

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,112

In re: 1133 13th Street, N.W., Unit 3A

Ward Two (2)

ERIC PAUL ISLER
Tenant/Appellant

v.

BRUCE LAWSON
Housing Provider/Appellee

DECISION AND ORDER

August 8, 2002

PER CURIAM. This case is an appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission), pursuant to the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001). The Act, 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 these proceedings.

I. PROCEDURAL HISTORY

On May 14, 2001 the tenant, Eric Paul Isler, filed Tenant Petition (TP) 27,112 with the Rental Accommodations and Conversion Division (RACD). In his petition, the tenant alleged a rent increase was taken on his unit while it was not in substantial compliance with the District's housing regulations; the apartment building in which the tenant's unit is located is not properly registered with RACD; the services and facilities provided in connection with the tenant's rental

unit were substantially reduced; and the housing provider took retaliatory action against the tenant. Tenant Petition at 3-5.

The OAD scheduled a hearing on the matter for October 4, 2001. At the hearing, legal counsel for the parties filed a Joint Motion for Continuance. See Record (R.) at 15. The hearing was rescheduled for November 19, 2001, at which time the hearing was presided over by Administrative Law Judge (ALJ) Lennox J. Simon. The housing provider appeared for the hearing; however, the tenant was not present and the case proceeded in the tenant's absence. In his decision and order, the ALJ stated that the tenant failed to prosecute the charges filed in TP 27,112 and dismissed the case with prejudice "due to the Respondent's [sic] absence and failure to state their [sic] case on the record."¹ Isler v. Lawson, TP 27,112 (OAD Nov. 19, 2001) at 1.

On December 4, 2001, the pro se tenant filed a timely Motion for Reconsideration,² in which he alleged:

[D]ue to the unforeseen [a]nthrax scare, all mail to be delivered to the [t]enant [c]ounsel, Barbara A. Rice, Esq., and Eric Paul Isler was held up in the Brentwood [p]ostal [o]ffice, thereby preventing deliveries for a couple of weeks. Barbara A. Rice, Esq., nor Eric Paul Isler received notification of the November 19th [sic] hearing.

Tenant's Motion for Reconsideration at 1. The ALJ did not to respond to the tenant's Motion, thereby denying it by operation of law.³

¹ The ALJ committed plain error when he incorrectly referred to the tenant as the "Respondent" at the hearing, rather than properly referring to the tenant as the Petitioner. The regulation, 14 DCMR § 3807.4 (1991) states "Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error."

² The tenant states in his Motion for Reconsideration that Barbara A. Rice, his former counsel, was dismissed for "ineffective assistance by counsel." Tenant's Motion for Reconsideration at 1.

³ The regulation, 14 DCMR § 4013.5 (1991), provides: "Failure of a hearing examiner to act on a motion for reconsideration within the time limit prescribed by §4013.2 shall constitute a denial of the motion for reconsideration."

II. ISSUES ON APPEAL

On January 3, 2001, the tenant, through counsel,⁴ filed a notice of appeal in the Commission, in which he raised the following issues: 1) The ALJ erred when he dismissed the case on the assertion that the tenant and his counsel were served with notice of the November 19, 2001 hearing; 2) the ALJ erred when he applied the law because he did not consider the misconduct of tenant's counsel; 3) that dismissal of the case unfairly prejudiced the tenant because his inability to state his case on the record was due to the misconduct of counsel; 4) the housing provider would not be unfairly prejudiced by a reversal or dismissal of the case on appeal because neither action would impair the housing provider's pursuit of relief in the matter; 5) the tenant was justified in his failure to appear at the hearing because he neither acted willfully nor in bad faith when he relied on his counsel to appear on his behalf; 6) the dismissal of the case denies the tenant due process of law; 7) the Commission has discretion and authority to grant a new hearing in this matter; and 8) the tenant should not be sanctioned by having his case dismissed, but if the matter must be dismissed it should be done with out prejudice. See Tenant's Notice of Appeal at 3-5.

III. DISCUSSION OF THE ISSUES

Whether the ALJ erred when he dismissed the case based on his conclusion that notice of the November 19, 2001 hearing was furnished to the tenant and his counsel.

On appeal, the tenant argues he did not receive notice of the November 19, 2001 hearing because an anthrax contamination at the Brentwood postal facility prevented the mail from being delivered to either himself or his counsel. Based on the postal delivery confirmation tracking

⁴ The tenant's Notice of Appeal states he is represented in this action by Attorney Brad Taylor.

number provided by the ALJ in his decision and order, the tenant asserts that “a subsequent call by the [tenant] to the U.S. Postal Service on 11/29/2001 [sic] revealed that the hearing notice letter sent to [the tenant’s] counsel was marked undeliverable and stamped [sic] to be returned to the sender [sic] on October 18, 2001.” Tenant’s Notice of Appeal at 2. Moreover, the tenant contends:

The Brentwood postal facility confirmed receipt of the letter at their facility, but conceded that it had never been delivered either to [the tenant’s] counsel or to [the tenant]. Although it was stamped [sic] to be returned to sender [sic] on October 18, [sic] it was never actually returned to DCRA, due to the fact that mail was still being held at the facility due to the public health emergency On the hearing date, neither counsel nor [tenant] appeared due to the failure of the delivery of notice to either.

Id.

Hearing notices are mailed pursuant to the Act, D.C. OFFICIAL CODE § 42-3509.04(a)(3) (2001), and must be furnished to the parties by certified mail or other form of service which assures delivery according to D.C. OFFICIAL CODE § 42-3502.16(c) (2001). See also Joyce v. District of Columbia Rental Hous. Comm’n., 741 A.2d 24 (D.C. 1999). In order to assure delivery, the OAD customarily takes official notice of the United States Postal Service (U.S.P.S.) delivery status report for each package mailed to the parties in a given action. OAD obtains the delivery status reports from the U.S.P.S. website and places each report in its respective record, which is accepted by the agency as evidence of delivery or non-delivery.

When the ALJ issued his decision and order, he raised the issue of whether proper notice of the November 19, 2001 hearing was served on the parties due to the tenant’s failure to appear. The ALJ concluded that proper notice was served on the parties because after the notices were mailed, “a follow-up telephone call on October 26, 2001, to 1-800-222-1811, the U.S. Postal Service’s Delivery Confirmation contact number confirmed that the notice of hearing letter was

delivered at the address of record on October 19, 2001, at 5:02 p.m. – Delivery Confirmation #0300 1290 0000 9204 7674.” Isler v. Lawson, TP 27,112 (OAD Nov. 19, 2001).

However, the Commission’s review of the record revealed there is no documentary evidence to support the ALJ’s conclusion that a follow-up telephone call was placed to the U.S.P.S. on October 26, 2001. In addition, the relevant U.S.P.S. delivery status reports are absent from the record. The Commission has held that “[a]dministrative decisions should rest solely upon evidence appearing in the hearing record of the agency proceeding.” Johnson v. Hughes, SF 20,040 (RHC Apr. 11, 1996) at 11 (citing D.C. CODE § 1-1509(b) (1981)). In the instant case, because there is no record evidence of the pertinent U.S.P.S. delivery status reports confirming delivery of the November 19, 2001 hearing notices to the parties, and because a telephone call to the U.S.P.S. is not an official U.S.P.S. record of delivery to the tenant, the ALJ erred when he dismissed TP 27,112. The Commission cannot conclude that the parties were properly served with notice because the record lacks substantial evidence to illustrate that the ALJ based his decision on information contained in the record.

According to the Act, D.C. OFFICIAL CODE § 42-3502.16(h) (2001), the Commission’s duty is to review the Rent Administrator’s decisions, and to reverse those decisions which it finds to be unsupported by substantial record evidence of the hearing before the Rent Administrator. See Stancil v. Davis, TP 24,709 (RHC Mar. 24, 2000) at 5. Because the instant case is devoid of record evidence that proper service was made to the tenant and his counsel, the decision of the ALJ is reversed and the case is remanded to OAD for a de novo hearing.

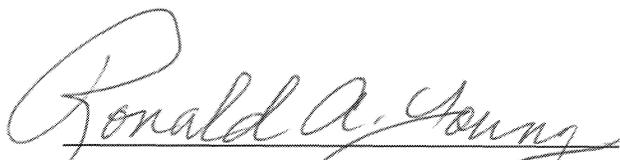
IV. CONCLUSION

The Commission’s review of the record revealed the tenant was not afforded proper service of notice of the November 19, 2001 OAD hearing. The record lacks supporting evidence

of the ALJ's conclusion that the agency confirmed delivery by placing a telephone call to the U.S.P.S. on October 26, 2001. Because there is no verifiable proof of proper service to the tenant and because the October 26, 2001 telephone call to the U.S.P.S. does not constitute an official U.S.P.S. record of delivery of notice to the tenant, the ALJ's decision is reversed and remanded to OAD for a de novo hearing. Accordingly, the additional issues raised on appeal by the tenant are denied as moot.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON

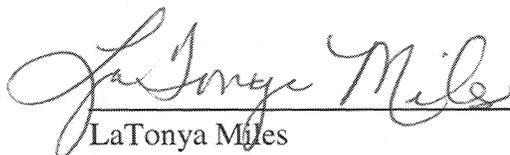

RONALD A. YOUNG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing DECISION AND ORDER in TP 27,112 was mailed by priority mail, with delivery confirmation, postage prepaid, this **8th day of August, 2002** to:

Brad Taylor, Esq.
710 7th Street, S.E.
Washington, D.C. 20003
Counsel for the Tenant

Gary Wright, Esq.
7220 Wisconsin Avenue, #320
Bethesda, MD 20814
Counsel for the Housing Provider

A handwritten signature in cursive script that reads "LaTonya Miles". The signature is written in black ink and is positioned above a horizontal line.

LaTonya Miles
Contact Representative