

STATE OF MINNESOTA  
IN COURT OF APPEALS  
Appellate Court Case No. A10-2211

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Mahmood Khan,

Relator,

vs.

City of Minneapolis,

Respondent.

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RELATOR'S REPLY BRIEF

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## INTRODUCTION

This brief is submitted for the limited purpose of replying to Respondent's Brief, dated May 11, 2011. To the extent that any arguments advanced in that brief are not specifically addressed in this reply brief, such omission should not be considered an agreement with or concession of the validity of said arguments; rather such omission should be considered as reflecting Relator's position that the argument is dealt with adequately in Relator's original brief.

## ARGUMENT

### **I. THE ADMINISTRATIVE HEARING PROCEDURE, PURSUANT TO WHICH RELATOR LOST HIS LICENSE, IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.**

In his original brief, Relator argued that the system by which the Minneapolis City Attorney both selects and compensates the hearing officers who hear administrative appeals deprives appellants of their due process rights by creating a financial incentive for the hearing officers to rule in the City's favor. In response, the City advances two arguments, both of which are without merit.

First of all, Respondent argues that this Court has rejected such an argument in two decisions, *Russell v. Special School Dist. No. 6*, 366 N.W.2d 700 (Minn. App. 1985), and its unpublished decision in *Queen v. Minneapolis Public Schools*,

*Special School Dist. No. 1*, 1990 WL 146608 (Minn. App. 1990). Neither case compels rejection of Relator's argument.

In *Russell*, the entire argument consisted of the following:

Russell argues that the hearing examiner hired by the school board was biased because he was hired and paid by the school district. [Quotations and citations omitted.] Although this court and the supreme court have strongly recommended that independent hearing examiners be hired, neither court has held that such an examiner is automatically biased because hired (sic) by the school district. [Citation omitted.]

366 N.W.2d at 705-706.

Thus, the argument this Court rejected in *Russell* was that because the individual hearing officer was hired and paid by one of the parties, that meant that the individual hearing officer was biased. That is not the argument Relator is making here. Relator is not making the argument that any individual hearing officer is biased; rather, Relator is arguing that a system which creates an inherent financial incentive for a hearing officer to rule in one party's favor violates the other party's due process rights. That is an argument that was not made or considered in *Russell*.

The argument in *Russell* was the same argument that this Court rejected in its unpublished decision in *Queen*. There, this Court stated:

Queen argues the selection of the hearing examiner violated his due

process rights because he was given no input in the selection. Queen further argues that an examiner is not neutral where it (sic) is unilaterally selected and paid by the district. Three classes of individuals, retired judges, state hearing examiners, and arbitrators qualified by the Minneapolis Public Employee Relations Board, have generally been considered qualified to serve as hearing examiners. [Citation omitted.] However, this list is nonexclusive. [Citation omitted.] To disqualify a hearing examiner, “an independent showing of bias, lack of qualification or neutrality is necessary.” [Citation omitted.]

Queen does not point to any instances where the examiner in this case exhibited “any lack of skill, integrity, bias, or a predisposition to favor the school district’s position.”

Respond. Append. 14.

Apart from the fact that *Queen*, as an unpublished decision, has no precedential value,<sup>1</sup> the decision addressed the same issue addressed in *Russell*, to-wit: whether the fact that one party hired and paid the hearing officer created an actual bias on the part of the hearing officer. As in *Russell*, this Court never considered nor decided whether a system which creates a financial incentive for a hearing officer to rule on one side, rather than the other, violates due process.

Secondly, Respondent argues that the system in Minneapolis is factually distinguishable from the one invalidated by the California Supreme Court in *Haas v. County of San Bernardino*, 24 Cal.4th 1017, 119 Cal.Rptr.2d 341, 45 P.3d 280

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<sup>1</sup>See Minn.Stats.Sec. 480A.08, Subd. 3(b), “Unpublished opinions of the Court of Appeals are not precedential.”

(2002). In *Haas*, hearing officers were hired on an *ad hoc* basis, thus creating a financial incentive to rule for the agency that hired them, in expectation of receiving future employment.<sup>2</sup> By contrast, Respondent argues, they city's hearing officers are hired for a three-year term and paid by the city attorney at the rate of \$250.00 per half day hearing.<sup>3</sup>

However, it is clear that the distinction between this case and *Haas* is one that exacerbates, rather than relieves, the financial incentive for a hearing officer to rule in the city's favor. Because the selection is for a three-year term and because the compensation for those three years can be up to \$175,000.00,<sup>4</sup> there is not only the financial incentive for future \$250.00 per half day sessions, but the financial incentive for a \$175,000.00 gravy train to continue. The most obvious way for a hearing officer to assure that the \$175,000 gravy train continues for a second, third and future three-year term is to be a rubber stamp for the city's decisions. This is

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<sup>2</sup>See 119 Cal.Rptr.2d at 350-351.

<sup>3</sup>See Resp.App. 12. As was the case with Relator's Appendix at A.67, Respondent's exhibit with respect to hearing officer compensation is not supported by any evidence in the record. However, as Respondent made no objection to this Court's taking judicial notice of Relator's submission, Relator has no objection to this Court taking judicial notice of Respondent's submission.

<sup>4</sup>Relator's Appendix at A.67.

clearly a “possible temptation...not to hold the balance nice, clear and true.”<sup>5</sup>

## **II. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE REVOCATION OF RELATOR’S LICENSE.**

Respondent’s brief on the subject of the sufficiency of the evidence is far more significant for what it fails to say than it is for what it says.

First of all, Respondent does not dispute that if the terms “let or allow,” as used in Minneapolis Code of Ordinances Secs. 244.790 and 244.400 are construed according to their plain meaning and require knowing permission on the part of the landlord for the tenant to engage in the illegal occupancy, there was no evidence before the hearing officer to sustain the revocation. Respondent makes no argument that any evidence in the record supports the conclusion that any illegal occupancy of the premises occurred with Relator’s knowledge, consent, permission or even acquiescence. This, Respondent’s position is entirely dependent on the City’s ordinances being construed to impose absolute liability on the landlord for the illegal activities of the tenant, regardless of the landlord’s lack of knowledge, consent, or permission.

Secondly, Respondent, in its brief nowhere disputes Relator’s argument that

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<sup>5</sup>*Haas*, 119 Cal.Rptr.2d at 351, citing *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 444(1927). Indeed in *Tumey*, the Court held that the possibility of the hearing officer getting awarded \$12 in costs for ruling against the Defendant was a constitutionally impermissible “temptation” If \$12 is too great a temptation, what about \$175,000.00?

Respondent's strict liability construction of the ordinances plainly lead to absurd and unreasonable results. Relator pointed out that a disgruntled tenant, facing eviction for unpaid rent, can simply move bedroom furniture into a basement room, call a city inspector, and wreak revenge on his landlord by costing the landlord his continued license to operate. Indeed that is exactly what appears to have happened in the instant case, as the tenants called the city inspectors to see the bedroom furniture in the basement on the very day the sheriff served them with a writ of recovery in an eviction action.<sup>6</sup> Not only does this construction of the ordinance permit removal of a landlord's livelihood without any fault on his part, it requires a \$3,000.00 reinstatement fee ever to get the license back.<sup>7</sup>

The arguments Respondent does make are clearly meritless. First of all, relying on the fact that the word "let" can mean both "allow or permit" or to agree to lease, Respondent argues that the words "let or allow," as used in M.C.O. Secs. 244.790 and 244.400, really refer to leasing rather than permitting. The term "let" is defined in Black's Law Dictionary, 9<sup>th</sup> Ed., as follows:

1. To allow or permit ^ the court, refusing is issue an injunction, let the nuisance continue^.
2. To offer (property) for lease; to rent out^the hospital let office space to several doctors^.
3. To award (a contract),

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<sup>6</sup>See Relator's brief, p. 8, n. 14.

<sup>7</sup>See M.C.O. Sec. 244.1945.

esp. after bids have been submitted^the federal agency let the project to the lowest bidder.

Clearly, the term “let,” as used in the terms “let or allow” refers to the first of these definitions. The term “let or allow” is the same type of redundancy that is common in the law.<sup>8</sup> Webster’s Dictionary, in its definition of the word “allow,” includes the following:

PERMIT (a pipe to ~ the heated air to escape) (occasional gaps ~ passage through the mountains) (pulled to the side to~ us to pass).

Clearly dictionary definitions, whether they be Black’s or Webster’s, support Relator’s position.

Next, Relator relies upon *State, City of Minneapolis v. Ellis*, 441 N.W.2d 134(Minn.App. 1989), for the proposition that Relator cannot delegate his duty to assure compliance with the city code to his tenants. An examination of the *Ellis* decision clearly demonstrates the lack of merit in this argument. *Ellis* involved a prosecution of a landlord for failure to comply with a written order to repair broken glass and screens in the windows of a residential dwelling. The landlord’s defense to the charge was that the responsibility for such repairs had been delegated to the tenants under the terms of their lease. This Court rejected that argument, based on

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<sup>8</sup>Consider, for example, “aid and abet” or “cease and desist.”

the provisions of Minn.Stats.Sec. 504.18, subds. 1 and 2, which, at the time,<sup>9</sup> provided, in pertinent part:

Subdivision 1. In every lease or license of residential premises, whether in writing or parol, the lessor or licensor covenants: ...

(c) To maintain the premises in compliance with the applicable health and safety laws of the state and local units of government where the premises are located during the term of the lease or license, except when violation of the health and safety law has been caused by the willful, malicious, or irresponsible conduct of the lessee or licensee or a person under the direction and control of the lessee or licensee.

The parties to a lease or license of residential premises may not waive or modify the covenants imposed by this section.

Subd. 2. The lessor or licensor may agree with the lessee or licensee that the lessee or licensee is to perform specified repairs or maintenance, but only if the agreement is supported by adequate consideration and set forth in a conspicuous writing.<sup>10</sup>

This Court concluded that “Appellant’s attempt to transfer this ultimate responsibility must fail under the statutory prohibition.” *Id.*

The contrast to the instant case could not be more obvious.

First of all, there was no attempt on the part of Relator to transfer an affirmative duty to the tenant. *Ellis* involved an affirmative duty to make repairs, a duty the statute said cannot be waived unless in writing, supported by

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<sup>9</sup>This section was repealed in 1998. The covenants contained in this section now appear in Minn.Stats.Sec. 504B.161.

<sup>10</sup>See 441 N.W.2d at 138.

consideration. By contrast, this case involved a prohibition against occupying certain portions of the leased premises, something under the exclusive control of the tenant, on a day-to-day basis.

Secondly, the statute in question, expressly exempts from the duty imposed the “willful” or “irresponsible” conduct of the tenants. Clearly if the tenants, having been repeatedly told by their landlord that they may not use the basement rooms as sleeping rooms,<sup>11</sup> nonetheless choose to so use the basement rooms, that conduct must clearly be deemed “willful” or “irresponsible,” within the meaning of the statute.<sup>12</sup>

Finally, unlike the landlord in *Ellis*, Relator in the instant case, upon receiving the orders from the city, promptly complied with the orders and corrected the unlawful occupancy. Thus, unlike the landlord in *Ellis*, who persisted in refusing to make the repairs after having been ordered to do so, did not “allow” the unlawful occupancy to continue. In *Ellis*, this Court concluded that the landlord had “allowed” the unlawful conduct based upon the following evidence:

Here, the trial court found: (1) a violation occurred; (2) appellant was the responsible party; (3) appellant was given notice of the violation; and

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<sup>11</sup>See the undisputed testimony of Relator’s caretaker, Melvin Snoodly at T. 68 and T. 80.

<sup>12</sup>The “willful” and “irresponsible” language now appears in Minn.Stats.Sec. 504B.161, Subd. 1(a)(2) and (4).

(4) *appellant failed to correct the violation within the time period* (Emphasis supplied.) The evidence is sufficient to support the trial court's conviction.

441 N.W.2d at 136.

Thus, the landlord in *Ellis* was held to have "allowed" the unlawful conduct precisely because, unlike Relator in the instant case, he failed to correct the violation when it came to his attention.

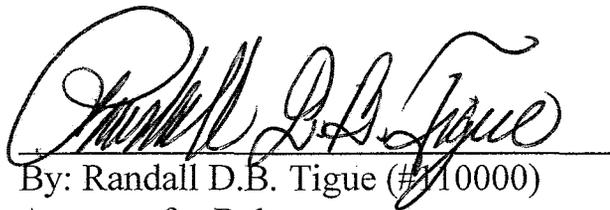
Hence, far from supporting Respondent's position, this Court's decision in *Ellis* strongly supports Relator.

### CONCLUSION

For all of the foregoing reasons, as well as those advanced in Relator's original brief, the revocation of Relator's residential rental license should be reversed.

Respectfully submitted,

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A handwritten signature in cursive script, reading "Randall D.B. Tigue", is written over a horizontal line.

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