

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,445

In re: 1630 R Street, N.W., Unit 730

Ward Two (2)

BORGER MANAGEMENT, INC.
Housing Provider/Appellant

v.

MARK MILLER
Tenant/Appellee

DECISION AND ORDER

March 4, 2004

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

I. PROCEDURAL HISTORY

On February 20, 2002, Mark Miller, the tenant of unit 730 at the housing accommodation located at 1630 R Street, N.W., filed Tenant Petition (TP) 27,445 with the Rental Accommodations and Conversion Division (RACD). In his petition the tenant alleged that the housing provider, Borger Management, Inc., directed retaliatory action against him for exercising his rights in violation of § 502 of the Act.

An Office of Adjudication (OAD) hearing on the petition was held on July 15, 2002. Administrative Law Judge (ALJ) Rory Smith conducted the OAD hearing. The ALJ issued the decision and order on September 20, 2002. The decision contained the following relevant findings of fact:

2. Respondent's community manager, Ms. Richardson spoke with Respondent on September 1, 2001 about impending renovations to the building.
3. Petitioner joined the Tourraine Tenants Association on September 25, 2001.
4. Respondent issued a memorandum on October 1, 2001 to all tenants advising them that the trash rooms would be closed permanently.
5. Respondent issued a Notice to Cure or Quit on November 12, 2001, requesting that Petitioner remove his dog from the premises.
6. Petitioner received from Respondent a notice to pay \$90.00 for the 30-day Notice to Cure or Quit.

Miller v. Borger Mgmt. Inc., TP 27,445 (OAD Sept. 20, 2002) at 2-3. The decision and order concluded as a matter of law:

Respondent retaliated against Petitioner for exercising his rights under § 502 of the Rental Housing Emergency [sic] Act of 1985. D.C. [OFFICIAL CODE] § 42-3505.02 (2001).

Id. at 7.

II. ISSUES ON APPEAL

On October 3, 2002, the housing provider filed a timely notice of appeal in the Commission. The Commission held the appellate hearing on February 20, 2003. The housing provider raised the following issues on appeal:

1. The Decision and Order is contrary to the evidence presented at the hearing on Tenant Petition 27,445.
2. The Administrative Law Judge erred in relying upon unreliable and unsubstantiated hearsay testimony presented by the Petitioner.

3. The Administrative Law Judge erred in concluding that the Housing Provider had retaliated in the case.
4. The assessment of a fine by the Administrative Law Judge was arbitrary, capricious and legally erroneous.

Notice of Appeal at 1.

III. DISCUSSION OF THE ISSUES

A. Whether the decision and order issued by the ALJ was contrary to the evidence presented at the hearing on the tenant petition.

The Commission's regulation concerning the initiation of appeals, 14 DCMR § 3802.5(b) (1991), provides that the notice of appeal shall contain the following: "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.)

On appeal to the Commission the housing provider argues: "The Decision and Order is contrary to the evidence presented at the hearing on Tenant Petition 27,445." However, the housing provider failed to provide the Commission with a specific instance where the ALJ's decision was contrary to the evidence adduced at the hearing. The Commission has previously held that an appeal, which fails to provide the Commission with a clear and concise statement of the alleged errors in the decision as required by 14 DCMR § 3802.5(b) (1991), will be dismissed. Battle v. McElvene, TP 24,752 (RHC May 18, 2000), Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000). Accordingly, the Commission dismisses this appeal issue as violative of the Commission's rules on appeals.

B. Whether the ALJ erred in relying upon unreliable and unsubstantiated hearsay testimony presented by the Petitioner.

In its brief on appeal, the housing provider argues that the ALJ's reliance upon the hearsay testimony of the tenant, regarding a conversation between the tenant's wife and a representative of the housing provider, wherein the tenants were given permission to maintain a pet in the housing accommodation was error. The housing provider argues:

Although hearsay evidence can, under some circumstances, serve as substantial evidence on which to base a finding of fact in an administrative proceeding, the factors to be considered in evaluating the reliability of the hearsay evidence are whether the declarant is bias [sic], whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and whether the hearsay statements were signed and sworn. See Gropp v. District of Columbia Bd. of Dentistry, 606 A.2d 1010 (D.C. 1992). In the instant case, Declarant was certainly bias [sic] and the hearsay statements were uncorroborated and contradicted by direct testimony.

Housing Provider's Brief on Appeal (Brief) at 4.

Contrary to the housing provider's argument, the DCAPA provides that hearsay evidence is admissible in administrative proceedings. The DCAPA states, "[a]ny oral and any documentary evidence may be received, but the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence." D.C. OFFICIAL CODE § 2-509(b) (2001) (emphasis added). Administrative hearings are not bound by the strict rules of evidence of courts of law and do permit the introduction of hearsay. The District of Columbia Court of Appeals (DCCA) has in fact stated that hearsay evidence can serve as the substantial evidence on which to base a finding of fact. Simmons v. Police & Firefighters' Retirement Bd., 478 A.2d 1093, 1095 (D.C. 1984). The court has also held that a hearing examiner's "[f]ailure to apply these generous principles of admissibility can be a basis for reversal." Kopff v. District of Columbia Alcoholic Beverage Control Bd., 381 A.2d 1372, 1385 (D.C. 1977). However, reversal is appropriate only upon a showing of prejudice. Id. See Tenants of 1915 Kalorama Rd., N.W. v. Columbia

Realty Venture, CI 20,630 and CI 20,653 (RHC Mar. 28, 1997). Further, the decision of the ALJ does not reflect that the tenant's hearsay testimony served as "substantial" evidence in his determination. The decision stated:

Petitioner had his dog at the time he moved into the premises on February 1, 1998. I question why Respondent would wait nearly four years later to ask Petitioner to remove his dog. In addition, Ms. Richardson (the housing provider's community manager) stated that she was afraid to enter the building, but if this were so, why did she wait so long to ask Petitioner to remove the dog when Ms. Richardson testified that she spoke with Petitioner's wife once or twice a week?

Miller v. Borger Mgmt. Inc., TP 27,445 (OAD Sept. 20, 2002) at 6. The court, in the case cited by the housing provider, Gropp v. District of Columbia Bd. of Dentistry, 606 A.2d 1010 (D.C. 1992), stated, "hearsay evidence can serve under some circumstances as 'substantial evidence' on which to base a finding of fact." Wisconsin Ave. Nursing Home v. District of Columbia Human Rights Comm'n, 527 A.2d 282 (D.C. 1987). "Its weight is determined by 'the item's 'truthfulness, reasonableness, and credibility.'" Wisconsin Ave. Nursing Home at 288 (quoting Gropp, 606 A.2d 1014, n.10.) In the instant case, the decision reflects that the ALJ based his conclusion on the reasonableness, and credibility of the testimony of the housing provider's employee, Ms. Richardson, rather than the hearsay testimony of the tenant.

Because the DCAPA allows hearsay evidence in an administrative hearing, and because the ALJ based his conclusion regarding retaliation on the reasonableness, and credibility of the testimony of the housing provider's employee, Ms. Richardson, the ALJ's inclusion of hearsay evidence in the instant case was not error. Accordingly, this appeal issue is denied.

C. Whether the ALJ erred in concluding that the housing provider retaliated against the tenant in the case.

In his decision and order the ALJ concluded that the housing provider retaliated against the tenant in violation of the Act, D.C. OFFICIAL CODE § 42-3505.02 (2001).¹

The ALJ's decision stated:

Since Petitioner became a member of the Association (D.C. Code § 42-3505.02(b)(4)) within six months of Respondent's actions—closing the trash rooms, issuing a Notice to Quit or Cure and demanding a \$90.00 fee for the Notice (D.C. Code § 42-3505.02(a)), there is a presumption of retaliatory action by Respondent. The burden now shifts to Respondent to rebut the presumption of retaliation by clear and convincing evidence (D.C. Code § 42-3505.02(b)).

...

However, I am not convinced by clear and convincing evidence that Respondent did not retaliate against Petitioner by issuing a Notice to Quit or Cure and

¹ The Act, D.C. OFFICIAL CODE § 42-3505.02 (2001), provides:

- (a) No housing provider shall take 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.

demanding a \$90.00 fee for the Notice. While Respondent states that it issued a Notice to both tenants that had dogs and that Respondent received complaints from tenants, I do not believe that these are objective reasons to issue the Notice and demand a \$90.00 fee; rather, I believe that these reasons are a pretext for retaliation against Petitioner for joining the Association.

Id.

The Act, D.C. OFFICIAL CODE § 42-3505.02 (2001), prohibits a housing provider from retaliating against tenants who exercise one of several rights expressly enumerated within that section or by any other provision of law. In order to trigger the protection of § 42-3505.02, a tenant must perform one of the six listed actions. Thereafter, any apparent act or “threat or coercion” taken by the housing provider within the statutory time period of six months is presumed to be retaliation. Accordingly, the housing provider must provide clear and convincing evidence to rebut the presumption of retaliatory action, beyond the defense that a law permitted the alleged retaliatory act. Meaning that the housing provider has the burden of producing clear and convincing evidence that his action was not motivated by a retaliatory purpose. See Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003).

In DeSzunyogh v. William C. Smith & Co., 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 (b) (2001)], 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.” See also Youssef v. United Mgmt. Co., Inc., 683 A.2d 152, 155 (D.C. 1996). The burden referred to in De Szunyogh is stated in the Act, D.C. OFFICIAL CODE § 42-3505.02(b) (2001) which provides:

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.

The presumption of retaliation is triggered when the tenant demonstrates that he engaged in any one of six protected acts in the six months preceding the alleged retaliatory conduct. The Act, however, provides a presumption of retaliation, only if the tenant engaged in one of the six protected acts, within the six months preceding the housing provider's action.

The ALJ, in Finding of Fact numbered three (3) determined that the tenant joined the Tourraine Tenants Association on September 25, 2001. He further determined in Finding of Fact numbered five (5) that the housing provider issued the tenant a Notice to Cure or Quit on November 12, 2001, demanding that the tenant remove his dog from the housing accommodation or vacate his unit. The housing provider contests neither finding, rather, the housing provider argues that it clearly and convincingly rebutted any presumption of retaliation.

On appeal, the housing provider argues that through the tenant's own testimony it was established that the only tenants to receive a Notice to Cure or Quit were the two (2) tenants who possessed dogs in contravention of their leases. Therefore, the housing provider argues, the conclusion that the notice to the tenant was issued as a retaliatory action is unsubstantiated. The housing provider also argues that the evidence of record did not support the conclusion that the housing provider was aware of the tenant's participation in the tenants' association. The housing provider further argues, citing Grubb v. Wm. Calomiris Investment Corp., 588 A.2d 1144 (D.C. 1991), that pursuant to District of Columbia law a landlord may enforce a provision of a lease that was not previously enforced.

The housing provider is correct, that the court in Grubb held that a housing provider had the right to enforce a term in its lease even where the housing provider acquiesced in the breach of the lease for a period of five (5) years, if the housing provider, as it did in this case, gives the tenant a statutory notice and an opportunity to cure. However, the Grubb court citing Entrepreneur, Ltd. v. Yasuna, 498 A.2d 1151, 1160 (D.C. 1985), further stated, “a relevant factor in determining whether forfeiture should be ordered is the presence or absence of ‘fair dealing’ by the landlord, i.e., whether ‘a breach was declared only when the landlord for other reasons desired to dispossess the tenant.’” The court concluded, “[t]he trial judge expressly found that appellant ‘has not demonstrated that this action was a pretext by the landlord for any reason which would be cognizable by this court.’” Grubb v. Wm. Calomiris Investment Corp., 588 A.2d at 1147. In the instant case, the opposite is true.

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

- 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:
 - 4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization.

Unlike the facts in Grubb and Yasuna, in the instant case, the Act required that the ALJ “presume retaliatory action” when he found that within the 6 months preceding the housing provider’s action of issuing a Notice to Quit or Cure, the tenant joined a tenant organization. The ALJ also properly determined that the housing provider’s denial of the facts that created the presumption of retaliation was not sufficient to rebut the presumption by clear and convincing evidence.

The ALJ has a responsibility to weigh the record evidence. He has “discretion to reasonably reject any evidence offered.” Harris v. District of Columbia Rental Hous. Comm’n, 505 A.2d 66, 69 (D.C. 1986), cited in Baxter v. Jackson, TP 24,370 (RHC Sept. 15, 2000). Furthermore, “[i]n rendering a decision, the Examiner is entrusted with a degree of latitude in deciding how he shall evaluate and credit the evidence presented.” Harris, 505 A.2d at 69. In the instant case, the ALJ concluded, “I am not convinced by clear and convincing evidence that [the housing provider] did not retaliate against [tenant] by issuing a Notice to Quit or Cure and demanding \$90.00 for the Notice.” Miller v. Borger Mgmt. Inc., TP 27,445 (OAD Sept. 20, 2002) at 6.

Accordingly, the decision of the ALJ on this issue is affirmed.

D. Whether the ALJ’s assessment of a fine against the housing provider was arbitrary, capricious and legally erroneous.

The ALJ imposed a fine against the housing provider of \$2,090.00, “for retaliating against Petitioner in violation of D.C. [OFFICIAL CODE] § 42-3505.02 (sic).” Miller v. Borger Mgmt. Inc., TP 27,445 (OAD Sept. 20, 2002) at 6. The ALJ offered no further explanation, analysis or reason for the fine. The housing provider argued:

[T]here is no finding in the decision, or for that matter, even a mention of a basis for the Hearing Examiner’s determination that the alleged violation of provisions of the Act was willful. Such a finding, with, at a minimum, supporting evidence, is a requirement under the provisions of the District of Columbia Administrative Procedure Act, D.C. [OFFICIAL CODE] § 2-501 *et seq.* (2001 ed.).

Brief at 5. The housing provider relied upon the Commission’s decision in Ratner Mgmt. Co. v. Tenants of Shipley Park, TP 11,613 (RHC Nov. 4, 1988), wherein the Commission stated:

We do not find present the element of intent and conscious choice necessary to sustain a finding of willfulness. There is no doubt that the

proof sustains the finding that the violations were 'knowing' as the word is used in § 901(a) of the Act, but no testimony was presented to meet the heavier burden imposed by § 901(b) of showing that the landlord's conduct was intentional, or deliberate or the product of a conscious choice.

Ratner at 5.

When a housing provider retaliates against a tenant, he shall be subject to a civil fine. D.C. OFFICIAL CODE § 42-3509.01(b) (2001). The Act states:

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

The Commission addressed the imposition of a fine pursuant to D.C. OFFICIAL CODE § 42-3509.01(b) (2001), in RECAP v. Powell, TP 27,042 (RHC Dec. 19, 2002).

The Commission stated:

In Quality Mgmt. Inc. 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 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.

Id. n.6.

RECAP at 5. The Commission also noted that the DCCA in Webb v. District of Columbia Rental Hous. Comm'n, 505 A.2d 467 (D.C. 1986), further discussed the term “knowingly” as used in the Act, quoting Quality Mgmt., stating:

‘[K]nowingly’ imports only a knowledge of the essential facts bringing petitioner’s conduct within reach of in [§ 42-3509.01(a)]; and, from such knowledge of the essential facts, the law presumes knowledge of the legal consequences arising from performance of the prohibited conduct. In other words ... actual knowledge of the unlawfulness of the act or omission is not required.

Webb, 505 A.2d at 469-70.

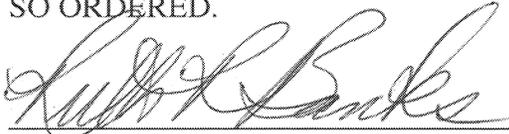
In the instant case, the ALJ failed to make findings of facts or conclusions of law on whether the housing provider acted willfully as is required by the terms of the Act. Accordingly, the decision of the ALJ imposing a \$2,090.00 fine is reversed and the fine is vacated.

IV. CONCLUSION

The housing provider failed to provide the Commission with a clear and concise statement of the alleged errors in the decision as required by 14 DCMR § 3802.5(b) (1991), showing that the decision of the ALJ was contrary to the evidence. Accordingly, this issue in the housing provider’s Notice of Appeal is dismissed. The ALJ’s inclusion of hearsay testimony as evidence at the OAD hearing was not error. Accordingly, this

appeal issue is denied. The decision of the ALJ finding that the housing provider failed to rebut the presumption of retaliation by clear and convincing evidence is affirmed. Finally, the decision of the ALJ imposing a \$2,090.00 fine is reversed and the fine is vacated.

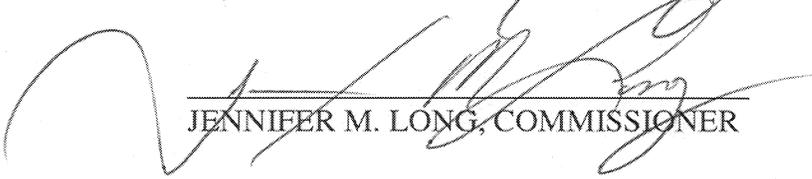
SO ORDERED.



RUTH R. BANKS, CHAIRPERSON



RONALD A. YOUNG, COMMISSIONER



JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the 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 certify that a copy of the foregoing Decision and Order in TP 27,445 was mailed postage prepaid by priority mail, with delivery confirmation on this 4th day of **March, 2004** to:

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