

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 25,034

In re: 4501 Connecticut Avenue, N.W., Unit 413

Ward Three (3)

CHARLES E. SMITH COMPANY
Housing Provider/Appellant

v.

ALICE LEE
Tenant/Appellee

DECISION AND ORDER

January 15, 2003

BANKS, CHAIRPERSON. This case is on appeal to the Rental Housing Commission from a decision and order issued by the Rent Administrator based on a petition filed in the Rental Accommodations and Conversion Division (RACD). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, 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 (DCMR), 14 DCMR §§ 3800-4399 (1991) govern the proceedings.

I. THE PROCEDURES

On July 25, 2000, Alice Lee, the Tenant, filed a tenant petition in RACD. She alleged in the petition that a rent increase was taken while her rental unit was not in substantial compliance with the housing regulations. However, she also wrote on the petition:

I moved in on Aug [sic] 1, 1997 at a monthly rent of \$957/mo. [sic]. My rent was then increased to \$980 mo [sic] on Nov [sic] 1, 1997. Over the past 3 years, my rent has been increased 5 times. The most current rent increase is \$100/mo [sic] for a monthly rent of \$1205. This is an increase of 26% in 3 years in a rent controlled building. The CPI has increased approximately – [sic] 6% over this time. In the past, I have asked in writing for proof of DCRA approval of my rent/ceiling increases. Charles E. Smith has never provided me any proof that DCRA has approved any of my rent/ceiling increases. I do not believe that all (if any) of my increases are in substantial compliance with the DC [sic] Housing regulations.¹

Tenant Petition at 3 & 6; Record (R.) at 3 & 6 (emphasis added).

The hearing on the petition was held on October 17, 2000. The Tenant amended the petition by deleting references to rent increases while housing code violations existed, and added to the petition the allegations written on the petition and quoted above, that the rent/ceiling increases were improper. Hearing Examiner Gerald Roper issued the decision and order on November 2, 2001, with the following text and findings of fact:

Based upon record evidence presented at the October 17, 2000 hearing, the Examiner rules that Petitioner's [Tenant's] claim, with respect to any irregularities in the rent ceilings or the monthly rent charged for her unit, have no merit, and that Petitioner [Tenant] has failed to meet her burden to establish that the rent ceilings for monthly rent charged filed with RACD for her unit are improper.

Petitioner [Tenant] presented no evidence nor a specific challenge that the five rent ceilings [sic] adjustments taken by Respondent [Housing Provider] for her unit has [sic] been taken other than as allowed by law.

OAD Decision at 10 (emphasis added).

Based on the record the Examiner concludes that Petitioner [Tenant] did not prove beyond a preponderance of the evidence² that the

¹ The Tenant's use of the words "rent/ceiling increases" are interpreted by the majority as referring to both rent increases (as found in findings of fact numbered 5, 7, 9, 11, and 14) and rent ceiling increases (as found in findings of fact 4, 6, 8, 10, and 13).

² There is no standard of proof "beyond a preponderance of the evidence." See 14 DCMR § 4003.3(c) (1991).

rent ceilings for her unit filed with RACD are improper. 14 DCMR Sect. 4003.1 (1991). Therefore, Petitioner's claim challenging the validity of the rent ceilings is denied and the motion to dismiss is granted.

Although Petitioner's [Tenant's] testimony included adjustments to the rent charge[] there was no specific challenge to the monthly rent increases that were implemented for Petitioner's [Tenant's] unit. Had there been such a challenge the Examiner would have applied 14 DCMR 4205.4(a)(4) which requires the Respondent [Housing Provider] to provide the date and authorization for the rent ceiling adjustment 'taken and perfected' in each notice of increase to the rent charged. In each rent charge increase Petitioner [Tenant] testified to during the period August 1, 1997 and [sic] July 25, 2000 the Respondent [Housing Provider] did not provided [sic] the date and authorization for the adjustments of general applicability that it took and perfected. (See, [sic] Tenant Notice of Increase of General Applicability, P. Exhibits 7,8,9,10 [sic]). Thus, the Respondent [Housing Provider] did not demonstrate nor to [sic] show their compliance with the Unitary Rent Ceiling Adjustment Act and the agency's regulation governing notice of the increase. See, [sic] D.C. Code Sect. 45-2518(h)(1) and 14 DCMR [sic] 4205.4. Also, see, [sic] Chibambo v. Lincoln Property Management [sic], TP 24,861 (RHC November [sic] 29, 2000). Accordingly, there can be no resolution of the rent charge issue since there was specific challenge raised by the Petitioner in her complaint or amended complaint.

OAD Decision at 11 (emphasis added).

Based on his analysis the hearing examiner made the following findings of fact:

1. The subject property is located at 4501 Connecticut Ave., N.W., unit # 413.
2. Alice Lee has resided at the subject premises since August 1, 1997 and is the Petitioner in this matter.
3. Charles E. Smith Company manages the subject property and is the Respondent in this matter.
4. At the inception of Petitioner's tenancy, a comparable unit vacancy rent ceiling increase was taken for her unit from \$2,412.00 to \$2,900.00.
5. Effective November 1, 1997, the monthly rents [sic] charge [sic] for Petitioner's unit was increased from \$957.00 to \$980.00 based upon a lease agreement with the Respondent.

6. Effective May 1, 1998, Respondent filed a 1.8% General Applicability rent ceiling increase, raising the rent ceiling for Petitioner's unit from \$2,900.00 to \$2,952.00.
7. Effective August 1, 1998, the monthly rent charge for Petitioner's unit was increased from \$980.00 to \$1,029.00.
8. Effective November 1, 1998, the rent ceiling for Petitioner's unit was increased from \$2,952.00 to \$2,967.00 based on a \$15.00 capital improvement surcharge approved by the Rent Administrator, on May 12, 1998, in CI 20,737.
9. Effective February 1, 1999, the monthly rent charges for Petitioner's unit was increased from \$1,029.00 to \$1,044.00.
10. On May 1, 1999, the rent ceiling for Petitioner's unit was increased from \$2,967.00 to \$2,997.00 based on a 1.0% increase of general applicability.
11. Effective August 1, 1999, the monthly rent charge for Petitioner's unit was increased from \$1,044.00 to \$1,104.00.
13. Effective May 1, 2000, the rent ceiling for Petitioner's unit was increased from \$2,997.00 to \$3,060.00 based on a 2.1% general applicability increase.³
14. Effective August 1, 2000, the monthly rents [sic] charge for Petitioner's unit was increased from \$1,104.00 to \$1,204.00.
15. At least 180 days elapsed between each rent increase for Petitioner's rent [sic] unit.

OAD Decision at 12.

The hearing examiner concluded:

1. The comparable unit vacancy rent ceiling increase taken for Petitioner's unit, as set forth in Findings [sic] of Fact #4, was taken in compliance with D.C. Code Sect. 45-2523(a)(2) [sic] and 14 DCMR 4207.5 [sic].
2. The general applicability rent ceiling increases taken for Petitioner's unit, as set forth in Findings of Fact #6, #10 and #13, were

³ The hearing examiner skipped one number between 11 and 13, and did not include a paragraph numbered 12.

implemented in compliance with D.C. Code Sect. 45-2516(b) and 14 DCMR 4204.10.

3. The rent ceiling surcharge taken for Petitioner's unit, as set forth in Findings [sic] of Fact #8 was implemented in compliance with D.C. Code Sect. 45-2520(a) [sic].
4. The increases in the monthly rent for Petitioner's unit, as set forth in Findings of Fact #5, #7, #9, #11, and #14, were not taken in compliance with D.C. Code Sect. 45-2518(h)(1) and 14 DCMR 4205.7 [sic]. (emphasis added.)
5. Petitioner failed to prove beyond a preponderance of the evidence that the rent ceilings and monthly rent charged filed with RACD for her unit were improper, pursuant to 14 DCMR 4003.1.

OAD Decision at 12 – 13.

On November 2, 2001, the hearing examiner dismissed the petition with prejudice. On November 15, 2001, the Housing Provider filed in OAD a motion for reconsideration, which was deemed denied because the hearing examiner did not rule on it.⁴ On December 13, 2001, the Housing Provider filed a notice of appeal from the hearing examiner's decision and order, and on March 11, 2002, the Commission held its hearing on the appeal.

II. THE APPEAL ISSUES

The Housing Provider's notice of appeal stated the following four (4) issues based on conclusion of law number four (4):

1. [Whether] it was error for the Rent Administrator to determine that the increases in the monthly rent for Appellee's apartment, as set forth in Findings of Fact Nos. 5, 7, 9, 11 and 14 and [sic] were not taken in compliance with D.C. Code § 45-2518(h)⁵ and 14 DCMR § 4205.7 (1998).

⁴ Pursuant to 14 DCMR § 4013.5 (1991), failure to rule on a motion for reconsideration within ten days, constitutes denial of the motion.

⁵ This section of the former D.C. CODE is now codified at D.C. OFFICIAL CODE § 42-3502.08(h) (2001).

2. [Whether] the Decision of the Rent Administrator, as it relates to Conclusion of Law No. 4 and the Findings of Fact set forth herein, was arbitrary, capricious and an abuse of discretion.
3. [Whether] the Decision of the Rent Administrator, as it relates to Conclusion of Law No. 4 and the Findings of Fact set forth therein, is not supported by the testimony or evidence presented at the hearing in this matter.
4. [Whether] the Decision of the Rent Administrator, as it relates to Conclusion of Law No. 4 and the Findings of Fact set forth therein, is erroneous as it does not comply with the provisions of the Unitary Rent Ceiling Adjustment Act. (emphasis added.)

III. THE COMMISSION'S MAJORITY DECISION

A. The Law

The Unitary Rent Ceiling Adjustment Act (Unitary Act), D.C. OFFICIAL CODE §§ 42-3502.08(h)(1)&(2) (2001), state:

[U]nless otherwise ordered by the Rent Administrator, each adjustment in rent charged permitted by this section may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment. If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.

Nothing in this subsection shall be construed to prevent a housing provider, at his or her election, from delaying the implementation of any rent ceiling adjustment, or from implementing less than the full amount of any rent ceiling adjustment. A rent ceiling adjustment, or any portion thereof, which remains unimplemented shall not expire and shall not be deemed forfeited or otherwise diminished.

The Commission's regulation, 14 DCMR § 4205.7 (1998), states:

Unless otherwise ordered by the Rent Administrator, each adjustment in rent charged may not exceed the amount of one (1) rent ceiling increase perfected but not implemented by the housing provider. (emphasis added.)

B. The Commission's Decision

The hearing examiner's conclusion number four (4) stated that the rent increases were not taken in conformity with the Unitary Act quoted above and 14 DCMR § 4205.7 (1998), which requires implementation of only one rent ceiling increase perfected but not implemented as an increase in the rent charged. Findings of Fact 5, 7, 9, 11, and 14, each described only one rent increase, therefore the subissue is whether each rent ceiling increase was not perfected prior to implementation as an increase of rent charged, in conformity with § 4205.7, and as stated in conclusion of law number four (4).

The findings of fact on appeal, as stated in appeal issue number one (1), are numbered 5, 7, 9, 11, and 14, which state:

5. Effective November 1, 1997, the monthly rents [sic] charge [sic] for Petitioner's unit was increased from \$957.00 to \$980.00 based upon a lease agreement with the Respondent.
7. Effective August 1, 1998, the monthly rent charge for Petitioner's unit was increased from \$980.00 to \$1,029.00.
9. Effective February 1, 1999, the monthly rent charge for Petitioner's unit was increased from \$1,029.00 to \$1,044.00.
11. Effective August 1, 1999, the monthly rent charge for Petitioner's unit was increased from, \$1,044.00 to \$1,104.00.
14. Effective August 1, 2000, the monthly rents [sic] charge for Petitioner's unit was increased from \$1,104.00 to \$1,204.00.

Conclusion of law number 4 states:

The increases in the monthly rent for Petitioner's unit, as set forth in Findings of Fact #5, #7, #9, #11, and #14, were not taken in compliance with D.C. Code Sect. 45-2518(h)(1) and 14 DCMR 4205.7 [sic].⁶ (emphasis added.)

⁶ Id.

Conclusions of law must rationally flow from the findings of fact. D.C. OFFICIAL CODE § 2-509(e) (2001), Metropolitan Poultry v. District of Columbia Dep't of Employment Servs., 706 A.2d 33 (D.C. 1998); Cruz v. District of Columbia Dep't of Employment Servs., 633 A.2d 66 (D.C. 1993). Conclusion of law numbered 4 does not rationally flow from the five findings listed in the notice of appeal, because the conclusion refers to the Act, D.C. OFFICIAL CODE § 45-3502.08(h)(1) (2001), and the rule related to perfection, 14 DCMR § 4205.7 (1998), without stating why the rent increases described in the findings were not taken in compliance with the specified section of the Act and the rule.

On review of the findings and conclusion, the majority of the Commission is in the dilemma of choosing, which is correct – the findings of fact or the appealed conclusion of law numbered four (4). That is not the proper function of a reviewing agency. The role of the reviewing agency is to determine whether the conclusions of law flow rationally from the findings of fact; whether the decision is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by the evidence. Meier v. District of Columbia Rental Accommodations Comm'n, 372 A.2d 566 (D.C. 1977). In this case, conclusion of law number four (4) does not flow rationally from the appealed findings of fact. Therefore, the majority of the Commission determined that conclusion of law number four (4) is arbitrary and capricious.

When the findings of fact do not rationally flow from the conclusion of law, the reviewing agency must remand for clarification from the hearing examiner. Wilson v. Hart, TP 24,319 (RHC June 17, 1998), citing George Washington Univ. Medical Hosp. v. District of Columbia Dep't of Employment Servs., 704 A.2d 1194 (D.C. 1997), Columbia

Realty Venture v. District of Columbia Rental Hous. Comm'n, 573 A.2d 362 (D.C. 1990). That is because “an appellate court may not assume the responsibility of the agency to make findings of fact, nor may it decide a case, in the absence of agency findings on the basis of inferences or hunches drawn from what a lawyer said or did not say.” Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1301 (D.C. 1990). See Majority’s Response to Dissent, p. 10, infra.

In addition, pursuant to 14 DCMR § 3807.4 (1991), the majority of the Commission noted plain error⁷ in the Rent Administrator’s decision where the hearing examiner stated the Housing Provider’s witness testified about specific “preserved” rent ceiling adjustments, including general applicability increases,⁸ OAD Decision at 9-10; and subsequently stated, in contradiction, that the Housing Provider did not provide the date and authorization for the adjustments of general applicability that the Housing Provider took and perfected. OAD Decision at 11. These conflicts must also be resolved by the hearing examiner on remand.

The majority of the Commission notes, pursuant to § 4205.7, there were no findings of fact on perfection of the rent ceiling adjustments, although the hearing examiner discussed perfection in the decision, when he stated the Housing Provider increased the rent charged based on preserved increases. OAD Decision at 9. See Sawyer Property Mgmt. v. Mitchell, TP 24,991 (RHC Oct. 31, 2002) (where the majority

⁷ See Proctor v. District of Columbia Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984).

⁸ D.C. OFFICIAL CODE § 42-3502.06 (2001) provides for the adjustment of general applicability.

of the Commission disallowed rent ceiling increases which were not perfected.)⁹ The Housing Provider raised perfection in appeal issue one (1) by citing to § 4205.7, which requires perfection for each rent ceiling increase implemented as rent charged.¹⁰

IV. CONCLUSION

As a result of the contradictions and conflicts, as well as the lack of findings of fact on perfection of the implemented rent ceiling adjustments, in the hearing examiner's decision and order, the Rent Administrator is urged to carefully review the issues in the petition and the evidence in the record, and issue a decision and order with findings of fact based on the issues in the petition and the evidence in the record; and issue conclusions of law that rationally flow from the findings of fact. A remand hearing is not ordered, because the existing record is complete for the remand proceedings. Wire Properties, Inc. v. District of Columbia Rental Hous. Comm'n, 476 A.2d 679, 682 (D.C. 1984). The issues in the notice of appeal are denied as moot, because the hearing examiner did not render a decision and order in accordance with the DCAPA, and it is impossible to apply the Act to the issues raised on appeal without rational conclusions of law that flow from the findings of fact.

MAJORITY'S RESPONSE TO DISSENT

The Commission held its hearing on March 11, 2002. The dissent ignored the statements of the Housing Provider's counsel at the Commission's hearing, where the following colloquy occurred:

CHAIRPERSON BANKS: May I ask you a question?

⁹ This citation is to the Commission's Order on Reconsideration, which significantly modified its original decision in Sawyer by overruling, in part, Lincoln Property Mgmt. v. Chibambo, TP 24,861 (Nov. 29, 2000).

¹⁰ See supra p. 6, where the text of § 4205.7 is quoted.

MR. ABRAHAM: Certainly.

CHAIRPERSON BANKS: With regard to conclusion of law number 4, which is on page 13 of this decision and order, the statement is a negative statement. Would your position be that should be a positive statement? That is, the word "not" should not be there?

MR. ABRAHAM: That's correct, Madame Chairperson.

CHAIRPERSON BANKS: And that's part of the case from your point of view?

MR. ABRAHAM: That would be the easiest way to deal with it. One could take out the word "not" or take out "not taken." If we wanted to make it flow with the others and just say "was/were implemented in compliance," or "were taken," so one can certainly strike out the word "not" and that would satisfy –

CHAIRPERSON BANKS: So the essence of your appeal is that you do not really challenge findings of fact numbers 5, 7, 9, 11, and 14?

MR. ABRAHAM: We're challenging the conclusion of law that says they were not taken in correct –

CHAIRPERSON BANKS: So those findings of fact, from your point of view, are based on record evidence and are correct?

MR. ABRAHAM: That's correct. I just wanted to –

CHAIRPERSON BANKS: So there is something twisted and perverse, from your point of view, that the findings of fact are correct, but the conclusions of law twisted around –

MR. ABRAHAM: That's correct.

CHAIRPERSON BANKS: -- to indicate it was incorrect?

MR. ABRAHAM: That's correct.

CHAIRPERSON BANKS: Not in compliance with the Act, mainly the Unitary Rent Ceiling Act, which you so properly cited?

MR. ABRAHAM: That's correct.

CHAIRPERSON BANKS: That's the essence of your case, isn't it?

MR. ABRAHAM. Exactly

RHC Hearing Transcript (Tr.) at 5-7 (emphasis added).

On page eight (8) of the majority's decision and order, it states:

Conclusion of law numbered 4 does not rationally flow from the five findings listed in the notice of appeal, because the conclusion refers to the Act, D.C. OFFICIAL CODE § 45-2518(h)(1) (2001), and the rule related to perfection, 14 DCMR § 4205.7 (1991), without stating why the rent increases described in the findings were not taken in compliance with the specified section of the Act and the rule.

On review of the findings and conclusion, the majority of the Commission is in the dilemma of choosing, which is correct – the findings of fact or the appealed conclusion of law numbered four (4). ... [T]he majority of the Commission determined that conclusion of law number four (4) is arbitrary and capricious.

The majority remanded this case to the hearing examiner to "... issue conclusions of law that rationally flow from the findings of fact." Majority decision at 9-10.

The dissent unnecessarily discusses the content of the tenant petition, the amended tenant petition, the hearing testimony, and whether the Tenant raised an issue related to rent or rent ceilings. Finally, the dissent offered a decision for each issue in the notice of appeal. However, at the Commission's hearing, as quoted above, counsel for the Housing Provider agreed with the Chairperson that the primary issue before the Commission was the conflict between the enumerated findings of fact, 5, 7, 9, 11, and 14, on the rent increases, and the non sequitur in conclusion of law numbered four (4) that those rent increases (not rent ceilings) were not taken in compliance with the Unitary Act and the regulation, 14 DCMR § 4205.7 (1998), which requires rent increases to be based on perfected rent ceilings. The OAD decision did not contain findings of fact that supported conclusion of law number four or that flowed rationally from the listed

findings of fact in conclusion of law number four. Consequently, the majority remands this case for proper findings of fact and conclusion of law based on the existing record.

We respectfully suggest that the dissent expanded this appeal beyond the statements of the Housing Provider's counsel at the Commission's hearing that conclusion of law number four (4) was not a logical conclusion after the findings of fact related to rent increases, which were contested issues before the hearing examiner. See quoted text, p. 2, supra. Notwithstanding the agreement between the Chairperson and counsel for the Housing Provider at the hearing, the Commission, an appeals agency, cannot make or correct the findings of fact for the hearing examiner. Meier v. District of Columbia Rental Accommodations Comm'n, 372 A.2d 566 (D.C. 1977); Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1301 (D.C. 1990).

Therefore, in conformity with case law and the DCAPA, the majority remanded this appeal for the hearing examiner to "issue conclusions of law that rationally flow from the findings of fact." Majority decision at 9.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER

LONG, COMMISSIONER, DISSENTING:

In the conclusion of its decision, the majority urged the Rent Administrator to carefully review the issues in the petition and the evidence in the record. The majority instructed the Rent Administrator to issue findings of fact and conclusions of law based

on the issues and evidence raised in the petition. Unfortunately, the majority misstated the sole allegation raised in the petition, and the majority raised issues and remanded the petition for findings of fact and conclusions of law on a rent increase claim that the tenant did not allege in the petition. The majority stated that the tenant alleged that the rent increases were improper. However, the tenant's sole allegation was that the rent ceiling for her unit was improper.

Initially, when the tenant filed her complaint, she alleged that the housing provider increased her rent, when her unit was not in substantial compliance with the housing regulations. In the section of the petition reserved for the tenant to provide the details of her claim, the tenant described rent increases and her request for proof that the agency approved the "rent/ceiling increases." Tenant Petition at 3.

When the hearing examiner convened the hearing, the housing provider's attorney sought clarification of the claim raised in the petition and the handwritten text that the tenant inserted under the claim that the rent increase was taken while her unit was not in substantial compliance with the housing code. Hearing Examiner Roper discussed the allegation and the text with the tenant, because the text that described rent and rent ceiling increases, did not relate to a claim concerning housing code violations. The hearing examiner reviewed each of the possible allegations that appeared on the Rent Administrator's tenant petition form. After the hearing examiner read each, the tenant stated that the most appropriate claim was whether the rent ceiling filed with the Rental Accommodations and Conversion Division was proper. See OAD Hearing Tape (Oct. 17, 2000). Thereafter, the tenant stated the following:

When I checked that box [on the tenant petition] I was thinking that meant that [the] rent increase was not in substantial compliance with

the D.C. law. But what I was preparing for was to talk about the rent ceilings that have been taken and the timeliness of them and whether or not the rent ceiling increases were in compliance with the law. That's what I prepared for.

OAD Hearing Tape (Oct. 17, 2000). The hearing examiner asked, "Do you know the law and are you prepared to go forward with that? Do you feel comfortable with that?" In response to the hearing examiner's questions, the tenant stated, "Yeah, that's what I prepared for." Id. Subsequently, the hearing examiner stated, "I am amending your petition to reflect the issue of whether or not the rent ceiling filed with the Rental Accommodations and Conversion Division for your unit is proper." Id. The housing provider's attorney stated that he did not object to the amendment.¹¹

When the hearing examiner issued the decision and order he stated that the issue was "[w]hether the rent ceiling filed with RACD for Petitioner's unit is improper?" OAD Decision at 2. In addition, the hearing examiner stated, "Although Petitioner's testimony included arguments to the rent charged there was no specific challenge to the monthly rent increases that were implemented for Petitioner's unit. ... Accordingly, there can be no resolution of the rent charge issue since there was [sic] specific challenge raised by the Petitioner in her complaint or amended complaint." Id. at 11. The tenant did not appeal any aspect of the hearing examiner's decision.

¹¹ The DCAPA, D.C. OFFICIAL CODE § 2-509(a) (2001), provides:

In any contested case, all parties thereto shall be given reasonable notice of the afforded hearing by the Mayor or the agency, as the case may be. The notice shall state the time, place, and issues involved, but if, by reason of the nature of the proceeding, the Mayor or the agency determines that the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present evidence and argument with respect thereto. (emphasis added).

In the face of statements by the tenant and the hearing examiner that the sole claim raised in the petition concerned the propriety of the rent ceiling, the majority stated that the “[t]enant amended the petition by deleting references to rent increases while housing code violations existed, and added to the petition the allegations written on the petition and quoted above, that the rent increases were improper.” Majority Decision at 2 (emphasis added). More troubling, however, is the majority’s remand for findings of fact and conclusions of law concerning the rent increases, which were not raised as claims in the amended petition. In addition, the majority improperly raised several subissues. The majority stated, “Findings of Fact 5, 7, 9, 11, and 14, each describe only one rent increase, therefore the subissue is whether each rent ceiling increase was not perfected prior to implementation as an increase of rent charged, in conformity with § 4205.7, and as stated in conclusion of law number four (4).” Majority Decision at 7.

The Commission’s review is limited to issues raised by the parties in the notice of appeal.¹² 14 DCMR § 3807.4 (1991). The tenant did not file a notice of appeal, and the housing provider did not raise an issue concerning the perfection of each rent ceiling adjustment that it utilized to increase the tenant’s rent. The majority indicated that the “[h]ousing [p]rovider raised perfection in appeal issue one (1) by citing to § 4205.7, which requires perfection of each rent ceiling increase implemented as rent charged.” Majority Decision at 10. This appears to be an overbroad interpretation of Issue 1. The housing provider merely recited § 4205.7, which the hearing examiner cited in Conclusion of Law 4. The housing provider alleged that the hearing examiner erred

¹² During the appeal process, parties and their attorneys file briefs and present oral arguments to explain, clarify, and elucidate issues raised in the notice of appeal. While briefs and oral argument aid the Commission in rendering its decision, the statements of counsel during the hearing, particularly in response to questions by the Commission, cannot supplant the issues raised in the notice of appeal.

when he determined that the rent increases were not taken in compliance with § 4205.7.

Notice of Appeal at 1. The housing provider did not raise an issue concerning the perfection of its rent ceilings, arguably because the housing provider prevailed on the claim concerning the tenant's rent ceiling. The majority's holding that the housing provider raised an issue concerning perfection of its rent ceilings is tantamount to holding that the housing provider raised an issue that is against the housing provider's interest.

Findings of Fact 5, 7, 9, 11, and 14, which the hearing examiner referenced in Conclusion of Law 4, concern five rent increases that the housing provider implemented. The hearing examiner found, as a matter of fact, that the housing provider implemented the rent increases. The hearing examiner simply found that the housing provider increased the tenant's rent on November 1, 1997, August 1, 1998, February 1, 1999, August 1, 1999, August 1, 2000. He did not find that the increases were taken in accordance with the provisions of the Act. The hearing examiner stated, "there can be no resolution of the rent charge issue since there was [no] specific challenge raised by the Petitioner in her complaint or amended complaint." OAD Decision at 11. Since the propriety of the rent increases was not a contested issue, the hearing examiner was not required to issue findings of fact and conclusions of law concerning the rent increases. See DCAPA, D.C. OFFICIAL CODE § 2-509(e) (2001) (providing that the "findings of fact and conclusions of law shall consist of a concise statement of the conclusions upon each contested issue of fact.") (emphasis added).

The majority has based its decision upon the premise that "Conclusion of law numbered 4 does not rationally flow from the five findings" Majority Decision at 8. The majority stated that "[o]n review the majority of the Commission is in the dilemma

of choosing, which is correct – the findings of fact or the appealed conclusion of law numbered four (4).” Id. However, there is no inherent contradiction. The hearing examiner simply found, as a matter of fact, that the housing provider increased the tenant’s rent on five separate occasions. He did not find that the rent increases were valid. Consequently, when the hearing examiner concluded, as a matter of law, that the rent increases were not taken in accordance with the law, there was no contradiction. He did not find that the rent increases were taken in accordance with the law and then conclude as a matter of law that the rent increases were invalid. The hearing examiner’s error, as detailed below, was in ruling upon the rent increases, which were not issues that the tenant ultimately raised in the amended tenant petition.

When the hearing examiner composed the findings of fact, he listed each rent and rent ceiling adjustment that the housing provider implemented during the statutory period covered by the petition. Thereafter, the hearing examiner issued a conclusion of law concerning the propriety of each rent ceiling adjustment. In Conclusion of Law 1, the hearing examiner concluded that the housing provider implemented the vacancy rent ceiling adjustment in accordance with D.C. OFFICIAL CODE § 42-3502.13(a)(2) (2001) and 14 DCMR § 4207.5 (1991), which prescribe the procedures for implementing a vacancy adjustment. In Conclusion of Law 2, the hearing examiner stated that the rent ceiling adjustments of general applicability were in accordance with D.C. OFFICIAL CODE § 42-3502.06(b) (2001) and 14 DCMR § 4204.10 (1991). Finally, in Conclusion of Law 3, the hearing examiner held that the housing provider implemented a capital improvement rent ceiling surcharge in compliance with D.C. OFFICIAL CODE § 42-3502.10 (2001).

The hearing examiner concluded, as a matter of law, that the housing provider implemented each rent ceiling adjustment in accordance with the applicable provisions of the Act and the regulations. In so doing, the hearing examiner addressed the only claim that the tenant alleged in the petition. Neither the tenant nor the housing provider appealed the hearing examiner's ruling concerning the rent ceiling adjustments. Consequently, the rulings are not subject to review.

In Conclusion of Law 4, the hearing examiner found that the "increases in the monthly rent for the [tenant's] unit, as set forth in Findings of Fact #5, #7, #9, #11, and #14, were not taken in compliance with [D.C. OFFICIAL CODE § 42-3502.08(h)(1)] and 14 DCMR 4205.7." OAD Decision at 13. On appeal, the housing provider argues that it was improper for the hearing examiner to determine that the monthly rent increases were not taken in accordance with § 42-3502.08(h)(1) and 14 DCMR § 4205.7; the hearing examiner's decision as it relates to Conclusion of Law 4 was arbitrary, capricious, and an abuse of discretion; the decision was unsupported by the evidence; and the decision, as it related to Conclusion of Law 4, did not comply with the provisions of the Unitary Rent Ceiling Adjustment Act.

The first issue raised on appeal was whether the hearing examiner erred when he determined that the monthly rent increases as set forth in Findings of Fact 5, 7, 9, 11, and 14 were not taken in compliance with D.C. OFFICIAL CODE § 42-3502.08(h)(1) (2001) and 14 DCMR § 4205.7 (1998). The Commission could have resolved this issue by holding that it was improper for the hearing examiner to determine that the rent increases were improper, because the tenant did not challenge the rent increases in the amended tenant petition.

The Commission could have resolved the second issue in the following manner: “The decision of the Rent Administrator, as it relates to Conclusion of Law No. 4 and Findings of Fact 5, 7, 9, 11, and 14 was arbitrary, capricious, and an abuse of discretion,”¹³ because the rent increases were not raised as claims in the tenant petition. Since the rent increases were not contested issues, the housing provider was under no obligation to defend the rent increases. See Stitt v. Outten, TP 22,809 (RHC Aug. 8, 1996) (holding that the hearing examiner erred when she issued findings of fact on a claim that the tenant did not raise; and the housing provider, therefore, did not have notice that a defense to the claim was required.) “[N]otice is consistent with the requirements of fundamental due process [when] the proceeding is one at which legal duties or privileges are to be adjudicated.” Hotel Assoc. of Washington, D.C. v. District of Columbia Minimum Wage and Industrial Safety Bd., 318 A.2d 294, 305 (D.C. 1974).

When the tenant rested her case, the housing provider moved to dismiss the tenant petition because the tenant did not prove her only claim, which was that the rent ceiling on file with the agency was improper. See OAD Hearing Tape (Oct. 17, 2000). In the decision and order the hearing examiner dismissed the petition, with prejudice, because the tenant did not “prove beyond [sic] a preponderance of the evidence that the rent ceilings and monthly rent charged filed with RACD for her unit were improper, pursuant to 14 DCMR § 4003.1.” OAD Decision at 13, Conclusion of Law 5. Consequently, the hearing examiner’s ruling, in Conclusion of Law 4, that the rent increases were not taken in compliance with D.C. OFFICIAL CODE § 42-3502.08(h)(1) (2001) and 14 DCMR § 4205.7 (1998) was arbitrary and capricious.

¹³ Notice of Appeal at 2.

Instead of resolving the issues that the housing provider raised, the majority converted the underlying claim from one involving the tenant's rent ceiling to a claim concerning rent increases;¹⁴ raised issues concerning the perfection of rent ceiling increases, which neither party raised;¹⁵ and remanded the petition for findings of fact and conclusions of law concerning the perfection of the rent ceiling adjustments. The remand will require the hearing examiner to explore claims that neither party raised and issue findings of fact and conclusions of law concerning issues and subissues that the majority created.

Accordingly, I respectfully dissent.



JENNIFER M. LONG, COMMISSIONER

¹⁴ See Sawyer Property Mgmt. v. Mitchell, TP 24,991 (RHC Oct. 31, 2002) (Long, Comm'r, dissenting) appeal filed sub nom. Sawyer Property Mgmt. v. District of Columbia Rental Hous. Comm'n, No. 02-AA-1362 (D.C. filed Dec. 6, 2002), where, despite the tenant's challenge to the rent and the housing provider's appeal of the hearing examiner's ruling concerning the rent, the majority altered the issue on appeal and transformed the case from one involving the rent to one concerning the rent ceiling.

¹⁵ The Commission's review is limited to the issues raised in the notice of appeal. However, 14 DCMR § 3807.4 (1991) empowers the Commission to correct plain error. When the majority raised an issue concerning the perfection of rent ceiling adjustments, the majority exceeded its authority to correct plain error, because the issue did not constitute plain error. See Majority Decision at 9. The hearing examiner concluded, as a matter of law, that the tenant did not prove that the rent ceilings were improper. Since neither the tenant nor the housing provider appealed this ruling, the Commission was not empowered to raise an issue concerning the tenant's rent ceiling. See Noori v. Whitten, TPs 27,045 & 046 (RHC Sept. 13, 2002) (Long, Comm'r, dissenting) (stating that the majority exceeded its authority to correct plain error and improperly reviewed an issue that was not raised on appeal).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing decision and order in TP 25,034 was mailed by priority mail, with confirmation of delivery postage prepaid this **15th day of January, 2003**, to:

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