

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 28,028

In re: 6817 Georgia Avenue, N.W., Unit 204

Ward Four (4)

BORGER MANAGEMENT, INC.
Housing Provider/Appellant

v.

MICHAEL SINDRAM
Tenant/Appellee

DECISION AND ORDER

June 1, 2005

PER CURIAM. This case is on appeal to the Rental Housing Commission from a decision and order issued by 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 (1991), govern the proceedings.

I. THE PROCEDURES

Michael Sindram, tenant, filed Tenant Petition (TP) 28,028 on December 30, 2003. In the petition, the tenant alleged that: 1) services and/or facilities provided in connection with the rental of his unit had been permanently eliminated; 2) services and/or facilities provided in connection with the rental of his unit had been substantially

reduced; 3) services and/or facilities, as set forth in a Voluntary Agreement filed with and approved by the Rent Administrator under § 215 of the Rental Housing Emergency [sic] Act of 1985, have not been provided as specified; 4) retaliatory action had been taken against Tenant by his housing provider, manager or other agent for exercising his rights in violation of § 502 of the Rental Housing Emergency [sic] Act of 1985; and 5) a Notice to Vacate had been served upon Tenant which violates the requirements of § 501 of the Rental Housing Emergency [sic] Act of 1985.

A Rental Accommodations and Conversion Division hearing was held on March 3, 2004 with Senior Hearing Examiner Gerald J. Roper presiding. On September 14, 2004, the hearing examiner issued his decision and order.

The decision and order contained the following:

Findings of Fact:

1. The Housing Provider replaced the heating system in the Petitioner's rental unit from 4 individual radiant heating units providing heat in the rental unit to 2 forced air heating units. The work began in June 2003 and was completed in October 2003.
2. The new heating units have individual temperature controls and are more efficient than the old unit.
3. The installation of the new heating system caused holes in the walls which contributed to an insect problem in Petitioner's rental unit.
4. The Petitioner did not provide the duration or severity of the insect problem.
5. The Housing Provider has charged the Petitioner a fee for lost key service and has not charged other tenants who have lost their key[s].
6. The issues involving whether services and facilities set forth in a Voluntary Agreement filed with the Rent Administrator have not been provided was withdrawn.

7. There was no evidence presented on the issue of whether a notice to vacate has been served on the tenant which violates the requirements of § 501 of the Act.
8. The Housing Provider has retaliated against the Petitioner.

Sindram v. Borger Mgmt., Inc., TP 28,028 (RACD Sept. 14, 2004) at 8.

Conclusions of Law:

1. Petitioner has failed to meet his burden of proof in accordance with 14 DCMR § 4003.1 to demonstrate that Respondent has substantially or permanently reduced related services in Petitioner's rental unit.
2. Respondent has retaliated against the Petitioner in violation of D.C. OFFICIAL CODE 2001 Ed. § 42-3505.02 (2001) and shall be fined pursuant to D.C. OFFICIAL CODE § 42-3509.01 (2001).

Id. at 9.

On September 22, 2004, the housing provider filed a notice of appeal with the Commission and a hearing was held on March 14, 2005.

II. THE ISSUES

The notice of appeal stated the following issues:

1. The Hearing Examiner erred in relying upon unreliable and unsubstantiated hearsay testimony presented by the Petitioner.
2. The Hearing Examiner erred in concluding that the Housing Provider had retaliated in this case.
3. The assessment of a fine by the Hearing Examiner was arbitrary, capricious and legally erroneous.

Notice of Appeal at 1.

III. DISCUSSION OF THE ISSUES

- A. Whether the Hearing Examiner erred in relying upon unreliable and unsubstantiated hearsay testimony presented by the Petitioner.

According to the DCAPA, “[a]ny oral and any documentary evidence” may be admissible as evidence so long as it is not “irrelevant, immaterial, and unduly repetitious.” D.C. OFFICIAL CODE § 2-509(b) (2001). Hearsay can also be relied upon 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). In the evaluation of the reliability of hearsay evidence, two of the five factors to consider are “whether the hearsay statement is contradicted by direct testimony, [and] whether the declarant is available to testify and be cross-examined[.]” Gropp v. District of Columbia Bd. of Dentistry, 606 A.2d 1010, 1014 (D.C. 1992), cited in Borger Mgmt., Inc. v. Miller, TP 27,445 (RHC Mar. 4, 2004) at 5.

Given that hearsay testimony is indeed admissible, the issue of hearsay in the instant case only requires the evaluation of the reliability of the hearsay evidence in the record. The only testimony given here on behalf of the tenant was testimony given by tenant himself, so it is clear that he was available to testify. The record shows that the housing provider was given the opportunity to cross-examine the tenant after he testified on his own behalf. Subsequently, the housing provider also presented their own witnesses and testimony. The record does not reflect that the housing provider’s witnesses provided direct testimony to contradict the hearsay evidence brought by the tenant. Therefore, there is no evidence of record to show that the hearing examiner relied upon hearsay evidence that was contradicted by direct testimony. Furthermore, since the tenant was available to testify and be cross-examined, his hearsay evidence was justifiably relied upon according to Gropp. Therefore, this issue is denied.

B. Whether the Hearing Examiner erred in concluding that the Housing Provider had retaliated in this case.

The Act, D.C. OFFICIAL CODE § 42-3505.02(a) (2001), states “[n]o housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant” by law. The standard for determining whether a housing provider’s actions are retaliatory is whether the action was taken within six months after the tenant engaged in one of six protected acts as enumerated in the Act. D.C. OFFICIAL CODE § 42-3505.02(b) (2001).¹ If such an action can be shown, “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[.]” Id. In other words, any adverse action taken by the housing provider within six months of the tenant’s exercising of his right is presumed to be retaliatory in nature. The burden of proof then shifts to the housing provider to provide clear and convincing evidence that it did *not* engage in such action in retaliation of the

¹ D.C. OFFICIAL CODE § 42-3505.02(b) (2001) 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, 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.

tenant's actions. Such evidence must extend "beyond the defense that a law permitted the alleged retaliatory act." Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003) (where the court used the example of a housing provider rebutting the presumption of retaliation by showing that his actions were taken for an economic reason and not in response to a tenant's behavior).

The tenant brought an action against the housing provider on August 15, 2001 in TP 27,259, in the Department of Consumer and Regulatory Affairs, RACD. On January 15, 2002, fewer than six months after the tenant's action, the housing provider issued a "Bar Notice" prohibiting the tenant from entering the Rental Office of the housing accommodation. According to the Act, a retaliatory action includes actions that constitute undue or unavoidable inconvenience to the tenant. D.C. OFFICIAL CODE § 42-3505.02(a) (2001). Because other tenants are permitted to pay their rent by simply stopping by the Rental Office, to prevent a disabled tenant from entering such office, and thereby forcing him to obtain postage to mail his rent, is clearly an unavoidable, and arguably undue, inconvenience. Furthermore, because the housing provider's actions were within six months of the tenant's filed petition, the action of the housing provider, barring the tenant from the rental office, is presumed to be retaliatory.

The only evidence given by the housing provider during the hearing to justify the Bar Notice was the testimony of Ms. Kreceda Page. Ms. Page testified that the Bar Notice was issued not in retaliation for any action taken by the tenant, but instead as a result of the tenant's "aggressiveness" towards her when he would come into her office. However, the housing provider failed to provide evidence of aggressive behavior or any documentation or evidence to demonstrate that such behavior took place. Therefore, the

hearing examiner found that the housing provider failed to meet its burden of proof to provide clear and convincing evidence to rebut the presumption of retaliatory action.

The record reflects that the tenant exercised a protected right under § 42-3505.02(b)(1); the housing provider took action within six months after the tenant filed the petition; and the housing provider's actions are of a type included in list of such actions that could constitute a retaliatory action under § 42-3505.02(a); and the housing provider failed to meet its burden of proof to rebut the statutory presumption of retaliatory action. Accordingly, the hearing examiner did not err in concluding that the housing provider had retaliated in this case. This issue is denied.

C. **Whether the assessment of a fine by the Hearing Examiner was arbitrary, capricious and legally erroneous.**

The hearing examiner imposed a fine on the housing provider of \$1000.00. Borger Mgmt., Inc. v. Sindram, TP 28,028 (RACD Sept. 14, 2004) at 9. The Act provides that “[a]ny person who wilfully ... commits any ... act in violation of any provision of this chapter or of any final administrative order issued 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). In Quality Mgmt., Inc. v. District of Columbia Rental Hous. Comm’n, 505 A.2d 73 (D.C. 1986), the District of Columbia Court of Appeals stated in its opinion that “[f]rom the context it is clear that the word "willfully" as used in § [42-3509.01(b)] demands a more culpable mental state than the word "knowingly" as used in § [42-3509.01(a)].” Id. at 76. In other words, the term “willfully” in § 42-3509.01(b) relates to whether or not the person committing the act intended to violate the law. Id. For example, if the housing provider's actions were actually in response to a tenant's actions, that may be considered willful; however, if the housing provider's

actions were merely coincidental, they would not be considered willful. Simply doing the act, but without intending to violate the law, would be knowingly, but not willfully.

Id.

In the instant case, the hearing examiner made no findings directed to the issue of willfulness. Therefore, since the requirements for imposing a fine pursuant to § 42-3509.01(b) were not met as far as any findings of willfulness, the hearing examiner erred in imposing a fine on the housing provider. However, “[a]bsent a holding by the RHC that no conclusion of willfulness could be made as a matter of law on this record, the proper course [is] not to strike the fine *simpliciter*, but rather to return the case to the [hearing examiner] for findings of fact related to that issue.” Miller v. District of Columbia Rental Hous. Comm’n, 870 A.2d 556, 2 (D.C. 2005). The Commission here does not hold that no conclusion of willfulness could be made as a matter of law on this record. Therefore, this issue is remanded for findings of fact and conclusions of law on the fine.

IV. CONCLUSION

The decision of the hearing examiner is affirmed, in part, and reversed and remanded, in part. The hearing examiner did not err in relying upon hearsay testimony presented by the tenant. Accordingly, this appeal issue is denied. The hearing examiner also did not err in concluding that the housing provider had retaliated against the tenant in this case. Accordingly, this appeal issue is denied. The hearing examiner failed to make any findings of fact or conclusions of law on whether or not the housing provider acted willfully in its actions against the tenant. Accordingly, the fine is reversed and the issue is remanded for further findings of fact and conclusions of law.

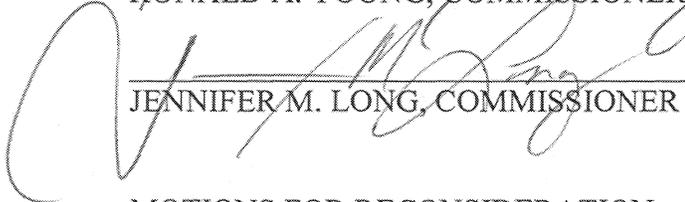
SO ORDERED.



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 issues 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:

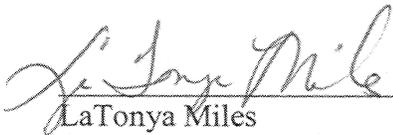
D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 28,028 was mailed by priority mail with delivery confirmation, postage prepaid, this 1st day of June, 2005, to:

Richard W. Luchs, Esq.
1620 L Street, N.W., Suite 900
Washington, D.C. 20036-5605

Michael Sindram
6817 Georgia Avenue, N.W. #204
Washington, D.C. 20012



LaTonya Miles
Contact Representative
(202) 442-8949