

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 22,784

In re: 6101 16th Street, N.W.

Ward Four (4)

JOHN HAGAN
Tenant/Appellant

v.

OLIVER COWAN, JR.
UNITED MANAGEMENT COMPANY, INC.
Housing Providers/Appellees

DECISION AND ORDER

August 29, 2003

LONG, COMMISSIONER. This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991), govern the proceedings.

I. PROCEDURAL HISTORY

Farouk Youssef, John Hagan, and Dorothy Davis Weiberger filed Tenant Petition (TP) 22,784 with the Rental Accommodations and Conversion Division (RACD) on August 28, 1991. The petition concerned the tenants' respective units, 411, 414, and 327 in the multi-unit housing accommodation located at 6101 16th Street, N.W. The tenants named Oliver Cowan, Jr. and United Management Company as the housing providers. In

the petition, the tenants alleged that the housing providers did not provide a proper thirty day notice of rent increase, filed an improper rent ceiling with the RACD, and increased the rent while there were substantial housing code violations.

Following the initial adjudicatory hearing, Hearing Examiner Leslie Johnson issued a decision and order, granting the petition in part. The tenants appealed the hearing examiner's decision to the Commission. The Commission remanded the matter to the OAD, because Hearing Examiner Johnson failed to issue findings of fact and conclusions of law on each material issue. See Youssef v. Cowan, TP 22,784 (RHC June 3, 1997).

On remand, the case was assigned to Hearing Examiner Gerald Roper, who conducted a hearing on February 1, 2000. John and Ernestine Hagan appeared for the hearing and informed the hearing examiner that Dorothy Weiberger died and Farouk Youssef no longer resided at the housing accommodation. Mr. Hagan also informed the hearing examiner that Attorney Bernard Gray represented him. However, Mr. Gray failed to appear for the hearing. Hearing Examiner Roper held the hearing in Mr. Gray's absence, because the hearing examiner continued the hearing on two prior occasions at Mr. Gray's request. Hearing Examiner Roper issued the decision and order on April 17, 2000. John Hagan, through Attorney Gray, appealed Hearing Examiner Roper's decision on May 30, 2000. The Commission held the appellate hearing on August 3, 2000, and issued its second decision and order in the matter on September 27, 2000. The Commission remanded the matter for a hearing de novo, because the hearing tapes were missing and the record was incomplete. See Youssef v. Cowan, TP 22,784 (RHC Sept. 27, 2000).

The Office of Adjudication scheduled the hearing de novo for June 19, 2001. The agency rescheduled the hearing to September 21, 2001, because Hearing Examiner Roper suffered death in his family. At Mr. Gray's request, the OAD rescheduled the hearing from September 21, 2001 to November 8, 2001. The agency faxed and mailed the hearing notice by priority mail with delivery confirmation on October 5, 2001. When the hearing examiner convened the hearing on November 8, 2001, no one appeared. However, Mr. Gray appeared with John and Ernestine Hagan on November 13, 2001. The hearing examiner went on the record on November 13, 2001 and informed the tenant and his attorney that the United States Postal Service delivered the notice for the November 8, 2001 hearing to Mr. Gray's office on October 6, 2001. Since neither Mr. Gray nor his client appeared for the scheduled hearing, the hearing examiner dismissed the petition with prejudice. See Youssef v. Cowan, TP 22,784 (OAD Mar. 28, 2002).

The tenant, through Attorney Gray, appealed the hearing examiner's dismissal. The Commission held the appellate hearing on September 19, 2002.

II. ISSUES ON APPEAL

The tenant, John Hagan, filed the notice of appeal through Attorney Gray. In the appeal, the tenant raised the following issues:

1. The Examiner abused his discretion by dismissing the case.
2. The [e]vidence does not support the findings of fact or conclusions of law.
3. The Examiner erred or abused his discretion by not acting on Petitioner's Motion for Reconsideration.

Notice of Appeal at 1.

III. DISCUSSION

A. Whether the hearing examiner abused his discretion by dismissing the petition.

The tenant, through Attorney Gray, asks the Commission to find that the hearing examiner abused his discretion when he dismissed the petition. On the facts of this case, the Commission finds that the hearing examiner did not abuse his discretion.

Following the Commission's second remand on September 27, 2000, the OAD scheduled the matter for a hearing on three different dates. The agency rescheduled the first hearing from June 19, 2001 to September 21, 2001, because the hearing examiner suffered death in his family on June 18, 2001. When the tenant's attorney received the hearing notice, he filed a motion for a continuance because he was scheduled to appear in the Superior Court of the District of Columbia. On October 5, 2001, the OAD granted the request, and issued an order rescheduling the hearing to November 8, 2001, which is a date Mr. Gray stated he was available.¹ The certificate of service reflects that the OAD faxed the order and sent it by priority mail on October 5, 2001.

The tenant's attorney does not deny that he received the hearing notice. During the Commission's hearing, Mr. Gray acknowledged that the United States Postal Service delivered the priority mail envelope to his home office in October 2001. He stated that the notice arrived during the month of October, when he was at home, but on vacation. During his vacation, he did not open his mail. He stated that he spoke to a clerk in OAD before his vacation, and the clerk advised him that the hearing was scheduled for November 13, 2001. The order rescheduling the hearing to November 8, 2001 remained unopened in Mr. Gray's home office, during his vacation in October and in the ensuing

¹ In the motion for continuance, Mr. Gray indicated that he was available for a hearing on September 26, 2001 and any day in November except November 1, 20, and 29, 2001.

days in November. Consequently, he and his client did not appear on the date and time that the agency reserved for the hearing.

In the notice of appeal, Mr. Gray stated the hearing examiner “abused his discretion by not considering alternatives to dismissal under the circumstances.” Notice of Appeal at 1. Mr. Gray did not give an example of an alternative to dismissal. He simply stated that the housing provider did not appear, and the tenant had always appeared. In addition, Mr. Gray indicated, in a footnote, that the agency could have utilized “this time” to do other matters. Id. at 2 n.1.

When the hearing examiner convened the hearing on November 8, 2001, the tenant, who bore the burden of proof did not appear in person or through counsel. The OAD rescheduled the hearing for November 8, 2001 at Mr. Gray’s request, set the hearing on a date Mr. Gray was available, and issued the order rescheduling the hearing in accordance with D.C. OFFICIAL CODE § 42-3502.16(c) (2001). On the third date set for the hearing, following the Commission’s second remand, the tenant failed to appear. His failure to appear cannot be attributed to any act or omission by the agency. The tenant’s attorney, who received the notice more than thirty days before the hearing, simply did not open the agency’s notice.

On the facts of this case, the Commission finds that the hearing examiner did not abuse his discretion when he dismissed the petition with prejudice. See Stancil v. District of Columbia Rental Hous. Comm’n, 806 A.2d 622 (D.C. 2002) (holding that the Commission may dismiss an appeal when the appellant fails to attend a scheduled hearing). Accordingly, the Commission denies Issue A and affirms the hearing examiner’s dismissal of the appeal.

B. Whether the evidence supports the findings of fact and conclusions of law.

Mr. Gray contends that Finding of Fact 5 is incomplete. In Finding of Fact 5, the hearing examiner wrote the following:

5. On August 31, 2001, Counsel for Petitioner, Bernard Gray filed a Motion [f]or [a] Continuance due to a conflict counsel had with two cases in the District of Columbia Superior Court, In the motion counsel gave his available dates as "September 26, 2001 and any day in November except the 1st, 20th and 29th."

Youssef v. Cowan, TP 22,784 (OAD Mar. 28, 2002) at 3. Mr. Gray maintains that Finding of Fact 5 is incomplete, because he also indicated that he would be out of the office for the month of October 2001. Mr. Gray did not indicate how the omission of the information regarding his vacation in October impacted his ability to attend the hearing on November 8, 2001. Assuming for the sake of argument that his failure to open a priority mail envelope that arrived in his home office while he was vacationing at home were excusable, it would not serve as a valid excuse for his failure to open the envelope during the seven days in November, which preceded the hearing date.

Mr. Gray also maintains that Finding of Fact 6 is incomplete. In Finding of Fact 6, the hearing examiner wrote:

6. The OAD staff notified the parties by telephone that the motion was granted. The Order granting the motion was issued [on] October 5, 2001, and notifying [sic] the parties of the rescheduled hearing date[,], November 8, 2001. The U.S. Postal Service Priority Mail Delivery Confirmation number is 0300 1290 0006 0954 6508[;] delivery was confirmed at 12:12 pm on October 6, 2001.

Id. at 3-4. Mr. Gray indicated that Finding of Fact 6 is incomplete because the OAD staff also confirmed the hearing date was November 13, 2001. Mr. Gray indicated that he informed his client of the November 13, 2001 hearing date before he went on vacation in October.

There is no record evidence to support Mr. Gray's assertion that an OAD staff member informed him that the hearing date was November 13, 2001. Consequently, there is no record evidence to support Mr. Gray's assertion that Finding of Fact 6 is incomplete because it did not contain Mr. Gray's assertion.

Mr. Gray also maintains that the findings of fact do not support the conclusions of law. The decision contains the following conclusions of law:

Petitioner received proper notice of the scheduled November 8, 2001 remand hearing in accordance with D.C. Code 42-3502.16.j [sic] and the Rental Housings [sic] Commissions [sic] Regulations, 14 DCMR 3911.

Where, as in this case, Petitioner failed to appear at the scheduled hearing to present his case and the party had notice of the date, time and location of the hearing, the Rent Administrator must dismiss that action. The issue to resolve is whether the matter is dismissed with or without prejudice.

...

Here, the record indicates Petitioner through his Counsel received proper notice of the scheduled November 8, 2001 hearing, in fact the case was scheduled on a date Counsel indicated that he was available for [sic] hearing.

Counsel made no contact with the Agency, prior to the November 8th scheduled hearing in this matter as he has on numerous occasions and provided no evidence or good cause why he did not attend the scheduled hearing. The fact that Counsel for the Petitioner believed the hearing was set for the 13th when he received actual notice for the 8th is insufficient cause. The Order granting the Motion [f]or [a] Continuance and the rescheduled hearing was properly addressed and delivered to Counsel's business address as was all previous notices. As such, the record does not contain sufficient facts and circumstances to constitute good cause why prejudice should not attach. Therefore, the Examiner's dismissal on Petitioner's failure to appear must be with prejudice.

Id. at 4-5.

Mr. Gray argues that "one should consider" his failure to contact the agency and his failure to appear for the hearing "out of the norm," since the hearing examiner acknowledged that Mr. Gray normally contacts the agency when he has pending matters.

Mr. Gray also maintains that the hearing examiner erred when he stated that Mr. Gray received actual notice of the hearing. Mr. Gray stated he received “constructive notice of the November 8, 2001 date.” Notice of Appeal at 2. Mr. Gray maintains, “[a]ctual notice of the November 13, 2001 date was received in Counsel’s discussion with staff. It can not [sic] be disputed that notice was delivered to Counsel. Counsel relied on the date given him by staff. At the time the notice was delivered to Counsel’s office, he had already reported to the Agency, he would not be there.” Id.

Notwithstanding Mr. Gray’s assertion to the contrary, the findings of fact and conclusions of law are supported by and in accordance with the substantial record evidence. See D.C. OFFICIAL CODE § 2-509(e) (2001). The record evidence supports the hearing examiner’s finding that the agency mailed the order rescheduling the hearing to November 8, 2001, more than thirty days before the rescheduled hearing, and the tenant’s attorney does not deny receipt of the hearing notice. Mr. Gray’s efforts to draw a distinction between actual and constructive notice and his assertion that his behavior was out of the norm, do not overcome the substantial record evidence reflecting that he received notice of the hearing. Since the substantial record evidence supports the findings of fact and conclusions of law, the Commission denies Issue B.

C. Whether the hearing examiner erred or abused his discretion by not acting on the tenant’s motion for reconsideration.

The Rent Administrator’s regulation, 14 DCMR § 4013 (1991), governs motions for reconsideration. The pertinent provisions of § 4013 provide the following:

4013.2 A motion for reconsideration shall be granted or denied by the hearing examiner within ten (10) days after receipt, and may only be granted on the basis of circumstances set forth in §4013.1.

- 4013.3 The denial of a motion for reconsideration shall not be subject to reconsideration or appeal.
- 4013.5 Failure of a hearing examiner to act on a motion for reconsideration within the time limit prescribed by §4013.2 shall constitute a denial of the motion for reconsideration.

According to the express terms of §§ 4013.3 and 4013.5, the hearing examiner's failure to act on a motion for reconsideration constitutes a denial of the motion, and the denial of the motion for reconsideration is not subject to reconsideration or appeal. The hearing examiner did not err or abuse his discretion when he failed to act on the motion for reconsideration. The regulations, which only provide ten days to respond to the motion for reconsideration, prescribe a denial by operation of law when the hearing examiner fails to act on the motion. Accordingly, the Commission denies Issue C.

IV. CONCLUSION

For the foregoing reasons, the Commission denies the issues raised on appeal and affirms the hearing examiner's decision to dismiss TP 22,784 with prejudice.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER


JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 22,784 was mailed by priority mail with delivery confirmation postage prepaid, this 29th day of August 2003 to:

Bernard A. Gray, Sr., Esq.
2009 18th Street, S.E.
Washington, D.C. 20020-4201

Oliver Cowan and
United Management Company, Inc.
6101 16th Street, N.W.
Washington, D.C. 20011


Constance Freeman
Commission Assistant