

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,690

In re: 816 E Street, N.E., Unit 514

Ward Six (6)

GABRIEL ZUCKER
Tenant/Appellant

v.

NWJ MANAGEMENT
Housing Provider/Appellee

DECISION AND ORDER

May 16, 2005

LONG, COMMISSIONER. This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), 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

Gabriel Zucker initiated these proceedings when he filed Tenant Petition (TP) 27,690 on November 26, 2002. Mr. Zucker began his tenancy at 816 E Street, N.E., unit 514, on July 1, 2001. When Mr. Zucker filed TP 27,690, he alleged that the rent ceiling filed with the RACD was improper; the housing provider substantially reduced his

services and facilities; and the housing provider directed retaliatory action against him. In addition, Mr. Zucker stated that he filed the petition in response to the proposed increase in the monthly rent and rent ceiling. The tenant listed Eric Kretschman as the owner of the housing accommodation, and NWJ Property Management, L.L.C./Capitol East Partners as the management company.

Hearing Examiner Keith Anderson convened the adjudicatory hearing on February 20, 2003. The tenant appeared pro se. Jerry Cole, the property manager and Shelton Gordon, manager for NWJ Management appeared on behalf of the housing provider. The hearing examiner issued the decision and order on August 15, 2003. The decision contained the following findings of fact and conclusions of law:

Findings of Fact

1. The subject housing accommodation is located at 816 E Street, N.E.
2. Gabriel Zucker has resided in apartment 514 at the subject property at all relevant times since July 1, 2001 and is the Petitioner in this matter. NWJ Management has managed the subject property at all relevant times since June 1, 2001 and is the Respondent in this matter.
3. The rent ceiling for Petitioner's unit was increased from \$1079 to \$1308 at various times between November 27, 1999, as set forth in Issue 2 in the Evaluation and Analysis section above. The current legal rent ceiling is \$1380¹ [sic] and the legal monthly rent charged is \$775 for Petitioner's unit, effective December 1, 2002. Petitioner provided no evidence that proved the \$1380 [sic] rent ceiling and the \$775 rent charged was incorrect.

¹ In the Evaluation and Analysis section of the decision, the hearing examiner correctly noted that the rent ceiling was \$1308.00 following the 2.6% adjustment of general applicability for calendar year 2002. See Petitioner's Exhibit 1. However, the hearing examiner erred when he transposed the numbers and placed \$1380.00 in the findings of fact and throughout the decision and order. The Commission's review is limited to issues raised in the notice of appeal. However, the Commission is empowered to correct plain error. In accordance with 14 DCMR § 3807.4 (1991), the Commission corrects the plain error and notes that the rent ceiling, following the 2.6% adjustment of general applicability, was \$1308.00.

4. The following conditions existed at Petitioner's unit at various times between July 1, 2001, the date Petitioner began the subject tenancy, and February 20, 2003, the hearing date for TP 27,690:
 1. Insufficient trash receptacle and trash collection;
 2. Defective lock on first set of building entrance doors;
 3. Defective hinges on second set of building entrance doors;
 4. Lack of hot water;
 5. Lack of availability of property/office manager; and
 6. Failure to post elevator inspection certificate.
5. As set forth in the Evaluation and Analysis of Evidence section above, record evidence indicates that the Respondent failed to provide adequate trash storage and collection at the property from October 1, 2001 to the date of the hearing in this matter; that the conditions were unsanitary, causing rodent and insect infestation; that Petitioner said the inconvenience was worth \$50 of his monthly rent; and the Respondent failed to proportionally reduce Petitioner's monthly rent.
6. As set forth in the Evaluation and Analysis of Evidence section above, Petitioner provided testimonial and documentary evidence that the defective door lock and hinge were not restored from May 31, 2002 to August 1, 2002, that the condition created a serious safety hazard, and that Respondent did not proportionally reduce Petitioner's monthly [sic]. The value of the reduction was \$300 by Petitioner's own testimony and Respondent's attempts to repair the lock and hinge were unsuccessful in light of their failure to resolve the vandalism problem at the subject property.
- 6.^[2]The failure to post the elevator certificate is not a related repair and maintenance service item.
7. Record evidence indicates that Respondent allowed Petitioner to deduct one full day rent for each day Petitioner suffered a loss of water at his apartment.
8. The value of Petitioner's unit is assessed at \$500 for services and other amenities and \$275 for the bare shelter. The monthly value of reduced trash storage and collection maintenance service is \$50, based on Petitioner's testimony, as set forth in **Chart 1** above.
9. As set forth in the Evaluation and Analysis of Evidence section above, based on the \$1234, \$1275 and \$1380 [sic] rent ceilings, and the \$725 and \$775 monthly rent charged levels for Petitioner's unit and the total

² The number 6 appeared twice in the findings of fact.

monthly value for the two instances of reduced services for each, the reduced month rent ceilings did not exceed either the \$725 or \$775 monthly rent charged.

10. Petitioner is not entitled to a rent refund as he paid no monthly rent in excess of either of the reduced rent ceilings.
11. All other findings of fact made by the Examiner in this Decision and Order are incorporated by reference in this section of Findings of Fact.

Conclusions of Law

1. From October 1, 2001 to February 20, 2003, trash removal and storage was [sic] insufficient at the subject property, and from May 31, 2002 to August 1, 2002, the lock and hinge on the two sets of building entrance doors were defective, as set forth in the Evaluation and Analysis of Evidence section, in violation of 14 DCMR Sect. 4211.6 (1991), and thereby constituted a substantial reduction in Petitioner's related repair and maintenance services, pursuant to Sect. 103(26), (27) and Sect. 211 of the Act, DC Code Sect. 42-3501(26) [sic], (27) and 42-3502.11 (2001).
2. Petitioner provided a preponderance of evidence of the nature, duration and value of the reduced related repair and maintenance services, as to the insufficient trash storage and collection; and the defective door lock and hinge, and whether they had been restored and revealed to Respondent, in compliance with 14 DCMR Sect. 4003 and 4211 (1991).
3. Pursuant to Sect. 901(a) of the Act, DC Official Code Sect. 42-3509(a) [sic] (2001), Petitioner is not entitled to a rent refund because [the] monthly rent charged by Respondent was not in excess of the reduced rent ceilings, based on Respondent's violation of Sect. 211 of the Act, as set forth in the Evaluation and Analysis of Evidence, Remedies, and Computation of Refund sections above.
4. All other conclusions of law made by the Examiner in this Decision and Order are incorporated by reference in this section of Conclusions of Law.

Zucker v. NWJ Mgmt., TP 27,690 (RACD Aug. 15, 2003) at 12-14.

On September 4, 2003, the tenant appealed the Rent Administrator's decision to the Commission. The Commission held the appellate hearing on December 4, 2003. The tenant appeared with counsel, Brynee K. Baylor, Esquire. The housing provider did not attend the Commission's hearing.

II. ISSUES

The tenant raised the following issues in the notice of appeal:

The Hearing Examiner and DCRA Procedurally Breached Their Obligation to Timely Return A Decision Causing Plaintiff Continued Harm

The Hearing Examiner Failed to Acknowledge Substantive Legal Evidence That Was Admissible and Should Have Been Acknowledged

The Hearing Examiner Made Unfair Remarks That Appeared to be Biased and Illegal

Notice of Appeal at 2-3.

III. DISCUSSION

A. Whether the hearing examiner and DCRA procedurally breached their obligation to timely return a decision causing plaintiff continued harm.

According to page twenty-five of *The Tenant's Guide to Safe and Decent Housing*, published by your office, "The law requires that the (tenant) hearings be held and decisions issued within 60 days of filing a petition." TP 27,690 (filed November 26, 2002) was initially heard on February 20, 2003 and was extended for two weeks, until March 7, 2003. But it wasn't until August 22, 2003 that I received a reply (please refer to Plaintiff's Exhibit 1 which shows the date your office mailed the response). Even if the policy has been changed to 120 days, as Tim Handy and Raenelle Zapata respectively asserted in phone conversations on August 21st and September 4th, that still does not explain why it took nearly 270 days to receive the Decision [and] Order.

Notice of Appeal at 2.

The tenant maintains that the agency breached its obligation to render a timely decision, because the hearing examiner issued the decision and order approximately 270 days after the tenant filed the petition. The tenant is correct in his assertion that the Tenant's Guide to Safe and Decent Housing states, "The law requires that the hearings be held and decisions issued within 60 days of filing a petition." Tenant's Guide at 25. Unfortunately, this statement is not accurate.

The Act, which is the law that governs the tenant's claims, provides: "The Rent Administrator shall issue a decision and an order approving or denying, in whole or in part, each petition within 120 days after the petition is filed with the Rent Administrator." D.C. OFFICIAL CODE § 42-3502.16(a) (2001). The tenant filed TP 27,690 on November 26, 2002. The hearing examiner issued the decision and order on August 15, 2003, which was 262 days after the tenant filed the petition. Since the hearing examiner issued the decision and order more than 120 days after the tenant filed the petition, the hearing examiner did not meet the time period prescribed in § 42-3502.16(a). However, the hearing examiner's failure to meet the prescribed time period was not reversible error, because the statutory time period for rendering a decision and order is not mandatory; it is directory. See Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs., 712 A.2d 1018 (D.C. 1998).

A directory statutory time period is a "provision in a statute, rule of procedure or the like, which is a mere direction or instruction of no obligatory force, and involving no invalidating consequence for its disregard, as opposed to an imperative or mandatory provision, which must be followed." BLACK'S LAW DICTIONARY 414 (5th ed. 1979). In Washington Hosp. Center, the court held that specific statutory time periods for agency action are directory. In its opinion, the court cited the following cases where it held that specific statutory time periods were not mandatory requirements that the agency must meet:

In re Morrell, 684 A.2d 361, 370 (D.C. 1996) (D.C. Bar rule specifying that the hearing committee "shall submit" its report within sixty days presumed to be "directory, rather than mandatory"); M.B.E., Inc. v. Minority Bus. Opportunity Comm'n, 485 A.2d 152, 155 n.1. (D.C. 1984) (regulation stating Commission's final decision "must be issued in writing within ninety (90) days" interpreted as "directory, rather than mandatory

or jurisdictional").

Washington Hosp. Ctr., 712 A.2d at 1020. The court held that the provisions were directory, even when the word "shall" appeared in the statute.

In accordance with the court's holding in Washington Hospital Center, the Commission has repeatedly held that the 120 day time period in § 42-3502.16(a) is directory. See Lyons v. Pickrum, TP 27,616 (RHC Feb. 1, 2005); Greene v. Urquilla, TP 27, 604 (RHC Jan. 14, 2005) (rejecting a challenge to the validity of a decision and order issued more than 120 days after the tenant filed the petition). Similarly, the Commission holds that the agency did not commit reversible error when Hearing Examiner Anderson issued the decision and order in TP 27,690 more than 120 days after the tenant filed TP 27,690.

In Issue A, the tenant also claims that the hearing examiner's delay in issuing the decision caused continued harm. However, the tenant did not state the nature of the harm. The Commission notes that the hearing examiner could not address any claims that occurred after the tenant filed the petition, because the filing date is the terminating point for the tenant's claim. In Menor v. Weinbaum, TP 22,769 (RHC Aug. 4, 1993), the Commission held the following:

We would like to clarify that conditions that occur prior to the filing of a tenant petition are the relevant matters that the parties are adjudicating. The fact that the condition may have continued past the filing of the petition or re-occurred after a condition had been repaired is at most corroborative evidence of the original condition. The occurrence of the reduction of services prior to the filing of the petition is significant, because the housing provider must be put on notice of a reduction in services and facilities, and failed to repair or adjust the rent, before the reduction can be considered a violation of the law. Additionally, if the filing of the petition were not the cut off point for the issues to be adjudicated, the landlord would never know what was to be defended.

Id. at 5 n.6.³ In accordance with Menor, the agency could not address the tenant's "continued harm," which may have occurred between the hearing and the date that the hearing examiner issued the decision and order.

For the foregoing reasons, the agency did not breach an obligation when the hearing examiner issued the decision and order more than 120 days after the tenant filed the petition. Accordingly, the Commission denies Issue A.

B. Whether the hearing examiner failed to acknowledge substantive legal evidence that was admissible and should have been acknowledged.

With respect to (2), [the hearing examiner's conscious choice to ignore submitted evidence] Hearing Examiner Keith Anderson ignored one of the most important charges-that NWJ lacked the proper license(s) to legally control my building for an extended period of time. He also concluded that having an old elevator run without a legitimate certificate "is not a related repair and maintenance service item." The reason this city requires an elevator to have a proper license to run is to ensure the safety of those individuals using the elevator. Failing to have a legitimate operator's license is contrary to the laws of the District of Columbia and it is clear that the landlord was in significant violation.

Notice of Appeal at 2.

The hearing examiner did not err when he declined to adjudicate the charge that NWJ lacked the proper license(s) to legally control the tenant's building for an extended period of time. Moreover, the hearing examiner did not err when he concluded that the failure to post an elevator certificate is not a related repair and maintenance service item.

When the tenant filed TP 27,690, he alleged that the rent ceilings filed with the Rental Accommodations and Conversion Division for his unit were improper; the

³ "When violations [that are alleged in the petition] are continuing in nature, the Commission also 'looks forward' from the date the petition was filed, to the termination date of the violation. If the violation did not terminate prior to the timely filing of the petition, and if the record contained evidence of the continuing violation, the remedy of refund for [the] improper rent adjustment may go up to the date the record closed, which is usually the hearing date." Jenkins v. Johnson, TP 23,410 (RHC Jan. 4, 1995) at 6.

services and facilities provided in connection with the rental of his unit had been substantially reduced; and retaliatory action had been directed against him for exercising his rights. However, the tenant did not claim that NWJ lacked a proper license to legally control the building.

The DCAPA “provides that ‘in any contested case, all parties thereto shall be given reasonable notice of the afforded hearing The notice shall state the time, place and issues involved’ D.C. Code § 1-1509(a) (1987)⁴ (emphasis supplied). A respondent is entitled to be fully aware of the scope of the charges in order to have an effective opportunity to be heard and to explain his conduct. M.B.E., Inc. v. Minority Bus. Opportunity Comm’n of the District of Columbia, 485 A.2d 152, 158 (D.C. 1984) (quoting Babazadeh v. District of Columbia Hackers’ License Appeal Bd., 390 A.2d 1004, 1008 (D.C. 1978)).” Hedgman v. District of Columbia Hackers’ License Appeal Bd., 549 A.2d 720, 724 (D.C. 1988). Moreover, in Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993), the Commission held: “It is well settled that parties must be informed of the nature of the hearing to give them an opportunity to prepare.” See also Menor v. Weinbaum, TP 22,769 (RHC Aug. 4, 1993) (holding that the agency cannot adjudicate issues that the tenant failed to raise in the petition).

When the tenant filed TP 27,690, he did not claim that NWJ lacked a proper license to legally control the building. Consequently, the housing provider did not receive notice of the tenant’s claim in accordance with the DCAPA, and the housing provider was not afforded an opportunity to prepare to answer the claim during the hearing. Hearing Examiner Anderson did not ignore the tenant’s charge that NWJ lacked

⁴ Currently D.C. OFFICIAL CODE § 2-509(a) (2001).

the proper licenses to legally control the housing accommodation; the tenant failed to properly raise the issue.

The tenant also alleged that the hearing examiner erred when he concluded that operating an elevator without a legitimate certificate is not a related repair and maintenance service item.

The Act defines related services as "services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse." D.C. OFFICIAL CODE § 42-3501.03(27) (2001). The reduction in services provision of the Act, § 42-3502.11, "was drafted to ensure that housing providers provide services required by [the] D.C. Housing Code." Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993) at 20. The reduction in services provision of the Act 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.

D.C. OFFICIAL CODE § 42-3502.11 (2001).

During the evidentiary hearing, the tenant presented oral and documentary evidence concerning the elevator certificate. The tenant testified that the certificate was not posted in the elevator, and he introduced a photograph to support his testimony. The tenant also testified that he never advised the housing provider that the certificate was not in the elevator. Moreover, the tenant testified that he experienced no problems with the

elevator service. In response to the tenant's testimony, the housing provider introduced an elevator certificate dated June 7, 2002 – June 30, 2003.

The tenant, who bore the burden of proof, did not present evidence to support a substantial reduction in the maintenance, repair, or provision of the elevator service. See D.C. OFFICIAL CODE § 42-3502.11 (2001). In fact, the tenant testified that he experienced no problems with the elevator service. Assuming for the sake of argument that the tenant proved the housing provider failed to post or possess a valid elevator certificate, the absence of the certificate is not cognizable as a reduction in services claim. Accordingly, the hearing examiner properly determined that the failure to post the elevator certificate is not a related repair and maintenance service item.

For the foregoing reasons, the Commission denies Issue B.

C. Whether the hearing examiner made unfair remarks that appeared to be biased and illegal.

As for 3, [prejudicial and peculiar remarks made by said Hearing Examiner to me during the course of the hearing process] Keith Anderson made numerous skeptical remarks, even after I provided him with hard evidence, such as pictures of heaping mounds of garbage. Example: "So why is this a problem if trash isn't collected? Other tenants might not seem to think this is an issue." This comment and the like can of course be verified by listening to the audio tapes of the proceeding.

Furthermore, one week after the hearing, I ran into Mr. Anderson, who asked me if I had 'straightened everything out' with the opposition-an odd question, given that the opposition expressed no interest in mediation. When I pointed this out, Mr. Anderson replied: "Too bad. They seemed like really cool guys." Does this sound like a fair and impartial judge?

Notice of Appeal at 3.

The procedures for requesting the disqualification of a hearing examiner are found at 14 DCMR § 4001 (1991), which provides:

- 4001.1 Any party may file a motion with the hearing examiner requesting a hearing examiner to withdraw from a proceeding or hearing on the basis of conflict of interest or other disqualification.
- 4001.2 The hearing examiner shall rule on the motion within ten (10) days of the filing of the motion.
- 4001.3 Denials of motions filed pursuant to §4001.2 may be reviewed by the Rent Administrator upon request of the moving party and rulings by the Rent Administrator shall be issued within ten (10) days of the request for review.
- 4001.4 In the event that a hearing examiner is disqualified, he or she shall withdraw from the proceeding or hearing, stating on the record the reasons for withdrawal, and shall immediately notify the Rent Administrator in writing.
- 4001.5 In the event a hearing examiner is disqualified for any reason, the matter shall be heard *de novo* before a different hearing examiner.

The tenant claims that the hearing examiner acted inappropriately during the hearing and before he issued the decision and order. However, there is no record proof that the tenant filed a motion to disqualify the hearing examiner, in accordance with 14 DCMR § 4001 (1991). The regulation empowers the hearing examiner and the Rent Administrator to rule upon motions to disqualify the hearing examiner. In the absence of a motion filed in accordance with § 4001, the Commission is not empowered to rule upon a motion to disqualify a hearing examiner. See Redmond v. Majerle Mgmt., Inc., TP 23,146 (RHC June 4, 1999) at 46.

When the record reveals that the hearing examiner engaged in conduct that impacts the parties' right to a fair hearing, the Commission may intervene. In Bedell v. Clarke, TP 24,979 (RHC Apr. 29, 2003), the Commission held that the tenant's oral request to disqualify the hearing examiner did not meet the requirements of 14 DCMR § 4001 (1991). However, in response to a related issue in the appeal, the Commission

ordered a new hearing before a different hearing examiner, because the initial examiner engaged in a course of conduct that revealed his bias. When the Commission reviewed the hearing tapes in the instant matter, the Commission did not detect partiality or improper conduct by Hearing Examiner Anderson.

Accordingly, the Commission denies Issue C.

IV. CONCLUSION

For the foregoing reasons, the Commission denies the issues that the tenant raised in the notice of appeal. However, the Commission noted and corrected plain error in the decision and order. In the Evaluation and Analysis section of the decision, the hearing examiner correctly noted that the rent ceiling was \$1308.00 following the 2.6% adjustment of general applicability for calendar year 2002. However, the hearing examiner erred when he transposed the numbers and placed \$1380.00 in the findings of fact and throughout the decision and order. In accordance with 14 DCMR § 3807.4 (1991), the Commission corrects the plain error and notes that the rent ceiling, following the 2.6% adjustment of general applicability, was \$1308.00.

With the correction of the plain error, the Rent Administrator's decision and order is affirmed.

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 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

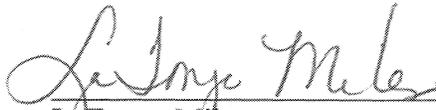
I hereby certify that a copy of the foregoing Decision and Order in TP 27,690 was mailed by priority mail with delivery confirmation, postage prepaid, this 16th day of May 2005 to:

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