

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,408

In re: 2231 California Street., N.W., Unit 301

Ward Two (2)

JAMES PARRECO
Housing Provider/Appellant

v.

HUGHES DENVER AKASSY
Tenant/Appellee

DECISION AND ORDER

December 8, 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 14, 2002, Hughes Denver Akassy, filed Tenant Petition (TP) 27,408, in the Housing Regulation Administration, Department of Consumer and Regulatory Affairs. The petition alleged the Housing Provider: 1) filed an improper rent ceiling, 2) permanently eliminated and substantially reduced services and facilities, and 3) took retaliatory action against the Tenant. On September 23, 2002, Administrative Law Judge (ALJ) James C. Harmon issued the decision and order on the petition. It contained:

Findings of Fact

I find, based on the substantial evidence presented at the hearing, the following facts:

1. The Petitioner has resided at 2231 California Street, N.W., Apartment #301, Washington, D.C. since on or about March 1, 1997. The Petitioner paid an initial rent in the amount of Seven Hundred Ninety Five Dollars (\$795.00).
2. The Petitioner, beginning in January 2002, and to the date of the hearing, has paid One Thousand Fifty Dollars(\$1,050.00) per month in rent into the Registry of Court at the Superior Court of the District of Columbia;
3. The Respondent James T. Parrecco is the President and General Partner of Indcom Land, Inc., which manages and is the landlord of the property located at 2231 California Street, N.W., Washington, D.C.
4. The Respondent, by notice dated November 20, 2001, increased the Petitioner's rent for his rental unit from Eight Hundred Seventy Nine Dollars (\$879.00) per month to One Thousand Fifty Dollars (\$1,050.00) per month, effective January 1, 2002. Such notice did not inform the Petitioner as to the basis of the most recent rent ceiling adjustment taken and perfected.
5. The increased rent in the amount of One Thousand Fifty Dollars (\$1,050.00) per month is being paid into the Court Registry at the Superior Court of the District of Columbia:[sic]
6. Tenant Petition #27,408 was filed with the Rental Accommodations and Conversion Division on January 14, 2002.
7. The Petitioner has not introduced any evidence to demonstrate that the rent ceiling relating to his rental unit that was filed with Rental Accommodations and Conversion Division for the subject rental unit, at any time during the three (3) years preceding the date of the filing of the Tenant Petition, i.e., from January 14, 1999, was illegal or improper.
8. For a two – (2) day period in December 2001, the Petitioner was without heat in his rental unit because of a broken boiler at the apartment complex. The petitioner informed management regarding the lack of heat by writing a note to Art LeFleur (spelled phonetically), who is the resident manager of the subject property located at 2231 California Street, N.W.
9. On September 12, 2000, the Respondent was cited by the Department of Consumer and Regulatory Affairs for fourteen (14) housing code violations. Among those violations are the following:

- A. Window does not fit reasonably well within its frame in the sleeping room;
 - B. Window not capable of opening and closing with ease in the sleeping room;
 - C. Window has missing hardware in the cooking room;
 - D. Wall had loose or peeling paint in the living room and cooking room; and [sic]
10. Subsequent to being served with the Housing Deficiency Notice relating to housing code violations, the Respondent by and through his maintenance person, made all repairs. The Respondent was not served with a Notice of Infraction for failing to make all of the necessary repairs in September 2000.
 11. The Respondent [sic] has failed to introduce any evidence to demonstrate that he identified with particularity and specificity to the Respondent the housing code violations that he alleges in his Tenant Petition relating to broken windows, failure to clean windows, peeling paint and broken bathroom sink that he maintains existed after the housing inspector inspected the rental unit in September 2000.
 12. The Tenant Petition did not identify with particularity or specificity to the Respondent the housing code violations that existed either in the subject rental unit or the common areas at the time that rent increases were taken by the Respondent.
 13. The Petitioner failed to introduce any evidence that services and facilities that were provided to the Petitioner as part of his tenancy were permanently eliminated during the three (3) year period preceding the date the Tenant Petition was filed, ie., from January 14, 1999.
 14. The Petitioner failed to introduce evidence regarding the date or dates when any services and facilities that were provided to the Petitioner during his tenancy were permanently eliminated during the three (3) year period preceding the date that the Tenant Petition was filed, i.e., from January 14, 1999.

Decision at 4-6.

Conclusions of Law

Based on the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, that:

1. The evidence has demonstrates [sic] that the Respondent has taken a rent increase that is larger than what is allowed under the Rental Housing Emergency [sic] Act of 1985 and in violation of 14 DCMR Section 4205.4.

2. The Petitioner has failed to prove, by a preponderance of law [sic], that the rent ceiling filed with the Rental Accommodations and Conversion Division, is improper, in violation of the D.C. Code Section 42-3502.06(a) (2001 ed.) and the Rental Housing Act of 1985.
3. The Petitioner has failed to prove, by a preponderance of the evidence, that services and/or facilities provided in connection with the Petitioner's rental unit have been permanently eliminated and/or substantially reduced, in violation of D.C. Code Section 42-3502.11 (2001 ed.) and the Rental Housing Act of 1985.
4. The Petitioner has failed to prove, by a preponderance of the evidence, that the Respondent has retaliated against him, in violation of D.C. Code Section 42-3505.02 (2001 ed.) and the Rental Housing Act of 1985.
5. The Respondent has acted knowingly and willfully in demanding a rent increase larger than what was allowed under the Rental Emergency [sic] Act of 1985; and
6. The Respondent has acted knowingly and willfully in substantially reducing a related service, i.e., heat, and failing to reduce the rent proportionally during the month of December 2001, in violation of D.C. Code Section 42-3502.14 (2001 ed.) and the Rental Housing Act of 1985.

Decision at 13.

On September 30, 2002, the Housing Provider filed a motion for reconsideration in the Office of Adjudication. On October 10, 2002, ALJ Harmon issued an order, which granted the motion for reconsideration, and stated an order relating to the issues raised in the motion for reconsideration would be issued forthwith. On October 16, 2002, ALJ Harmon issued the order on the issues raised in the motion for reconsideration.

On October 21, 2002, the Housing Provider filed a notice of appeal in the Commission. On October 29, 2002, the Apartment and Office Building Association of Metropolitan Washington (AOBA) filed a motion for leave to appear as amicus curiae on the issue of the imposition of fines under the Act, and the Commission granted the motion. On December 9, 2002, the Housing Provider filed its brief, and on December 16, 2002 AOBA filed the amicus curiae brief. The Commission held its hearing on February 6, 2003.

II. THE NOTICE OF APPEAL

On October 21, 2002, the Housing Provider filed the notice of appeal, which raised the following issues:

1. The Decision and Order ordering a rent rollback and imposition of a fine due to an allegedly improper rent increase is contrary to the statute and applicable regulations, and is arbitrary, capricious, an abuse of discretion and denial of due process, because it is founded on an issue neither raised in the tenant petition nor raised or argued at the hearing in this case.
2. The Decision and Order is arbitrary, capricious and an abuse of discretion, because the hearing examiner has imposed a rent increase notification requirement which does not exist anywhere in the law.
3. The Decision and Order ordering a rent rollback on the ground Housing Provider/Appellant failed to explain the basis of the increase in his notice to the tenant is arbitrary, capricious and an abuse of discretion, because it is based on a version of a regulation, which was superseded in 1998 and, therefore, not in effect when the circumstances of this case arose.
4. The Decision and Order ordering a rent rollback is arbitrary, capricious and an abuse of discretion, because the Appellant was penalized for using an official form issued and used by the Department of Consumer and Regulatory Affairs for rent increases to tenants.
5. The Decision and Order ordering a rent rollback is arbitrary, capricious and an abuse of discretion, because it is in direct contravention of Commission decisions dealing with notices of rent increases and the examiner's duty to explain his findings, and misstates applicable law, fails to state a sufficient legal basis for its holding, and improperly shifts the burden of proof to Housing Provider/Appellant.
6. The Decision and Order is arbitrary, capricious and an abuse of discretion, because there was no legal basis for finding a reduction in services and ordering a reduction in the rent ceiling for two days due to a lack of heat, when the evidence showed the heat was repaired promptly after it broke down.
7. The Decision and order is arbitrary, capricious and an abuse of discretion because it ordered a rollback of rent due to a lack of heat for two days, when the Rental Housing Act authorizes a rollback only when the rent, after reduction of the ceiling, exceeds the lawful rent ceiling.
8. The Decision and Order is contrary to the statute and applicable regulations, arbitrary, capricious, and abuse of discretion and not supported by substantial evidence, because it imposes a fine and finds a willful violation of the law using a definition of "willful" which is not consistent with applicable law and

prior precedent and there is not substantial evidence in the record to support a finding of willfulness.

9. The decision on Housing Provider/Appellant's Motion for Reconsideration is arbitrary, capricious and an abuse of discretion because it is premised on a confusion of the issues in the case, and Housing Provider/Appellant's arguments on the issues, and it completely changes the basis of the original Decision and Order, without any legal justification therefore.

III. DISCUSSION AND DECISION ON THE ISSUES

A. The Decision and Order ordering a rent rollback and imposition of a fine due to an allegedly improper rent increase is contrary to the statute and applicable regulations, and is arbitrary, capricious, an abuse of discretion and denial of due process, because it is founded on an issue neither raised in the tenant petition nor raised or argued at the hearing in this case.

This issue requires an analysis of the tenant petition and a determination whether one of the issues raised in the tenant petition charged an improper rent increase. The Tenant wrote in the tenant petition:

The rent is more [sic] higher than other tenants on my floor who moved on [sic] after me. My landlord try[sic] to have me evicted by increasing [sic] my rent by more than 20% this month. My ceiling (and my rent) are to[sic] high for the poor condition my apartment offer[.] (emphasis added.)

Tenant Petition, Section V, p.3, Record (R.) at 14.

The ALJ wrote in the decision:

Lastly, the Examiner is aware that the Respondent [sic] did not check the category under "Complaints Involving Increases In Rent" relating to a rent increase larger than the amount of increase that is allowed by the Rental Housing [sic] Emergency Act of 1985. The Examiner notes, however, that the Petitioner did complain about his rent being too high, and that such rent was increased by more than 20% in the narrative section on page three (3) of the Tenant Petition. Accordingly, the Respondent was put on notice that the Respondent [Tenant] was complaining about a rental increase that was 'too high' for his rental unit. It follows that if the Respondent was put on notice as to the allegation regarding the rental increase, the Respondent cannot claim a violation of his due process rights for the Examiner to consider the Petitioner's [Tenant's] claim regarding an

increase in rent that was ‘too high,’ and thus larger than what any provision of the Rental Housing Emergency [sic] Act of 1985 allowed.

Decision at 7.

The substantial evidence in the record is that the tenant petition raised an issue of whether the Tenant’s rent and rent increase were higher than allowed by the Act. The substantial evidence in the record is in the quoted text above, from the tenant petition with the allegation about the Tenant’s rent being raised 20% and higher than other tenants’ rents. Accordingly, the ALJ is affirmed on this issue, because the housing Provider had notice of the issue related to the rent increase. See Ungar v. District of Columbia Rental Hous. Comm’n, 535 A.2d 887, 890 (D.C. 1987), where the court stated notice must be strictly adhered to, since issues with the potential to adversely affect either other tenants or the landlord may lurk initially undetected in the tenant’s petition. Id. Here, in the instant appeal, the Tenant wrote out his allegation that his rent was too high, and beyond what the Act allowed, therefore, his complaint was not hidden or undetected in the petition. The Commission concludes that the Housing Provider received due process notice of the Tenant’s allegations, as required by the District of Columbia Administrative Procedure Act (DCAPA) D.C. OFFICIAL CODE § 2-509(a) (2001).

B. The Decision and Order is arbitrary, capricious and an abuse of discretion, because the hearing examiner has imposed a rent increase notification requirement which does not exist anywhere in the law.

The ALJ wrote in finding of fact numbered 4:

The Respondent, by notice dated November 20, 2001, increased the Petitioner’s rent for his rental unit from Eight Hundred Seventy Nine Dollars (\$879.00) per month to One Thousand Fifty Dollars (\$1,050.00) per month, effective January 1, 2002. Such notice did not inform the Petitioner as to the basis of the most recent rent ceiling adjustment taken and perfected.

The ALJ cited 14 DCMR § 4205.4 (45 D.C. Reg. Feb. 6, 1998), which provides:

A housing provider shall implement a rent adjustment by taking the following actions, and no rent adjustment shall be deemed properly implemented unless the following actions are taken:

- (a) The housing provider shall provide the tenant of the rental unit, not less than thirty (30) days written notice pursuant to § 904 of the Act, the following:
 - (1) The amount of the rent adjustment;
 - (2) The amount of the adjusted rent;
 - (3) The date upon which the adjusted rent shall be due; and
 - (4) The date and authorization for the rent ceiling adjustment taken and perfected pursuant to § 4202.9 (emphasis added).¹

The decision stated that the Housing Provider failed to inform the Tenant of the authorization for the rent ceiling adjustment taken and perfected, and did not provide a basis for the rent increase. Decision at 3, 6 & 7. The ALJ referred to Respondent's Exh.1, Exhibit B to find that the data required by § 4205.4(a)(4) was not on the notice of rent increase. Decision at 7. Specifically, the relevant text of the notice on the Housing Provider's letterhead, not the agency's form, stated:

Please be advised that the rent for your apartment will be increased to \$1050.00, effective January 1, 2002.

TENANT'S NAME Hughes Denver Akassy Date November 20, 2002

ADDRESS 2231 California St., NW, Apt. # 301 Registration No. 16754
Washington, D.C. 20008

Dear Mr. Akassy:

Your Legal Rent Ceiling Is \$ 3818.00

Your Current Rent Charge Is \$ 879.00

Your New Rent Ceiling Is \$ 3818.00

¹ In Sawyer, TP 24,991 (RHC Oct. 31, 2002), infra, p.9, the Commission "stated section 4202.9 will be revised to refer to 4205.9." Id. n.11. "In Lincoln Property, the Commission stated: The reference to 14 DCMR [§] 4202.9 is in error, because there is no § 4202.9 in the regulations. The error occurred when the Commission amended 14 DCMR [§] 4205.... On November 22, 2000, the Commission submitted a correction to this error to the District of Columbia Office of Documents and Administrative Issuances. When revisions are completed, 14 DCMR [§] 4205.4 will reference 14 DCMR [§] 4205.9." Sawyer, TP 24,991 (RHC Oct. 31, 2002), n.53, infra, p. 9.

Your New Rent Charge Is

\$ 1050.00

Record (R.) at 41.

The notice on the Housing Provider's letterhead, not the agency's form, did not state the date and authorization for the rent ceiling adjustment taken and perfected. Accordingly, it did not comply with the rule, 14 DCMR § 4205.4, D.C. Reg. 688 (Feb. 6, 1998), which implemented the Unitary Rent Ceiling Adjustment Act, D.C. OFFICIAL CODE § 42-3502.08(h)(1)-(2) (2001) (Unitary Act), which allows a rent increase based on only one authorized and previously unimplemented rent ceiling adjustment.² See Sawyer Property Mgmt. v. Mitchell, TP 24,991 (Oct. 31, 2002) at 13-16 (Commissioner Long Dissenting).

More importantly, there was no testimony by the Housing Provider at the hearing that identified the one authorized and previously unimplemented rent ceiling adjustment or portion of an authorized and previously unimplemented rent ceiling adjustment that was implemented by the notice of rent increase to the Tenant. See Lincoln Property Mgmt. v. Chibambo, TP 24,681 (RHC Nov. 29, 2000). Instead of identifying an authorized and unimplemented rent ceiling adjustment or portion of an authorized and unimplemented rent ceiling adjustment, which the Housing Provider implemented as a rent increase charge, the Housing Provider testified that the Tenant's rent increase was

² D. C. OFFICIAL CODE § 42-3502.08(h)(1) states:

(h)(1) One year from March 16, 1993, unless otherwise ordered by the Rent Administrator, each adjustment in rent charged permitted by this section may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment. If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.

(2) Nothing in this subsection shall be construed to prevent a housing provider, at his or her election, from delaying the implementation of any rent ceiling adjustment, or from implementing less than the full amount of any rent ceiling adjustment. A rent ceiling adjustment, or portion thereof, which remains unimplemented shall not expire and shall not be deemed forfeited or otherwise diminished.

based on direct and indirect costs (i.e., attorney's fees) associated with the suits he filed against the Tenant in the Landlord and Tenant Branch of the Superior Court.³ Therefore, there was no basis in the record for the ALJ to determine that the rent increase was based on a previously perfected and unimplemented rent ceiling adjustment or a portion of a rent ceiling adjustment under the Act. Id.

In contrast, the Commission's decision in Lincoln Property Mgmt. explained that the Housing Provider in that appeal, "offered evidence that it increased the tenant's rent by implementing a previously unimplemented vacancy rent ceiling adjustment in accordance with [D.C. OFFICIAL CODE § 42-3502.08 (2001)]." Id. at 5. "The hearing examiner did not reference nor credit the housing provider's testimony that it increased the rent charged by utilizing a previously unimplemented vacancy rent ceiling adjustment." Id. at 8-9 (emphasis added). Therefore, the Commission reversed the hearing examiner in Lincoln Property Mgmt.

In the instant appeal, the Commission listened to the hearing CD for testimony that the Housing Provider implemented an authorized previously perfected unimplemented rent ceiling adjustment or portion of a an authorized previously perfected and unimplemented rent ceiling adjustment, however, no such testimony was on the hearing CD. Therefore, this appeal is not similar to Lincoln Property Mgmt., because there is no testimony in the record as evidence to support a finding that the Housing Provider implemented a previously perfected and unimplemented rent ceiling adjustment or portion of a previously unimplemented and perfected rent ceiling adjustment as a new increased rent charge for the Tenant. Therefore, the ALJ is affirmed on this issue.

C. The Decision and Order ordering a rent rollback on the ground Housing Provider/Appellant failed to explain the basis of the increase in his notice to the tenant is arbitrary,

³ OAD Hearing CD (July 16, 2002).

capricious and an abuse of discretion, because it is based on a version of a regulation, which was superseded in 1998 and, therefore, not in effect when the circumstances of this case arose.

This issue, as written, is too vague to make a ruling. This appeal issue is denied for failure to comply with 14 DCMR § 3802.5(b) (1991), which states, in part:

The notice of appeal shall contain the following:

...

- (b) The Rental Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from, and a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator. (emphasis added.)

The notice of appeal does not explain how the decision “is based on a version of a regulation, which was superseded in 1998 and, therefore, not in effect when the circumstances of this case arose,” as stated in issue three. There are more than 600 rent control regulations, when all of the subparts are counted. This issue does not identify the regulation or subpart of a regulation that was superceded in 1998. Accordingly, this issue is denied and the ALJ is affirmed.

D. The Decision and Order ordering a rent rollback is arbitrary, capricious and an abuse of discretion, because the Appellant was penalized for using an official form issued and used by the Department of Consumer and Regulatory Affairs for rent increases to tenants.

The rule, 14 DCMR § 4206.5 (1991) states:

Where a housing provider increases the rent for a rental unit to an amount equal to or less than the rent ceiling adjustment permitted by §4206.1, the housing provider shall comply with the provision of §§4205.4 and 4205.5, and the notices required by §§4101.6 and 4205.4(a) may be issued simultaneously to the affected tenant on a form of notice approved by the Rent Administrator. (emphasis added.)

The official preprinted form used by the Rent Administrator does not ask for information related to the one rent ceiling adjustment or portion of a rent ceiling

adjustment being implemented by the Housing Provider on the notice to the Tenant. However, in this case, the Housing Provider did not use the preprinted form distributed by the Rent Administrator. Instead, the rent increase notice to the Tenant was on the Housing Provider's letterhead.

A similar issue arose in Tenants of 2300 and 2330 Good Hope Rd., S.E. v. Marbury Plaza, CIs 20,753 & 20,754 (RHC Mar. 14, 2002). In that case, the Rent Administrator failed to create the form for the elderly and disabled tenants to claim exemption from rent increases based on capital improvement surcharges, and failed to submit that form to the Commission for approval. Id. at 12-14. The Commission noted that it had created the form and submitted it to the Rent Administrator for use by tenants who desired to claim the elderly and disabled exemption from capital improvement rent increases. Id. at 14. In that case, the Commission remanded for the Rent Administrator to mail the form to the tenants and allow them the opportunity to claim the elderly and disabled exemption. Id. at 15.

In this appeal, the Commission will not remand this issue because the Housing Provider did not use the Rent Administrator's form. More importantly, the Housing Provider did not raise this issue below and before the ALJ. The law is that an appeal issue must be raised at the hearing, and if a party fails to raise an issue at the hearing, that party cannot raise that issue on appeal. 1880 Columbia Rd. Tenants' Assoc. v. District of Columbia Rental Hous. Comm'n, 400 A.2d 330, 339 (D.C. 1979). Accordingly, this issue is denied and the ALJ is affirmed.

E. The Decision and Order ordering a rent rollback is arbitrary, capricious and an abuse of discretion, because it is in direct contravention of Commission decisions dealing with notices of rent increases and the examiner's duty to explain his findings, and misstates applicable law, fails to state a sufficient legal basis for its holding, and improperly shifts the burden of proof to Housing Provider/Appellant.

This appeal issue is denied for failure to comply with 14 DCMR § 3802.5(b) (1991), which states, in part:

The notice of appeal shall contain the following:

...

- (c) The Rental Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from, and a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator.

The Housing Provider did not explain how the decision and order was “in direct contravention of Commission decisions dealing with notices of rent increases and the examiner’s duty to explain his findings, and misstates applicable law, fails to state a sufficient legal basis for its holding, and improperly shifts the burden of proof to Housing Provider/Appellant,” as written in issue E.

The text in issue E does not refer to errors by the hearing examiner in the decision and order as required by 14 DCMR § 3802.5(b) (1991). See Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (Sept. 28, 2001) at 12-13; Hagner Mgmt. Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999) at 39. Accordingly, the statements in issue E are dismissed, because they fail to state issues related to alleged errors in the decision in this appeal. See Mersha v. Town Center Ltd. P’ship, TP 24,970 (RHC Dec. 21, 2001) (where the Commission dismissed several statements written by the Tenant as issues on appeal).

- F. The Decision and Order is arbitrary, capricious and an abuse of discretion, because there was no legal basis for finding a reduction in services and ordering a reduction in the rent ceiling for two days due to a lack of heat, when the evidence showed the heat was repaired promptly after it broke down.**

Credibility findings are given deference and will not be disturbed. See Eilers v. Bureau of Motor Vehicle Servs., 583 A.2d 677 (D.C. 1990). It is the duty of the hearing

examiner to determine the credibility of witnesses, Citywide Learning Center v. William C. Smith, 488 A.2d 1310 (D.C 1985). The Commission will not disturb an examiner's finding that is supported by substantial evidence in the record. Reich & Young v. Scullin, TPs 22,093 & 22,094 (RHC Mar. 31, 1993); Gray v. Davis, TP 23,081 (RHC Dec. 7, 1993).

The Commission reviewed the hearing CD, which contains the July 16, 2002 hearing testimony. The Tenant testified that he was without heat for two (2) days in December 2001. The Housing Provider's maintenance man testified that he fixed the heater in five to six hours. The ALJ found in favor of the tenant. See finding of fact numbered eight (8), which states:

For a two – (2) day period in December 2001, the Petitioner was without heat in his rental unit because of a broken boiler at the apartment complex. The petitioner informed management regarding the lack of heat by writing a note to Art LeFleur (spelled phonetically), who is the resident manager of the subject property located at 2231 California Street, N.W.

Decision at 5.

The ALJ concluded:

The Respondent has acted knowingly and willfully in substantially reducing a related service, i.e., heat, and failing to reduce the rent proportionally during the month of December 2001, in violation of D.C. Code Section 42-3502.14 (2001 ed.) and the Rental Housing Act of 1985.

Decision at 13.

The ALJ had the duty to weigh the evidence (testimony) and assess credibility. The ALJ had substantial evidence in the record from the Tenant's testimony to make the finding of fact and conclusion of law, quoted above, that the Tenant was without heat for two (2) days in the month of December 2001. Based on the record, this issue is denied, and the ALJ is affirmed.

G. The Decision and order is arbitrary, capricious and an abuse of discretion because it ordered a rollback of rent due to a lack

of heat for two days, when the Rental Housing Act authorizes a rollback only when the rent, after reduction of the ceiling, exceeds the lawful rent ceiling.

The Act at D.C. OFFICIAL CODE § 42-3502.11 (2001) provides:

If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

An award for reduction of services and facilities must be explained and justified based on the record. Bealer v. District of Columbia Rental Hous. Comm'n, 472 A.2d 901 (D.C. 1984). In Hiatt Place P'ship v. Hiatt Place Tenants' Assoc., TP 21,149 (RHC May 1, 1991), the Commission held the proper manner to calculate a rent refund in a reduction in service and facility award is to reduce the rent ceiling based on the value of the reduction in services or facilities for the period of time during which that reduction existed, and then compare the rent actually charged to the reduced rent ceiling to conclude whether the rent charged exceeds the reduced rent ceiling. If it does exceed the rent ceiling, then the appropriate award is made.

In the decision, the ALJ properly stated and discussed the four factors that the Tenant's evidence must show: 1) the item eliminated was a related service or facility, 2) the service or facility was reduced and not promptly restored without a reduction in rent, 3) the housing provider had knowledge (notice) of the reduction, and 4) the reduction was substantial. Washington Realty Co. v. 3030 -30th Street, N.W., TP 20,749 (RHC Jan. 30, 1991). Next, the ALJ assesses a value for the reduction. See also Washington Realty Co. v. Rowe, TP 11,802 (RHC May 14, 1986) at 3-4. Decision at 8-9.

In this appeal, the ALJ discussed his duties were:

In a substantial reduction of services case, in order to calculate any refund that is due the Petitioner, the Examiner must do the following:

housing accommodation regarding the lack of heat, the question presented is whether the Respondent acted willfully.

While the term 'willfully' is not defined in the Rental Housing Act of 1985, such term is defined in Black's law dictionary, 5th Edition (1979) as follows:

Proceeding from a conscious motion of the will; voluntary.
Intending the result which actually comes to pass;
designed. Intentional; not accidental
or involuntary.

The Examiner finds that the evidence in the instant matter demonstrates that the Respondent James Parrecco[sic] acted intentionally and voluntarily when he notified the Petitioner of an increase in rent for the subject rental unit effective January 1, 2002, and when he failed to proportionally reduce the Petitioner's rent for the month of December 2001 because the lack of heat for two (2) days. (emphasis added.)

Decision at 11 & 12.

Based on his discussion and finding, the ALJ issued a fine of \$1,000.00, "for knowingly and willfully violating the Rental Housing Emergency [sic] Act of 1985 by demanding a rent increase that was larger than what the law allowed under the Act."

Decision at 13. See Meyers v. Smith, TP 26,129 (RHC Mar. 17, 2003) (to sustain a fine, the hearing examiner must make findings of fact and conclusions of law on whether the housing provider acted willfully or in accordance with the terms of Act). In RECAP-Gillian v. Powell, TP 27,042 (RHC Dec. 19, 2002) at 5, the Commission stated:

In Quality Mgmt v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73, 75-76 (D.C. 1986) the court quoted the legislative history of the penalty section of the Act to explain the distinction between a "knowing" violation of the Act under § 42-3509.01(a) as distinct from § 42-3509.01(b), which requires a housing provider to act "willfully" in violation of the Act. The court stated the distinction, "is further supported by the necessity to draw some independent meaning from the word "willfully," as used in ... [§ 42-3509.01(b)]." Id. The Council created legislative history during debates on the distinctions, which states:

From the context it is clear that the word 'willfully' as it is used in [§ 42-3509.01(b)] demands a more culpable mental state than the word "knowingly" as used in [§ 42-3509.01(a)]....There is a difference. 'Willfully' goes to

1. Determine the current rent ceiling;
2. Reduce the ceiling based on the value of the reduction in services or facilities; and
3. Calculate whether the rent actually charged is equal to, or lower, or higher than the reduced rent ceiling.

In the case at bar, the current rent ceiling is Three Thousand Eight Hundred Eighteen Dollars (\$3,818.00). The value assessed the reduction in service, i.e., the lack of heat for two (2) days, is twenty dollar [sic] (\$20.00). Accordingly, the Adjusted Rent Ceiling for the month of December 2001 was Three Thousand Seven Hundred Ninety Eight Dollars (\$3,798.00). Because the rent actually charged, i.e., One Thousand Fifty Dollar [sic] (\$1,050.00) was less than the reduced or adjusted rent ceiling, the Petitioner is not legally entitled to a rent refund.

Decision at 12-13.

The ALJ's analysis was correct and the Commission affirms the ALJ and denies this issue.

H. The Decision and Order is contrary to the statute and applicable regulations, arbitrary, capricious, and abuse of discretion and not supported by substantial evidence, because it imposes a fine and finds a willful violation of the law using a definition of "willful" which is not consistent with applicable law and prior precedent and there is not substantial evidence in the record to support a finding of willfulness.

The Act provides:

Any person who willfully (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).

The hearing examiner wrote in the decision:

Having determined that the Respondent James Parrecco [sic] has violated the Rental Housing Act of 1985 by charging rent that is larger than what the Act allows and has substantially reduced the service/facilities at the

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.' Knowingly [is a] lower ... standard.

In the instant appeal, the ALJ made the findings of fact, quoted above, and conclusions of law (numbered five (5) and six (6)), based on the conduct of the Housing Provider that he intentionally violated the Act. Accordingly, the ALJ is affirmed.

I. The decision on Housing Provider/Appellant's Motion for Reconsideration is arbitrary, capricious and an abuse of discretion because it is premised on a confusion of the issues in the case, and Housing Provider/Appellant's arguments on the issues, and it completely changes the basis of the original Decision and Order, without any legal justification therefore.

An order issued on a motion for reconsideration is not subject to appeal. See Dey v. L. J. Development, Inc., TP 26,119 (Aug. 29, 2003); Alpar v. Polinger, TP 27,146, (RHC Aug. 8, 2003) n.1; Wedderburn v. Thomas, TP 23,970 (RHC July 30, 1996); 14 DCMR § 4013.3 (1991), which state that an order on a motion for reconsideration is not appealable. This issue is denied.

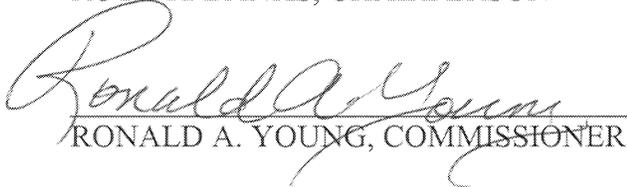
IV. CONCLUSION

The Commission affirms the ALJ on issues A (related to notice in the petition of improper rent increase); B (related to notice to the Tenant of the date and authorization of most recent rent ceiling adjustment); C and E (related to vague statements that were not issues on appeal in conformity with 14 DCMR § 3802.5(b) (1991)); D (related to the Rent Administrator's form, which the Housing Provider did not use); F (related to substantial evidence in the record to support the ALJ's credibility finding in favor of the Tenant); G (related to the reduction of the rent ceiling and no reduction in rent for reduction of services and facilities, because the Tenant's rent did not exceed the reduced ceiling); H (related to the ALJ's finding of willful conduct by the Housing Provider to

sustain the fine assessed by the ALJ), and the Commission dismissed issue J, because an order on reconsideration is not an appealable order.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, 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'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 telephone number:

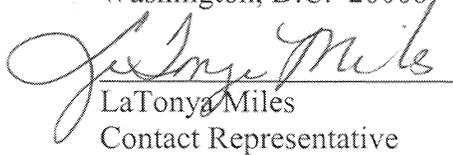
D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 27,408 was mailed by priority mail with confirmation of delivery, to the persons noted below this 8th day of December 2003.

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

Hughes Denver Akassy
2231 California Street, N.W.
Apartment 301
Washington, D.C. 20008


LaTonya Miles
Contact Representative