

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

TP 27,985

In re: 5200 North Capitol Street, N.W., Unit 3

Ward Four (4)

**EVANGELINE COVINGTON**

Tenant/Appellant

v.

**FOLEY PROPERTIES, INCORPORATED**

Housing Provider/Appellee

**DECISION AND ORDER**

**June 21, 2006**

**PER CURIAM.** This case is on appeal to the Rental Housing Commission (Commission) from a decision and order issued by the Office of the Rent Administrator, based on a petition filed in the Rental Accommodations and Conversion Division (RACD). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, 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 (2004), govern the proceedings.

**I. PROCEDURAL HISTORY**

The housing accommodation, located at 5200 North Capitol Street, N.W., is a multi-unit building, managed by Foley Properties, Incorporated, the housing provider/appellee. The tenant/appellant, Evangeline Covington, began her tenancy in unit three (3) at the housing accommodation on or about October 1, 2000. On November 17, 2003, Covington, filed tenant petition (TP) 27,985 in the Department of Consumer and Regulatory Affairs's Rental

Accommodations and Conversion Division. The petition alleged: 1) the rent ceiling filed with the RACD for her unit was improper; 2) a rent increase was taken while the unit was not in substantial compliance with the District of Columbia Housing Regulations; 3) services and facilities provided in connection with the rental of her unit were substantially reduced; and 4) retaliatory action was directed against her by the Housing Provider, manager or other agent for exercising her rights in violation of section 502 of the Rental Housing Act of 1985. A hearing was initially scheduled for January 7, 2004, but was rescheduled by motion of the parties and held on May 27, 2004. Hearing Examiner Carl Bradford issued the decision and order on the petition on September 3, 2004 with the following findings of fact and conclusions of law:

Findings of Fact

1. The housing accommodation is located at 5200 North Capitol Street, N.W., Washington, D.C.
2. The housing accommodation is managed by Foley Properties.
3. The housing accommodation contains 146 rental units.
4. At least 180 days elapsed between each increase in the rent for the units.
5. Each rent ceiling increase implemented during Petitioner's tenancy did not exceed the legally allowable rate.
6. The rent charged for Petitioner's unit did not exceed the legally calculated rent ceiling.
7. Petitioner was provided proper notices of all increases in the rent more than thirty (30) days in advance of the respective rent increases.
8. The Housing Provider did not reduce Petitioner's services and facilities in violation of the Act.
9. The Housing Provider did not retaliate against Petitioner in violation of the Act.

10. The Examiner found that the facts in this case, the arguments proffered and the evidence in support thereof does not clearly support dismissal under the res judicata doctrine.
11. All other findings of fact made by the Examiner in these Decisions are hereby incorporated by reference into this section of Findings of Fact.

#### Conclusions of Law

1. The increases in the rent charged to the Petitioner were implemented in conformity with the provisions of the Act.
2. The Petitioner failed to prove by a preponderance of the evidence that she had been overcharged monthly rent.
3. The Petitioner failed to prove by a preponderance of the evidence that her services and facilities had been reduced.
4. The Respondent provided sufficient evidence to overcome the presumption that it retaliated against Petitioner.
5. All other conclusions of law made by the Examiner in this Decision are hereby incorporated by reference into this section of Findings of Fact.

Covington v. Foley Prop., TP 27,985 (RACD Sept. 3, 2004)(Decision) at 10-11. The hearing examiner denied the petition in the decision and order, and the tenant filed a notice of appeal on September 23, 2004 in the Commission, which held its hearing on December 9, 2004.

## **II. ISSUES ON APPEAL**

The tenant's notice of appeal raised the following issues:

1. The evidence does not support the Petitioner's rent ceiling is correct.
2. The Examiner erred when finding there were no "substantial housing code violations" existing when the rent increases were taken.
3. There is no substantial evidence in the record to support that all repairs were timely made.
4. The evidence does not support the Examiner's finding that the water temperature was just below 120 degrees and then conclude that this temperature did not pose a "substantial danger to the health, safety and welfare of the Petitioner.

5. The evidence does not support and the Examiner erred when he concluded based on giving the “Respondent the benefit of the doubt” that the Respondent did not retaliate against the Petitioner.

Notice of Appeal at 1-2.

### III. DISCUSSION OF THE ISSUES

#### A. The evidence does not support the Petitioner’s rent ceiling is correct.

The Commission’s regulation concerning the initiation of appeals, 14 DCMR § 3802.5(b) (2004), 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, in this issue, the tenant failed to state the error in the Rent Administrator’s decision. The tenant failed to provide the Commission with a specific finding of fact or conclusion of law wherein the hearing examiner made a determination regarding a specific rent ceiling increase affecting the tenant’s unit. The Commission has previously held that when an appeal issue is not a clear and concise statement of an alleged error it is “violative of the Commission’s rules on appeals.” Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000); cited in Battle v. McElvene, TP 24,752 (RHC May 18, 2000); Akers v. Peterson, TP 27,987 (RHC July 1, 2005). Accordingly, this issue is dismissed, because it fails to clearly and concisely state an issue related to alleged errors in the hearing examiner’s decision as required by 14 DCMR § 3802.5(b) (2004).

#### B. The Examiner erred when finding there were no “substantial housing code violations” existing when the rent increases were taken.

The regulation at 14 DCMR § 4216.2 (2004), provides a list of housing code violations which, if found to exist, are considered to be “substantial” violations of the housing code. The relevant part of 14 DCMR § 4216.2 (2004) states:

For purposes of this subtitle, ‘substantial compliance with the housing code’ means the absence of any substantial violations as defined in § 103(35) of the Act, including but not limited to, the following:

...

(b) Frequent lack of hot water; (emphasis added)

On appeal to the Commission, the tenant argued that the hearing examiner erred by finding that there were no substantial housing code violations when the rent increases were taken, because the tenant’s water never reached the required 120 degrees fahrenheit. Furthermore, as proof of the continued existence of substantial housing code violations, the tenant entered into evidence housing violation notices dated January 1, 2002, June 11, 2002, August 6, 2002, March 25, 2002, and April 4, 2003, which contained housing code violations for inadequate hot water, poorly maintained plumbing facilities, and defective light fixtures. However, in the evaluation and legal analysis section of his decision, the hearing examiner stated:

Based on the evidence presented, the Examiner is persuaded that the Petitioner’s hot water temperature was between 85 and 90 degrees,<sup>1</sup> which was less than the 120 degrees fahrenheit required by the Code.

...

Based on the evidence that has been presented, the Examiner finds that there has not been a substantial reduction in services and facilities on the part of the Respondent, as related to housing code violations in Petitioner’s unit. The record does establish that there were violations in Petitioner’s unit. However, they were not the type violations that adversely affected the Petitioner’s health,

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<sup>1</sup> Although the hearing examiner determined the water temperature to be between 85 and 90 degrees, the housing inspector testified that the water actually reached a low of 78.1 degrees fahrenheit in the cooking room and a high of 105 degrees fahrenheit in the bathing room. Tape Recording (RACD Hearing May 27, 2004).

welfare or safety, based on the testimony of the Petitioner and Housing Inspector Reed.

Accordingly, the Examiner finds there has not been a substantial reduction in services and facilities as claimed by Petitioner. Therefore, this issue is dismissed.

Decision at 7-8.

In this case, the documentary evidence and the witness testimony establish the fact that the water in the tenant's rental unit never reached the required 120 degrees fahrenheit during the time in which the rental increases were taken. However, the hearing examiner concluded that the violations were not the type to adversely affect the tenant's "health, welfare or safety," and thus not substantial enough to cause a "reduction in services and facilities." Id. at 8. On the contrary, the Commission has held that a tenant need only show the "existence of the violations to meet the 'substantial' test under 14 DCMR § 4216.2 (2004)." Vicente v. Jackson, TP 27,614 (RHC Sept. 19, 2005) at 17. In addition, the Commission has held that housing code violations "are considered to be, in and of themselves, substantial." Id. at 17; citing Taylor v. Chase Manhattan Mortgage, TP 24,303 & TP 24,420 (RHC Sept. 9, 1999); Stancil v. Carter, TP 23,265 (RHC July 31, 1997). Therefore, the hearing examiner erred by finding that there were no substantial housing code violations during the time when the housing provider implemented the rent increases of general applicability on October 1, 2002 and October 1, 2003.

Pursuant to the Act, D.C. OFFICIAL CODE § 42-3509.01(a) (2001) provides:

Any person who knowingly . . . substantially reduces or eliminates related services<sup>2</sup> previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by

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<sup>2</sup> "Related services" means 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). Covington v. Foley Prop. Inc., TP 27,985  
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which the rent<sup>3</sup> exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

Accordingly, this issue is reversed and remanded to the hearing examiner to establish a value of the reduced services drawing upon his expertise and evidence in the record regarding the “nature of the violation, duration and substantiality.” See Kemp v. Marshall Heights Community Dev., TP 24,786 (RHC Aug. 1, 2000) at 8; citing Calomiris v. Misuriello, TP 4809 (RHC Aug. 30, 1982); Nicholls v. Tenants of 5005, 07, 09 D Street, S.E., TP 11,302 (RHC Sept. 6, 1985). Thereafter, the hearing examiner shall lower the ceiling by the monthly value of the reduced services. Newton v. Hope, TP 27,034 (RHC May 29, 2002) at 10.

Additionally, the hearing examiner shall determine whether the tenant was entitled to a rent refund, due to the existence of the housing code violation. A tenant is only entitled to a rent refund if the rent actually charged by the housing provider is higher than the reduced rent ceiling. Where the rent actually charged is equal to or lower than the reduced rent ceiling there has been no excess rent collected and no refund is required. Borger Mgmt., Inc. v. Warren, TP 23,909 (RHC June 3, 1999) at 11; citing Hiatt Place P’ship v. Hiatt Place Tenants’ Ass’n, TP 21,149 (RHC May 1, 1991). If the rent charged exceeds the reduced rent ceiling, the hearing examiner shall order a rent refund.

**C. There is no substantial evidence in the record to support that all repairs were timely made.**

In reviewing decisions, the Commission’s role is not to weigh the testimony and substitute itself for the fact-finder “who received the conflicting evidence and determined the weight to be accorded the evidence.” See Stancil, TP 23,265 (RHC July 31, 1997); see also

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<sup>3</sup> “Rent” means the entire amount of money, money’s worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities. D.C. OFFICIAL CODE § 42-3501.03(28) (2001) (emphasis added).

Communications Workers v. District of Columbia Comm'n on Human Rights, 367 A.2d 149, 152 (D.C. 1976). It is the Commission's duty to reverse decisions that contain "findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator." 14 DCMR § 3807.1 (2004). In his decision and order the hearing examiner stated:

Property manager, Russell Adams, testified that he and his staff had made every attempt to accommodate the Petitioner's complaint. Whenever, he or his staff was put on notice of violations in the housing accommodation they were taken care of right away.

...

Housing Inspector Reed indicated that she abated some violations because she could not get the cooperation of the Petitioner. Further, the violations that were cited were abated in a timely manner by the Respondent.

...

Here, there was testimony that Petitioner had contacted the housing provider regarding violations, which he failed to repair timely. Petitioner then called the HRA Housing Inspection Division, which cited the Respondent for violations. The Respondent abated the violations immediately based on the testimony of Housing Inspector Reed, who the Examiner determines is an experienced housing inspector.

Decision at 7. It is apparent from his decision that the hearing examiner found the testimony of the housing inspector credible.

The record evidence supporting the hearing examiner's conclusion includes unrefuted testimony at the hearing by the housing inspector, as well as notices to the tenant requesting entry into her unit. During the RACD hearing, the housing inspector testified that the property manager was always willing to correct the violations, and for the most part he kept her well-informed of the progress he was making. Tape Recording (RACD Hearing May 27, 2004). In addition, the housing inspector stated that she received letters from the property manager

indicating his difficulty with gaining access into the tenant's unit, which she mentioned sometimes caused delays in the repairs, Id.; (Respondent's Exhibit #3). Based on the housing provider's testimony and the documentary evidence admitted in the record, the hearing examiner determined that the housing provider was either timely in making the repairs or was prevented from doing so by the tenant.

Accordingly, the Commission concludes that there is substantial evidence in the record to support the hearing examiner's decision that the repairs were timely made or the tenant prevented the repairs, and therefore his decision is affirmed.

**D. The evidence does not support the Examiner's finding that the water temperature was just below 120 degrees and then conclude that this temperature did not pose a "substantial danger to the health, safety, and welfare of the Petitioner."**

The Act provides that:

Where the Rent Administrator finds there have been excessive and prolonged violations of the housing regulations affecting the health, safety, and security of the tenants or the habitability of the housing accommodation in which the tenants reside and that the housing provider has failed to correct the violations, the Rent Administrator may roll back the rents for the affected rental units to an amount which shall not be less than the September 1, 1983, base rent for the rental units until the violations have been abated.

D.C. OFFICIAL CODE § 42-3502.08 (a)(2) (2001). Pursuant to the housing regulations at 14 DCMR § 4216.2(b) (2004), "[f]requent lack of hot water" qualifies as a substantial housing code violation and therefore is deemed to affect the health, safety, and welfare of the tenant. In addition, DCRA has established 120 degrees fahrenheit as the required temperature for running water in a tenant's rental unit. (Petitioner's Exhibits #3-4).

The housing inspector testified that the tenant's water never reached the mandatory 120 degrees fahrenheit, and cited the housing provider on several occasions<sup>4</sup> for this violation, which

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<sup>4</sup> See Petitioner's Exhibits #3-4  
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has yet to be abated according to the record. Tape Recording (RACD Hearing May 27, 2004). Additionally, the Commission has previously held that a tenant is not required to show that housing code violations existing in the rental unit threaten one's "health, safety or welfare." Rather, a tenant "merely has to show the existence of the violations to meet the 'substantial' test under 14 DCMR § 4216.2 (2004). See Vicente, TP 27,614 at 17; see also Nwanko v. Dist. of Columbia Rental Hous. Comm'n, 542 A.2d 827 (D.C. 1988) (finding that the important inquiry is whether, in fact, an alleged substantial housing code violation exists at the time the rent increase is taken).

Nonetheless, in his decision and order, the hearing examiner concluded:

Based on the evidence presented, the Examiner is persuaded that the Petitioner's hot water temperature was between 85 and 90 degrees, which was less than the 120 degrees fahrenheit required by the Code. However, the Examiner is not persuaded that the repairs needed were of the nature that would present a substantial danger to the health, safety, and welfare of the Petitioner.

Decision at 7. The substantial evidence in the record does not support such a conclusion. Accordingly, the hearing examiner's conclusion is reversed and remanded for a finding that a water temperature below 120 degrees fahrenheit is a substantial danger to the tenant's health, safety, and welfare as established by the Act, and the housing regulations.

**E. The evidence does not support and the Examiner erred when he concluded based on giving the "Respondent the benefit of the doubt" that the Respondent did not retaliate against the Petitioner.**

At the Commission's appellate hearing, the tenant's attorney, Mr. Gray, concluded his oral argument without making argument on the issue of retaliation. When asked whether the issue was still viable in the case, Mr. Gray responded, "no . . . uh that one we will write-off."

CD Recording (RHC Hearing Dec. 9, 2004). Accordingly, the Commission grants the tenant's motion to withdraw the retaliation issue made during oral argument.<sup>5</sup> Id.

#### IV. CONCLUSION

For the foregoing reasons, the hearing examiner's decision is affirmed in part, and the tenant's appeal issue one (1) is dismissed for failure to provide a clear and concise statement of the alleged errors in the decision of the Rent Administrator as required by 14 DCMR § 3802.5(b) (2004). The tenant's appeal issue two (2) is remanded to the hearing examiner for findings of fact and conclusions of law that there were substantial housing code violations existing when the housing provider implemented the rent increases. Accordingly, the hearing examiner is ordered to determine whether the tenant is entitled to a rent refund, treble damages, or a rent roll back. Furthermore, the tenant's appeal issue four (4) is granted, and the decision of the hearing examiner is reversed and remanded for a finding that a water temperature below 120 degrees fahrenheit is a substantial danger to the tenant's health, safety and welfare as established by the Act and the housing regulations. No new hearing is ordered.

**SO ORDERED.**



RUTH R. BANKS, CHAIRPERSON



RONALD A. YOUNG, COMMISSIONER

#### MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004) 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."

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<sup>5</sup> 14 DCMR § 3814.1 (2004) provides, "motions may be made orally at a hearing."

## 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:

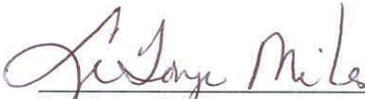
D.C. Court of Appeals  
Office of the Clerk  
500 Indiana Avenue, N.W.  
6th Floor  
Washington, D.C. 20001  
(202) 879-2700

## **CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing DECISION AND ORDER in TP 27,985 was mailed by priority mail, with confirmation of delivery, postage prepaid this 21<sup>st</sup> day of June 2006 to:

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