

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,681 & TP 24,681A

In re: 40 G Street, S.W., Unit B

Ward Six (6)

DEBORAH A. REDMAN
Tenant/Appellant/Cross-Appellee

v.

PHILIP A. GRAHAM
Housing Provider/Appellee/Cross-Appellant

DECISION AND ORDER

July 1, 2004

YOUNG, COMMISSIONER. This case is on appeal from the District of Columbia 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 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 these proceedings.

I. PROCEDURAL HISTORY

On March 15, 1999, the tenant, Deborah A. Redman, who occupied the downstairs unit at the 2-unit housing accommodation at 40 G Street, S.W., filed Tenant Petition (TP) 24,681 with the Rental Accommodations and Conversion Division (RACD). In her petition Ms. Redman alleged that Philip A. Graham, the housing provider: 1) took a rent increase larger than the amount of increase permitted by the Act;

2) charged rent which exceeded the legally calculated rent ceiling for her unit; 3) took a rent increase while her unit was not in substantial compliance with the Act; 4) increased her rent while a written lease was in effect which prohibited an increase; 5) substantially reduced services and/or facilities provided in connection with her unit; 6) directed retaliatory action against her for exercising her rights in violation of § 502 of the Act. On December 8, 2000, the tenant filed TP 26,174 which alleged that the housing provider, in violation of section 502 of the Act, directed retaliatory action against her for exercising her rights. By order of the Rent Administrator, TP 26,174 was consolidated for hearing with TP 24,681 and re-designated TP 24,681A.

Office of Adjudication (OAD) hearings on the petitions were held on January 17, February 6 and 15, March 1, 15, and 22, April 5, 12, and 26, May 3 and 10, 2002.

Hearing Examiner Henry W. McCoy conducted the OAD hearings. The hearing examiner issued the decision and order on October 4, 2002. The hearing examiner made the following findings of fact:

1. Since June 14, 1996, the Petitioner has resided in the lower-level unit of the duplex condominium at 40 G Street, SW [sic], designated as unit #B.
2. There was no provision in the Petitioner' lease that prohibited rent increases during the lease term.
3. On October 31, 1997, the Respondent purchased 40 G Street, S.W.
4. On May 1, 1998, the Respondent registered the subject housing accommodation with the Rental Accommodations and Conversion Division.
5. In the registration form, the Respondent set the rent ceiling for Petitioner's unit at \$814.00 based on a unit previously exempt from rent control.
6. On May 26, 1998, the Respondent served the Petitioner with a Tenant Notice of Increase of General Applicability effective July 1, 1998 with the wrong calculations for the rent ceiling.

7. On June 16, 1998, the Respondent served the Petitioner with a revised and corrected Tenant Notice of Increase of General Applicability raising the rent ceiling from \$814.00 to \$829.00 and increasing the rent charge from \$775.00 to \$810.00 effective February 1, 1999.
8. The Respondent increased Petitioner's rent by 4.5%, \$35.00, instead of the 1.8% increase amount to the rent ceiling, \$15.00.
9. On December 18, 1998, the Respondent served the Petitioner with a Notice of Increase of General Applicability effective February 1, 1999 based on the same CPI increase raising the Petitioner's rent from \$810.00 to \$829.00, effective February 1, 1999.
10. On February 1, 1998, the Petitioner first notified the Respondent about a problem with water seepage in her unit.
11. [A]nd also notified him that flooding occurred in the kitchen, the furnace room, and the second floor ceiling.
12. The Petitioner notified the Respondent August 16, 1998 that the window latch was broken.
13. The Petitioner notified the Respondent on October 29, 1998 that the window latch was broken.
14. On December 14, 1998, the Respondent was cited for failing to have a hard wired smoke detector in Petitioner's unit.
15. On December 16, 1998, the Respondent had workmen enter the Petitioner's unit and install a hard wired smoke detector on the lower level.
16. On November 23, 1998, the Petitioner's requested from the Respondent weather stripping to insulate both doors from cold air and second hand smoke.
17. In the summer of 1998, there was a problem with the stairwell window, which the Petitioner resolved on her own before the Respondent responded to her request.
18. By letter dated August 16, 1998, the Petitioner first complained to the Respondent about the level of noise generated by the upstairs neighbor, which was a problem until they vacated the apartment in May 2001.
19. In early 1998, the Respondent changed the kitchen light fixture in the Petitioner's kitchen.

20. In September 2000, the Respondent had a fire in his home located at 2021-11th Street, NW [sic], which caused heavy damage to three rooms on two levels and minor damage to several other rooms.
21. On December 4, 2000, the Respondent served the Petitioner with a 90 day Notice to Vacate for Personal Use.
22. At the time the Respondent served the notice to vacate for personal use, the upstairs apartment was occupied with tenants paying a higher rent than the Petitioner.
23. On June 25, 2001, the Respondent executed a new lease with new tenants for the upstairs apartment.
24. For each of the alleged housing code violations, the Petitioner contacted the Respondent on numerous occasions trying to resolve the problems.
25. The Petitioner vacated the subject housing accommodation on or about September 19, 2002.

Redman v. Graham, TP 24,681 & TP 24,681A (OAD Oct. 4, 2002) at 5-7. The hearing examiner concluded as a matter of law:

1. The evidence demonstrates that the Respondent has charged rent that was larger than the amount of increase, which was allowed by any applicable provision of the Rental Housing Emergency [sic] Act 1985.
2. The rent ceiling being charged does not exceed the legally calculated rent ceiling for Petitioner's unit in violation of D.C. [Official] Code § 42-3502.09(a).
3. Respondent did not increase Petitioner's rent while a written lease prohibiting such increases was in effect in violation of D.C. [Official] Code § 42-3502.08(e).
4. Petitioner's rental unit was not in substantial compliance with the D.C. Housing Regulations when the Respondent increased the Petitioner's rent in (sic) August 1, 1998 and February 1, 1999, in violation of D.C. [Official] Code § 42-3502.08(a)(1)(A).
5. The Petitioner has proved by a preponderance of the evidence that the Respondent has retaliated against her, in violation of D.C. [Official] Code § 42-3505.02.

Id. at 22.

The tenant and housing provider filed timely notices of appeal in the Commission on October 24 and November 5, 2002, respectively. The Commission originally scheduled this matter for a hearing on February 18, 2003. However, as a result of a snowstorm on that date, the Commission rescheduled the hearing to March 10, 2003. The Commission issued the hearing notice on February 21, 2003, notifying the parties and or their representatives of the new hearing date. The record reflects that the United States Postal Service delivered the hearing notices to the parties' addresses of record on February 22, 2003.

On the date of the hearing, Monday, March 10, 2003, the tenant contacted the Commission stating that due to illness she would not attend the scheduled hearing. The Commission convened the hearing at the time indicated in the February 21, 2003 Notice of Hearing. The housing provider, Philip Graham, appeared with counsel; the tenant failed to appear. The Commission informed the housing provider that the tenant contacted the Commission's staff, asserted that she was ill, and stated that she would not attend the hearing. The housing provider made an oral motion to dismiss the tenant's appeal, because of her failure to appear at the Commission hearing. The Commission took the housing provider's motion under advisement, and received oral argument on the issues raised in the housing provider's notice of appeal.

On March 20, 2003, the tenant filed a motion to continue the hearing which was held on March 10, 2003. Attached to the motion was a letter from the tenant's doctor dated March 11, 2003. The tenant's doctor stated that the tenant was unable to attend the March 10, 2003 hearing, due to an unspecified illness.

By order dated April 24, 2003, the Commission granted the housing provider's motion to dismiss the tenant's appeal. See Redman v. Graham, TP 24,681 & TP 24,681A (RHC Apr. 24, 2003). The Commission dismissed the tenant's appeal, citing the District of Columbia Court of Appeals' (DCCA) decision in Stancil v. District of Columbia Rental Hous. Comm'n, 806 A.2d 622 (D.C. 2002). In Stancil, the DCCA affirmed a Commission decision dismissing an appeal, holding that the Commission has the authority to dismiss an appeal when the appellant received proper notice and failed to attend the scheduled hearing.

II. ISSUES ON APPEAL

The housing provider raised the following issues on appeal:

1. The decision clearly contained mathematical errors which would reduce the award from \$44,985.86 to \$2,495. The mathematical errors are more fully set forth in Respondent's Motion for Reconsideration which is attached hereto and incorporated herein.
2. The issue of retaliation was barred by the doctrine of *res judicata*. A final decision was previously issued in TP 27104 [sic] which was conclusion of the claim. The issue was raised and proven at the hearing of this petition.
3. The issue of abatement for diminished services were barred by the doctrine of *res judicata* and by having been precluded by entry of judgment by the Superior Court in case number SC-19359-00. The defense was raised and proved by the Respondent at the hearing on this matter.
4. The Hearing Examiner erred by including an award for a period of time subsequent to the filing of the complaint, when at the hearing he properly limited the evidence to the pre-filing condition of the accommodation.

Notice of Appeal at unnumbered pages 1-2.

III. DISCUSSION OF THE ISSUES

- A. Whether the decision of the hearing examiner clearly contained mathematical errors which would reduce the award from \$44,985.86 to \$2495.00.

The housing provider argues that the decision contains mathematical errors which led to the refund of \$44,985.86, to the tenant. The housing provider further argues that the refund excluding refunds for periods beyond the date of the tenant petition, March 15, 1999, should be no greater than \$2495.00.

The hearing examiner's calculation of the reduction of services and/or facilities was computed in the following table (Table A):

A _____	B _____	C _____	D _____	E _____	F _____
Nature of Reduction	Duration of Reduction	Total Days of Violation	Monthly Value	Daily Value	Total Reduced Value
Flooding	2-1-98 to 8-15-98	196	\$100.00	\$3.33	\$653.00
Stairwell Garbage Etc.	8-16-98 to 10-28-98	64	\$220.00	\$7.33	\$469.00
Window Latch	10-29-98 to 11-7-98	10	\$245.00	\$8.17	\$82.00
Stairwell Garbage Etc.	11-8-98 to 1-22-98	15	\$220.00	\$7.33	\$110.00
Weather Stripping	11-23-98 to 5-16-01 ¹	905	\$270.00	\$9.00	\$8,145.00
Flooding Stairwell, Weather Stripping	5-17-01 to 5-10-02 ²	358	\$190.00	\$6.33	\$2,266.00

Redman v. Graham, TP 24,681 & TP 24,681A (OAD Oct. 4, 2002) at 17-18. The hearing examiner's decision attempts to establish the reduced rent ceiling by subtracting the value of the reduction in services from the then current rent ceiling of \$829.00.

¹ This award for reduction of services and/or facilities is, in part, outside the filing date of the tenant petition, March 15, 1999.

² This award for reduction of services and/or facilities is outside the filing date of the tenant petition, March 15, 1999.

The hearing examiner illustrated the reduction of the rent ceiling in the following table (Table B):

A	B	C	D	E
Period of Time	Current Rent Ceiling	Value of Reduction in Services	Adjusted Rent Ceiling	Rent Charged
2-1-98 to 8-15-98	\$814.00	\$653.00	\$161.00	\$775.00
8-16-98 to 10-28-98	\$829.00	\$469.00	\$360.00	\$810.00
10-29-98 to 11-7-98	\$829.00	\$ 82.00	\$747.00	\$829.00
11-8-98 to 11-22-98	\$829.00	\$110.00	\$719.00	\$829.00
11-23-98 to 5-16-01	\$829.00	\$8,145.00	\$ 0.00	\$829.00
5-17-01 to 5-10-02	\$829.00	\$2,266.00	\$ 0.00	\$829.00

Id. at 18-19. It is in this table that the hearing examiner's ultimate errors in calculating the refund due the tenant begin. Column C of Table B, labeled "Value of Reduction in Services" represents the total value of reduced services for the entire period of the reduction in services and facilities. See Table A, Column F. In his calculation, the hearing examiner, as one example, used the total value of reduced services for flooding for the entire period (\$653.00) to reduce the rent ceiling, rather than his valuation of the monthly value of the reduced service for flooding in Table A, Column D (\$100.00).

In the case of the flooding which the hearing examiner found occurred from February 1, 1998 through August 15, 1998, the hearing examiner reduced the rent ceiling of \$814.00 by \$653.00, rather than \$100.00. That error resulted in a new rent ceiling of \$161.00 rather than \$714.00 ($\$814.00 - \$100.00 = \$714.00$). The hearing examiner determined that the tenant's rent charged was \$775.00, and therefore erroneously

concluded that she was due a refund of \$614.00 per month, rather than the correct amount of the overcharge \$61.00 per month ($\$775.00 - \$714.00 = \61.00), for the reduction of services and/or facilities due to flooding for that period. The hearing examiner then mistakenly concluded that the tenant was due a refund of \$4298.00 ($\$614.00 \times 7 = \4298.00), rather than the correct amount of \$427.00 ($\$61.00 \times 7 \text{ months} = \427.00) for that period. The hearing examiner repeated this error throughout Table B, which led to his erroneous calculation of the tenant's refund in the following table (Table C):

A	B	C	D
Date of Overcharge	Amount of Overcharge	Length of Overcharge	Refund Amount
2-1-98 to 8-15-98	\$614.00	7 months	\$4,298.00
8-16-98 to 10-28-98	\$341.00	3 months	\$1,023.00
10-29-98 to 11-7-98	\$82.00	10 days	\$ 27.00
11-8-98 to 11-22-98	\$110.00	15 days	\$ 55.00
11-23-98 to 5-16-01	\$829.00	30 months	\$24,870.00
5-17-01 to 5-10-02	\$829.00	12 months	<u>\$9,948.00</u>
Total			\$40,221.00

Redman v. Graham, TP 24,681 & TP 24,681A (OAD Oct. 4, 2002) at 19.

Pursuant to D.C. OFFICIAL CODE § 42-3502.11 (2001), the Rent Administrator may increase or decrease the rent ceiling, as applicable to reflect the changes in the services or facilities. In addition, the Act provides:

Any person who ... (2) substantially reduces or eliminates related services previously provided for a rental unit shall be held liable by the Rent Administrator or Rental Housing Commission ... for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or

for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

D.C. OFFICIAL CODE § 42-3509.01(a) (2001). “The housing provider is liable for a rent refund only if the rent charged is higher than the reduced rent ceiling. Where the rent actually charged is equal to or lower than the reduced rent ceiling, there was no excess rent collected and no refund is required.” Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000), citing Hiatt Place P’ship v. Hiatt Place Tenants’ Ass’n, TP 21,149 (RHC May 1, 1991).

The hearing examiner erred in his calculation of a rent refund to the tenant when he used the total dollar value of reduced services and/or facilities for the entire period of the reduction, rather than the monthly value he placed on each reduction of services and facilities. Therefore, in correcting his calculation, the hearing examiner should apply the following standard: 1) determine the tenant's rent ceiling for the period in question; 2) place a value on the decreased services and/or facilities per month; 3) reduce the rent ceiling for the period in question by the amount of the monthly value of reduced services and/or facilities, thereby creating a “new” rent ceiling; 4) determine the amount of the monthly rent charged; and 5) determine whether the monthly rent charged was higher than the “new” rent ceiling. See Kemp, at 10-11. Therefore, the decision of the hearing examiner is reversed and remanded for a recalculation of the rent refund.

The Commission notes the hearing examiner committed plain error³ when he calculated the interest on the rent refund. The hearing examiner erred by using the total amount of the rent overcharge held by the housing provider rather than a separate,

³ The Commission’s rule, 14 DCMR § 3807.4 (1991) provides: “Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error.”

descending, calculation for each month that the rent overcharge was held by the housing provider. Interest is calculated by multiplying the overcharge by the number of months the housing provider held the rent overcharge, by the judgment interest rate used by the Superior Court of the District of Columbia on the date that the hearing examiner issued the decision and order. 14 DCMR § 3826.3 (1998); see also Joseph v. Heidary, TP 27,136 (RHC July 29, 2003); Redmond v. Majerle Mgmt., Inc., TP 23,146 (RHC Mar. 26, 2002); The Rittenhouse, LLC v. Campbell, TP 25,093 (RHC Dec. 17, 2002).

Therefore, the interest calculation in the decision and order is reversed and the decision is remanded for a recalculation of the interest due the tenant on the corrected rent refund.

Accordingly, the decision of the hearing examiner is reversed. The decision is remanded for a recalculation of the rent refund awarded the tenant and a recalculation of the interest due the tenant. The award of a refund, if any, is further subject to the hearing examiner's decision regarding the effect of the housing provider's defense of res judicata as a result of the decision of the Superior Court of the District of Columbia Civil Division, Small Claims and Conciliation Branch in SC-19359-00. See Section III, C infra.

B. Whether the hearing examiner erred when he found that the housing provider retaliated against the tenant in that, a final decision was previously issued in TP 27,104, which was preclusion of the claim, and therefore, barred by the doctrine of res judicata.

The housing provider argues that the hearing examiner erred when he found that the housing provider retaliated against the tenant. Further, the housing provider argues that the hearing examiner failed to rule on the preclusive effect of a prior OAD decision which determined that the tenant had failed to carry her burden of proof that any retaliation occurred. The housing provider asserts that a decision by OAD in TP 27,104,

was issued on April 10, 2002. The housing provider contends that the result of the April 10, 2002 decision in TP 27,104 was dismissal of the tenant's petition, alleging retaliation, with prejudice. Therefore, the housing provider asserts the tenant is barred from asserting claims against him by the doctrine of res judicata in TP 24,681 and TP 24,681A.

The Act, D.C. OFFICIAL CODE § 42-3505.02 (2001), prohibits a housing provider from retaliating against tenants who exercise one of several rights expressly enumerated within that section or by any other provision of law.⁴ In order to trigger the protection of § 42-3505.02, a tenant must perform one of the six listed actions. Thereafter, any apparent act of "threat or coercion" taken by the housing provider within the statutory time period of six months is presumed to be retaliation.⁵ To overcome the presumption,

⁴ D.C. OFFICIAL CODE § 42-3505.02(b) (2001) provides:

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:

- 1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;
- 2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
- 3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing of a violation of the housing regulations;
- 4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
- 5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or
- 6) Brought legal action against the housing provider.

⁵ "Retaliatory action," as it is defined under the statute, may take many forms, D.C. OFFICIAL CODE § 42-3505.02(a) (2001), provides in pertinent part:

Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience,

the housing provider must provide clear and convincing evidence to rebut the presumption of retaliatory action, beyond the defense that a law permitted the alleged retaliatory act. See De Szunyogh v. William C. Smith & Co., 604 A.2d 1 (D.C. 1992). Meaning that the housing provider has the burden of producing clear and convincing evidence that his action was not motivated by a retaliatory purpose. The housing provider may for example, rebut the presumption by showing that his actions were taken for an economic reason and not in response to a tenant's behavior.

In the instant case, the housing provider asserts that a prior decision of OAD, TP 27,104, which was decided on April 10, 2002, precludes a finding in this case that the housing provider retaliated against the tenant. The housing provider contends therefore that Hearing Examiner McCoy's finding of retaliation was barred by the doctrine of res judicata.

The evidence in the record reflects that Deborah A. Redman, the tenant in the instant case, filed TP 27,104, with RACD, on May 9, 2001. In her petition Ms. Redman alleged that Philip A. Graham, the housing provider in this case, violated section 502 of the Act, by directing retaliatory action against her for exercising her rights; and served on her a Notice to Vacate which violated the requirements of section 501 of the Act. An OAD hearing on the petition was held on October 1, 2001. Administrative Law Judge Lennox Simon conducted the OAD hearing. Judge Simon's decision and order was issued on April 10, 2002. In his decision, Judge Simon dismissed TP 27,104, after concluding as a matter of law:

violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

1. The Petitioner has failed to prove, by a preponderance of the evidence that the Respondent has retaliated against her, in violation of D.C. [Official] Code Section 42-3505.02 [(2001)].
2. The Petitioner has failed to prove, by a preponderance of the evidence, that the Respondent has served an illegal or invalid Notice to Vacate on her, in violation of D.C. [Official] Code Section 42-3505.01(a) [(2001)].

Redman v. Graham, TP 27,104 (OAD Apr. 10, 2002) at 7. The ALJ did not find the tenant proved the exercise of a right that triggered the presumption of retaliation. Id.

Tenant Petition 24,681A which alleged retaliation, based on a bad faith Notice to Vacate, was filed on December 8, 2000, with a decision by the Rent Administrator rendered on October 4, 2002. Tenant Petition 27,104, which also alleged retaliation, including an allegation of a bad faith Notice to Vacate, was filed on May 9, 2001 and the decision was issued on April 10, 2002.

The District of Columbia Court of Appeals set forth the conditions necessary for invocation of the doctrine of res judicata and the effect of the doctrine in Henderson v. Snider Bros., Inc., 439 A.2d 481, 485 (D.C. 1981). The court stated:

When the parties are the same, and the essence of the claim and the evidence necessary to establish it are the same, res judicata applies.

...

The doctrine of res judicata (direct estoppel) requires that a valid, final judgment when rendered on the merits be considered an absolute bar to subsequent actions based on the same claim or demand between the same parties. ... Under the doctrine of res judicata a judgment estops not only as to every ground of recovery of defense actually presented in the action, but also as to every ground which might have been presented. Cromwell v. County of Sac., 94 U.S. 351, 24 L. Ed. 195 (1878) (emphasis added).

In order to invoke the doctrine of res judicata, a valid, final judgment on the merits of the first case must be present. Newton Towers Ltd. P'ship v. Newton House Tenants Ass'n., TP 20,005 (RHC Feb. 1, 1988). In this case, the decision relied on by the

housing provider, Redman v. Graham, TP 27,104 (OAD Apr. 10, 2002), was a valid final judgment on the merits of the tenant's assertion that the housing provider retaliated against her. Res judicata is an affirmative defense that must be pleaded and proved by the party who invokes the doctrine. The housing provider argued at the hearing and presented evidence, Respondent's (R) Exhibit (Exh.) 34, that a final judgment on the merits of the tenant's claim of retaliation had been rendered by OAD on April 10, 2002, prior to the decision in the instant case, that the present claim is the same as the claim which was raised in TP 27,104, and that the tenant was a party in the prior case. See Patton v. Klein, 746 A.2d 866, 870 (D.C. 1999) (citations omitted), cited in Frank v. The BARAC Co., TP 25,001 (RHC Aug. 20, 2002).

Accordingly, the hearing examiner's conclusion of law numbered five (5), that the tenant proved by a preponderance of the evidence that the housing provider retaliated against her is reversed. Further, the hearing examiner's order that the housing provider pay a \$1500.00 penalty for retaliation is also reversed.

C. **Whether the hearing examiner erred when he failed to conclude that the issue of reduction of services and facilities was barred by the doctrine of *res judicata* as a result of an entry of judgment by the Superior Court in case number SC-19359-00.**

At the OAD hearing, the housing provider raised the affirmative defense of res judicata.⁶ The housing provider argued that as a result of the judgments of the Superior Court of the District of Columbia Civil Division, Landlord-Tenant Branch in L&T-041960-98, and the Small Claims and Conciliation Branch in SC-19359-00, the tenant was barred from relitigating the merits of her claims regarding reduction of services and facilities. OAD Hearing CD April 5, 2002.

⁶ See Discussion Issue B.

In his decision and order the hearing examiner addressed the effect of the Superior Court's ruling in L&T-041960-98. Redman v. Graham, TP 24,681 & TP 24,681A (OAD Oct. 4, 2002) at 3-4. However, he failed to consider the result of the decision by the Superior Court Small Claims and Conciliation Branch in SC-19359-00. At the hearing, the housing provider's testimony was that he received a judgment from the court in January 2001 regarding the same claims brought by the tenant in TP 24,681. The housing provider presented evidence showing that the tenant's appeal of the judgment in the housing provider's favor was dismissed. Respondent's Exhs. 5-7.

Hearing examiners are not required to summarize or address testimony or evidence that is not material to the findings of fact. Tenants of 329 Rhode Island Ave., N.E. v. Auxier, HP 10,702 (RHC Dec. 1, 1988). However, the DCAPA, D.C. OFFICIAL CODE § 2-509(e) (2001), requires that the hearing examiner make findings of fact and conclusions of law on each contested issue of fact. See Braddock v. Smith, 711 A.2d 835, 838 (D.C. 1998); Citizen's Ass'n of Georgetown v. District of Columbia Zoning Comm'n, 402 A.2d 36 (D.C. 1979); see also Washington Realty Co. v. 3030 30th St. Tenant Ass'n, TP 20,749 (RHC Jan. 30, 1991), cited in Redmond v. Majerle Mgmt., TP 23,146 (RHC Oct. 25, 1995).

In the instant case, the hearing examiner failed to make a finding of fact and a conclusion of law on the housing provider's defense to the tenant's claim of reduction of services and/or facilities. Accordingly, this issue is remanded to the hearing examiner for findings of fact and conclusions of law regarding the evidence presented by the housing provider on the issue of whether the Superior Court Small Claims and Conciliation

Branch decision in SC-19359-00, precludes the tenant from litigating identical issues in TP 24,681.

D. Whether the hearing examiner erred when he included in his decision and order an award of a rent refund for a period of time subsequent to the filing of the tenant petition.

In his decision and order the hearing examiner, in computing the amount of refund due the tenant, includes periods of time after the tenant filed her petition, on March 15, 1999. Specifically, the hearing examiner awards the tenant a refund for lack of weather stripping in her unit from November 11, 1998 through May 10, 2002. Further, the hearing examiner awarded a rent refund for flooding in the stairwell at the accommodation from May 17, 2001 through May 10, 2002. Redman v. Graham, TP 24,681 & TP 24,681A (OAD Oct. 4, 2002) at 18.

On appeal to the Commission, the housing provider argues that the abatement period in the hearing examiner's decision and order extends beyond the date on which the tenant filed her tenant petition, March 15, 1999. The housing provider also argued that the hearing examiner limited the evidence at the hearing to events up to and including March 15, 1999.

The Commission has previously held:

When 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 for [the] improper rent adjustment may go up to the date the record closed, which is usually the hearing date.

Jenkins v. Johnson, TP 23,410 (RHC Jan. 4, 1995), cited in Redmond v. Majerle Mgmt., Inc., TP 23,146 (RHC Mar. 26, 2002). In the instant case, however, the examiner ruled, at the hearing, that only evidence up to the date of the filing of the tenant petition, March

15, 1999, would be accepted. As a result of the examiner's ruling, both the tenant and the housing provider were deprived of the opportunity to put on the record either evidence of continuing reductions in services and/or facilities or defenses to the allegations. The Commission may reverse a decision of the Rent Administrator, which it determines to be arbitrary, capricious, an abuse of discretion, not in accordance with the provisions of the Act, or unsupported by substantial evidence in the record. D.C. OFFICIAL CODE § 42-3502.16(h) (2001). See South Dakota Ave. Tenants' Ass'n v. Cowan, TP 23,085 (RHC Sept. 14, 1998). Because the hearing examiner limited the evidence presented at the hearing, the substantial evidence in the record does not support his decision to award the tenant rent refunds for reductions in services and/or facilities for the period beyond March 15, 1999.

Accordingly, the decision of the hearing examiner awarding the tenant rent refunds for periods of time beyond the date of the tenant petition is reversed. The decision is remanded to the Rent Administrator for a recalculation of the rent refund excluding any amount awarded for the period beyond March 15, 1999.

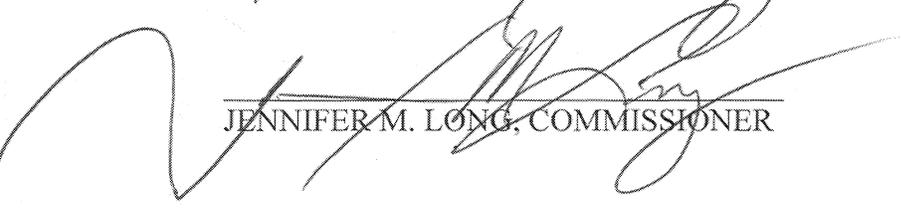
IV. CONCLUSION

The decision of the hearing examiner awarding the tenant a rent refund is reversed and the decision is remanded for a recalculation of the rent refund awarded the tenant and a recalculation of the interest due the tenant in accordance with the procedures set out in this decision. The award of a rent refund is subject to the hearing examiner's decision regarding the effect of the housing provider's defense of res judicata as a result of the decision of the Superior Court in SC-19359-00. The hearing examiner's conclusion of law numbered five (5), concluding that the tenant proved by a preponderance of the

evidence that the housing provider retaliated against the tenant is reversed. Further, the hearing examiner's order that the housing provider pay a \$1500.00 penalty for retaliation is also reversed. The decision is remanded to the hearing examiner for findings of fact and conclusions of law on the effect of the court's decision in SC-19359-00. Finally, the decision is remanded to the Rent Administrator for a recalculation of the rent refund excluding any amount awarded for the period beyond March 15, 1999.

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 District of Columbia 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 telephone 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 certify that a copy of the foregoing Decision and Order in TP 24,681 and TP 24,681A was mailed postage prepaid by priority mail, with delivery confirmation on this **1st day of July, 2004** to:

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