break, any “promise” not to fine him (*see* App. Br. at 24-26). Mastro claims that the City “offered [him] a deal allowing him to avoid a fine if he timely corrected all violations, filed an executed Certificate, and provided legible copies of any and all bills, receipts, and/or other proof of compliance” (App. Br. at 24 (citing A63)). But the very sentence that he relies on for this “deal” specifically states—in text underlined for emphasis—that he will be exempt from a fine only if “the Certificate of Correction is accepted by the Fire Department” (A68; *see also* A63). Mastro cannot read that requirement out of the alleged deal. *See Cerra v. Syracuse Univ.*, 273 A.D.2d 942, 942 (4th Dep’t 2000) (if offer is contingent on offeror’s acceptance of offeree’s submission, and offeror rejects that submission, there is no contract).

In any event, Mastro did not keep his side of the alleged bargain, which required timely submission of “any and all bills, receipts, and/or other proof of compliance” (A63; A68). Even though ADT replaced the battery on the zone 15 smoke detector nearly six weeks before Mastro’s initial submission (A83), Mastro failed to submit any information about

that smoke detector until nearly six weeks after the deadline passed (*id.*).

Finally, Mastro claims “unjust enrichment,” but ignores the time and resources that FDNY wasted in addressing his false alarms, which is a key part of the calculus. *Lake Minnewaska Mt. Houses v. Rekis*, 259 A.D.2d 797 (3d Dep’t 1999) (unjust enrichment claim should appeal to equity and good conscience, and “principles of equity mandate consideration of the totality of the circumstances”). He concedes that he twice summoned FDNY with false alarms during a brutally cold January, and ultimately secured a 62% reduction in the amount of his fine. His cries of victimhood ring hollow. As Supreme Court rightly concluded, “There has been no injustice or deprivation of rights here” (A16).

## CONCLUSION

For the foregoing reasons, this Court should affirm Supreme Court's decision and judgment.

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Respectfully submitted,

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## **PRINTING SPECIFICATIONS STATEMENT**

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