DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

CI 20,755

In re: 6101 16th Street, N.W.

Ward Four (4)

TENANTS OF RITTENHOUSE APARTMENTS
Tenants/Appellants

v.

RITTENHOUSE, LLC.
Housing Provider/Appellee

ORDER ON MOTION FOR RECONSIDERATION

February 27, 2006

YOUNG, COMMISSIONER. This case is on appeal from the District of Columbia 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 Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

On November 14, 2005, the Commission issued a decision and order in the above-captioned appeal. The Commission decision remanded the case to the Rent Administrator because part of the hearing record, the tape recording of the hearing, was missing from the file when the Commission reviewed the record. The decision stated in part:

> The Commission concludes, because the testimony on the hearing tapes was not retained with the official record in this case, the record is incomplete. The Act requires the Commission to review the record, which by law in the DCAPA includes the testimony on the hearing tapes, to determine whether the hearing examiner's decision was 'arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence on the record of the proceedings.' D.C. OFFICIAL CODE § 42-3502.16(h) (2001).
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> Therefore, based on the mandates in the Act, the DCAPA, and the case law, the Commission cannot properly decide this case without the record of the missing testimony on the tapes. Accordingly, this case is remanded to the Rent Administrator for a hearing de novo.

Tenants of Rittenhouse Apartments v. Rittenhouse, LLC., CI 20,755 (RHC Nov. 14, 2005) at 6-7.

On November 23, 2005, the housing provider filed a motion for reconsideration of the Commission decision. The housing provider argues:

> The Decision and Order is wrong as a matter of law. The law is clear that it is the duty of the appellants (here the tenants) to present to the appellate body an adequate record for it to determine the appeal. If the record is incomplete, the appeal is denied because the decision below is presumed to be correct. This applies both in the judicial as well as administrative context.

Motion for Reconsideration at 1. The housing provider further argues, "Stated simply, if a part of the record is missing, then the Appellants have failed in their burden of persuasion to show that error has occurred, and they should bear the consequences of that failure." Id. at 2. The housing provider asserts that the District of Columbia Court of Appeals decision in Hoage v. Bd. of Trustees, 714 A.2d 776 (D.C. 1998), should dictate the result in the instant case. The court in Hoage, stated:

> While our rules require the agency to prepare and transmit the record to the court, the ultimate burden of persuasion is on the party challenging the agency's decision, so it is up to that party to ensure that any gaps in the record are filled. In a case such as this, it is the employee, rather than the university, who has the responsibility to make sure the president has all the relevant information before making a ruling.[6]

[6] 8 DCMR § 1825.3, published in 39 D.C. Register 4795, 4809 (1992), states:

> The request for review [filed by the employee] shall include the following:
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> ...
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> (c) Copies of any relevant documentary evidence supporting the employee's request for review.

Id. at 781.

II. THE LAW

The Act, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), requires the proceedings for administrative hearings and appeals to conform to the DCAPA. The Act states:

> All petitions filed under this section, all hearings held relating to the Petitions, and all appeals taken from decisions of the Rent Administrator shall be considered and held according to the provisions of this section and title I of the District of Columbia Administrative Procedure Act. In the case of any direct, irreconcilable conflict between the provisions of this section and the District of Columbia Administrative Procedure Act, the District of Columbia Administrative Procedure Act shall prevail.

D.C. OFFICIAL CODE § 42-350.16(g) (2001). (emphasis added.) The relevant part of the DCAPA states:

> The Mayor or the agency shall maintain an official record in each contested case, to include testimony and exhibits, but it shall not be necessary to make any transcription unless a copy of such record is timely requested by any party to such case, or transcription is required by law.

D.C. OFFICIAL CODE § 2-509(c) (2001) (emphasis added.). The Commission's regulation at 14 DCMR § 3804.3 (2004), provides that the tape recordings or transcript of the hearings before the hearing examiner shall constitute the official record for consideration on appeal.[1] The regulations also provide the Commission and the Rent

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[1] The applicable regulation, 14 DCMR § 3804.3 (2004), provides in part:

> The record of appeal shall consist of the following:
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> ...

Administrator with direction concerning the tape recordings of hearings. The relevant Commission regulation, 14 DCMR § 3820.1 (2004) states, "The entire proceedings of hearings on motions and appeals shall be recorded on tape, which shall remain in the custody of the Commission at all times." The regulation applicable to the Rent Administrator, 14 DCMR § 4006.1 (2004), provides, "The entire proceedings of hearings and other matters shall be recorded on tape, which shall remain in the custody of the Rent Administrator at all times." Both regulations clearly envision that the agency, and not the parties, should maintain custody of the tape recordings of the hearings. Neither the DCAPA nor the regulations require that the parties either transcribe or copy the tape recordings of their hearings for later inclusion in the record in the unfortunate event, as occurred here, where the tape recordings have been lost.

In Mellon Prop. Mgmt. Co. v. Jimoh, TP 23,467 (RHC Apr. 24, 1997), the Commission held, "without the complete hearing record, we cannot properly determine whether the examiner's findings were based upon substantial evidence in the record." See also Wheeler v. District of Columbia Bd. of Zoning Adjustment, 395 A.2d 85 (D.C. 1978); Williams v. Poretsky Mgmt. Co., Inc., TP 23,625 (RHC July 11, 1966); Allen v. Yoon, TP 21,804 (RHC Aug. 7, 1992); Hashim v. Peerless Prop., TP 21,877 (RHC Aug. 5, 1992). The Commission has held, when reviewing a record with missing tapes, "[w]here issues on appeal depend for their resolution on the record of the hearing ... we cannot proceed to decision. Instead, it is necessary for us to remand to the Rent

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(b) The tape recordings or transcript of the hearings before the hearing examiner.

Administrator for a new hearing." Sibert v. Barros and Co., TP 12,019 (RHC July 24, 1989) at 2-3.

III. CONCLUSION

Due to the loss of the tape recording of the hearing before the Rent Administrator, the Commission is without the complete hearing record, and therefore cannot properly determine whether the examiner's findings of fact and conclusions of law were based upon substantial evidence in the record. Accordingly, the Commission's decision to remand this case for a hearing de novo is affirmed and the housing provider's motion for reconsideration is denied.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order on Motion for Reconsideration in CI 20,755 was sent by priority mail, with delivery confirmation, postage prepaid, this **27th February, 2006** to:

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