DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 25,047

In re: 6101 16th Street, N.W., Unit 901

Ward Four (4)

WILLETE COLEMAN
Tenant/Appellant

v.

RITTENHOUSE, LLC, ET AL.
Housing Providers/Appellees

ORDER ON MOTION FOR RECONSIDERATION

June 24, 2002

LONG, COMMISSIONER. On April 30, 2002, the District of Columbia Rental Housing Commission (Commission) issued a decision and order in TP 25,047. The Commission remanded the petition to the Rent Administrator, because the hearing examiner failed to record the entire proceeding. On May 13, 2002, the housing provider, through counsel, filed a motion for reconsideration of the Commission's decision and order. Pursuant to 14 DCMR § 3823.3 (1991), the Commission must grant the motion for reconsideration, deny the motion, or enlarge the time for a later disposition of the motion within fifteen days of the filing date. In accordance with § 3823.3, the Commission enlarged the time to June 24, 2002 for the disposition of the motion for reconsideration. See Coleman v. Rittenhouse LLC, TP 25,047 (RHC May 22, 2002).

I. ISSUES ON RECONSIDERATION

In support of the motion for reconsideration, the housing provider made the following arguments:

1. The hearing examiner did not base any of the findings of fact or conclusions of law in his decision on any evidence presented off the record.

2. The tenant did not object at the hearing to the hearing examiner permitting an "off the record" discussion.

3. The tenant did not raise this issue in her notice of appeal, and the Commission should not have considered it.

Motion for Reconsideration at 1.

II. DISCUSSION

A. Whether the tenant raised the hearing examiner's error of turning off the tape recorder as an issue in the notice of appeal.

In the motion for reconsideration, the housing provider argues that the Commission erred when it considered the hearing examiner's failure to record the entire proceeding, because the tenant did not raise the issue in the notice of appeal. The Commission denies the housing provider's motion on this issue, because the tenant raised the issue in the notice of appeal and developed the issue in the brief filed in support of the appeal.

The tenant filed a notice of appeal in accordance with 14 DCMR § 3802.5 (1991), which requires the tenant to provide a clear and concise statement of the alleged errors in the Rent Administrator's decision. In the notice of appeal, the tenant raised the following germane issues:

> 1. The hearing examiner erroneously concluded in the **DECISION & ORDER** that I failed to "introduce into evidence the rent increase notices for either the September 1, 1999 or March 1, 2000 adjustments or any other evidence as to the amount of the monthly increases that were implemented for her unit on each date." Therefore, Finding of Fact 7 and Conclusions of Law 3 and 4 should be reversed, and the case remanded to the Hearing Examiner with directions to find in favor of the Tenant/Petitioner.

> 3. The hearing examiner committed plain error in a decision that violates the D.C. Administrative Procedure Act, 1 [sic] D.C. Code § 1501 et seq.
>
> 5. The tenant/respondent [sic] files this Notice of Appeal with the Rental Housing Commission since the errors of law and fact violate the District of Columbia Administrative Procedure Act, 1 [sic] D.C. Code § 1501 et seq.
>
> 8. Did the hearing examiner commit reversible error in Finding of Fact 7 and Conclusions of Law 3 and 4 by concluding that the Tenant/Petitioner had not submitted evidence sufficient to show rent increases implemented for her unit on September 1, 1999 and March 1, 2000.

Notice of Appeal at 2-4. The tenant alleged error in the hearing examiner's finding that she failed to carry her burden of proof concerning the September 1, 1999 and March 1, 2000 rent increases.

In accordance with 14 DCMR § 3802.7 (1991), the tenant filed a brief in support of the issues that she raised in the notice of appeal. The tenant utilized the brief to repeat the issues raised in the notice of appeal and provide a detailed discussion of each issue. On the issue concerning the hearing examiner's error in finding that the tenant did not introduce the rent increase notices, the tenant wrote the following:

> Did the hearing examiner commit reversible error in Finding of Fact 7 and Conclusions of Law 3 and 4 by concluding that the Tenant/Petitioner had not submitted evidence sufficient to show rent increases implemented for her unit on September 1, 1999 and March 1, 2000.
>
> Petitioner asserts that she provided copies of notice of rent increases implemented for her unit on September 1, 1999 and March 1, 2000 on the first day of the hearing. I have listened to the tape of the proceedings of the first day of the hearing. Although nothing on that tape indicates that I handed in the two notices of rent increase, the reason nothing shows up on tape is that Hearing Examiner Roper turned it off to consider whether the parties could settle their differences. During that discussion, I served both Mr. Roper and the housing provider's attorney Eric von [sic] Salzen with copies of the two notices of rent increases for September 1, 1999, and March 1, 2000.

Tenant's Brief at 3 (emphasis added).

On appeal, the tenant alleged that the hearing examiner erred when he determined that she failed to carry her burden of proof concerning the September 1, 1999 and March 1, 2000 rent increases. In the brief submitted in support of the appeal, the tenant developed the issues by providing a detailed explanation of the hearing examiner's error. The explanation included the statement that "Hearing Examiner Roper turned it [recorder] off to consider whether the parties could settle their differences." The tenant's use of the brief to develop the issues raised in the notice of appeal was a permissible use of the brief. See Frye & Welch Assocs., P.C. v. District of Columbia Contract Appeals Bd., 664 A.2d 1230 (D.C. 1995); Joyner v. Jonathan Woodner Co., 479 A.2d 308 (D.C. 1984).

Accordingly, the housing provider's argument that the "hearing examiner's alleged error in turning off the tape recorder cannot be considered by the Commission, because the tenant did not raise this issue in her notice of appeal," is denied.

B. Whether the hearing examiner based any of the findings of fact or conclusions of law in his decision on any evidence presented off the record.

The housing provider, through counsel, concedes that the hearing examiner stopped the recording. However, the housing provider maintains that what occurred "while the tape recorder was turned off was not evidence, and the hearing examiner did not base his decision on it." Motion for Reconsideration at 4. The housing provider argues that the "hearing examiner did not err in turning off the tape recorder, because what happened while the tape recorder was turned off was not part of the 'proceeding' for

which a record is required, and the hearing examiner properly did not base his decision on anything that happened off the record." Id. at 3.

"We cannot accept the factual representations in the landlords' [motion for reconsideration] as to what happened at the [OAD] hearing. 'Appellate review is limited to matters appearing in the record before us, and we cannot base our review of errors upon statements of counsel which are unsupported by that record.'" Cohen v. District of Columbia Rental Hous. Comm'n, 496 A.2d 603, 607 (D.C. 1990) (quoting D.C. Transit Sys., Inc. v. Milton, 250 A.2d 549, 550 (D.C. 1969)).

The Commission's review is limited to the issues raised in the notice of appeal. See 14 DCMR § 3807.4 (1991). On appeal, the tenant challenged the hearing examiner's finding that she failed to carry her burden of proof concerning the rent increases. In the brief filed in support of the appeal, the tenant stated that the record did not reflect the submission of the relevant evidence, because the hearing examiner stopped the recording on the first day of the hearing to allow the parties to attempt to settle the case. The tenant maintains that she submitted the rent increase notices for September 1, 1999 and March 1, 2000 to the hearing examiner and the housing provider's attorney on the first day of the hearing.

When the Commission conducts its review, the Commission examines the record in order to determine whether the substantial record evidence supports the hearing examiner's decision. See D.C. OFFICIAL CODE § 42-3502.16(h) (2001). In the decision and order, the hearing examiner found that the tenant failed to carry her burden of proof concerning the amount of the rent increases. When the Commission reviewed the recording of the OAD hearing, the Commission found that the hearing examiner stopped

the recording to permit the parties to attempt to settle the case. In addition, when the hearing examiner resumed the recording, he referenced discussions that he and the parties held off the record.

When the Commission attempted to review the hearing examiner's finding that the tenant failed to carry her burden of proof concerning the September 1, 1999 and March 1, 2000 rent increases, the Commission discovered that the record was incomplete, because the hearing examiner failed to record the entire proceeding. Citing the DCAPA, D.C. OFFICIAL CODE § 2-509 (2001), 14 DCMR § 4006.1 (1991), and Commission precedent on this issue, the Commission held that the hearing examiner committed reversible error when he failed to record the entire proceeding.

The Act empowers the Commission to decide the issues on appeal based upon the substantial evidence that appears in the record of the proceedings before the Rent Administrator. When the record is incomplete, the Commission is unable to conduct its review. Burnett v. Sharma, TP 24,910 (RHC Oct. 3, 2000); Youssef v. Cowan, TP 22,784 (RHC Sept. 27, 2000); Dorchester House Assocs. v. Tenants of Dorchester House, CI 20,672 & TPs 22,558, 23,520, 23,909, 23,973 (RHC June 3, 1997).

On reconsideration, the housing provider maintains that what occurred when the recording ceased was not evidence. In addition, the housing provider's attorney indicated that he did not believe the tenant submitted the rent increase notices on the first day of the hearing. The tenant, on the other hand, maintains that she submitted the documents. The Commission, which is not empowered to make findings of fact or credibility determinations, cannot determine the veracity of the tenant's statement that she submitted the documents or the housing provider's position that she did not. Moreover, the

Commission cannot accept the housing provider's representation that the actions that occurred off the record were not part of the proceedings and did not constitute evidence. See Cohen, supra at 5.

For the foregoing reasons, the housing provider's assertion that the hearing examiner did not base his decision on any off the record discussions is denied.

C. Whether the tenant can complain on appeal about the off-the-record discussions, because she did not object to them at the hearing.

In the motion for reconsideration, the housing provider argues that the tenant cannot challenge the discussions that were not recorded, because she did not object to the discussions during the OAD hearing. The housing provider asserted that "[i]t is a fundamental principle of administrative law that a party cannot complain on appeal about an issue that he or she did not raise before the agency." Motion for Reconsideration at 6.

In support of its position, the housing provider cited the following District of Columbia Court of Appeals cases: Lenkin Co. Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Abolaji v. District of Columbia Taxicab Comm'n, 609 A.2d 671, 672 (D.C. 1992); Glenbrook Road Ass'n v. District of Columbia Bd. of Zoning Adjustment, 605 A.2d 22, 23 (D.C. 1992); and Bealer v. District of Columbia Rental Hous. Comm'n, 472 A.2d 901, 903 (D.C. 1984). In each of these cases, the Court held that failure to raise a claim at the agency level precluded review by the Court. Specifically in Lenkin and Bealer, the Court held that it could not consider issues that the parties failed to raise in the Commission. The Court's decisions, which precluded the Court's review of issues that the parties failed to raise at the agency level, do not hold that a party's failure to raise an issue at the OAD hearing precludes review by the Commission.

In addition to the DCCA cases, the housing provider cited cases where the Commission declined to review issues that the party failed to raise at the OAD hearing. The case upon which the housing provider primarily relies, Heard v. Estate of Anderson, TP 23,836 (RHC June 20, 1996), is distinguishable from the instant case. The relevant portion, which appears in the motion for reconsideration, is quoted below.

> Although the tenant/appellant had an opportunity to introduce into the record evidence of a private discussion between the [e]xaminer and an unidentified party, the tenant/appellant failed to raise, at the hearing procedures, any issue of ex parte communications.
>
> A tenant/appellant's failure to raise a particular issue at trial prevents consideration of the issue on appeal; only in an exceptional case where injustice might otherwise result will an appellate court be prompted to review questions of law which were not raised at trial.

Heard at 11 (citations omitted).

In the notice of appeal, the tenant alleged the following: "The hearing examiner erroneously concluded in the DECISION & ORDER that I failed to 'introduce into evidence the rent increase notices for either the September 1, 1999 or March 1, 2000 adjustments or any other evidence as to the amount of the monthly increases that were implemented for her unit on each date.'" Notice of Appeal at 1-2.

The decision in Heard does not control the instant case, because the tenant did not have an occasion to allege error until the hearing examiner issued the decision and order in which he found that the tenant failed to introduce the relevant evidence. In the brief filed in support of the appeal, the tenant alleges that she "followed instructions, handed the rent increase notices for [e]xhibit purposes to the Hearing Examiner and Mr. [V]on Salzen, and raised issues related to the improper rent ceilings and rents charged." Tenant's Brief at 3. In the notice of appeal, she states, "[t]he hearing examiner

erroneously concluded in the DECISION & ORDER" that she failed to introduce the rent increase notices. In essence, the tenant avers that she did not know that the documents were not in evidence until she received the decision and order. Accordingly, she had no basis on which to raise the issue during the OAD proceedings.

Moreover, parties have a right to a hearing in accordance with the Act and the provisions of § 4000. See 14 DCMR § 3903 (1991). The regulation, 14 DCMR § 4000.1 (1991), mandates that "[a]ll hearings shall be conducted in accordance with the DCAPA;" and § 4006.1 provides that the "entire proceedings of hearings and other matters shall be recorded on tape." (emphasis added). The hearing examiner, who is empowered by the Rent Administrator to conduct the hearing, bears the responsibility to hold the hearing in accordance with the laws governing the proceedings. A party, particularly a pro se tenant, does not bear the burden of instructing the hearing examiner to record the entire proceeding. When a party is aggrieved by a final decision issued by the hearing examiner, D.C. OFFICIAL CODE § 42-3502.16(h) (2001) and 14 DCMR § 3802.1 (1991) permit the party to obtain review by the Commission.

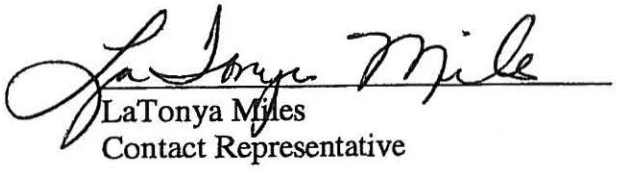
In accordance with the Act and § 3802.1, the tenant appealed the hearing examiner's final decision and order. The findings of fact and conclusions of law that she appealed, where not ripe for challenge until the hearing examiner issued the decision and order. Accordingly, the housing provider's argument that the tenant cannot complain on appeal about the off-the-record discussions, because she did not object to them at the hearing, is denied.

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Order on the Motion for Reconsideration in TP 25,047 by priority mail with delivery confirmation, postage prepaid, this 24th day of June 2002 to:

Willette Coleman
5135 Eighth Street, N.E.
Washington, D.C. 20011
Tenant

Eric Von Salzen, Esquire
Hogan & Hartson L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
Housing Provider's Attorney



LaTonya Miles
Contact Representative