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COURT OF APPEALS

STATE OF NEW YORK

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MATTER OF THE COUNCIL OF THE CITY OF NEW YORK,

Respondent,

-against-

No. 193

THE DEPARTMENT OF HOMELESS SERVICES  
OF THE CITY OF NEW YORK, et al.,

Appellants.

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20 Eagle Street  
Albany, New York 12207  
October 8, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 193,  
2 Matter of the Council of the City of New York v. the  
3 Department of Homeless Services.

4 (Pause)

5 CHIEF JUDGE LIPPMAN: Counsel?

6 MR. STERNBERG: Good afternoon, Your  
7 Honors. Ronald Sternberg from the Office of the New  
8 York City Corporation Counsel, on behalf of the  
9 respondents-appellants. I would respectfully request  
10 three minutes rebuttal, please.

11 CHIEF JUDGE LIPPMAN: Sure. Counsel, how  
12 would you characterize your order? What - - - what -  
13 - - you talk about it being just an extension of  
14 state policy that already existed. Why do you see it  
15 that - - - that way, rather than being a new  
16 regulation?

17 MR. STERNBERG: Going to our second point,  
18 we - - - we contend it is not a rule because it falls  
19 within an exception to the rules under CAPA - - -

20 CHIEF JUDGE LIPPMAN: But sometimes an  
21 exception can swallow the rule, right?

22 MR. STERNBERG: Perhaps it can; it doesn't  
23 in this point. We - - -

24 CHIEF JUDGE LIPPMAN: Why not? Why not?

25 MR. STERNBERG: We are actually doing what

1 the state requires us to do. We are requiring  
2 applicants for temporary housing assistance to  
3 demonstrate their eligibility.

4 CHIEF JUDGE LIPPMAN: But this isn't what  
5 you had been doing for a long period of time, right,  
6 to get this kind of documentation?

7 MR. STERNBERG: It's not what we have been  
8 doing, no. This is - - -

9 CHIEF JUDGE LIPPMAN: So why won't it be  
10 viewed in that context, in your previous practice, as  
11 a new - - - new rule, and not just enforcing what  
12 already exists?

13 MR. STERNBERG: Well, it is new for the  
14 city. This is a new procedure for the city - - -

15 CHIEF JUDGE LIPPMAN: Then why - - -

16 MR. STERNBERG: - - - but mandate - - -

17 CHIEF JUDGE LIPPMAN: - - - why shouldn't  
18 you follow the established procedure to put in a new  
19 procedure? Why shouldn't you have done it through  
20 the way you would normally do a new procedure that  
21 you're putting in?

22 MR. STERNBERG: Well, the way we normally  
23 do it, if we are promulgating a rule, we go through  
24 CAPA. If we are not promulgating a rule, we - - -

25 CHIEF JUDGE LIPPMAN: But in plain - - -

1 MR. STERNBERG: - - - we don't go through  
2 CAPA.

3 CHIEF JUDGE LIPPMAN: - - - in plain  
4 layman's term - - - terms, could you view this as a  
5 new rule? You know what I mean? Put aside - - -  
6 technically I understand you're trying to argue that  
7 it's a - - - it's based on a state rule, it's not  
8 anything new, or the state policy. But in plain  
9 layman's terms, is it something new that should go  
10 through, you know, the normal process in doing - - -  
11 in putting a new rule in place?

12 MR. STERNBERG: I agree with the first part  
13 of your question, not the second part.

14 CHIEF JUDGE LIPPMAN: Go ahead.

15 MR. STERNBERG: The first part of your  
16 question, I have no choice but to say it is new for  
17 the city. We never before required applicants to  
18 demonstrate their entitlement to - - - or their  
19 eligibility for temporary housing assistance. We are  
20 now or we now propose two things.

21 JUDGE SMITH: Are you saying you are out of  
22 compliance with the state requirements until then?

23 MR. STERNBERG: Exactly.

24 JUDGE SMITH: What - - - does this thing  
25 have to be all one or all the other? Can't - - -

1           this is about nine pages; can't there be some things  
2           in there that are rules and some that are not?

3                       MR. STERNBERG: Well, Your Honors actually  
4           faced this in the Transit Authority case, and we were  
5           surprised to find that the briefs in the Transit  
6           Authority case - - - or our briefs mirrored the  
7           briefs of the Transit Authority case very, very  
8           closely. And the same argument was made, actually,  
9           in that case, where you had elements of - - - fixed  
10          elements and you had discretionary elements. But  
11          this court decided that overall - - - the overall  
12          part - - - the overall rule was discretionary. The  
13          fact that there might have been - - -

14                      JUDGE SMITH: Is that - - - is that univ -  
15          - - you've got to take the whole thing and say it's  
16          either a rule or - - - I mean, why - - - you know,  
17          why don't - - - I mean, if that's the case, you can  
18          probably get any rules you want, if you just mix them  
19          in with enough other stuff.

20                      MR. STERNBERG: Well, first of all, we  
21          haven't done that. First of all, this - - - in - - -

22                      JUDGE SMITH: But why can't - - - why can't  
23          you take these things one at a time?

24                      MR. STERNBERG: Well, even if you looked at  
25          this bit by bit by bit, the fact is that, in its

1           totality, and in its parts, it is entirely - - -

2                   JUDGE SMITH: But what about the 2,000-  
3           dollar threshold? That looks kind of rulish to me,  
4           to the - - - the provision that says if you've got  
5           2,000 dollars or more, you've got to spend it on  
6           housing.

7                   MR. STERNBERG: Well, yes, as I say, there  
8           are fixed parts, but each one of those - - -

9                   JUDGE GRAFFEO: That's not part of the  
10          state requirement, is it, the 2,000 dollars?

11                  MR. STERNBERG: We do have parts of our - -  
12          - we do have parts of our - - - of our procedure that  
13          are - - - that are not exactly - - -

14                  CHIEF JUDGE LIPPMAN: Yeah, but what's -

15                  MR. STERNBERG: - - - from the state - - -

16                  CHIEF JUDGE LIPPMAN: - - - what's - - - is  
17          there really discretion here?

18                  MR. STERNBERG: Absolutely. And let - - -  
19          I - - - let me - - -

20                  CHIEF JUDGE LIPPMAN: Or is that a pretty  
21          hard and fast requirement that's changed what was  
22          before?

23                  MR. STERNBERG: May I draw Your Honors'  
24          attention - - -

25                  CHIEF JUDGE LIPPMAN: Yeah, sure.

1 MR. STERNBERG: - - - please, to page 156  
2 of the record. And this goes to - - - this goes  
3 immediately to the fact that everything in here is  
4 discretionary, even those things that seem to be hard  
5 and fast.

6 And the eligibility recommendation, right  
7 in the procedure, is - - - the eligibility specialist  
8 makes three recommendations. One, the applicant is  
9 eligible; two, the applicant is ineligible for one of  
10 two reasons, either that he doesn't - - - he or she  
11 does not need temporary housing or has been not  
12 cooperative; or the investigation is complete. Those  
13 are the three recommendations that are available, and  
14 each of those recommendations is governed by the  
15 following, based on these guidelines and the totality  
16 of the circumstances surrounding each individual  
17 applicant.

18 JUDGE PIGOTT: It strikes me - - -

19 MR. STERNBERG: You don't - - -

20 JUDGE PIGOTT: It strikes me, sir - - - I'm  
21 over here - - - if this had been promulgated within  
22 the department - - - in other words, it never went  
23 outside - - - and you said to your people, this is  
24 what we're - - - these are our guidelines for  
25 determining these things, you may not have had a

1           problem, right, because - - -

2                   MR. STERNBERG: That's exactly what we - -

3           -

4                   JUDGE PIGOTT: You just would not have told  
5           the public. But - - - and I'm not being critical  
6           about that, but what about, as Judge Smith says, if  
7           all of a sudden you're telling your people if they've  
8           got money in the bank, reject them.

9                   MR. STERNBERG: My response to that is that  
10          even that requirement, based on what I just read,  
11          even that requirement, no matter how - - - how  
12          concrete it seems in reading it, even that  
13          requirement is discretionary. In other words, we  
14          have discretion - - -

15                  JUDGE PIGOTT: But what came to my mind - -  
16          - I apologize for interrupting you, but if somebody  
17          reads the rule and says, well, geez, I've got money  
18          in the bank, I can't - - - I'm not - - - I might as  
19          well not go down and apply; I'm going to get  
20          rejected.

21                  MR. STERNBERG: And what I'm trying to say  
22          is that doesn't necessarily happen. The fact is that  
23          discretion is exercised each step of the way; that's  
24          what it provides.

25                  JUDGE PIGOTT: But what I meant is they

1           wouldn't - - - they're not going to darken your door  
2           because they've been told if they have money in the  
3           bank, they can't apply. You're saying yes, you can  
4           apply and yes, we'll look at other matters, but is  
5           that clear in the promulgated outline?

6                       MR. STERNBERG: Well, honestly, I think  
7           someone who needs and wants temporary housing shelter  
8           will come down and will make an application - - -

9                       JUDGE READ: Well, I have a question.

10                      JUDGE RIVERA: Counselor - - -

11                      JUDGE READ: What's the practical effect,  
12           if you lose? What's the practical effect? I mean,  
13           you have to - - - is it - - - is it you have to go  
14           through a rulemaking process, you have to promulgate  
15           it and get public comment? You can still do the same  
16           thing, can't you?

17                      MR. STERNBERG: Exactly. I mean, the  
18           practical effect of losing this small part of this -  
19           - - well, this is a whole proceeding; we have other  
20           challenges - - - is that it's subject to CAPA and we  
21           - - -

22                      CHIEF JUDGE LIPPMAN: Wouldn't you have  
23           been better off following CAPA to begin with?

24                      MR. STERNBERG: Well, you know, there are  
25           other - - -

1 CHIEF JUDGE LIPPMAN: Putting aside whether  
2 you must. It would have been better to do that,  
3 right?

4 MR. STERNBERG: There were other  
5 implications. I mean, we had - - -

6 CHIEF JUDGE LIPPMAN: What were the other  
7 implications?

8 MR. STERNBERG: Well, obviously the city  
9 has administrative agencies which do this kind of  
10 work all the time. And if I may again, Your Honors,  
11 the wider implications of saying this is a rule means  
12 that the agencies are going to, you know, have to  
13 CAPA things that we don't think need to be CAPA'd.  
14 And actually - - -

15 JUDGE READ: So the practical - - -

16 JUDGE RIVERA: Counsel - - -

17 JUDGE READ: So the practical implication  
18 that you're worried about is not so much this case  
19 but the spillover effect into city rulemaking  
20 generally?

21 MR. STERNBERG: We are certainly concerned  
22 about this case, in particular. We are here because  
23 we - - - we propose to this court that the question  
24 is an important one for the city, as a whole, for the  
25 state, as a whole, in knowing what constitutes a rule

1 and what constitutes guidelines. Then just - - -

2 JUDGE RIVERA: Counselor - - -

3 JUDGE GRAFFEO: Could you just tell us why  
4 it took fifteen years, or whatever, to do this,  
5 because families go through this process, right?

6 MR. STERNBERG: That's correct, Your Honor.

7 JUDGE GRAFFEO: Families that seek housing  
8 assistance go through this process. So why the  
9 distinction between these two service populations?

10 MR. STERNBERG: I cannot answer that  
11 question. I mean, it's a policy - - - it's a policy  
12 determination made along the way. And honestly, I  
13 don't have an answer for you. I know it happened and  
14 I know that families were subject to the same thing,  
15 which - - - but I can't give you an answer as to why  
16 we waited.

17 JUDGE RIVERA: Counselor, if I can just go  
18 back to your prior point that you say discretion is  
19 exercised at every step of the way. So is the  
20 discretion left without some direction? Isn't there  
21 some direction for that discretion at every step?  
22 It's not unfettered discretion, right?

23 MR. STERNBERG: No, absolutely. The  
24 guidelines of precisely what is in the - - - what is  
25 in the procedure are the guidelines that are to

1 measure the discretion that is exercised. The - - -

2 JUDGE RIVERA: Why isn't that sufficiently  
3 structured to make it a rule, to push it past the  
4 line of discretion to something that's more  
5 structured and rigid?

6 MR. STERNBERG: Well, this is - - - this -  
7 - - an eligibility specialist reads this and knows  
8 what to look for, how to weigh various factors, but  
9 exercising discretion. Some factors may be more  
10 important than others. A particular circumstance may  
11 call for saying, you know, we're going to put more  
12 weight on this and less weight on this, or we're not  
13 even going to consider this.

14 JUDGE RIVERA: Yes, but getting back to  
15 points previously made by other members of the bench.  
16 There are particular mandates that there is no  
17 discretion, so it is not true that the specialist  
18 really decides.

19 MR. STERNBERG: Two answers. One, that's  
20 the way it seems, but it's not because - - - because  
21 right at the end of - - - right at the end it says  
22 you'll consider these guidelines and you'll consider  
23 all the circumstances surrounding the application.  
24 So my first response would be what seems to be a  
25 fixed thing is not really fixed, because we can weigh

1 and balance.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MR. STERNBERG: Secondly, even assuming  
4 it's fixed, the overall determination is a patently  
5 discretionary determination.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.  
7 You'll have your rebuttal. Thanks, counselor.

8 MR. STERNBERG: Thank you.

9 JUDGE GRAFFEO: Counsel, if I could pick up  
10 on my question. Since families, for years, have had  
11 to go through this needs assessment process, why - -  
12 - what's the problem with having this population do  
13 it so there's not that disparity? The families are  
14 just as sympathetic as this group.

15 MR. METZLER: Well, to be clear, Your  
16 Honor, I don't think that the - - - whether this is a  
17 good policy or not or whether it balances with what's  
18 being done with families is really what's at issue on  
19 this particular appeal. What's at issue on this  
20 particular appeal is whether or not the city has gone  
21 through the necessary steps to make sure that the - -  
22 -

23 JUDGE GRAFFEO: Right, if they go through  
24 the CAPA process, you could end up in the same end  
25 result here, possibly.



1           guideli - - - or state, whatever they are, rules,  
2           guidelines, directives that say you're supposed to  
3           make sure that he can - - - that he can't afford his  
4           own housing?

5                   MR. METZLER: Well, so there is the - - -  
6           there are those guidelines, but as a practical matter  
7           today - - - I have a couple things, I guess, to say  
8           about the - - - the determination - - -

9                   JUDGE SMITH: Well, is he right that the  
10          city has just been out of compliance with those?

11                   MR. METZLER: Well, he's correct that the  
12          city has done nothing like this since those were  
13          issued, and that's to - - - to the Chief Judge's  
14          question, that's why it would represent such a sea  
15          change. He's not correct that the state regulations  
16          - - -

17                   JUDGE SMITH: Well, but if your - - - if a  
18          city agency has been violating state law for fifteen  
19          years, it doesn't have to go through a CAPA process  
20          to decide - - - if it decides it wants to comply,  
21          does it?

22                   MR. METZLER: Well, so the second part of  
23          my answer was he's not correct that the state  
24          regulations require this. And another - - - I think  
25          that that's obvious, not only from their conduct but

1 from everything that they've said and that the state  
2 has said prior to this litigation.

3 JUDGE SMITH: But some of these - - - some  
4 of these regulations, or whatever they are, some of  
5 this text is straight repetition from the state  
6 documents.

7 MR. METZLER: Some of the text is. I think  
8 that it's clear that the objective of the state  
9 regulations and the administrative directives was to  
10 free up social services districts to set up these  
11 types of procedures, if they wanted to. And you  
12 would hope - - - one would hope that social services  
13 districts would not be doing things that were  
14 directly contrary to what the - - -

15 CHIEF JUDGE LIPPMAN: How would you  
16 characterize the state's response to what they did?

17 MR. METZLER: Well, the state wrote a  
18 letter saying that they did not find it inconsistent,  
19 but there was - - - they did not say that you were  
20 required to do this and where have you been for the  
21 last fifteen years. In fact, the state's letter to -  
22 - - on November 9th, to DHS said that it's inaccurate  
23 to suggest that the state even approved of this. And  
24 - - -

25 JUDGE PIGOTT: You were about to say they

1 were doing something that's contrary to what?

2 MR. METZLER: I don't recall.

3 JUDGE PIGOTT: All right.

4 MR. METZLER: I mean, it's contrary to what  
5 - - - you mean, what they're about to do right now?

6 JUDGE SMITH: I think maybe your point was  
7 if they've been doing it all these years, maybe it  
8 doesn't violate state law.

9 MR. METZLER: Well, the third - - - I guess  
10 it doesn't violate state law for them not to have  
11 done it; I think that's correct. What the state law  
12 was doing was trying to provide flexibility - - -  
13 it's not state law; the state regulation was trying  
14 to - - -

15 JUDGE SMITH: Well, whatever, it doesn't  
16 say - - - it doesn't say "may" in there; it says  
17 you've got to do it.

18 MR. METZLER: Well, we can separate - - -  
19 the regulations, I think, is important to separate  
20 from the administrative directives. So the  
21 regulations are talking about what are the  
22 obligations that individuals have. And they say - -  
23 - and they allow, they permit social services  
24 districts to implement these types of procedures, but  
25 they don't require them to do so. And I think that

1 the purpose of that, and they made clear in their  
2 preliminary statements that they were trying to  
3 provide flexibility, that some of the social services  
4 districts were feeling as though they had to provide  
5 shelter to everybody who walked in, and the state was  
6 saying, no, we're going to give you some flexibility  
7 to set up procedures.

8 JUDGE SMITH: Let me ask you a different  
9 question, which I asked your adversary. Does this  
10 have to be all or nothing? Couldn't there be some  
11 things in here that are rules and some that are not  
12 rules?

13 MR. METZLER: It does not have to be all or  
14 nothing, absolutely. There are specific mandatory  
15 elements which Justice Gische pointed out that are -  
16 - - that would have to go through the rulemaking  
17 process.

18 JUDGE SMITH: And I'm sure you would put  
19 the 2,000-dollar threshold on that list.

20 MR. METZLER: The 2,000-dollar threshold is  
21 there.

22 JUDGE SMITH: What's the second most  
23 obvious example of a rule in here?

24 MR. METZLER: The signing of a medical  
25 release. An applicant has to sign a medical release,

1           which I'm not even sure what the relationship is  
2           between that and their seeking shelter, or even the  
3           overarching purpose of the - - - of the procedure,  
4           which is to determine whether they have other shelter  
5           or not, need require them to sign a medical - - -

6                    JUDGE SMITH: Well, it doesn't seem  
7           ridiculous that if someone is applying for shelter,  
8           you might want to know what his health will tolerate  
9           and what it won't.

10                   MR. METZLER: I'm not saying it's  
11           ridiculous, but certainly it's not something that's  
12           required within the state man - - -

13                   JUDGE GRAFFEO: So are you asking us on  
14           this court to decide what's a rule and what isn't a  
15           rule?

16                   MR. METZLER: Our - - -

17                   JUDGE GRAFFEO: You know, where does that  
18           distinction get made? I guess I'm asking you what  
19           you're asking us to do.

20                   MR. METZLER: Well, I'm asking you to  
21           affirm in totality, for two reasons. I mean, I think  
22           you have to look - - - there's two levels going on  
23           here. The first level is that this procedure - - -

24                   JUDGE GRAFFEO: Well, I understand you want  
25           us to affirm, but what specifically is it you want us

1 to say? You want us to say these things are rules  
2 and these things aren't?

3 MR. METZLER: Well, the procedure, as a  
4 whole, is clearly a rule. I mean, the element of - -  
5 -

6 JUDGE GRAFFEO: You want us to say  
7 everything's a rule?

8 MR. METZLER: This procedure, on its face,  
9 the text of this procedure is - - - needs to go  
10 through CAPA; it is a rule under CAPA. It - - -

11 CHIEF JUDGE LIPPMAN: So you want us to say  
12 looking - - -

13 JUDGE GRAFFEO: All nine pages.

14 CHIEF JUDGE LIPPMAN: - - - looking at the  
15 fixed or discretionary, whatever's a part of it, it's  
16 all a rule, and as a result it has to go to CAPA and  
17 just direct that?

18 MR. METZLER: Yeah, the DHS argument - - -  
19 their argument about discretion, sort of gets lost -  
20 - - loses - - -

21 CHIEF JUDGE LIPPMAN: So it is all or  
22 nothing, in answer to Judge Smith's question.

23 MR. METZLER: No, not from our - - -

24 CHIEF JUDGE LIPPMAN: There are  
25 discretionary parts and nondiscretionary parts, but

1 we do have to look at it and decide whether, as a  
2 whole, it's a rule or not?

3 MR. METZLER: No, I'm sorry if I'm not - -  
4 -

5 CHIEF JUDGE LIPPMAN: Then answer the - - -

6 MR. METZLER: - - - I'm sorry if I'm not  
7 being clear.

8 CHIEF JUDGE LIPPMAN: Then answer to Judge  
9 Graffeo; what is it that you want us to rule?

10 MR. METZLER: Well, my point about that  
11 there being mandatory elements is - - - frankly, it's  
12 an in the alternative argument, that even if you find  
13 that the entire procedure itself - - - but the  
14 definition that this court has set for a rule and  
15 that's in the plain text of CAPA is a standard - - -  
16 a statement of general applicability and sets forth  
17 standards or procedures that establish a course of  
18 conduct for future agency adjudications. On its  
19 face, page 1 of the procedure says that it sets forth  
20 the standards by which DHS - - - that that's the  
21 whole purpose of it. So that is a statement of  
22 general applicability, applies to all intake  
23 facilities and it applies to all single adult  
24 applicants.

25 Now, the cases that they're relying on, the

1 New York City Transit Authority case, for instance,  
2 and the Roman Catholic Diocese case, they're simply  
3 misreading the facts of those cases when they say  
4 that it proves too much to say well, it applies  
5 across the board.

6 If you look at - - - in *Alca v. Delaney*,  
7 the bid withdrawal procedure that was at issue there,  
8 the Court held it was not a rule because it did not  
9 apply across the board.

10 In the Transit Authority case, we're  
11 talking about penalty guidelines, and they were just  
12 that, they were guidelines. And the - - -

13 JUDGE PIGOTT: Your opponent makes the  
14 argument that - - - obviously there's discretion in  
15 all of this. And I asked earlier, if this was an  
16 internal document, which was circulated among the  
17 managers of the various places, you would have no  
18 complaint, would you?

19 MR. METZLER: On its face, as an internal -  
20 - - even if it's as an internal document, if it  
21 stands the way that it is written today, we would  
22 argue that it has to go through CAPA because, by  
23 contrast to Roman Catholic, or New York City Transit  
24 Authority, where the individual inspector in Transit  
25 Authority was free to just disregard the guideline if

1           they wanted to, there's nothing on the face, and DHS  
2           doesn't argue this, that would allow an intake staff  
3           from DHS to just say you know what, there's something  
4           different about today, something different about you  
5           - - -

6                        CHIEF JUDGE LIPPMAN: Well, he's saying  
7           that he - - -

8                        MR. METZLER: - - - I'm going to disregard  
9           this.

10                      CHIEF JUDGE LIPPMAN: Counselor, he's  
11           saying - - - your adversary's saying that it says but  
12           also you can just take the totality of the  
13           circumstances and do what you want. Do you buy that?

14                      MR. METZLER: No, that's not - - - that is  
15           not what - - -

16                      CHIEF JUDGE LIPPMAN: Why not? He's  
17           pointing to that specific language.

18                      MR. METZLER: Because the front of the page  
19           of the policy says that it applies to all intake  
20           facilities, and that there's going to be an  
21           investigation - - -

22                      CHIEF JUDGE LIPPMAN: So they wouldn't have  
23           - - -

24                      MR. METZLER: - - - and it's going to be -  
25           - -

1 CHIEF JUDGE LIPPMAN: So let me understand  
2 what you're saying. So they wouldn't have the  
3 ability, at the intake, to say, look, we don't really  
4 need that because of the totality of the  
5 circumstances?

6 MR. METZLER: No, they have to go through  
7 the entire procedure.

8 JUDGE PIGOTT: So if somebody came in in  
9 the dead of winter, cold, and had no place to stay,  
10 if they wouldn't sign a medical release, under your  
11 interpretation of their rule, he would not - - - he  
12 could not be given a place to stay.

13 MR. METZLER: That's correct.

14 JUDGE PIGOTT: That's the way you read it,  
15 and of course they're saying - - -

16 MR. METZLER: Well, and I think even - - -  
17 even before the actual adjudication - - - I mean,  
18 this court has been very clear that there's a - - -  
19 oh, I see my time has expired. May I - - -

20 CHIEF JUDGE LIPPMAN: That's - - - answer  
21 the judge's question.

22 MR. METZLER: Okay.

23 CHIEF JUDGE LIPPMAN: Sure.

24 MR. METZLER: There's this distinction  
25 that's very clear between individual adjudications

1 and whether or not they turn this individual out or  
2 not, and rulemaking, which is setting forth standards  
3 that the agency's going to follow going forward.  
4 It's a quasi-legislative act. Regardless of the  
5 circumstances, the individual coming in, if this  
6 policy is implemented, is going to go through this  
7 whole investigation, and there will be an eligibility  
8 determination - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. METZLER: - - - in contrast to today  
11 where there is none.

12 CHIEF JUDGE LIPPMAN: Okay, counselor,  
13 thanks.

14 MR. METZLER: Thank you.

15 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

16 Counselor, does everybody coming in have to  
17 go through this - - - these protocols that you've set  
18 up, or could the person at the desk say, ah, I'll  
19 look at - - - take this thing in the totality; you  
20 don't have to do it.

21 MR. STERNBERG: No, I don't think I'm being  
22 - - - I don't want to give that impression at all.

23 CHIEF JUDGE LIPPMAN: So they do have to go  
24 through these different requirements?

25 MR. STERNBERG: They certainly have to - -

1 - they certainly have to demonstrate their  
2 eligibility for temporary - - -

3 CHIEF JUDGE LIPPMAN: But then - - -

4 MR. STERNBERG: - - - housing assistance -  
5 - -

6 CHIEF JUDGE LIPPMAN: - - - ultimately, in  
7 the determination, you know, saying they could - - -  
8 they could say, well, you didn't do this, that and  
9 the other thing, but it's okay.

10 MR. STERNBERG: Well, for instance, for the  
11 - - -

12 CHIEF JUDGE LIPPMAN: Is that a yes?

13 MR. STERNBERG: Well, for the medical - - -  
14 for the - - - yes. Not - - -

15 CHIEF JUDGE LIPPMAN: The 2,000 dollars,  
16 the medical. At the end of the day, when they make  
17 the determination, you can say, well, you didn't - -  
18 - you didn't meet these - - - these - - - whatever  
19 they are, this rule, but you can stay. That's your  
20 distinction from your adversary. Your adversary is  
21 saying you've got to run through the hoops before you  
22 get there, and you're saying, yeah, you do, but after  
23 you've run through the hoops we can just say, in the  
24 totality, it doesn't matter.

25 MR. STERNBERG: Ultimately, that - - -

1 CHIEF JUDGE LIPPMAN: I mean, that's the  
2 difference between the two of you.

3 MR. STERNBERG: Ultimately, this is a  
4 totally discretionary decision with guidelines  
5 provided by the procedure. There can't be - - - I  
6 mean, the decision itself has to go through a number  
7 of layers. It can't be a willy-nilly decision.

8 CHIEF JUDGE LIPPMAN: But if you have a  
9 homeless person who's freezing, whatever the worst  
10 circumstances are, and they come in, pursuant to this  
11 new directive, whether you want to call it a rule or  
12 not, they have to do all this stuff before they would  
13 be considered as to whether they could stay.

14 MR. STERNBERG: Well, first of all, anyone  
15 who comes in, pending this process, is put into  
16 temporary housing. No one is - - - no one is put out  
17 on the street. Anyone who comes in, pending the  
18 process, has temporary housing. Signing - - - first  
19 of all, this only requires you to sign - - -  
20 authorize the release of your medical documents. If  
21 you don't comply with the requirements, if you don't  
22 cooperate, that's not excusable using discretion,  
23 unless you are physically or mentally unable to  
24 comply. You're physically and mentally unable to  
25 comply - - -

1 CHIEF JUDGE LIPPMAN: But the - - -

2 MR. STERNBERG: - - - how do we determine  
3 that? We - - -

4 CHIEF JUDGE LIPPMAN: But putting that  
5 aside, the result would have been different before  
6 you issued this than afterwards.

7 MR. STERNBERG: Before we issued this,  
8 everyone who came in was entitled - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. STERNBERG: - - - to temporary housing  
11 - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. STERNBERG: - - - temporary housing.

14 CHIEF JUDGE LIPPMAN: Thank you. Go ahead.

15 MR. STERNBERG: Can I - - -

16 CHIEF JUDGE LIPPMAN: Finish your thought,  
17 sure.

18 MR. STERNBERG: We talked a little bit  
19 about - - - I mean, we talked about policy, and I  
20 think it's important - - - I mean, the case is  
21 important, both macro - - - micro and macro.

22 Macro, it's important because  
23 administrative agencies have to know what they're  
24 doing. And I'd just like to refer you to then  
25 Justice Levine in the Third Department, who was

1 descending from a finding that there was a rule this  
2 court affirmed on the basis of his reasoning. And he  
3 said "the majority too broadly construes the filing  
4 requirement", at that time, "misreads judicial  
5 precedent, applying it, and will, I fear, create  
6 uncertainty in the field of administrative law where  
7 agencies announce or evolve guidelines to aid in  
8 making ad hoc decisions", which is precisely - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. STERNBERG: - - - what this is - - -  
11 "in performing their adjudication" - - -

12 CHIEF JUDGE LIPPMAN: Okay, couns - - -

13 JUDGE PIGOTT: May I - - - may I, Judge?

14 CHIEF JUDGE LIPPMAN: Go ahead, Judge  
15 Pigott, sure.

16 JUDGE PIGOTT: What's the problem you're  
17 trying to solve here?

18 MR. STERNBERG: The problem - - -

19 JUDGE PIGOTT: That you're trying to  
20 resolve that you - - -

21 MR. STERNBERG: The problem we're trying to  
22 resolve is the state has required us to ensure that  
23 people - - - that eligible - - - that single adults -  
24 - -

25 JUDGE PIGOTT: And consequence - - -

1                   MR. STERNBERG: - - - who apply for  
2 temporary housing are in fact eligible for that  
3 housing.

4                   JUDGE PIGOTT: Are they going to pull your  
5 funding if you - - - you know, if you don't do this?

6                   MR. STERNBERG: I haven't consulted with  
7 the state. I don't know - - -

8                   JUDGE SMITH: Well, is it also - - - I  
9 mean, there are all these requirements that you're  
10 trying to comply with, but you're also saving money,  
11 aren't you? I mean, it costs - - - it costs a lot of  
12 money if you don't enforce requirements that people  
13 can get their own housing if they can afford it.

14                   MR. STERNBERG: Well, then - - - and the  
15 state said that. The state said there are limited  
16 funds. And the state said that there's a finite  
17 amount of money to spend. And we want to be sure  
18 that that's spent on the people who deserve to have  
19 the housing. That's the purpose - - -

20                   CHIEF JUDGE LIPPMAN: Okay.

21                   MR. STERNBERG: - - - of the state  
22 regulation.

23                   CHIEF JUDGE LIPPMAN: Thanks. Thanks,  
24 counselor. Thank you, both.

25                   MR. STERNBERG: Thank you, Your Honors.

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CHIEF JUDGE LIPPMAN: Appreciate it.  
(Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of The Council of the City of New York v. The Department of Homeless Services of the City of New York, et al., No. 193 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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