DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 25,092

In re: 1801 16th Street, N.W., Unit 707

Ward One (1)

PINNACLE REALTY MANAGEMENT COMPANY
Housing Provider/Appellant

v.

JAMES VOLTZ
Tenant/Appellee

DECISION AND ORDER

March 4, 2004

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

I. PROCEDURAL HISTORY

James Voltz, who is a tenant at 1801 16th Street, N.W., unit 707, filed Tenant Petition (TP) 25,092 with the Rental Accommodations and Conversion Division (RACD) on September 19, 2000. In the petition, the tenant alleged that the housing provider, Pinnacle Realty Management Company (Pinnacle), permanently eliminated a service or

facility that was previously provided in connection with his rental unit. The tenant also raised a miscellaneous claim related to a waiting list at the housing accommodation.

On October 12, 2000, the housing provider, through counsel, filed a motion to dismiss the petition. The parties appeared before Hearing Examiner Thomas Word for an evidentiary hearing on November 7, 2000. The tenant appeared pro se, and the housing provider appeared with counsel, Richard Luchs. The housing provider's attorney moved to dismiss the petition, arguing that the statute of limitations barred the claims for a reduction in services and facilities. Hearing Examiner Word held that the statute of limitations barred the tenant's claims and dismissed the petition with prejudice. See Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (OAD Feb. 28, 2001). On March 16, 2001, the tenant filed a notice of appeal from the hearing examiner's decision, and the Commission held the appellate hearing on April 30, 2001. The Commission reversed the hearing examiner's ruling that the statute of limitations barred the tenant's claims and remanded the matter for a hearing de novo.

Hearing Examiner Henry McCoy convened the hearing de novo on December 10, 2001. The tenant appeared pro se. Myles Levin and Attorney Richard Luchs appeared on behalf of the housing provider. After evaluating the evidence, the hearing examiner issued the following findings of fact:

1. The Somerset House located at 1801 – 16th Street, NW had a roof deck until it was removed in July 1997 so repairs could be made to the roof.

2. Petitioner moved into 1801 – 16th Street, NW, apartment #707 in November 1997.

3. Petitioner moved into the apartment based on advertisements he saw and representations made by the former resident manager, Ms. Kelly, that the building had a roof deck and that it would be replaced.

4. Neither Petitioner's lease agreement nor the landlord registration form lists the roof deck.

5. The roof deck was offered and provided as an amenity available to all tenants in the building through payment of their monthly rent and without additional charge.

6. At lease signing and continuing until April 1, 1999, Petitioner's rent charge was $379.00 and his rent ceiling was $497.00.

7. The prior management company, Legum & Norman Realty, Inc., placed building materials on the roof for the reinstallation of the roof deck.

8. In the spring of 1998, Respondent assumed management of the housing accommodation.

9. On June 6, 1998, Respondent informed the tenants that the roof deck would not be replaced.

10. Respondent did not replace the roof deck and did not reduce Petitioner's rent by an amount to reflect the value of the roof deck.

11. The permanent elimination of the roof deck is valued at $85.00 per month.

12. Subtracting the monthly value of the roof deck from the rent ceiling creates a new legal rent ceiling for Petitioner's unit of $412.00 ($497.00 - $85.00 = $412.00).

13. Respondent has not filed an amended registration form reflecting elimination of the roof deck to establish a legal basis for future rent ceiling adjustments.

Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (OAD Aug. 22, 2002) at 3-4. After making the findings of fact, the hearing examiner issued the following conclusions of law:

1. In not replacing the roof deck, Respondent permanently eliminated a related facility provided in connection with Petitioner's rental unit in violation of D.C. [Official] Code § 42-3502.11.

2. Pursuant to D.C. [Official] Code § 42-3502.11, the legal rent ceiling for Apartment #707 at 1801 – 16th Street, NW, shall be $412.00.

3. Respondent's waiting list to select tenants for vacant apartments did not violate any provision of the Act as codified at D.C. [Official] Code § 42-2501.01 et seq.

Id. at 9. Hearing Examiner McCoy ordered the housing provider to refund $1697.74 to the tenant and pay a $1000.00 fine for permanently eliminating the roof deck. The housing provider appealed the hearing examiner's decision to the Commission on August 30, 2002. The Commission held the appellate hearing on February 20, 2003.

II. ISSUES ON APPEAL

The housing provider raised the following issues in the notice of appeal.

A. The Administrative Law Judge (ALJ)[1] erred in concluding that the roof deck was a related facility/service at the [b]uilding, as the same is not listed in the Registration Statement, and Petitioner's lease does not state that a roof deck is provided as such a facility or service.

B. The ALJ erred by not finding that the claim of reduction in services was barred by the applicable statute of limitations under the D.C. Rental Housing Act.

C. The Decision and Order is contrary to the evidence presented at the hearing below.

D. The ALJ improperly calculated the damages awarded to Petitioner.

E. The assessment of a fine by the Administrative Law Judge was arbitrary, capricious and erroneous.

Notice of Appeal at 1.

III. DISCUSSION

A. Whether the hearing examiner erred in concluding that the roof deck was a related facility/service at the housing accommodation, because it was not listed in the registration statement, and the

[1] Henry McCoy used the title of Hearing Examiner in the decision and order. As a result, the Commission uses the title, hearing examiner, when it refers to Mr. McCoy throughout the decision.

tenant's lease does not state that a roof deck is provided as such a facility or service.

The hearing examiner did not err when he concluded that the roof deck was a related facility at the housing accommodation. The substantial evidence introduced during the hearing supported the hearing examiner's decision. Moreover, Hearing Examiner McCoy's decision was consistent with prior Commission rulings on this issue.

Hearing Examiner McCoy took official notice of the decisions and orders in Marsh v. Pinnacle Realty Mgmt. Co., TP 24,827 (OAD Mar. 30, 2000)[2] and Pinnacle Realty Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000). Decision at 6. In addition, he admitted Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (RHC Sept. 28, 2001) as Tenant's Exhibit (T. Exh.) 1. Each of these cases concerned the removal of the roof deck at the housing accommodation that is the subject of the instant petition.

In Marsh, the tenant alleged that the housing provider permanently eliminated a facility provided in connection with her rental unit, when it removed the roof deck. The hearing examiner determined that the roof deck was a related facility in Marsh v. Pinnacle Realty Mgmt. Co., TP 24,827 (OAD Mar. 30, 2000). Pinnacle, the housing provider in Marsh and the instant case, appealed the Rent Administrator's decision to the Commission. After reviewing the record evidence and the statutory definition of a related facility,[3] the Commission affirmed the Rent Administrator's decision and held

---

[2] The decision, which the hearing examiner identified as Marsh v. Pinnacle Realty Mgmt. Co., TP 24,827 (OAD Mar. 30, 2000), was cited as Castro v. Pinnacle Realty Mgmt. Co, TP 24,827 (OAD Mar. 30. 2000) in the Commission's decision in Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (RHC Sept. 28, 2001). Mr. Castro was the first of several names that appeared in the caption with Ms. Marsh.

[3] "'Related facility' means any facility, furnishing, or equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit, including any use of a kitchen, bath, laundry facility, parking facility, or the common use of any common room, yard, or other common area." D.C. OFFICIAL CODE § 42-3501.03(26) (2001).

that the roof deck was a related facility. Pinnacle Realty Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000). The housing provider, who was represented by counsel, did not appeal the Commission's decision.

During the hearing de novo in the instant case, the tenant testified that the housing provider listed the roof deck as an amenity in its Internet advertisement. When the tenant toured the housing accommodation before assuming occupancy in November 1997, the resident manager promoted the roof deck and stated that it was directly across from the tenant's unit. Although the housing provider removed the roof deck before the tenant assumed occupancy, the tenant argued that his rent included the roof deck as an amenity. Since the housing provider did not restore the roof deck or adjust the tenant's rent after the housing provider permanently eliminated the roof deck, the tenant sought redress from the agency.

The housing provider's witness, Myles R. Levin, testified that he served as the property's investment manager since May or June 1998, when Pinnacle replaced the previous property manager. Mr. Levin testified that the roof deck was not listed as a service or facility in the registration documents or the tenant's lease. In addition, he testified that his research revealed that there were no written advertisements in trade journals or The Washington Post that listed the roof deck as an amenity.

After receiving the parties' testimony, the hearing examiner found that the roof deck was not listed in the tenant's lease or the housing provider's registration documents. Finding of Fact 4. However, the hearing examiner found that the roof deck was offered as an amenity to the tenants through the payment of their rent, and there was no additional charge for the use of the roof deck. Finding of Fact 5. Hearing Examiner

McCoy rejected the housing provider's position that the roof deck was not a related facility, because it was not listed in the registration documents. Citing Marsh v. Pinnacle Realty Mgmt. Co., TP 24,827 (OAD Mar. 30, 2000) and Pinnacle Realty Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000),[4] the hearing examiner noted that the Commission reviewed the housing provider's argument on this issue and determined that the roof deck was a related facility.

In Marsh, Hearing Examiner Gerald Roper issued the following pertinent findings of fact:

> The landlord registration statement on file does not list the roof deck.
>
> Management has advertised vacant rental units in the housing accommodation as having a roof deck available for the tenants.
>
> The roof deck has been part of the housing accommodation and available for the tenants' use for over 37 years.
>
> There has never been a fee or a charge associated with the use of the roof deck, and the roof deck has always been maintained and equipped by the housing provider for the use of the tenants.
>
> The roof deck is part of the extended common area of the housing accommodation.

Marsh at 11-12, Findings of Fact 1, 4-6, 8. The housing provider appealed Hearing Examiner Roper's finding that the roof deck was a related facility.

After reviewing the housing provider's appeal, the Commission held:

> The hearing examiner determined that the unrefutted evidence of record showed that the roof deck, while not listed as either a related or optional facility, was a "related" facility provided and maintained by the housing provider, without additional fees or charges, and made available

[4] In accordance with the DCAPA, D.C. OFFICIAL CODE § 2-509 (2001), the hearing examiner took official notice of Marsh v. Pinnacle Mgmt. Co., TP 24,827 (OAD Mar. 30, 2000) and Pinnacle Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000). The hearing examiner gave the parties an opportunity to show facts contrary to those that he officially noticed. However, neither party challenged the decisions that the hearing examiner officially noticed.

> to the tenants of the housing accommodation for their use as tenants in conjunction with the payment of their rent.
>
> There was substantial evidence in the record to support the findings by the hearing examiner that the roof deck was a related facility, because it was a common area used by the tenants without an additional fee. Accordingly, the decision of the hearing examiner is affirmed and the appeal of this issue by the housing provider is denied.

Pinnacle Realty Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000) at 6.

In the instant case, Hearing Examiner McCoy issued the following findings of fact, which were similar to those issued by Hearing Examiner Roper.

> The Somerset House located at 1801 – 16th Street, NW had a roof deck until it was removed in July 1997 so repairs could be made to the roof.
>
> Petitioner moved into the apartment based on advertisements he saw and representations made by the former resident manager, Ms. Kelly, that the building had a roof deck and that it would be replaced.
>
> Neither Petitioner's lease agreement nor the landlord registration form lists the roof deck.
>
> The roof deck was offered and provided as an amenity available to all tenants in the building through payment of their monthly rent and without additional charge.
>
> The prior management company, Legum & Norman Realty, Inc., placed building materials on the roof for the reinstallation of the roof deck.
>
> In the spring of 1998, Respondent assumed management of the housing accommodation.
>
> On June 6, 1998, Respondent informed the tenants that the roof deck would not be replaced.
>
> Respondent did not replace the roof deck and did not reduce Petitioner's rent by an amount to reflect the value of the roof deck.
>
> The permanent elimination of the roof deck is valued at $85.00 per month.

> Respondent has not filed an amended registration form reflecting elimination of the roof deck to establish a legal basis for future rent ceiling adjustments.

Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (OAD Aug. 22, 2002) at 3-4, Findings of Fact 1, 3-5, 7-11, 13.

The Act states "that the use of the facility is 'authorized by payment of rent charged for the rental unit.' Accordingly, it is irrelevant whether the facility is listed in the rental agreement between the tenant and the housing provider. The true concern is whether an individual who pays rent at a particular housing accommodation would be entitled to use that facility." Cobb v. Charles E. Smith Mgmt. Co., TP 23,889 (RHC July 21, 1998) at 9. The substantial evidence on the record of these proceedings supports Hearing Examiner McCoy's findings of fact and his determination that the roof deck was a related facility, because the tenant's rent would have entitled him to use the roof deck facility. Moreover, Hearing Examiner McCoy's decision was consistent with the Commission's holding in Pinnacle Realty Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000). Accordingly, the Commission denies Issue A.

B. Whether the hearing examiner erred by not finding that the claim of reduction in services was barred by the applicable statute of limitations under the Act.

Hearing Examiner McCoy did not err when he determined that the statute of limitations did not bar the tenant's claim. Moreover, the hearing examiner correctly noted that the Commission ruled upon the statute of limitations in Pinnacle Realty Mgmt.

Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000)[5] and Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (RHC Sept. 28, 2001).

When the parties appeared for the initial evidentiary hearing in the instant case, the housing provider moved to dismiss the petition. The housing provider argued that the statute of limitations barred the tenant's claim, because the housing provider removed the roof deck on July 1, 1997. Since the tenant did not file the petition until September 19, 2000, more than three years lapsed between the reduction in the facility and the filing of the claim. Consequently, the housing provider argued, the Act's three-year statute of limitations barred the tenant's claim.[6] Hearing Examiner Word agreed and dismissed the tenant petition.

The tenant, James Voltz, appealed Hearing Examiner Word's decision to the Commission. The tenant maintained that the statute of limitations did not begin to run on his claim for the permanent elimination of the roof deck facility until the housing provider notified the tenant that it would not restore the roof deck. Since the housing provider informed the tenant on June 6, 1998 that it would not restore the roof deck, the Act's three-year statute of limitations did not bar the claim that the tenant filed on September 19, 2000.

---

[5] In Marsh, TP 24,827 (RHC Sept. 7, 2000) at 9, the Commission held, "In this case, the tenants were notified that the roof deck was discontinued on June 8, 1998, and the tenant's petition was filed on October 13, 1999, which was within the three (3) year statute of limitations in the Act."

[6] D.C. OFFICIAL CODE § 42-3502.06(e) (2001) provides:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment.

When the Commission decided the first appeal in this matter, the Commission held:

> The substantial record evidence did not support [H]earing [E]xaminer [Word's] determination that the statute of limitations barred the tenant's claim that the housing provider permanently eliminated related services and facilities.

Voltz at 12.

> The record evidence, R. Exh. 1, revealed that the housing provider closed the roof deck for renovations in July 1997, and that on June 6, 1998, the housing provider notified the tenants that it would not reinstall the roof deck. In the petition, the tenant claimed that Pinnacle Realty Management Company permanently eliminated related services and/or facilities. The date that the housing provider closed the roof deck for repairs, cannot be the date from which one measures the tenant's claim that Pinnacle Realty Management Company permanently eliminated the roof deck, particularly when the notice of permanent removal was dated June 6, 1998.

Id. at 10. The Commission reversed Hearing Examiner Word's decision and remanded the matter for a hearing de novo.

During the hearing before Hearing Examiner McCoy, the tenant testified that the resident manager informed him that the building's roof deck was removed in July 1997, and she promised him that it would be rebuilt and opened in the spring of 1998. The tenant testified that he and other tenants watched as a crane placed materials to rebuild the roof deck onto the roof, in the spring of 1998. On June 6, 1998, the new management company, Pinnacle, sent a letter to the tenants advising them that the housing provider would not rebuild the roof deck.

Myles Levin, Pinnacle's investment manager, testified that Pinnacle replaced the prior management company in the spring of 1998. Mr. Levin testified that when he became the investment manager, there were materials on the roof to rebuild the roof deck.

He indicated that the previous management company placed the materials on the roof. However, the prior management company did not have the owners' permission to rebuild the roof deck. Consequently, he removed the materials at the direction of the owners. To quell what he described as rumors and speculation that the roof deck would be rebuilt, Myles Levin acknowledged sending a letter to the tenants on June 6, 1998 to advise them that the roof deck would not be rebuilt.

After the tenant cross-examined Mr. Levin, the following exchange occurred between Hearing Examiner McCoy and Mr. Levin.

> McCoy: You testified Sir that the prior managers of the property did not have the authority to replace the roof deck.
>
> Levin: I so stated. There was no written approval. The management contract calls for certain dollar amounts to be approved in writing by the owners of the property. That was not done. They had no knowledge of it and did not approve it. <u>It was done by the management company unbeknownst to the owners of the property sir. That was one of the reasons why, amongst others, that we were hired.</u>
>
> McCoy: So it's your testimony that the roof deck had been removed to repair the roof that was underneath.
>
> Levin: That is correct.
>
> McCoy: And that when you assumed management you were instructed not to replace the roof?
>
> Levin: The roof deck sir, that is correct.

CD Recording (OAD Dec. 10, 2001) (emphasis added).

The questions posed by the hearing examiner revealed that the prior management company took steps to rebuild the roof deck. The housing provider's testimony was

consistent with the tenant's testimony that the prior management company promised to rebuild the roof deck and placed rebuilding materials on the roof in the spring of 1998.

Notwithstanding the evidence presented during the hearing and the Commission's prior rulings concerning the statute of limitations, the housing provider maintains that the statute of limitations bars the tenant's claim, because the statute began to run when the housing provider closed the roof deck for repairs on July 1, 1997.

"[T]he statute of limitations begins to run when a plaintiff either has actual knowledge of a cause of action or is charged with knowledge of that cause of action." Cevenini v. Archbishop of Washington, 707 A.2d 768, 771 (D.C. 1998) (citations omitted). The housing provider maintains that the tenant should be charged with knowledge of the cause of action when the housing provider closed the roof deck on July 1, 1997 for repairs. However, the housing provider's witness and the tenant testified that the prior management company planned to rebuild the roof deck and manifested that intent through the spring of 1998. The fact that the prior management company may have acted with apparent authority as opposed to actual authority from the owners cannot be charged against the tenant. Consequently, the tenant cannot be charged with knowledge of the cause of action prior to June 6, 1998, when the housing provider notified the tenant that it would not rebuild the roof deck.

"What constitutes the accrual of a cause of action is a question of law; the actual date of accrual, however, is a question of fact." Executive Sandwich Shoppe, Inc. v. Carr Realty Corp., 749 A.2d 724, 735 (D.C. 2000) (quoting Cevenini, 707 A.2d at 770-771); see also Doe v. Medlantic Health Care Group, Inc., 814 A.2d 939 (D.C. 2003). Hearing Examiner McCoy found that on June 6, 1998 the housing provider informed the tenant

that the roof deck would not be replaced. Finding of Fact 9. As a matter of law, the tenant's cause of action for the permanent elimination of the roof deck accrued on June 6, 1998, when Pinnacle informed the tenant that it would not rebuild the roof deck.

Since Myles Levin, Pinnacle's investment manager, corroborated the tenant's testimony that the prior management company took steps to rebuild the roof deck until the spring of 1998, there is no record support for the housing provider's argument that the statute began to run on July 1, 1997 as opposed to June 6, 1998. On these facts, it would be very difficult to conclude that the tenant's cause of action accrued on July 1, 1997 as opposed to June 6, 1998. However, "where two constructions as to the limitations period are possible, the courts prefer the one which gives the longer period in which to prosecute the action. ... 'If there is any reasonable doubt in a statute of limitations problem, the court will resolve the question in favor of the complaint standing and against the challenge.'" Simpson v. District of Columbia Office of Human Rights, 597 A.2d 392, 401 (D.C. 1991) (citations omitted).

For the foregoing reasons, the Commission holds that the tenant's cause of action accrued on June 6, 1998. Since the tenant filed the petition on September 19, 2000, the Act's statute of limitations does not bar the tenant's claim. Accordingly, the Commission denies Issue B.

C. Whether the decision and order is contrary to the evidence presented at the hearing below.

The regulation, 14 DCMR § 3802.5 (1991), provides that the notice of appeal shall contain a clear and concise statement of the alleged errors in the hearing examiner's decision. In Issue C, the housing provider alleged that the decision was contrary to the evidence. This issue is too vague for review, because the housing provider did not

identify a particular section of the decision that was contrary to any specific portion of the evidence. See McKinney v. King, TP 27,264 (RHC July 24, 2002); Tenants of 2480 16th St., N.W. v. Dorchester Hous. Ass'n., CI 20,739 & CI 20,741(RHC Jan. 14, 2000) (denying review because the appealing party failed to provide a clear statement of the alleged error as required by the Commission's regulation).

Accordingly, the Commission dismisses Issue C, because the housing provider failed to provide a clear and concise statement of the alleged error.

D. Whether the hearing examiner improperly calculated the damages awarded to the tenant.

The housing provider argues that the hearing examiner erred when he calculated the damages awarded to the tenant, because the hearing examiner did not apply the rent ceiling adjustments of general applicability for 1999 and 2000 before he calculated the rent refund. In addition, the housing provider argues that the hearing examiner erred when he reduced the rent ceiling by $170.00 as opposed to $85.00, which was the value the hearing examiner assigned to the permanent elimination of the roof deck. For the reasons discussed below, the Commission grants this issue in part and remands this matter to the hearing examiner.

The hearing examiner determined that the rent ceiling for the tenant's unit was $497.00 from the beginning of his tenancy until April 1, 1999. Finding of Fact 6.[7] The hearing examiner found that the permanent elimination of the roof deck was valued at $85.00 per month.[8] Consequently, he reduced the rent ceiling for the tenant's unit by $85.00 to reflect the permanent elimination of the roof deck. In Finding of Fact 12, the

[7] Neither party challenged Finding of Fact 6.

[8] Finding of Fact 11.

hearing examiner wrote, "[s]ubtracting the monthly value of the roof deck from the rent ceiling creates a new legal rent ceiling for Petitioner's unit of $412.00 ($497.00 - $85.00 = $412.00)." The hearing examiner rolled back the tenant's rent to $412.00 and held that the tenant's rent and rent ceiling shall remain at $412.00 until the housing provider filed an amended registration form to reflect the loss of the roof deck.

Although the hearing examiner found that the new rent ceiling was $412.00, the hearing examiner reduced the new rent ceiling by an additional $85.00. The hearing examiner subtracted $85.00 from $412.00 and arrived at $327.00. After he performed the calculation, ($412 - $85.00 = $327.00), the hearing examiner calculated the refund using $327.00 as the legal rent ceiling. Decision at 7-9. The housing provider argues that this constituted reversible error. The Commission agrees. The hearing examiner erred when he used $327.00 to calculate the rent refund instead of $412.00.

The housing provider also argues that it is "entitled to the benefit of the subsequent CPI[-W] adjustments which were 1.8 percent in 1999[9] and 2.1 percent in 2000, respectively." Housing Provider's Brief at 8. The housing provider maintains that the hearing examiner erred when he failed to increase the rent ceiling by the annual adjustments of general applicability for 1999 and 2000 when he calculated the rent refund.

During the hearing, the housing provider introduced copies of the Certificates of Election of Adjustment of General Applicability (Certificate(s) of Election) for 1997,

[9] The housing provider asserts that the CPI-W was 1.8% in 1999. This statement is incorrect. The adjustment of general applicability, which is equal to the change during the previous year in the consumer price index for urban wage earners and clerical workers (CPI-W), was 1.8% in 1998, and it was 1.0% in 1999. See infra notes 10 and 15.

1998, and 2000.[10] The hearing examiner marked the Certificates of Election as Respondent's Exhibits (R. Exh(s).) 1, 2, and 3, respectively, and admitted them as record evidence. Each copy of the Certificate of Election contains what appears to be a RACD file stamp. However, the file stamps on two of the exhibits are faint. In Finding of Fact 6, the hearing examiner stated that the tenant's rent ceiling was $497.00 from the time he signed the lease until April 1, 1999. However, the hearing examiner did not issue findings of fact or conclusions of law concerning R. Exhs. 2 or 3.

The housing provider cites Guerra v. Shannon & Luchs Co., TP 10,939 (RHC Apr. 2, 1986) for the proposition that the housing provider is entitled to the adjustments of general applicability in 1999 and 2000. In addition, the housing provider submitted a chart that contains the calculation of the rent ceiling, using the purported adjustments of general applicability for 1999 and 2000 and the corresponding calculation of damages. Housing Provider's Brief at 9. The housing provider suggests that the Commission can simply perform the calculations in the same manner that it performed the calculations in Guerra. However, the facts in Guerra are inapposite to the facts in the instant case.

In Guerra, the housing provider implemented a vacancy rent ceiling adjustment. Thereafter, the housing provider perfected an adjustment of general applicability and gave the tenants notice of the adjustment. When the housing provider calculated the

---

[10] The Act, D.C. OFFICIAL CODE § 42-3502.05(b) (2001), provides:

> (b) On an annual basis, the Rental Housing Commission shall determine an adjustment of general applicability in the rent ceiling established by subsection (a) of this section. This adjustment of general applicability shall be equal to the change during the previous calendar year, ending each December 31, in the Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the preceding calendar year. No adjustment of general applicability shall exceed 10%. A housing provider may not implement an adjustment of general applicability, or an adjustment permitted by subsection (c) of this section for a rental unit within 12 months of the effective date of the previous adjustment of general applicability, or instead, an adjustment permitted by subsection (c) of this section in the rent ceiling for that unit.

adjustment of general applicability, it built upon the rent ceiling that included the vacancy rent ceiling adjustment. When the matter reached the Commission following a remand from the District of Columbia Court of Appeals,[11] the Commission invalidated the vacancy rent ceiling adjustment. As a result, the notice of the adjustment of general applicability contained an incorrect statement of the rent ceiling, because it was built upon the vacancy rent ceiling adjustment that the Commission subsequently invalidated. However, the Commission upheld the adjustment of general applicability. The Commission noted that the housing provider's effort to perfect the adjustment of general applicability was proper in every respect, save the calculation, which the Commission described as "an unfortunate result" of the housing provider's belief that the vacancy adjustment was proper.[12] Moreover, the Commission held:

> We find sufficient evidence in the record ... to calculate the permissible rent ceiling for the subject unit during all relevant times, and choose for reasons of administrative efficiency to make the findings rather than to remand this issue back to the Rent Administrator for a pre-ordained and totally predictable result.

Id. at 8.

> This is particularly true where, as here, the latent deficiency ... can be corrected by a simple recalculation. This means in effect, that the deficiency in the notice of the 1982 CPI adjustment (the erroneous statement of the current rent ceiling) is not in these circumstances of sufficient gravity to justify denial to the landlord of the adjustment he tried to implement.

Id. at 9.

---

[11] See Guerra v. District of Columbia Rental Hous. Comm'n, 501 A.2d 786 (D.C. 1985).

[12] Guerra v. Shannon & Luchs Co., TP 10,939 (RHC Apr. 2, 1986) at 9. The Commission noted that the housing provider faced consequences for its mistaken belief that the vacancy adjustment was proper. Those consequences included an award of a rent refund to the tenant.

The facts that enabled the Commission to hold that the housing provider was entitled to the adjustment of general applicability and perform the rent ceiling calculation in Guerra are not present in the instant case.

The housing provider in the instant case asserts that it is entitled to the benefits of the adjustments of general applicability for 1999 and 2000. However, the housing provider did not submit a Certificate of Election for the 1999 CPI-W.[13] The Certificate of Election for the 1998 CPI-W, R. Exh. 2, contains an agency file stamp dated February 18, 1998. However the year, "'98", has a strike through it. To the immediate right of '~~98~~ is "99" with the handwritten initials "WN" next to it. In addition, the housing provider's brief states that the CPI-W was 1.8% in 1999. However, R. Exh. 2 indicates that the CPI-W for 1998 was 1.8%.[14] Moreover, the Certificate of Election for the 2000 CPI-W, R. Exh. 3, contains a very faint file stamp; however, the filing date appears to be July 31, 2000.

The irregularities surrounding the housing provider's exhibits prevent the Commission from concluding that the housing provider is entitled to the benefits of the adjustments of general applicability for 1999 and 2000. The Commission cannot

---

[13] The Certificate of Election of Adjustment of General Applicability is a form issued by the RACD. The first page of the form contains an area where the housing provider inserts the year and the CPI-W into the following format. **THE** [year] **CPI-W**: [percentage]. The housing provider introduced three Certificates of Election that contained the following: R. Exh. 1, **THE 1997 CPI-W:** 2.8%; R. Exh. 2, **THE** 1998 **CPI-W:** 1.8%; R. Exh. 3, **THE** 2000 **CPI-W:** 2.1%. The housing provider did not introduce a Certificate of Election for the 1999 CPI-W.

[14] The Commission takes official notice of the fact that the adjustment of general applicability was 1.8% in 1998, and it was 1.0% in 1999. The Commission takes this action pursuant to the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE § 2-509(b), which provides that where the decision of an agency in a contested case rests upon official notice of a material fact not appearing in the evidence in the record, any party to such a case, upon timely request, shall be afforded an opportunity to show the contrary. In accordance with D.C. OFFICIAL CODE § 2-509(b), the parties have fifteen (15) days from the date of this decision to show facts contrary to those officially noticed by the Commission. See Carey v. District Unemployment Compensation Bd., 304 A.2d 18, 20 (D.C. 1973).

conclude that it can cure the deficiencies in the 1999 and 2000 adjustments of general applicability with a simple recalculation as it did in Guerra. The only deficiency in Guerra was the erroneous statement of the rent ceiling. The apparent deficiencies in the instant case are far greater in number and degree. See 14 DCMR § 4204.10 (1991).[15]

The evidence in the instant record does not lend itself to a simple calculation of the adjustments of general applicability for 1999 and 2000, and the result is neither "pre-ordained nor totally predictable." Guerra at 8. Moreover, the hearing examiner did not issue findings of fact or conclusions of law with respect to the adjustments of general applicability for 1999 and 2000. Accordingly, the Commission remands this matter to the hearing examiner with instructions to determine whether the housing provider is entitled to the benefit of the adjustments of general applicability for 1999 and 2000. The hearing examiner shall issue findings of fact and conclusions of law concerning R. Exhs. 2 and 3 and the adjustments of general applicability for 1999 and 2000. Thereafter, the hearing examiner shall recalculate the rent ceiling and the rent refund[16] by using $412.00

---

[15] The regulation, 14 DCMR § 4204.10 (1991), provides:

> Notwithstanding §4204.9, a housing provider shall take and perfect a rent ceiling increase authorized by §206(b) of the Act (an adjustment of general applicability) by filing with the Rent Administrator and serving on the affected tenant or tenants in the manner prescribed in §4101.6 a Certificate of Election of Adjustment of General Applicability, which shall do the following:
>
> (a) Identify each rental unit to which the election applies;
>
> (b) Set forth the amount of the adjustment elected to be taken, and the prior and new rent ceiling for each unit; and
>
> (c) Be filed and served within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.

[16] "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 was collected and no refund is required." Kemp v. Marshall Heights Community Dev., TP 24,786 (RHC Aug. 1, 2000) at 8 citing Hiatt Place P'ship v. Hiatt Place Tenants Ass'n, TP 21,149 (RHC May 10, 1991). However, the hearing examiner may award a rent roll back if the rent charged is lower than the rent ceiling. See Afshar v. District of Columbia Rental Hous. Comm'n, 504 A.2d 1105 (D.C. 1986);

as the starting point for the rent ceiling calculation.

E. Whether the assessment of a fine by the hearing examiner was arbitrary, capricious and erroneous.

The housing provider argues that the hearing examiner erred when he imposed a fine when there was no finding of willfulness.

The Act empowers the hearing examiner to impose fines when a housing provider willfully violates the Act. The penalty provision of the Act provides:

> (b) Any person who wilfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation.

D.C. OFFICIAL CODE § 42-3509.01(b) (2001) (emphasis added). A prerequisite to the imposition of a fine is a finding of willful conduct. In Quality Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73 (D.C. 1986), the court discussed the meaning of the term willful. The court stated:

> Section [42-3509.01(b)] prohibits anybody from collecting rent increases that have been disapproved, making false statements in filing rent control documents, or otherwise behaving in a manner contrary to the rent control statute. A $5,000 fine is provided for each occasion on which [§ 42-3509.01(b)] is "willfully" violated. From the context it is clear that the word "willfully" as used in [§ 42-3509.01(b)] demands a more culpable mental state than the word "knowingly" as used in [§ 42-3509.01(a)]. This interpretation is buttressed by reference to the legislative history ....

Id. at 76 n.6. The court also quoted the following portion of the legislature's debate concerning the distinction between the terms knowingly and willfully.

Cobb v. Charles E. Smith Mgmt. Co., TP 23,889 (RHC July 21, 1998); D.C. OFFICIAL CODE § 42-3509.01(a) (2001).

> "Willfully" goes to intent to violate the law. "Knowingly" is simply that you know what you are doing. A different standard. If you know that you are increasing the rent, the fact that you don't intend to violate the law would be "knowingly ". If you also intended to violate the law, that would be "willfully".

Id. (quoting Council of the District of Columbia, Council Period 3, Second Session, 43rd Legislative Session at 88-93 (Nov. 14, 1980).

The hearing examiner did not discuss the fine in the text of the decision, and he did not issue findings of fact or conclusions of law concerning whether the housing provider willfully violated the Act. The hearing examiner simply ordered the housing provider to pay a fine in the amount of $1000.00 for violating the Act by permanently eliminating the roof deck facility. Since the hearing examiner did not find that the housing provider willfully violated the Act, the Commission vacates the fine.

IV. CONCLUSION

The Commission denies Issue A and affirms the hearing examiner's finding that the roof deck was a related facility. The Commission denies Issue B and affirms the hearing examiner's ruling that the statute of limitations did not bar the tenant's claim. The Commission determines as a matter of law that the tenant's cause of action for the permanent elimination of the roof deck facility accrued on June 6, 1998. Since the tenant filed the petition on September 19, 2000, the statute of limitations did not bar his claim.

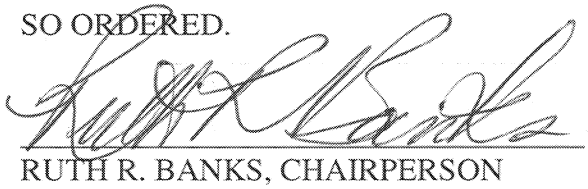
Further, the Commission dismisses Issue C because the housing provider failed to provide a clear and concise statement of the alleged error in the hearing examiner's decision.

The Commission grants Issue D in part and remands this matter, because the hearing examiner erred when he calculated the rent refund. The hearing examiner reduced the rent ceiling from $497.00 to $412.00 to reflect the $85.00 rent ceiling

reduction for the permanent elimination of the roof deck. The hearing examiner determined the new rent ceiling was $412.00. However, he erred when he reduced the new rent ceiling by an additional $85.00 and calculated the rent refund by using $327.00 instead of $412.00. Consequently, the Commission vacates the calculation of the rent refund. Furthermore, the hearing examiner shall resolve the sub issue that the housing provider raised in Issue D, which is whether the housing provider is entitled to the benefit of the CPI-W for 1999 and 2000. To that end, the hearing examiner shall issue findings of fact and conclusions of law concerning R. Exhs. 2 and 3, and the adjustments of general applicability for 1999 and 2000. Thereafter, the hearing examiner shall calculate the rent refund using $412.00 as the starting point for the calculations.

Finally, the Commission grants Issue E and vacates the fine, because the hearing examiner erred when he imposed a fine in the absence of a finding that the housing provider willfully violated the Act.

SO ORDERED.



RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to

dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

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

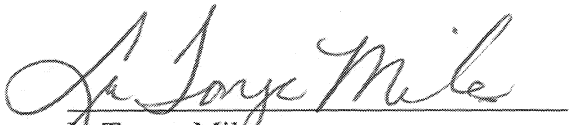
D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W.
6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 25,092 was mailed by priority mail with delivery confirmation, postage prepaid, this 4th day of March 2004 to:

Richard Luchs, Esquire
Greenstein DeLorme & Luchs, P.C.
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036-5605

James Voltz
1801 16th Street, N.W.
Unit 707
Washington, D.C. 20009



LaTonya Miles
Contact Representative
(202) 442-8949