

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 26,155

In re: 2501 Porter Street, N.W., Unit 214

Ward Three (3)

ANNETTE KORNBLUM
Tenant/Appellant

v.

CHARLES E. SMITH RESIDENTIAL REALTY, L.P.
Housing Provider/Appellee

DECISION AND ORDER

March 11, 2005

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) and its amendments, govern the proceedings.

I. PROCEDURAL HISTORY

The tenant, Annette Kornblum, began her tenancy at 2501 Porter Street, N.W., unit 214, on April 16, 1998. The housing provider, Charles E. Smith Residential Realty, L.P., is the manager of the multi-unit housing accommodation. The tenant initiated this action when her attorney, Bernard Gray, Sr., filed Tenant Petition (TP) 26,155 with the Rental Accommodations and Conversion Division (RACD) on November 27, 2000.

In the petition, the tenant alleged that the housing provider imposed an improper rent increase; failed to file the proper rent increase forms with RACD; charged a rent that exceeded the legally calculated rent ceiling; filed an improper rent ceiling with RACD; retaliated against the tenant; and failed to give the tenant notice that the property was exempt from the rent stabilization provisions of the Act.

The Rent Administrator transmitted TP 26,155 to the Office of Adjudication (OAD) for a hearing. Hearing Examiner Celio Young conducted the evidentiary hearing on April 5, 2001. The tenant appeared and was represented by Bernard Gray, Sr., Esquire. Attorneys Richard Luchs and James Devita represented the housing provider during the hearing. After each party presented evidence on the claims alleged in the petition, the hearing examiner invited the parties to submit proposed decisions and orders. The housing provider submitted a proposed decision and order on April 13, 2001 and filed a motion for attorney's fees on April 20, 2001. The tenant submitted a proposed decision and order on April 27, 2001. On November 16, 2001, Administrative Law Judge (ALJ) Lennox Simon issued a proposed decision and order.¹ The proposed decision contained the following findings of fact and conclusions of law:

Findings of Fact

1. The subject property is located at 2501 Porter Street, N.W.

¹ Since Hearing Examiner Young conducted the hearing, ALJ Simon did not personally hear the evidence. Consequently, ALJ Simon issued a proposed decision and order in accordance with D.C. OFFICIAL CODE § 2-509(d) (2001), which provides:

Whenever in a contested case a majority of those who are to render the final order or decision did not personally hear the evidence, no order or decision adverse to a party to the case (other than the Mayor or an agency) shall be made until a proposed order or decision, including findings of fact and conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the order or decision, who, in such case, shall personally consider such portions of the exclusive record, as provided in subsection (c) of this section, as may be designated by any party.

2. Petitioner Annette Kornblum completed and signed her application for Unit 214 on April 16, 1998, and has resided as a tenant in Unit 214 from April 16, 1998 to this present time.
3. Respondent Charles E. Smith Residential Realty, L.P. filed its registration claim of exemption statement with the RACD on October 6, 1994.
4. Respondent Charles E. Smith Residential Realty, L.P. posted its registration/exemption statement at the property at 2501 Porter Street, N.W. between 1994 and 1995.
5. Petitioner filed her tenant petition challenging Respondent's claim of exemption on November 27, 2000.
6. The application for unit 214 which Petitioner signed contained a section pertaining to the applicability of the District of Columbia Rent Stabilization Act [sic].
7. At the time that Petitioner met with Respondent's property manager, Gail Johnson to fill out a rental application for Unit 214, Ms. Johnson wrote the word, "Exempt" across the portion of the rental application that concerned the applicability of the District of Columbia Rent Stabilization Act [sic]. Respondent also informed Petitioner that rental increases for rental Unit 214 would not be subject to the District of Columbia Rent Stabilization Act [sic]. Petitioner saw Ms. Johnson write the word "Exempt" on the rental application, and then received a copy of the rental application with the word "exempt" written across the portion of the application prior to the time Petitioner executed her lease.
8. At the time that Ms. Johnson and Ms. Kornblum filled out the rental application for Unit 214, Ms. Kornblum had a bachelor's degree from the University of Minnesota, and a master's degree in journalism from Columbia University.
9. At the time that Ms. Johnson and Ms. Kornblum filled out the rental application for Unit 214, Ms. Kornblum had prior litigation experience with another landlord involving the issue of exemption from rent control.
10. Ms. Kornblum heard Ms. Johnson explain that rental increases for Unit 214 would be exempt from rent control and, by reason of her education and prior litigation experience with other tenant petition

matters, Ms. Kornblum had reason to know what Ms. Johnson meant by the word "exempt."

11. Respondent sent Petitioner written notices on July 7, 1999, November 8, 1999, February 7, 2000 and March 14, 2000, requiring [P]etitioner to pay late fees and to pay her rent by way of certified check or money order due to Petitioner's failure to pay her rent by the 5th of each month.
12. Petitioner sent a letter to Respondent on February 25, 2000, complaining about having to pay a rental "surcharge."
13. Petitioner had been allowed to pay her rent without incurring a late fee in December 2000 and January 2001, because Melinda Matzen had agreed to give Petitioner a two (2) month grace period to coordinate her pay period/salary with her rent payments. Petitioner and Respondent further agreed that [P]etitioner would have to resume making her payments by the 5th day of each month in February 2001.
14. Petitioner received advance written notice in [the] summer of 1999 that the storage area on the second floor where her property was located was going to be cleaned. Respondent subsequently removed Petitioner's property from the storage area at 2501 Porter Street, N.W. in May 2000, because it constituted a fire hazard.

Kornblum v. Charles E. Smith Residential Realty, L.P., TP 26,155 (OAD Nov. 16, 2001)

at 4-5.

Conclusions of Law

1. Respondent has satisfied 14 D.C.M.R. Sections 4101.3 and 4101.6 by posting its registration/exemption statement at the property located at 2501 Porter Street, N.W. between 1994 and 1995;
2. Petitioner is barred by the statute of limitations contained in D.C. Code Section 45-2516(e) [currently § 42-3502.06(e)] from challenging the validity of Respondent's claim of exemption and posting of Respondent's registration statement;
3. Respondent has satisfied D.C. Code Section 45-2515(d) [currently § 42-3502.05(d)] by providing [P]etitioner with written notice that rental increases for Unit #214 would not be subject to the District of Columbia Rent Stabilization Program as required by D.C. Code Section 45-2515(d) [currently § 42-3502.05(d)] by giving [P]etitioner

written notice of Respondent's claim of exemption at the time [P]etitioner filled out a rental application for Unit 214;

4. Petitioner's unit is exempt from rent control pursuant to [§] 45-2515(a)(2) [currently § 42-3502.05(a)(2)].
5. Respondent did not retaliate against Petitioner by disposing of her property or by requiring her to pay late fees after she sent a letter to Respondent on February 25, 2000 complaining about the amount of rent that she was paying; and
6. Petitioner's petition was not frivolous, unreasonable, groundless, and was not filed in bad faith, therefore, Respondent is not entitled to attorney's fees pursuant to D.C. Code Section 45-2592 [currently § 42-3509.02].

Id. at 11-12.

The tenant's attorney, Bernard Gray, Sr., filed exceptions to the proposed decision and order. The exceptions did not contain an agency stamp, which would have reflected the date Attorney Gray filed the exceptions. The certificate of service indicates that Attorney Gray mailed the exceptions to the housing provider's attorney on December 6, 2001. On January 10, 2002, the housing provider's attorney, Richard Luchs, filed a letter with ALJ Simon and served opposing counsel. In the letter, Mr. Luchs stated that he was not served with tenant's exceptions and objections until January 8, 2002, which the housing provider stated was more than one month after they were purportedly filed with OAD. Mr. Luchs asked the ALJ not to consider the tenant's exceptions, because they were not served in accordance with the agency's rules. In the alternative, Mr. Luchs asked the ALJ to overrule the exceptions in accordance with the proposed decision and order.

On February 3, 2003, the housing provider filed a response to the tenant's exceptions to the proposed decision and order. Thereafter, ALJ Simon issued an order

overruling the tenant's exceptions. The ALJ signed the order; however, the certificate of service, which purportedly served to certify that the agency mailed the order on February 20, 2003, was not signed.

The tenant appealed the final decision and order on March 22, 2003, and the Commission held the appellate hearing on November 6, 2003.

II. ISSUES

The tenant, through counsel, raised the following issues in the notice of appeal:

- A. The evidence does not support Finding of Fact number 6.
- B. The evidence does not support Finding of Fact number 7.
- C. The evidence does not support Conclusions [sic] of law number 1 [sic] the posting of the registration/claim of exemption between 1994 and 1995 satisfies D.C. Code § 42-3502.05(h).
- D. The evidence does not support Conclusions [sic] of Law number 2 [sic] Petitioner is not barred by the statute of limitations since the Respondent's [sic] is not in compliant [sic] with the law.
- E. The evidence does not support Conclusions [sic] of Law number 3 since the law contemplates that the Petitioner would receive the notice with sufficient time to make an intelligent decision concerning the consequences of one's [sic] decision.
- F. The evidence does not support Conclusions [sic] of Law number 4 since the ALJ did not find that the registration/claim of exemption form was posted at the time the Petitioner took possession of her unit.
- G. The evidence does not support Conclusion of Law number 5 since he placed the burden of proof on the Petitioner.

Tenant's Notice of Appeal at 1-2.

III. DISCUSSION

- A. The evidence does not support Finding of Fact number 6.
- B. The evidence does not support Finding of Fact number 7.

In Issues A and B, the tenant merely asserts that the evidence does not support the ALJ's factual findings that the rental application contained a section pertaining to rent stabilization, and that Ms. Johnson wrote the word exempt across that section of the application. Contrary to the tenant's assertion, Findings of Fact 6 and 7 were supported by both oral and documentary evidence.

On direct examination, the tenant testified that she signed the rental application and lease on April 16, 1998. However, she stated that she did not receive notice that the housing accommodation was exempt from the rent stabilization program. On cross-examination, the housing provider's attorney introduced a copy of the rental application, which was marked Respondent's Exhibit (R. Exh.) 1. The tenant acknowledged that she signed two sections of the application on April 16, 1998. The tenant admitted that a section of application contained the words "DC Rent Control Buildings" in typewritten language, and the word "EXEMPT" was handwritten on that section of the form in blue ink.

The relevant portion of the tenant's testimony appears below:

Mr. DeVita: Isn't it true ma'am that at the time that you and Gail Johnson filled out this application form that Gail Johnson told you that the building at 2501 Porter Street, N.W. was exempt from rent control and that she wrote the word exempt in the box at the same time?

Ms. Kornblum: She certainly wrote exempt in here and as to her giving me notice, I don't recall that it was done in great haste. You know she may have.

OAD Hearing CD-ROM, Apr. 5, 2001. On redirect examination, the tenant stated she believed Ms. Johnson wrote the word exempt on the application before the tenant signed it.

Gail Johnson, the housing provider's marketing manager, testified that she assisted the tenant when the tenant completed the rental application and signed the lease on April 16, 1998. Ms. Johnson testified that she wrote the word "EXEMPT" in blue ink on the section of the application that pertained to rent control buildings. In addition, Ms. Johnson stated that she discussed the housing accommodation's exempt status with the tenant, when the tenant completed the rental application.

In addition to the oral evidence offered to rebut the tenant's claim that she did not receive notice that the property was exempt, the housing provider introduced a copy of the Charles E. Smith Residential Realty, L.P. Application, which was marked R. Exh. 1, and admitted it as record evidence. The application contained the following:

DC RENT CONTROL BUILDINGS ONLY
The rent ceiling on apartment _____ is \$ _____ EXEMPT and understand that the monthly rental may be increased to not more than \$ _____ on _____, plus any other allowable increase permitted by law. The last rent ceiling adjustment on this apartment was on _____.

Annette Kornblum
Applicant

Melinda Matzen
Property Director

The documentary evidence, R. Exh. 1, revealed that the rental application contained a section pertaining to rent control buildings, which are statutorily described as buildings governed by the rent stabilization provisions of the Act. See D.C. OFFICIAL CODE § 42-3502.05 (2001) (appearing within Title 42, Chapter 35, Subchapter II, Rent Stabilization Program). The lines on the form that were reserved for the rent ceiling and statutorily prescribed rent and rent ceiling adjustments were blank, and the word "EXEMPT" was handwritten across that portion of the application. The tenant and the housing provider's agent placed their signatures directly below this section of the application.

After the ALJ reviewed the record evidence, he issued the following findings of fact:

The application for unit 214 which Petitioner signed contained a section pertaining to the applicability of the District of Columbia Rent Stabilization Act [sic].

At the time that Petitioner met with Respondent's property manager, Gail Johnson[,] to fill out a rental application for Unit 214, Ms. Johnson wrote the word, "Exempt" across the portion of the rental application that concerned the applicability of the District of Columbia Rent Stabilization Act [sic]. Respondent also informed Petitioner that rental increases for rental Unit 214 would not be subject to the District of Columbia Rent Stabilization Act [sic]. Petitioner saw Ms. Johnson write the word "Exempt" on the rental application, and then received a copy of the rental application with the word "exempt" written across the portion of the application prior to the time Petitioner executed her lease.

Findings of Fact 6 and 7, Decision at 4.

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

Every decision and order adverse to a party to the case ... shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact ... shall be supported by and in accordance with the reliable, probative, and substantial evidence.

The ALJ found, as a matter of fact, that the rental application contained a section pertaining to the rent stabilization program, and that Ms. Johnson wrote the word exempt across that section of the application. Findings of Fact 6 and 7 were supported by and in accordance with the substantial oral and documentary evidence on the record of the proceedings. Since the findings of fact were supported by the substantial record evidence, the Commission affirms the ALJ's decision and denies Issues A and B.

C. The evidence does not support conclusion of law number 1 [sic] the posting of the registration/claim of exemption between 1994 and 1995 satisfies D.C. OFFICIAL CODE § 42-3502.05(h) (2001).

When the tenant's attorney drafted Issue C, he referenced and quoted D.C.

OFFICIAL CODE § 42-3502.05(h) (2001), which provides:

Each registration statement filed under this section shall be available for public inspection at the Division, and each housing provider shall keep a duplicate of the registration statement posted in a public place on the premises of the housing accommodation to which the registration statement applies. Each housing provider may, instead of posting in each housing accommodation comprised of a single rental unit, mail to each tenant of the housing accommodation a duplicate of the registration statement.

When the ALJ issued Conclusion of Law 1, he did not cite D.C. OFFICIAL CODE § 42-3502.05(h). The ALJ concluded, as a matter of law, that the housing provider satisfied 14 DCMR §§ "4101.3 and 4101.6 by posting its registration/exemption statement at the property located at 2501 Porter Street, N.W. between 1994 and 1995." Conclusion of Law 1. The regulations, 14 DCMR §§ 4101.3 and 4101.6 (1991), implement and closely mirror D.C. OFFICIAL CODE § 42-3502.05(h) (2001).

The regulations, which the ALJ cited in Conclusion of Law 1, govern the registration requirements for rental units and housing accommodations. The regulation, 14 DCMR § 4101.3 (1991), provides:

The registration requirements of the Act shall be satisfied for any rental unit not properly registered under the Rental Housing Act of 1980 only if the following applies:

- (a) The housing provider of the rental unit has properly completed and filed with the Rent Administrator a new Registration/Claim of Exemption form pursuant to the Act and any regulations promulgated thereunder; and
- (b) The housing provider has complied with the posting or mailing requirements of §4101.6, and certified compliance to the Rent Administrator on a form provided for such certification.

The second regulation relied upon by the ALJ, 14 DCMR § 4101.6 (1991), provides:

Each housing provider who files a Registration/Claim of Exemption form under the Act shall, prior to or simultaneously with the filing, post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit or housing accommodation to which it applies, or shall mail a true copy to each tenant of the rental unit or housing accommodation. (emphasis added).

The record reflects that the housing provider filed the Registration/Claim of Exemption Form for 2501 Porter Street, N.W. on October 6, 1994. Cynthia Claire, who worked as the housing provider's senior property manager from 1990 to 1995, testified that the Registration/Claim of Exemption Form (R. Exh. 2) was posted on the lobby wall during her period of employment. The ALJ found Ms. Claire's testimony to be credible and found, as a matter of fact, that the housing provider "posted its registration/exemption statement at the property at 2501 Porter Street, N.W. between 1994 and 1995." Finding of Fact 4. As a result, the ALJ concluded as a matter of law that the housing provider met the requirements of §§ 4101.3 and 4101.6.

Contrary to the tenant's assertion in Issue C, Conclusion of Law 1 is supported by the record evidence. During the hearing, the housing provider demonstrated its compliance with 14 DCMR §§ 4101.3 and 4101.6 (1991). To demonstrate compliance with § 4101.3, the housing provider introduced the Registration/Claim of Exemption Form, which contained an agency date stamp that showed it was filed with the RACD on October 6, 1994. The housing provider demonstrated compliance with § 4101.6 by offering testimony that "prior to or simultaneously with the filing" of the registration statement, the housing provider "post[ed] a true copy of the Registration/Claim of Exemption form in a conspicuous place at the ... housing accommodation." 14 DCMR § 4101.6 (1991) (emphasis added).

Accordingly, the Commission denies Issue C and affirms the ALJ's decision.

D. The evidence does not support Conclusion of Law number 2. Petitioner is not barred by the statute of limitations since the Respondent is not in compliance with the law.

In Conclusion of Law 2, the ALJ held that the tenant was “barred by the statute of limitations contained in D.C. Code Section 45-2516(e) [currently § 42-3502.06(e)] from challenging the validity of Respondent’s claim of exemption and posting of Respondent’s registration statement.” On appeal, the tenant argues that the evidence does not support Conclusion of Law 2 and the statute of limitations does not bar the tenant’s claim, since the housing provider is not in compliance with the law. Contrary to the tenant’s assertion, the housing provider was in compliance with the law when it registered in 1994 and posted the registration statement during that period.

On October 6, 1994, the housing provider filed a claim of exemption pursuant to D.C. OFFICIAL CODE § 42-3502.05(a)(2) (2001), which provides:

(a) Sections 42-3502.05(f) through 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except:

...

(2) Any rental unit in any newly constructed housing accommodation for which the building permit was issued after December 31, 1975, or any newly created rental unit, added to an existing structure or housing accommodation and covered by a certificate of occupancy for housing use issued after January 1, 1980, provided, however, that this exemption shall not apply to any housing accommodation the construction of which required the demolition of an housing accommodation subject to this chapter, unless the number of newly constructed rental units exceeds the number of demolished rental units;

In accordance with 14 DCMR § 4101.6 (1991), the housing provider posted the registration statement in the lobby of the housing accommodation prior to or simultaneously with the filing. See discussion supra Issue C. The ALJ determined that the housing provider complied with 14 DCMR §§ 4101.3 and 4101.6 (1991), when the

housing provider filed and contemporaneously posted the Registration/Claim of Exemption Form. Since the ALJ's findings are supported by the substantial evidence on the record of the proceedings, the Commission affirms the ALJ's findings and denies Issue D.

E. The evidence does not support Conclusion of Law number 3 since the law contemplates that the Petitioner would receive the notice with sufficient time to make an intelligent decision concerning the consequences of her decision.

The ALJ determined that the housing provider met the requirements of D.C. OFFICIAL CODE § 42-3502.09(d) (2001), when the tenant executed the rental application that provided notice of the exemption. In Conclusion of Law 3, the ALJ stated:

Respondent has satisfied D.C. Code Section 45-2515(d) [currently § 42-3502.05(d)] by providing [P]etitioner with written notice that rental increases for Unit #214 would not be subject to the District of Columbia Rent Stabilization Program as required by D.C. Code Section 45-2515(d) [currently § 42-3502.05(d)] by giving [P]etitioner written notice of Respondent's claim of exemption at the time [P]etitioner filled out a rental application for Unit 214.

D.C. OFFICIAL CODE § 42-3502.05(d) (2001) provides:

Prior to the execution of a lease or other rental agreement after July 17, 1985, a prospective tenant of any unit exempted under subsection (a) of this section shall receive a notice in writing advising the prospective tenant that rent increases for the accommodation are not regulated by the rent stabilization program.

As discussed and illustrated in Issues A and B, the rental application provided notice that the housing provider was exempt from the rent stabilization provisions of the Act. See discussion supra. On appeal, the tenant maintains that the law contemplates that the tenant would receive the notice with sufficient time to make an intelligent decision concerning the consequences of her decision. The tenant's counsel did not cite any legal authority to support this contention.

The tenant testified that she filled out the rental application before she signed the lease and moved into the housing accommodation. On cross-examination, the tenant testified that she had an opportunity to ask questions about the apartment and discuss the terms of her lease. The tenant also acknowledged that before she filled out the rental application, she was involved in a tenant petition where one of the issues was whether the housing provider was exempt from rent control. See Kornblum v. Zegeye, TP 24,338 (RHC Aug. 19, 1999).²

Although the tenant acknowledged that she had prior experience with petitions involving claims of exemption from rent control, the tenant stated that she did not know what the word exempt meant on the rental application. She stated she did not even think about what exempt meant, and she stated that it meant nothing to her. The tenant concluded by stating, "It said DC rent control buildings only, exempt. That's all I thought." (OAD Hearing CD-ROM, Apr. 5, 2001).

After the ALJ reviewed the evidence, he issued the following findings of fact:

8. At the time that Ms. Johnson and Ms. Kornblum filled out the rental application for Unit 214, Ms. Kornblum had a bachelor's degree from the University of Minnesota, and a master's degree in journalism from Columbia University.
9. At the time that Ms. Johnson and Ms. Kornblum filled out the rental application for Unit 214, Ms. Kornblum had prior litigation experience with another landlord involving the issue of exemption from rent control.

² The Commission takes official notice of the Commission's decision and order in TP 24,338, which states that the tenant filed TP 24,338 on April 4, 1997, and the agency held the hearing on September 29, 1997. The Commission takes official notice of Kornblum v. Zegeye, TP 24,338 (RHC Aug. 19, 1999) pursuant to D.C. OFFICIAL CODE § 2-509(b) (2001), which provides: "Where the decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such a case shall on timely request be afforded an opportunity to show the contrary." In accordance with § 2-509(b), the parties have ten (10) days from the date of issuance of the decision and order in TP 26,155 to show facts contrary to those officially noticed by the Commission.

10. Ms. Kornblum heard Ms. Johnson explain that rental increases for Unit 214 would be exempt from rent control and, by reason of her education and prior litigation experience with other tenant petition matters, Ms. Kornblum had reason to know what Ms. Johnson meant by the word “exempt.”

Decision at 4-5.

The findings of fact reveal that the ALJ made a credibility determination in favor of the housing provider and against the tenant. The ALJ is empowered to resolve conflicts in the testimony and make credibility determinations. Fazekas v. Dreyfuss, TP 20,394 (RHC Apr. 14, 1989). Appellate tribunals are required to give deference to the hearing officer’s findings, and those findings should not be disturbed if they are supported by substantial evidence. See Eilers v. District of Columbia Bureau of Motor Vehicles Servs., 583 A.2d 677 (D.C. 1990); Smith Prop. Holdings Three D.C. Ltd. P’ship v. Tenants of 2601 Woodley Place, N.W., CI 20,736 (RHC June 30, 1999); Ford v. Dudley, TP 23,973 (RHC June 3, 1999). The Commission will not disturb the ALJ’s credibility determinations, because they are supported by the substantial record evidence. See D.C. OFFICIAL CODE § 42-3502.16(h) (2001).³

The Act requires the housing provider to give written notice of the exemption before the tenant executes the lease. The housing provider presented credible evidence that proved the tenant received written and oral notice that the housing accommodation was exempt from the rent stabilization provisions of the Act, “prior to the execution of a lease.” D.C. OFFICIAL CODE § 42-3502.05(d) (2001).

³ D.C. OFFICIAL CODE § 42-3502.16(h) (2001) provides:

The Rental Housing Commission may reverse, in whole or in part, any decision of the Rent Administrator which it finds to be arbitrary, capricious, an abuse of discretion, not in accordance with the provisions of this chapter, or unsupported by substantial evidence on the record of the proceedings before the Rent Administrator, or it may affirm, in whole or in part, the Rent Administrator’s decision.

The tenant received written notice of the housing provider's exemption in accordance with the Act, and she received the notice in sufficient time to make an intelligent decision. The written notice, prior to the execution of the lease, buttressed by the tenant's previous experience with claims of exemption, constitute substantial evidence that the tenant received notice in sufficient time to make an intelligent decision. Since the housing provider gave the tenant written notice before she signed the lease, the housing provider satisfied the requirements of § 42-3502.05(d). Accordingly, the Commission affirms the ALJ's decision and denies Issue E.

F. The evidence does not support Conclusion of Law number 4 since the ALJ did not find that the registration/claim of exemption form was posted at the time the Petitioner took possession of her unit.

In Conclusion of Law 4, the ALJ determined: "Petitioner's unit is exempt from rent control pursuant to 45-2515(a)(2)" [currently § 42-3502.05(a)(2)]. D.C. OFFICIAL CODE § 42-3502.05(a)(2) (2001) provides:

(b) Sections 42-3502.05(f) through 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except:

...

(2) Any rental unit in any newly constructed housing accommodation for which the building permit was issued after December 31, 1975, or any newly created rental unit, added to an existing structure or housing accommodation and covered by a certificate of occupancy for housing use issued after January 1, 1980, provided, however, that this exemption shall not apply to any housing accommodation the construction of which required the demolition of an housing accommodation subject to this chapter, unless the number of newly constructed rental units exceeds the number of demolished rental units;

For the reasons that follow, the Commission affirms Conclusion of Law 4 and denies Issue F.

In Issue C supra, the Commission held that the housing provider satisfied the registration requirements when the housing provider filed the Registration/Claim of Exemption Form on October 6, 1994 and contemporaneously posted the form in the lobby of the housing accommodation. Moreover, in Issues A, B, and E, the Commission held that the housing provider gave the tenant oral and written notice of the exemption in accordance with the Act and regulations, when the tenant executed the rental application on April 16, 1998.

The tenant does not challenge the exempt status of the housing accommodation.⁴ The tenant argues that her rental unit is not exempt from the rent stabilization provisions of the Act, because the ALJ did not find that the registration statement was posted when the tenant took possession of her unit.

The Commission has repeatedly held that the housing provider's failure to give the tenant written notice of its exemption renders the claim of exemption void, until the housing provider provides the requisite notice. In Chaney v. H.J. Turner Real Estate Co., TP 20,347 (RHC Mar. 24, 1989), the Commission directed the hearing examiner to find that the housing provider failed to comply with the mailing or posting requirements of 14 DCMR § 4101.6 (1991), because the housing provider admitted that he did not give the tenant notice of the exemption by posting or mailing a copy of the claim of exemption to the tenant. The Commission held that the "failure to notify a tenant of a claim of exemption pursuant to the regulations is not a facial defect that can be cured within 30 days of notice, thereby rehabilitating the claim from the initial date of filing as if the

⁴ Before the evidentiary hearing, the parties stipulated that the housing accommodation was constructed in 1987.

defect had not occurred. The failure to notify the tenant makes the claim of exemption void until proper notification is given.” Id. at 4.

The Commission may, however, depart from precedent established in earlier cases when the case under review presents a unique set of facts. In Majerle Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 866 A.2d 41 (D.C. 2004), the court affirmed the Commission’s departure from earlier precedent, because the case presented a “unique set of facts that were not found in its prior decisions.” Similarly, the facts in the instant case are sufficiently unique to distinguish it from the cases where the Commission found the housing accommodation was not exempt, because the housing provider failed to post or mail the Registration/Claim of Exemption Form.

In the instant case, the housing provider met the registration requirements of the Act when the housing provider filed and contemporaneously posted the Registration/Claim of Exemption Form. In addition, the housing provider gave the tenant written notice of its exemption and secured the tenant’s signature in two separate sections of the rental application. In addition to placing her signature in the center of the application, the tenant also signed directly under the portion of the application where the housing provider gave notice of its exemption from the rent stabilization provisions of the Act, commonly known as rent control. Moreover, the tenant filed a petition and challenged another housing provider’s claim of exemption, before she signed the rental application that provided notice of the exemption in the instant case.

In Richards v. Wood, TP 27,588 (RHC July 15, 2004) at 4, the Commission held, “the housing provider failed to qualify for the exemption because at no time did the housing provider inform the [tenant], that the accommodation was exempt from the

strictures of the Act.” Similarly, in Goodman v. District of Columbia Rental Hous. Comm’n, 573 A.2d 1293, 1301 n.20 (D.C. 1990), the court noted that “[t]here is likewise no finding as to whether or when the [tenant] may have learned, from some source other than a notice from [the housing provider], that [the housing provider] claimed exemption from coverage.”

Unlike the facts in Richards and Goodman, the record is replete with evidence the housing provider gave the tenant written notice of its exemption. Moreover, “[t]here is ... [a] finding as to whether or when the [tenant] may have learned, from some source other than a notice from [the housing provider],”⁵ the meaning and impact of the word exempt that appeared on the rental application. ALJ Simon found, as a matter of fact that “[a]t the time that Ms. Johnson and Ms. Kornblum filled out the rental application for Unit 214, Ms. Kornblum had prior litigation experience with another landlord involving the issue of exemption from rent control.” Finding of Fact 9; see also note 2 supra.

Consequently, the ALJ did not err when he concluded as a matter of law that the tenant’s unit was exempt from rent control pursuant to § 42-3502.05(a)(2). The evidence supports Conclusion of Law 4, because the housing provider satisfied the registration requirements when it filed the Registration/Claim of Exemption Form on October 6, 1994, contemporaneously posted the registration statement, and gave the tenant written notice of the exemption before she executed the lease on April 16, 1998. On the facts of this case, the housing provider did not forfeit the exemption because the ALJ did not find that the Registration/Claim of Exemption Form was posted when the tenant took possession of her unit. Accordingly, the Commission denies Issue F.

⁵ Goodman, 573 A.2d at 1301 n.20.

G. The evidence does not support Conclusion of Law number 5 since he [sic] placed the burden of proof on the Petitioner.

In Conclusion of Law 5, the ALJ determined that the “Respondent did not retaliate against Petitioner by disposing of her property or by requiring her to pay late fees after she sent a letter to the Respondent on February 25, 2000 complaining about the amount of rent that she was paying.” On appeal, the tenant argues that the ALJ erred because he placed the burden of proof on the tenant.

The tenant’s position is premised upon the mistaken belief that the presumption of retaliation is an automatic entitlement. The presumption does not arise until the tenant meets her burden to show that within the six months preceding the housing provider's alleged retaliatory action, the tenant exercised one of six enumerated rights that triggered the presumption. See Brookens v. Hagner Mgmt. Corp., TP 4284 (RHC Aug. 31, 2000).

The retaliation provision of the Act, D.C. OFFICIAL CODE § 42-3505.02 (2001), provides:

(a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

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

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

The tenant's position that the ALJ erred because he placed the burden of proof on the tenant is contrary to the retaliation provision of the Act.

Pursuant to D.C. OFFICIAL CODE § 42-3505.02 (2001), the Act provides a presumption of retaliation if the tenant presents proof that she engaged in one of six enumerated acts within the six months preceding the housing provider's action. In De Szunyogh v. William C. Smith & Co., Inc., 604 A.2d 1, 4, (D.C. 1992), the Court held: "If a tenant alleges acts which fall under the retaliatory eviction statute, D.C. [OFFICIAL] CODE § [42-3505.02], the statute by definition applies, and the landlord is presumed to have taken 'an action not otherwise permitted by the law' unless it can meet its burden under the statute." (emphasis added.) Once the tenant presents sufficient evidence to

trigger the presumption, the housing provider must present clear and convincing evidence to rebut the presumption in accordance with § 42-3505.02(b).

The tenant attempted to show that the housing provider retaliated against her after she sent a letter on February 25, 2000 objecting to a late fee and the \$100.00 monthly surcharge she incurred because of her credit rating. The tenant argued that the housing provider retaliated against her for sending the February 25, 2000 letter by not permitting her to pay rent after the fifth day of the month without incurring late fees, requiring her to pay by certified check or money order, and disposing of her personal property.

During the hearing, the tenant acknowledged that the lease required a late fee after the fifth day of the month. She also stated that she received several notices that she would have to pay a late fee and pay by certified check or money order, before she wrote the letter on February 25, 2000.

On cross-examination, the tenant admitted that she received R. Exh. 4, which was a July 7, 1999 notice informing her that she would have to pay a late fee and pay by certified check or money order because she had not paid her rent by July 5, 1999. The housing provider also introduced R. Exh. 5, which was a November 8, 1999 notice informing the tenant that she would have to pay a late fee and pay by certified check or money order, because she did not pay her rent before November 5, 1999. Finally, the housing provider introduced R. Exh. 6, which was a February 7, 2000 notice informing the tenant that she would have to pay a late fee and pay by certified check or money order, because she did not pay her rent by February 5, 2000. The tenant acknowledged that after February 25, 2000, the housing provider simply continued to send the same type of notice that was sent prior to February 25, 2000.

On the issue of the tenant's personal possessions, the tenant testified that the housing provider disposed of her possessions after the tenant wrote the letter on February 25, 2000. The tenant testified that several of her items were moved from the second floor storage room to the first floor storage room. She stated that the housing provider assured her that the items would be safe. However, in May 2000, those items were given to the Salvation Army, including an antique dresser.

The housing provider's witness testified that the tenant rented a storage space. However, the tenant left some of her property in a cramped space outside of the storage bin, and this caused a fire hazard. At the end of the summer of 1999, the housing provider delivered notices to the tenants advising them that management was going to clean the storage areas. The notice also advised the tenants that they were required to place their possessions in their bins. Thereafter, the housing provider cleaned the area and disposed of the items that were not in the storage bins. The housing provider's witness testified that management did not send the notices or clean the storage area because the tenant sent the letter on February 25, 2000.

The ALJ's analysis of the tenant's retaliation claim was not flawless. However, the hearing examiner discussed the facts surrounding the claim, cited and applied the retaliatory action provision of the statute, and stated that the housing provider "presented clear and convincing evidence to rebutted [sic] the presumption of retaliation, and therefore, shall not be considered to have retaliated against [the tenant] in violation of D.C. Code 45-2552 (1990) [currently § 42-3505.02 (2001)]." Decision at 9.

The ALJ concluded as a matter of law: "Respondent did not retaliate against Petitioner by disposing of her property or by requiring her to pay late fees after she sent a

letter to Respondent on February 25, 2000 complaining about the amount of rent that she was paying.” The ALJ reached the conclusion of law after making the following findings of fact:

11. Respondent sent Petitioner written notices on July 7, 1999, November 8, 1999, February 7, 2000 and March 14, 2000, requiring [P]etitioner to pay late fees and to pay her rent by way of certified check or money order due to Petitioner’s failure to pay her rent by the 5th of each month.
12. Petitioner sent a letter to Respondent on February 25, 2000, complaining about having to pay a rental “surcharge.”
13. Petitioner had been allowed to pay her rent without incurring a late fee in December 2000 and January 2001, because Melinda Matzen had agreed to give Petitioner a two (2) month grace period to coordinate her pay period/salary with her rent payments. Petitioner and Respondent further agreed that [P]etitioner would have to resume making her payments by the 5th day of each month in February 2001.
14. Petitioner received advance written notice in [the] summer of 1999 that the storage area on the second floor where her property was located was going to be cleaned. Respondent subsequently removed Petitioner’s property from the storage area at 2501 Porter Street, N.W. in May 2000, because it constituted a fire hazard.

Decision at 5.

The ALJ’s findings of fact and conclusion of law were supported by and in accordance with the substantial evidence on the record of the proceedings. See D.C. OFFICIAL CODE § 2-509(e) (2001). Moreover, the ALJ properly applied the retaliation statute and assigned the proper burdens of proof. Accordingly, the Commission affirms the ALJ’s decision and denies Issue G.

IV. CONCLUSION

For the foregoing reasons, the Commission denies the issues that the tenant raised in the notice of appeal and affirms the decision and order.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

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

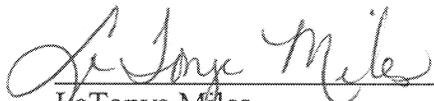
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 26,155 was mailed by priority mail with delivery confirmation, postage prepaid, this 11th day of March 2005 to:

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