

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,396

In re: 1336 Nicholson Street, N.W., Units 1, 2, & 4

Ward Four (4)

BRENDA MARSH IRBY
WILMARIE DAVIS
MORRELL CHASTEN
Tenants

v.

MILTON BESS, JR.
Housing Provider

DECISION AND ORDER

February 21, 2003

BANKS, CHAIRPERSON. This case is on appeal to the Rental Housing Commission from a decision and order issued by the Rent Administrator. 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 (DCMR), 14 DCMR §§ 3800-4399 (1991) govern the proceedings.

I. THE PROCEDURES

On January 7, 2002, the Tenants filed tenant petition (TP) 27,396 in the Housing Regulation Administration. The petition alleged: 1) rent increases while the rental units were not in substantial compliance with the housing regulations, 2) services and facilities in the rental units were substantially reduced and permanently eliminated, and 3) the claim of retaliation based on verbal abuse and legal action in court.

On April 18, 2002, counsel for the Housing Provider filed a motion to dismiss the petition. The motion stated that the rental units were exempt from rent control, as evidenced by the Registration/Claim of Exemption Form attached as an exhibit to the motion, and that the Tenants did not challenge the claim of exemption in their Answer (opposition) to the motion. Motion at 1. The motion also stated that where tenants allege a reduction of services and are paying rent into the registry of the Superior Court, it will determine the rent refund, if any, to the tenants, because of concurrent jurisdiction over that issue citing Drayton v. Poretsky Mgmt, Inc., 462 A.2d 1115, 1122 (D.C. 1983). Finally, the motion stated that the Tenants' claim of retaliation is cognizable in the pending landlord and tenant action in the Superior Court, which scheduled a hearing for July 1, 2002. Motion at 1 & 2.

The Tenants filed an answer opposing the motion to dismiss, and requested the Office of Adjudication (OAD) hearing be held as scheduled (for June 25, 2002). Answer at 2. However, on May 13, 2002, Administrative Law Judge (ALJ) Henry McCoy of OAD issued the decision and order granting the motion to dismiss. Subsequently, on May 17, 2002, the ALJ issued an amended decision and order with the identical rulings as the first decision and order, which granted the motion to dismiss and dismissed the petition with prejudice.

The OAD decision and order stated that the rental units were exempt, and that the claim of exemption was not challenged by the Tenants, (Decision at 2.) Further, the Tenants knew of the claim of exemption when they filed their Answer with a copy of the rent increase notice that stated the property was exempt and gave the exemption number (Decision at 2.)

On retaliation, the hearing examiner held that charge would survive although the property was exempt; however, the retaliation issue could be litigated in the Superior Court case on the date already set by that court. (Decision at 2.)

On June 14, 2002, pursuant to D.C. OFFICIAL CODE § 42-3502.16(h) (2001), the Commission issued its notice to the parties of its intent to review the issues in this case. The Commission held its hearing on July 18, 2002.

II. ISSUES FOR REVIEW

- A. Whether the hearing examiner erred when he dismissed TP 27,396 before affording the tenants a hearing in accordance with 14 DCMR § 3903.1 (1991).
- B. Whether the hearing examiner erred by determining that the property was exempt and dismissing TP 27,396 based on a claim of exemption filed on December 27, 1999.
- C. Whether the hearing examiner erred in dismissing the tenant's claim of retaliation based on a pending action in Superior Court.

III. THE LAW

A. Hearings

The Rental Housing Act of 1985, provides for a hearing upon request of a party,

D. C. OFFICIAL CODE § 42-3502.16(b-c)(g) (2001), as follows:

(b) Immediately upon receipt of the petition, the Rent Administrator shall notify the nonpetitioning party, housing provider or tenant, by certified mail or other form of service which assures delivery of the petition, of the right of either party to make, within 15 days after the receipt of the notice, a written request for a hearing on the petition. The Rent Administrator may deny the petition if the issue is moot or the petition does not comply with subsection (a) of this section.

(c) If a hearing is requested timely by either party, notice of the time and place of the hearing shall be furnished the parties by certified mail or other form of service which assures delivery at least 15 days before the commencement of the hearing....

...

(g) All petitions filed under this section, all hearings held relating to the petitions, and all appeals taken from decision of the Rent Administrator shall be considered and held according to the provisions of this section and title I of the District of Columbia Administrative Procedure Act. In the case of any direct, irreconcilable conflict between the provision of this section and the District of Columbia Administrative Procedure Act, the District of Columbia Administrative Procedure Act shall prevail.

The DCAPA, D.C. OFFICIAL CODE § 2-509 (2001), provides for a hearing as follows:

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

(b) In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof. (emphasis added.)

The rules for the Rent Administrator provide for a hearing as follows:

“The parties to petitions before the Rent Administrator have a right to a hearing in accordance with the provisions of the Act and chapter 40.”

14 DCMR § 3903.1 (1991).

“The proponent of a rule or order shall have the burden of establishing each finding of fact essential to the rule or order by a preponderance of the evidence.”

14 DCMR § 4003.1 (1991).

B. Exemption

The Act provides for exemption based on ownership of four or fewer units, D. C. OFFICIAL CODE § 42-3502.05(a)(3) (2001). The burden of proof is on the housing provider to prove eligibility for an exemption from the Act. Revithes v. District of

Columbia Rental Hous. Comm'n, 536 A.2d 1007 (D.C. 1987); Best v. Gayle, TP 23,043 (RHC Nov. 21, 1996) at 5. The Commission stated in The Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) at 12-13:

In each instance of a claimed exemption, the housing provider has the burden of proof. Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990); citing Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007, 1017 (D.C. 1987) (other citations omitted.) The filing of a claim of exemption form does not ipso facto meet the burden of proof on exemption, because the facts stated therein must be proven not to be a misrepresentation. Revithes at 1011-12.... We conclude, some evidence of the exemption must be presented at the OAD hearing, not merely an assertion, or oral statement, or the Registration/Claim of Exemption Form, for the Commission to review to determine the record contains substantial evidence to support the claim of exemption. (citation omitted.)

C. Retaliation

The Superior Court and the Rent Administrator have concurrent jurisdiction over claims related to retaliation. DeSzunyogh v. William C. Smith & Co., 604 A.2d 1 (D.C. 1992), cited in H. G. Smithy Co. v. Arieno, TP 23,329 (RHC June 5, 1996) at 5.

IV. THE COMMISSION'S DECISION

- A. **Whether the hearing examiner erred when he dismissed TP 27,396 before affording the tenants a hearing in accordance with 14 DCMR § 3903.1 (1991).**
- B. **Whether the hearing examiner erred by determining that the property was exempt and dismissing TP 27,396 based on a claim of exemption filed on December 27, 1999.**

The Act requires the nonpetitioning party to request a hearing within 15 days of notice of the filing of the petition. In this case, the nonpetitioning party was the Housing Provider, who did not request a hearing. However, the DCAPA requires in a contested case that a hearing be held with the opportunity to present evidence and argument. The Rent Administrator's rule, 14 DCMR § 3903.1 (1991), provides, "the parties to petitions

before the Rent Administrator have a right to a hearing.” Nevertheless, the Act states that the DCAPA controls when the terms of the Act and DCAPA conflict. In the facts of this case, the Act and DCAPA do not conflict, because the tenants did not contest exemption. However, the Housing Provider had the burden of proof on the issue of exemption, but failed to do more than assert the claim of exemption and did not present proof of it. See discussion in Vista Edgewood Terrace, supra, Section II, where the Commission held presenting the Registration/Claim of Exemption Form does not prove exemption. Accordingly, the ALJ is reversed on this issue, because he failed to hold a hearing, where the Housing Provider could meet his burden of proof. Further, the ALJ made the ruling of exemption based on the Housing Provider’s Registration/Claim of Exemption Form without taking evidence on that issue, and giving the Tenants the opportunity to argue whether the Housing Provider met his burden of proof, as provided in the DCAPA, D.C. OFFICIAL CODE § 2-509 (2001). Therefore, the issue of exemption is remanded for a hearing, where the Housing Provider has the burden of proof, Goodman, supra, and both parties have the opportunity for the presentation of evidence and argument on the exemption issue.

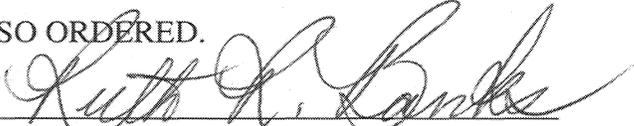
C. Whether the hearing examiner erred in dismissing the tenant’s claim of retaliation based on a pending action in Superior Court.

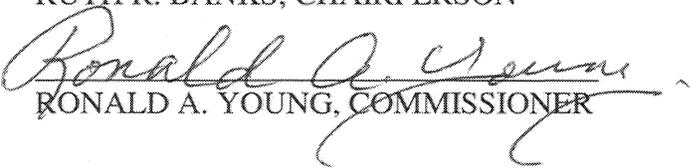
In the circumstances in this case, the ALJ had only one remaining issue, after disposing of the small housing provider exemption issue, which also disposed of the claim of improper rent increases while housing code violations existed.¹ Both the Superior Court and the Rent Administrator had concurrent jurisdiction over the retaliation

¹ Small housing providers are not mandated to meet the housing code before increasing rent, as must other housing providers. See Taylor v. District of Columbia Rental Accommodations Comm’n, 404 A.2d 173 (D.C. 1979).

issue. However, there is nothing in the record for the Commission to review that the retaliation issue was before the Superior Court for it to exercise its jurisdiction. An inquiry should be made of the pleadings and status of the Superior Court case. In addition, whether complete relief is more promptly available in the Rent Administrator's decision and order or in the court. In this case, there was a pending Superior Court action with a hearing date, but nothing in the OAD certified file that proved the Superior Court had the retaliation issue before it. The ALJ relied upon the statement in the motion to dismiss: "The Tenant Petition alleges retaliation which is a defense cognizable in the landlord and tenant proceeding." Motion at 1. Since the Housing Provider asserted the retaliation issue was before the Superior Court, the Housing Provider had the burden of proof. 14 DCMR § 4003.1 (1991). There is nothing in the OAD certified file showing that the Tenants raised retaliation as a defense in the Superior Court. Moreover, the Housing Provider is not the party to raise defenses for the Tenants. Accordingly, the ALJ is reversed on dismissal of the Tenants' retaliation issue. That issue is remanded for hearing and findings of fact and conclusions of law.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER

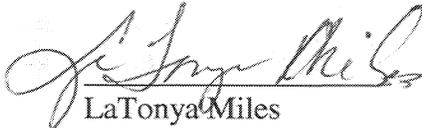
CERTIFICATE OF SERVICE

I certify that a copy of the decision and order in TP 27,396 was served by priority mail, with delivery confirmation, postage prepaid, this **21st day of February, 2003**, to:

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