

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

TP 24,379

In re: 1320 Missouri Avenue, N.W.

Ward Four (4)

CHRISTIAN DIAS and MARIE DIAS  
Housing Providers/Appellants

v.

AARONITA PERRY  
Tenant/Appellee

**DECISION AND ORDER**

July 30, 2004

**LONG, COMMISSIONER.** This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), 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) and its amendments, govern the proceedings.

**I. PROCEDURAL HISTORY**

The tenant, Aaronita Perry, initiated this matter when she filed Tenant Petition (TP) 24,379 on June 30, 1997. In the petition, the tenant alleged that the housing providers, Marie and Christian Dias: 1) imposed a rent increase that was larger than the amount of increase permitted by any provision of the Act; 2) failed to file the proper rent

increase forms with the RACD; 3) charged rent that exceeded the legally calculated rent ceiling; 4) filed an improper rent ceiling with the RACD; and 5) increased the rent while the unit was not in substantial compliance with the housing regulations.

Hearing Examiner Gerald Roper held the evidentiary hearing on October 7, 1997. On that date, the tenant appeared with counsel, Paula D. Scott. However, the housing providers failed to appear. After noting that notice was mailed to all of the parties by first class mail on September 4, 1997, Hearing Examiner Roper proceeded with the hearing. Following the hearing, the housing providers' attorney filed a motion to set aside the default and order a new hearing, because the housing providers did not receive actual notice of the hearing. The tenant's attorney filed an opposition to the housing providers' motion. On May 7, 1999, Hearing Examiner Roper issued the decision and order. In the decision, the hearing examiner denied the motion to set aside the default and ordered the housing providers to pay a trebled rent refund of \$2782.00. The tenant's attorney filed a motion for reconsideration, which was denied by operation of law.<sup>1</sup>

On May 26, 1999, the housing providers, Marie Dias and Christian Dias, filed a notice of appeal with the Commission. In response, the tenant filed an answer and a motion for summary affirmance. The Commission denied the motion for summary affirmance and granted the appeal. The Commission remanded the matter for a hearing de novo, because the agency failed to send the hearing notice by certified mail or another form of service that assured delivery.

Hearing Examiner Roper held the hearing de novo on March 28, 2000. The tenant appeared with counsel, Michele Singer, and the housing provider, Marie Dias, appeared with her attorney, Bernard Gray, Sr. Hearing Examiner Roper issued the

---

<sup>1</sup> See 14 DCMR § 4013 (1991).

decision and order on May 9, 2000 and ruled in favor of the tenants. On May 26, 2000, the housing providers appealed the hearing examiner's decision. Following a hearing on the appeal, the Commission affirmed the decision in part, reversed it in part, and remanded the matter to Hearing Examiner Roper on April 20, 2001. The hearing examiner issued the remand decision on November 19, 2002. The decision contained the following findings of fact:

1. The evidence on the record from the March 28, 2000 hearing established that Marie Dias received rent payments from Petitioner.
2. The evidence on the record from the March 28, 2000 hearing established that housing provider, Marie Dias, as Christian Dias' agent, was entitled to receive rent payments.
3. The evidence on the record from the March 28, 2000 hearing, established that Petitioner in the past had been living and rent had been demanded for rental unit 301 including:
  - a. the Amended Registration/Claim of Exemption Form filed by Respondents on March 20, 1997 that actually demanded a 12% vacant [sic] rent increase;
  - b. the evidence that Petitioner entered into a lease with the housing providers on March 11, 1996 (Petitioner's exhibit #6) and an amended lease in April 1996 (Petitioner's exhibit #7);
  - c. testimony that established that Petitioner began to reside at unit 301 on July 2<sup>nd</sup> 1996; the certificate of occupancy filed by the housing providers on April 15, 1996 (Petitioner's exhibit #2);
  - d. complaints for possession filed by the Respondents and naming the Petitioner as the tenant-defendant in October 1996 (Petitioner's exhibit #11) and September 1997 (Respondents' exhibit #2);
  - e. the housing code violation notices for rental unit 301 (Petitioner's exhibits #13, #14, and #15); and
  - f. the pictures of unit 301's housing code violations during the winter of 1997 as taken by Mrs. Perry.

4. There was no rebuttal of evidence in the record from the March 28, 2000 hearing, which established that Petitioner in the past had been living and rent in the amount of \$500 had been demanded from Mrs. Perry for rental unit 301.

Perry v. Dias, TP 24,379 (RACD Nov. 19, 2002) at 9-10. In addition, the decision contained the following conclusions of law:

1. The housing provider's motion to dismiss Marie [Dias] should be denied because she meets the test of a housing provider as defined by D.C. Code § 45-2503(15). Ms. Dias actually received rent and was entitled to receive rent and therefore, is a proper party to the proceeding.
2. The Respondent increased the rent in excess of the rent ceiling in violation of D.C. Code Section 45-2516. The evidence shows that at the time of the March 28, 2000 hearing, Petitioner had been residing in unit 301 and, the rent of \$500 had been demanded for rental unit 301. Because these facts were not rebutted, the evidence gave rise to the presumption that Petitioner was still living at the premises, and rent in the amount of \$500 was still being demanded from Mrs. Perry for rental unit 301 at the time of the hearing. The legal rent ceiling is \$386.00.

Id. at 10. The hearing examiner ordered a rent refund of \$1500.00 for the period April 1996 through June 1996, and a refund of \$5016.00 for the period July 1996 through March 2000.<sup>2</sup> The hearing examiner determined that the total rent refund was \$6516.00, which he trebled to \$19,548.00. The hearing examiner added interest in the amount of \$939.19 and ordered the housing provider to refund \$20,487.19 to the tenant.

On December 6, 2002, the housing providers, through counsel, appealed the hearing examiner's decision and order. The Commission held the appellate hearing on March 19, 2003. During the hearing, the Commission asked the parties to submit post-hearing memoranda on the application of a presumption, which was one of the issues

---

<sup>2</sup> When the hearing examiner calculated the rent refund for July 1996 through March 2000, he calculated the refund for forty-four months. However, the period July 1996 through March 2000 is a forty-five month period. For the reasons that follow, this was harmless error.

raised in the notice of appeal. The tenant's counsel submitted a memorandum of law on April 9, 2003. The housing providers' attorney did not submit a memorandum of law.

## II. ISSUES ON APPEAL

The housing providers' attorney raised the following issues in the notice of appeal.

- A. The Examiner failed to address the effect a Power of Attorney has on D.C. CODE [sic] § 42-3501.03(15). "Housing provider means a landlord, an owner, lessor, sublessor, assignee, or their agent, or any other person receiving or entitled to receive rents or benefits for the use or occupancy of any rental unit within a housing accommodation within the District.["]
- B. The Examiner erred by finding that the Occupant was a tenant based upon the evidence and entitled to the protection of the Rental Housing Act.
- C. The Examiner erred when he held that a presumption was created as to the Occupants' continued occupancy of the property.
- D. The evidence does [sic] support the conclusion that the Petitioner resided in unit 301 from July, 1996 through March, 2000.

Notice of Appeal at 1-2.

## III. DISCUSSION

### A. Whether the hearing examiner failed to address the effect a power of attorney has on D.C. OFFICIAL CODE § 42-3501.03(15) (2001).

In the first appeal in this matter, the housing providers' attorney, Bernard Gray, Sr., alleged that the hearing examiner erred when he failed to address Marie Dias' status as a party. The Commission reviewed the record and determined that Mr. Gray made an oral motion to dismiss Ms. Dias as a party, after the tenant presented her case. Mr. Gray stated, "I request that Ms. Dias be dismissed as a party complainant in here. She is not the owner of the building. She has a power of attorney for her son, and therefore, she has

not signed the lease that has been admitted into evidence, and therefore she should not be on the complaint itself.” OAD Hearing Tape (Mar. 28, 2000).

The hearing examiner denied the motion to dismiss Marie Dias as a party. However, the hearing examiner did not explain why he denied the motion. As a result, the Commission remanded the matter to the hearing examiner. The Commission directed the hearing examiner to issue a written order, in accordance with 14 DCMR § 4008 (1991), and explain his decision to deny counsel’s motion to dismiss Marie Dias as a party.

Following the Commission’s remand, the hearing examiner found that Marie Dias was a proper party, because she met the statutory definition of a housing provider. A housing provider “means a landlord, an owner, lessor, sublessor, assignee, or their agent, or any other person receiving or entitled to receive rents or benefits for the use or occupancy of any rental unit within a housing accommodation within the District.” D.C. OFFICIAL CODE § 42-3501.03(15) (2001). After evaluating the evidence, the hearing examiner made the following findings of fact:

1. The evidence on the record from the March 28, 2000 hearing established that Marie Dias received rent payments from Petitioner.
2. The evidence on the record from the March 28, 2000 hearing established that housing provider, Marie Dias, as Christian Dias’ agent, was entitled to receive rent payments.

Perry v. Dias, TP 24,379 (RACD Nov. 19, 2002) at 9.

The Commission reviewed the record and found that there was substantial record evidence to support the hearing examiner’s finding that Ms. Dias was a housing provider. During the hearing, the tenant testified that she submitted her rent payments to Marie

Dias. The tenant introduced rent receipts signed by Marie Dias, which evidenced payment of rent by the tenant to Marie Dias. Petitioner's Exhibit (P. Exhs.) 8b, 8d, 8f. In addition, the tenant submitted several exhibits that listed Marie Dias as the agent for Christian Dias, who is the owner of the housing accommodation and Ms. Dias' son. Marie Dias is listed as the management agent on the amended registration form, P. Exh. 5, and the initials "MD" appear on the amended lease, P. Exh. 7. In addition, the tenant introduced P. Exh. 10, which is a complaint for possession that lists Christian Dias/Marie Dias as the Plaintiffs/Landlords. See P. Exhs. 2, 9, 11; see also Respondent's Exhibits 2-3.

When the parties appeared for the hearing on March 28, 2000, the parties completed the agency's attendance sheet. The attendance sheet requests the names of each person appearing at the hearing, and provides a space for each person to identify themselves as a landlord, tenant, witness, or counsel. Marie Dias' name appears on the attendance sheet, and she is identified as the landlord. During the hearing, Marie Dias testified that she managed the housing accommodation for her son, received rent from the tenant, and filed two suits for possession against the tenant. In addition, Ms. Dias testified that she contacted RACD to determine the rent ceilings for the housing accommodations, and she filed rent increase forms with RACD. Moreover, there is an affidavit in the record that was submitted by Attorney Gray and executed by Marie Dias. The affidavit contains the following: "I, Marie Dias, first being duly sworn, depose and say as follows: 1. I am one of the Housing Providers in this action." Record at 62.

When the Commission issued the decision and order following the first appeal, the Commission noted: "Given the evidence presented by the tenant and the un rebutted

testimony of the tenant and Marie Dias at the hearing, it is unclear to the Commission the basis upon which the housing provider argued that Marie Dias was not a proper party as a housing provider as contemplated by D.C. [OFFICIAL] CODE § [42-3501.03(15)].” RHC Decision at 8. The housing providers’ continuing assertion that Marie Dias does not meet the statutory definition of a housing provider remains unclear.

In the instant appeal, the housing providers argue that the hearing examiner erred, because he did not address the effect that a power of attorney has on D.C. OFFICIAL CODE § 42-3501.03(15) (2001). When the housing providers’ attorney moved to dismiss Marie Dias as a party, he stated that Ms. Dias had a power of attorney for her son. On cross-examination, Ms. Dias testified that she had a power of attorney to handle the property for her son. However, Ms. Dias did not offer any evidence concerning the impact that a power of attorney has on the statutory definition of a housing provider. On appeal, the housing providers’ attorney did not submit a brief or offer any legal authority to demonstrate the legal effect that a power of attorney has on the statutory definition of a housing provider.

For the foregoing reasons, the Commission affirms the hearing examiner’s determination that Marie Dias is a housing provider.

**B. Whether the hearing examiner erred by finding the occupant was a tenant based upon the evidence and entitled to the protection of the Act.**

When the housing providers filed the first appeal in this matter, they alleged that Hearing Examiner Roper erred when he failed to consider their assertion that Ms. Perry was not a tenant. The Commission reviewed this issue in the decision and order issued on April 20, 2001. The Commission quoted and applied the statutory definition of a

tenant, held that Ms. Perry was a tenant, and denied the issue. After reviewing additional issues that the housing providers raised in the initial appeal, the Commission remanded the matter to Hearing Examiner Roper. However, the tenant's status was no longer a viable issue, because the Commission held that Ms. Perry was a tenant. Dias v. Perry, TP 24,379 (RHC Apr. 20, 2001).

Since the Commission issued a definitive ruling on Ms. Perry's status as a tenant, the Commission's ruling constituted the law of the case on that issue. The law of the case doctrine prohibits the Commission from reopening an issue that it resolved in an earlier appeal. Lynn v. Lynn, 617 A.2d 963 (D.C. 1992).

During the Commission's hearing, the housing provider's attorney indicated that he raised the issue in the second appeal, to preserve the issue for review by the District of Columbia Court of Appeals. A "second administrative appeal of the issues previously resolved in [the first appeal is] altogether futile. ... 'The law does not require the doing of a futile act' [and the Court will not] deny parties their day in court for failure to jump through futile procedural hoops." Tenants of 1255 New Hampshire Ave., N.W. v. District of Columbia Rental Hous. Comm'n, 647 A.2d 70, 76 (D.C. 1994) (quoting Ohio v. Roberts, 448 U.S. 56, 74, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980)).

Accordingly, the Commission will not revisit Ms. Perry's status, because the Commission previously affirmed the hearing examiner's finding that she is a tenant.

**C. Whether the evidence supports the conclusion that the tenant resided in unit 301 from July 1996 through March 2000.**

The evidence introduced during the hearing does not support the conclusion that the tenant resided in unit 301 through March 2000. During the hearing, the housing provider and the tenant testified that the tenant, who began paying rent for unit 104 in

April 1, 1996, moved into unit 301 on July 2, 1996.<sup>3</sup> The parties testified to a series of events from March 1996 through various dates in 1997. However, the tenant did not offer any evidence to prove that she occupied the rental unit through March 2000, and there was no evidence that the housing provider demanded rent through March 2000.

In the housing provider's first appeal, the Commission confronted the issue concerning the propriety of the award of a rent refund through March 2000. The Commission, citing the DCAPA,<sup>4</sup> noted that the tenant bore the burden of proving the duration of her tenancy. D.C. OFFICIAL CODE § 2-509(b) (2001).<sup>5</sup> The Commission held that the tenant failed to meet her burden, because she did not present reliable, probative, and substantial evidence that she occupied the rental unit and was entitled to a rent refund through March 2000. The Commission reversed the hearing examiner's award of a rent refund through March 2000, remanded the matter, and instructed the hearing examiner to review the record evidence and determine the dates that the tenant occupied unit 301. RHC Decision at 12-13.

When the hearing examiner issued the decision following the remand, the hearing examiner listed "the record evidence from the March 28, 2000 hearing, [that] established that Petitioner in the past had been living and rent had been demanded for rental unit 301

---

<sup>3</sup> On March 11, 1996, the tenant signed a lease to move into unit 104 on April 1, 1996. The tenant testified that she never occupied unit 104, because it was inhabitable. However, the tenant paid rent from April through June 1996 for unit 104. The Commission ordered a rent refund for the total amount of rent that the tenant paid for the months of April, May, and June 1996. Dias v. Perry, TP 24,379 (RHC Apr. 20, 2001) at 11.

<sup>4</sup> The regulation, which governs the agency's hearings, provides: "All hearings shall be conducted in accordance with the procedures for contested cases set forth in the D.C. Administrative Procedure Act..." 14 DCMR § 4001.2 (1991).

<sup>5</sup> D.C. OFFICIAL CODE § 2-509(b) (2001) provides: "In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof."

....” RACD Decision at 9. The hearing examiner listed a series of exhibits that the parties introduced during the hearing. The documents, which were dated from April 1996 through the winter of 1997, did not establish that the tenant occupied the rental unit until March 2000. However, the hearing examiner issued the following conclusion of law:

The Respondent increased the rent in excess of the rent ceiling in violation of D.C. Code Section 45-2516.<sup>6]</sup> The evidence shows that at the time of the March 28, 2000 hearing, Petitioner had been residing in unit 301 and, the rent of \$500.00 had been demanded for rental unit 301. Because these facts were not rebutted, the evidence gave rise to the presumption that Petitioner was still living at the premises, and rent in the amount of \$500.00 was still being demanded from Mrs. Perry for rental unit 301 at the time of the hearing.

Conclusion of Law 2, RACD Decision at 10.

The hearing examiner, who acknowledged “the tenant did not provide direct testimony regarding whether she resided at the housing accommodation until the March 2000 OAD hearing,” stated, “an unrebutted presumption was established.” RACD Decision at 6. The concept of a presumption, which the Commission discussed in Issue D infra, does not supplant the burden of proof that the DCAPA places on the proponent in contested cases. D.C. OFFICIAL CODE § 2-509(b) (2001);<sup>7</sup> see also Rosenboro v. Askin, TPs 3991 & 4673 (RHC Feb. 26, 1993) (holding that the petitioner must provide evidence to satisfy the burden of proving her claim).

---

<sup>6</sup> Currently D.C. OFFICIAL CODE § 42-3502.06 (2001).

<sup>7</sup> The DCAPA, D.C. OFFICIAL CODE § 2-509(b) (2001), provides: “In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof.”

The Commission has reviewed the issue of whether a rent refund from the initial violation date through the hearing date was proper, when a tenant claimed that a reduction in services and facilities continued through the hearing date.

On this issue, the Commission held that “[w]hen violations are continuing in nature, the Commission also ‘looks forward’ from the date the petition was filed, to the termination date of the violation. If the violation did not terminate prior to the timely filing of the petition, **and if the record contained evidence of the continuing violation**, the remedy of refund ... may go up to the date the record closed, which is usually the hearing date.”

Redmond v. Majerle Mgmt., Inc., TP 23,146 (RHC Mar. 26, 2002) at 46 (quoting Jenkins v. Johnson, TP 23,410 (RHC Jan. 4, 1995) at 6) (emphasis added).

In order to affirm the hearing examiner’s award of a rent refund through the date of the hearing, the record must show that the tenant produced evidence that she occupied the rental unit or the housing providers demanded rent through March 2000. In the instant case, the hearing examiner listed the documents, introduced during the March 28, 2000 hearing, which established that the tenant “in the past had been living and rent had been demanded for rental unit 301.” Finding of Fact 3, RACD Decision at 9. The documents, which were dated April 1996 through the winter of 1997, did not establish that the tenant occupied the rental unit or that the housing providers demanded rent until March 2000.

Accordingly, the Commission reverses the award of the rent refund through March 2000. The Commission remands this matter to the hearing examiner for a calculation of the rent refund from July 1996 through a date certain during the winter of 1997, or the last date for which there is direct record evidence that the tenant occupied the rental unit or the housing providers demanded rent.

The Commission noted plain error in the interest calculation.<sup>8</sup> The hearing examiner erred when he calculated interest in accordance with 14 DCMR § 4217.3 (1991), which has been repealed. Additionally, the hearing examiner erred when he calculated interest on the total amount of the refund, as opposed to performing a separate interest calculation for each time period that the housing provider held the rent overcharge.

The Commission orders the hearing examiner to recalculate interest on the entire rent refund, including the rent refund for the months of April through June 1996. The hearing examiner shall calculate interest in accordance with 14 DCMR § 3826 (1998); 45 D.C. Reg. 686 (Feb. 6, 1998). In addition, the hearing examiner shall calculate interest in the manner prescribed in Stevens v. Cannon, TP 23,523 (RHC Oct. 23, 1998). See also Johnson v. Gray, TP 21,400 (RHC Aug. 1, 1994) (explaining and illustrating the method of calculating interest; however, using fluctuating interest rates that were repealed by 14 DCMR § 3826.3 (1998)).

**D. Whether the hearing examiner erred when he held that a presumption was created as to the occupant's continued occupancy of the property.**

When the hearing examiner issued the decision and order, he stated, “the evidence gave rise to an un rebutted presumption the Petitioner was still living at the housing accommodation up to the date of the hearing.” RACD Decision at 3. In addition, the hearing examiner issued the following conclusion of law.

The Respondent increased the rent in excess of the rent ceiling in violation of D.C. Code Section 45-2516.<sup>9</sup> The evidence shows that at the time of the March 28, 2000 hearing, Petitioner had been residing in unit 301 and,

---

<sup>8</sup> “Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error. 14 DCMR § 3807.4 (1991).

<sup>9</sup> Currently D.C. OFFICIAL CODE § 42-3502.06 (2001).

the rent of \$500 had been demanded for rental unit 301. Because these facts were not rebutted, the evidence gave rise to the presumption that Petitioner was still living at the premises, and rent in the amount of \$500 was still being demanded from Mrs. Perry for rental unit 301 at the time of the hearing. The legal rent ceiling is \$386.00.

Conclusion of Law 2, RACD Decision at 10.

Quoting Smith's Transfer & Storage Co. v. Murphy, 115 A.2d 300, 303 (D.C. 1955), the hearing examiner wrote: "In the absence of direct testimony, a presumption controls the result by rule of law ... ('The function of the inference or presumption is to control the result by rule of law in the absence of evidence in rebuttal ... The burden of proceeding with sufficient evidence to rebut the presumption of negligence or fault, however, does shift to the defendant' (as the party that must rebut the presumption)."

RACD Decision at 6.

When the hearing examiner quoted Smith's Transfer & Storage Co., he omitted pivotal language, which appears within the quoted section of the opinion. The court also stated, "The above authorities agree that the burden of proof on the issue of negligence or fault, however, does not shift to the defendant." Id. (citations omitted) (emphasis added).

The hearing examiner's reliance on Smith's Transfer & Storage Co. is misplaced for two reasons. The hearing examiner based his decision upon the presumption discussed in Smith's Transfer & Storage Co., which concerned the presumption that exists in bailment cases, as a matter of law. In addition, the hearing examiner ignored the court's holding concerning the burden of proof.

In Smith's Transfer & Storage Co., the court stated:

Plaintiff made a prima facie case by showing the bailment and the loss of his property. This is the rule in the law of bailments established in this jurisdiction. ... The function of the inference or presumption is to control the result by rule of law in the absence of evidence in rebuttal. When

evidence in rebuttal is introduced by the bailee the presumption or inference disappears from the case as a rule of law but retains the probative weight of an inference of fact. ... The ... authorities agree that the burden of proof on the issue of negligence is not shifted to the defendant but remains always with the plaintiff.

Id. at 303. The rule of law related to presumptions in bailments has no application to tenant petitions filed under the Rental Housing Act of 1985.<sup>10</sup> What is controlling, however, is the court's holding that the burden of proof always remains with the plaintiff.

The DCAPA, D.C. OFFICIAL CODE § 2-509(b) (2001), provides: "In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof." In contested cases, the tenant must provide evidence to satisfy the burden of proving her claim. Rosenboro v. Askin, TPs 3991 & 4673 (RHC Feb. 26, 1993). "Presumptions are not evidence,"<sup>11</sup> and they do not satisfy the tenant's burden of proof. Accordingly, the tenant cannot recover a rent refund through March 2000, because the hearing examiner presumed she resided at the housing accommodation through the date of the hearing.

The hearing examiner also cited Henderson v. Mann, 47 App. D.C. 174, 178 (D.C. Cir. 1917), where the court held: "While the evidence does not disclose affirmatively that the appellant continued to live in South Washington during all the years

---

<sup>10</sup> The Act contains a statutory presumption when a tenant alleges retaliation. The retaliation section of the Act, D.C. OFFICIAL CODE § 42-3505.02 (2001), provides:

(b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant [takes one of six enumerated actions].

The presumption, which governs claims of retaliation, does not extend to other provisions of the Act.

<sup>11</sup> Gilles v. Ware, 615 A.2d 533, 550 n.4 (D.C. 1992) (citation omitted).

since she left the property, there is nothing to show that she did not, and therefore we must assume that she did; for where existence of a condition is shown it will be presumed to continue until the reverse is disclosed.” The court’s holding in Henderson, that a pre-existing condition is presumed to continue to exist, does not overcome the tenant’s burden to produce evidence that she resided in the housing accommodation until March 2000.<sup>12</sup>

In Cafritz v. District of Columbia Rental Hous. Comm'n, 615 A.2d 222, 228 (D.C. 1992), the court stated, "opinions must be read in the context of the facts ... of the order under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading." The court’s admonishment in Cafritz rings true in the instant case. The court’s rulings concerning presumptions found in bailment cases, does not replace the DCAPA requirement that the tenant present direct evidence to prove her claim and satisfy her burden of proof. Even when a presumption exists, and it does not in the instant case, the burden of proof remains with the proponent of the rule or order.<sup>13</sup>

For the foregoing reasons, the hearing examiner erred when he held that the evidence gave rise to an un rebutted presumption that the tenant was living at the housing accommodation through the March 28, 2000 hearing.

---

<sup>12</sup> The tenant’s attorney cited Smith’s Transfer & Storage Co. v. Murphy, 115 A.2d 300 (D.C. 1955) and Henderson v. Mann, 47 App. D.C. 174 (D.C. Cir. 1917) in the post-hearing memorandum submitted following the Commission’s hearing. Counsel’s reliance on these cases is similarly misplaced.

<sup>13</sup> See Banachowski v. Saunders, 187 A.2d 891, 892 (D.C. 1963) (holding that the “ultimate burden of persuasion on the issue of the bailee's negligence remains throughout upon the bailor”).

#### IV. CONCLUSION

For the foregoing reasons, the Commission affirms the decision in part, reverses the decision in part, and remands the case for a recalculation of the rent refund.

The Commission affirms the hearing examiner's finding that Marie Dias is a housing provider, and declines to revisit or reverse its previous ruling that Ms. Perry is a tenant.

Further, the Commission reverses the hearing examiner's finding that tenant was entitled to a rent refund through the date of the hearing, because the tenant did not produce evidence that she occupied the rental unit until the March 28, 2000 hearing. Moreover, the Commission reverses the hearing examiner's conclusion that the evidence gave rise to an un rebutted presumption that the tenant was still living at the housing accommodation on the date of the hearing.

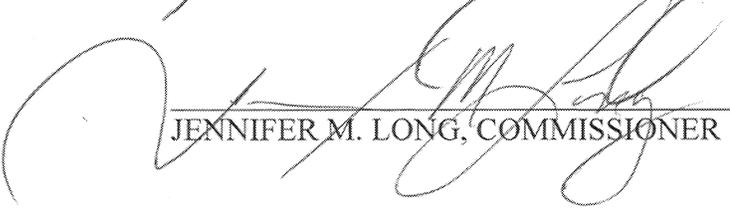
Accordingly, the Commission reverses the award of the rent refund through March 2000. The Commission remands this matter to the hearing examiner for a calculation of the rent refund from July 1996 through a date certain during the winter of 1997, or the last date for which there is direct record evidence that the tenant occupied the rental unit or the housing providers demanded rent.

Finally, the Commission noted plain error in the interest calculation. The hearing examiner erred when he calculated interest in accordance with 14 DCMR § 4217.3, which the Commission repealed, and when he calculated interest on the total amount of the refund, as opposed to performing a separate interest calculation for each time period that the housing provider held the rent overcharge. The Commission orders the hearing examiner to recalculate interest on the entire rent refund, including the rent refund for the

months of April through June 1996 and the refund from July 1996 through the last date that the tenant occupied the rental unit. The hearing examiner shall calculate interest in the manner prescribed in 14 DCMR § 3826 (1998) and Stevens v. Cannon, TP 23,523 (RHC Oct. 23, 1998).

SO ORDERED.

  
RONALD A. YOUNG, COMMISSIONER

  
JENNIFER M. LONG, COMMISSIONER

#### MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

#### JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the D.C. Court of Appeals. The Court's Rule, D.C. APP. R. 15(a), provides in part: "Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thirty days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed ... and by tendering the prescribed docketing fee to the clerk." The Court may be contacted at the following address and

phone number:

D.C. Court of Appeals  
Office of the Clerk  
500 Indiana Avenue, N.W.  
6th Floor  
Washington, D.C. 20001  
(202) 879-2700

### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 24,379 was mailed by priority mail with delivery confirmation, postage prepaid, this 30th day of July 2004 to:

Bernard A. Gray, Sr., Esquire  
2009 18<sup>th</sup> Street, S.E.  
Washington, D.C. 20020-4201

Vanita A. Snow, Esquire  
Neighborhood Legal Services Program  
701 4<sup>th</sup> Street, N.W.  
Washington, D.C. 20001



LaTonya Miles  
Contact Representative  
(202) 442-8949