

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

CIs 20,753 & 20,754

TENANTS OF 2300 AND 2330 GOOD HOPE ROAD, S.E.

Tenants/Appellants

v.

MARBURY PLAZA, L.L.C.

Housing Provider/Appellee

**ORDER ON HOUSING PROVIDER'S MOTION TO DISMISS APPEAL AND
TENANTS MOTION TO AMEND THE CAPTION OF THE APPEAL AND/OR TO
IDENTIFY THE PARTIES TO THE APPEAL**

March 14, 2002

BANKS, CHAIRPERSON. This appeal is from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission), pursuant to the Rental Housing Act of 1985, (Act), D.C. OFFICIAL CODE §§ 42-3501.01 -3509.07, the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510, and the District of Columbia Municipal Regulations (DCMR), 14 DCMR §§ 3800-4399, which govern the proceedings.

I. THE PROCEDURES

On December 10, 2001, the Office of Adjudication (OAD) issued the decision and order by Hearing Examiner Gerald Roper in capital improvement petitions, CIs 20,753 and 20,754. The hearing examiner granted the Housing Provider's petition for rent ceiling increases for capital

improvements of new elevators in the two housing accommodations at 2300 and 2330 Good Hope Road, S.E. On December 28, 2001, the Tenants filed a notice of appeal in the Rental Housing Commission.

On January 14, 2002, the Housing Provider filed a motion to dismiss the appeal, pursuant to 14 DCMR § 3802.5(a), because the caption on the notice of appeal did not identify the name(s) of the appellant(s). The Housing Provider argued in the motion that only the Tenants who appeared as parties below have standing to appeal. DeLevay v. DISTRICT OF COLUMBIA Rental Accommodations Comm'n, 411 A.2d 354, 360 (D.C. 1980). The Housing Provider asserted, "[t]he hearing examiner's decision identifies who the parties were below. See [sic] Marbury Plaza, L.L.C. v. Tenants of 2300 and 2330 Good Hope Road, S.E., CI 20,753 & 20,754 (OAD Dec. 10, 2001) at 1-2. Unless the would-be appellants are identified, the Commission cannot determine whether or not they were parties below." Motion at 1-2.

Second, the Housing Provider asserted that it was necessary to know the names of the appellants to make the determination whether any were eligible for the exemption for the elderly and disabled Tenants. Finally, the Housing Provider asserted only those Tenants who were parties to the appeal can be affected by the outcome, citing Lenkin

Co. Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 642 A.2d 1282, 1287-88 (D.C. 1994).

The Housing Provider concluded that the only remedy for failure to name an appellant was to dismiss the appeal, citing Gavin v. William J. Davis & Hartford Know Asso., TP 21,284 (RHC May 17, 1989). The Housing Provider argued, if the Commission allowed additional time to provide the names of the appellants, it would, in effect, be extending the time for the persons so named to file an appeal. Motion at 3.

The Tenants opposed the motion to dismiss their appeal by stating the hearing examiner failed to identify the Tenants as parties in the OAD decision and order, and captioned the case as, "Tenants of 2300 and 2330 Good Hope Road, S.E." Second, the Tenants submitted into evidence a list of 137 occupants who were represented by counsel. Third, the Tenants' counsel argued defective notice, when the Housing Provider filed the capital improvement petition, because the Tenants were not notified by the Housing Provider of the elderly and disabled exemption,

pursuant to 14 DCMR § 4210.2.¹ Therefore, the capital improvement petition was defective.

In addition to their opposition to the Housing Provider's motion to dismiss, on January 28, 2002, the Tenants filed a motion in which they argued for the amendment of the notice of appeal to identify the Tenants, who are represented by the case caption "Tenants of 2300 and 2330 Good Hope Road, S.E." The Tenants also asserted they filed a list of Tenants represented by counsel, and that finding of fact number 10 stated the Tenants were identified in Appendices A and B. Further, the Tenants asserted that the caption on the notice of appeal included the Tenants in the appendices.

On February 1, 2002, the Housing Provider filed an opposition to the motion to amend the caption, stating 14 DCMR § 3802.5 requires the name of the appellant on the notice of appeal. The Housing Provider also argued that failure to identify an appellant was an error that deprived the Commission of jurisdiction over the appeal, citing Appeal of District of Columbia Nurses' Ass'n, 272 U.S. App.

¹ 14 DCMR § 4210.2 states:

A housing provider shall file a capital improvement petition on a form approved by the Commission. The form shall be accompanied by instructions for completion of the form, which shall include notification to the affected Tenants that the petition was filed and notification of the right to claim status as an elderly or disabled tenant. (emphasis added.) See D.C. Reg. (Feb. 6, 1998) at 688-89.

D.C. 231, 854 F.2d 1448, 1450 (1988) cert. denied sub nom. District of Columbia Nurses' Ass'n v. District of Columbia, 491 U.S. 906 (1989), and several other cases. The Housing Provider concluded that any amendment to the notice of appeal would be adding appellants who did not appeal within the statutory time. Therefore, the Tenants' appeal should be dismissed.

II. THE ISSUES

- A. Whether the failure to make findings of fact on the identity of the tenant parties in the OAD decision and order is plain error by the hearing examiner.
- B. What is the status of the elderly and disabled Tenants in this case?
- C. Whether the Tenants identified by name the aggrieved Tenants in the notice of appeal.
- D. Whether the Tenants may amend the caption on the notice of appeal to identify the appealing Tenants.

III. THE DISCUSSION OF THE ISSUES AND COMMISSION'S ORDER

- A. Whether the failure to make findings of fact on the identity of the tenant parties in the OAD decision and order is plain error by the hearing examiner.²

² Plain error involves errors that are clear under current law and affect the fairness of the hearing. Brawner v. United States, 745 A.2d 354 (D.C. 2000). Here, the plain error was the failure of the hearing examiner to identify the Tenants, who were parties, and to name them in the decision, as required by 14 DCMR § 3904.1, which states, "[i]ndividual Tenants involved in any proceeding shall be individually identified."

Hearing Examiner Roper did not name an individual Tenant in the OAD decision and order, as a party in the OAD decision and order. The OAD decision and order states:

She [Tammy Green] identified Respondents' Exhibits Nos. 1 and 2 as lists of the Tenants of 2300 and 2330 Good Hope Road, S.E., respectively, who had authorized the Tenant Association to represent them in this proceeding.

Marbury Plaza, L.L.C. v. Tenants of 2300 and 2330 Good Hope Rd., S.E., CIs 20,753 & 20,754 (OAD Dec. 10, 2001) at 8.

The Commission noted findings of fact 16 and 17 in the OAD decision and order state:

16. Respondents' Exhibit No. 1, List of Tenants of 2300 Good Hope Road, S.E. [,] represented by tenant association.
17. Respondents' Exhibit No. 2, List of Tenants of 2330 Good Hope Road, S.E. [,] represented by tenant association.

Decision at 5. However, a further findings of fact was:

10. The Tenants represented by the Tenant Association in this proceeding are listed in Appendix A (2300 Good Hope Road, S.E.) and Appendix B (2330 Good Hope Road, S.E.).

Id. at 21. The Commission also noted there were no exhibit lists and no appendices attached to the OAD decision and order. Therefore, no Tenant names, as parties, were in the OAD decision and order.

Rent Administrator rules state at 14 DCMR §
3904.1:

CIs 20,753 & 20,754
Order on Motions to Dismiss Appeal, Amend Notice of Appeal, and Correct Caption
March 13, 2002

Individual Tenants involved in any proceeding shall be individually identified.

The Housing Provider's statement in its motion to dismiss that the OAD decision identified the parties, is erroneous, because the decision stated, "[p]resent at the hearing were:" followed by a list of the names of the housing provider's witnesses and counsel, and the names of Tenants and their counsel.³ Decision at 2. The Commission rules state:

14 DCMR § 3807.4

Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error.

14 DCMR § 3809.1

The Commission shall continue the caption of the case as determined by the Rent Administrator in accordance with § 3905, but shall designate the appellant and appellee.

14 DCMR § 3809.3

If it appears to the Commission that the identity of the parties has been incorrectly determined by the Rent Administrator, the Commission may⁴

³ Cf. Tenants of 1325 Emerson Street, N.W. v. Emerson Gardens Limited Partnership, CI 20,070 (Feb. 4, 1987) (where the Commission held "neither the individuals making up the appellant group nor the group itself appeared as parties in the proceedings before the Rent Administrator, they are not 'aggrieved part[ties]' having the right to appeal to the Commission and therefore the appeal must be dismissed." (citation omitted). In this appeal, the Tenants did appear and did form a group, and had representatives at the hearing.

⁴ The word "may ... is indicative of discretion or choice between tow or more alternatives." Tenants of 1755 N Street, N.W. v. N Street Follies Limited Partnership, HP 20,746 (RHC June 21, 2000).

substitute or add the correct parties on its own motion. (emphasis added.)

In this case the Commission, pursuant to 14 DCMR § 3807.4, determined there was plain error by the hearing examiner, when he failed to identify the individual Tenants who were parties in the case before him, pursuant to his duty under 14 DCMR § 3904.1, cited supra at 6. The failure to identify the Tenants who were parties deprived the Tenants of standing to appeal. Lenkin Co. Management, Inc. v. DISTRICT OF COLUMBIA Rental Hous. Comm'n, 642 A.2d 1282, 1287-88 (D.C. 1994). The names listed on page 2 of the OAD decision included both Housing Provider witnesses and Tenants, in addition to their counsel. The decision did not state which witnesses were designated as parties. Specifically, the Tenants were listed in the decision as "present" at the hearing, not as parties.⁵ The failure to attach appendices and the failure to make findings of fact

⁵ Cf. Sup. Ct. Civ. R. 10, which states, "[e]very pleading shall contain a caption setting forth the ... name or names of the party or parties on whose behalf the pleading is filed." When the Rent Administrator does not have a specific rule on an issue, the rules mandate reference to the Civil Rules of the Superior Court of the District of Columbia. See 14 DCMR § 4018.1 (D.C. Reg. (Feb. 6, 1998) at 687, which states: "[w]hen these rules are silent on a procedural issue before the Rent Administrator, issues must be decided by using as guidance the current rules of civil procedure published and followed by the Superior Court of the District of Columbia." The rule, 14 DCMR § 3905, governs the captions of documents filed with the Rent Administrator, and are silent on where the names of parties are to be placed.

on the identity of the Tenant parties was plain error by the hearing examiner.

The issue before the Commission is how to correct the plain error in the OAD decision and order. The identity of the Tenants was in evidence in the record, as evidenced by findings of fact numbers 10, 16, and 17, cited above at 6. Therefore, the Tenants did not cause the error in the OAD decision. It was caused by the hearing examiner who failed to follow the rule, 14 DCMR § 3904.1, to identify the Tenants, as parties, in the proceedings before him.

To remedy the hearing examiner's plain error⁶ the Commission remands this appeal to OAD with instructions to make findings of fact and conclusions of law on the identity of the Tenants by name and address, including unit number, and resolve the issue of who are the Tenant parties in the OAD decision and order. Cf. Cotton v. U.S. Pipe & Foundry Co., 856 F.2d 158 (11th Cir. 1988) (where the appeals court remanded for determination of the identity of the parties due to confusion over the identity of the

⁶ Plain error relates to the issues raised. Youssef v. Cowan, TP 22,784 (RHC Sept. 27, 2000) at 20.

appellants).⁷

The hearing examiner had a record to make findings of fact⁸ on the identity of the Tenants who were parties, since he had in the record before him lists of the Tenants' names,⁹ Tenants present at the hearing, and an order that stated the Tenants at the two housing accommodations were parties to this case. He failed to make the findings and violated the requirements of the Act and DCAPA, which require findings of fact on all contested issues. See n.7.

B. What is the status of the elderly and disabled Tenants in this case?¹⁰

The Rent Administrator has the duty under the Act to issue the procedures for the implementation of the Act.

⁷ See Goff v. Askin, LR 8132 (RHC Apr. 17, 1987) (where the Commission ordered a conference to determine the identity of one appellant). In the instant case, there are over a hundred potential Tenant parties, and the parties and counsel are best able to present evidence to the hearing examiner to clarify the record on the identity of the Tenants who are parties. Id. at 2.

⁸ D.C. OFFICIAL CODE § 42-3502.16 provides:

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.

The DCAPA mandates that the hearing examiner make findings of fact and conclusions of law on all contested issues. D.C. OFFICIAL CODE § 2-509(e).

⁹ See list of Tenant names at 2300 Good Hope Road, S.E., at Record (R.) 74-113, & 118-19, in file for CI 20,753.

¹⁰ Both the Housing Provider and the Tenants raised in their motions the error related to the elderly and disabled Tenants. See discussion at 2-3.

The Rent Administrator did not issue the form for the Commission to approve for the elderly and disabled Tenants to claim exemption from the capital improvement surcharge. The Tenants did not receive notice of their statutory right to claim the elderly and disabled exemption. D.C. OFFICIAL CODE § 42-3502.06(f)(1), states:

Unless permitted under § 42-3502.10(j), a capital improvement increase in the rent charged as provided under § 42-3502.10 shall not be assessed against any elderly or disabled tenant who leases and occupies a rental unit regulated under this chapter. (emphasis added).

This section of the Act was implemented in regulations 14 DCMR § 4210.2 (See n.1) and 14 DCMR § 4210.46 &.47, which state:

Except in accordance with the procedures set forth in § 4210.51 of these rules:

- (a) a capital improvement increase in the rent charged shall not be assessed against a tenant found by the Rent Administrator to be an elderly tenant or disabled tenant, who leases and occupies a rental unit regulated under Title II of the Act.
- (b) a tenant found to be an elderly or disabled tenant by the Rent Administrator shall not be assessed an increase in the rent charged for an approved capital improvement notwithstanding the income of any other tenant or co-lessee of the unit. (emphasis added.)

The procedures for an elderly or disabled tenant to claim exemption from payment of capital

improvement rent ceiling increase shall be as follows:

- (a) If the increase in the rent charged is based on an approved capital improvement petition for which the notice of hearing was issued on or after the effective date of § 4210.45 through § 4210.52 of these rules, the elderly or disabled tenant, who claims the benefit of § 4210.46 shall:

- (1) File with the Rent Administrator a claim of exemption in writing on a form approved by the Commission, within fifteen (15) days after receipt of notice of hearing on the capital improvement petition;

- (2) State on the form that the tenant is an elderly or disabled tenant and submit any supporting documents that prove the tenant qualifies as an elderly or disabled tenant, as defined by § 4299.2(a); and

- (3) Serve a copy of the claim and supporting documents on the housing provider named in the petition, or if the housing provider is represented, serve the housing provider's representative in accordance with § 3911.¹¹ (emphasis added).

- (b) The claim for status as an elderly or disabled tenant shall be determined as part of the hearing on the capital improvement petition.

It was impossible for the Tenants to use a form to claim the status of elderly or disabled, because the Rent

¹¹ See D.C. Reg. (Feb. 6, 1998) at 689.

Administrator failed to create the form for approval by the Commission, as required by 14 DCMR 4210.47(a)(1), cited above. The form was not in existence until the Commission performed the Rent Administrator's duty and adopted the form for the Tenants to claim the status of an elderly or disabled tenant.¹²

The hearing examiner attempted to excuse the findings of fact related to the elderly and disabled Tenants by erroneously stating the Commission had not adopted a form for the claim of exemption by the elderly or disabled Tenants. Decision at 17. However, the Act mandates, "the Rent Administrator shall draft rules and procedures for the administration of this chapter to be transmitted to the Rental Housing Commission for its action under § 42-3502.02(a)(1)." D.C. OFFICIAL CODE § 42-3502.04 (emphasis added). Pursuant to D.C. OFFICIAL CODE § 42-3502.03(a), the Rent Administrator, not the Chairperson of the Commission, is the head of Rental Accommodation and Conversion Division (RACD), where the form for the elderly and disabled Tenants was to be drafted and transmitted to the Commission for approval for use by the parties in capital improvement

¹² The Commission also volunteered to create and write seven (7) other forms related to rent and rent ceiling increases under the Rental Housing Act of 1985.

cases before they are heard and decided by a hearing examiner. 14 DCMR § 4210.47(a)(1).

Thus, according to the text of the Act and the text of the relevant rules, the development of the "procedures" though the creation of a form for the administration of the elderly and disabled exemption for the Tenants was the duty of the Rent Administrator, who failed to perform that duty, not the Commission, which had the duty to "approve" the form. In the absence of action by the Rent Administrator and in an effort to benefit both the housing providers and Tenants, the Commission volunteered to perform the duty of the Rent Administrator. That task was completed on October 2, 2001, with subsequent revisions to the elderly and disabled form. Nevertheless, the fact is the claim forms did not exist at the time the capital improvement petitions were filed and heard in this case.

Accordingly, the Housing Provider's motion to dismiss is denied, because of the hearing examiner's plain errors and the failure of the Rent Administrator to issue the form for the approval by the Commission for the Tenants to claim exemption from the capital improvement surcharge, because they are elderly and disabled Tenants.

Since the form now exists, this case is remanded for hearing and findings of fact and conclusions of law

on both the identity of the Tenants as parties, and the identity of Tenants claiming to be elderly or disabled. Prior to the hearing, the Housing Provider must serve each Tenant in the two housing accommodations the form adopted by the Commission to claim the exemption as an elderly or disabled Tenant. Then the Tenants would have notice pursuant to 14 DCMR § 4210.2 cited at note 1. The Tenants must complete and file the form within fifteen days as required by rule, 14 DCMR § 4210.47(a)(1), cited above at 12.

C. Whether the Tenants may amend the caption on the notice of appeal to identify the Tenants.

The Tenants' motion to amend the caption of the notice of appeal is denied, because the Commission does not have the power to allow amendments to the notice of appeal, after the appeal period has expired. Time limits to appeal are jurisdictional and the time limits may not be extended. Cf. Assalaam v. Lipinske, TP 24,726 (RHC Apr. 18, 2000) (where the Commission denied the Tenant the opportunity to amend the notice of appeal to add new issues, because the appeal period expired).

D. Whether the Tenants identified by name the aggrieved Tenants in the notice of appeal.

Based on the Commission's review of the record, specifically the notice of appeal, the Tenants did not name

a person as either a tenant or an appellant in the caption of the notice of appeal. However, that error was due to the failure of the hearing examiner to make findings of fact and conclusions of law that identified anyone as a tenant and party to this case, contrary to his duty under 14 DCMR § 3904.1. The remedy is remand to the hearing examiner, not dismissal, because of the plain error by the hearing examiner, not the Tenants, whose identities were in the record.

IV. Conclusion


The Commission has the power under its rule, 14 DCMR § 3809.3, to determine the identity of the Tenants.¹³ No substitution or addition of parties may occur without the opportunity to file objections. 14 DCMR § 3809.4. That power should be exercised when there is no issue about the identity of the appellant(s), otherwise the Commission would be fact finding, which is a function of the Rent Administrator. See note 6.

In this case, there are over a hundred potential Tenant parties. Accordingly, the Commission remands this case to OAD for findings of fact on the identity of the Tenants who participated in the proceedings below and the

¹³ An agency must follow its rules. Hanson v. District of Columbia Rental Hous. Comm'n, 584 A.2d 592, 595 (D.C. 1991).

names of the Tenants who are found to be elderly and disabled, because the Commission is not a fact finding agency. Meir v. District of Columbia Rental Accommodations Comm'n, 372 A.d 566 (D.C. 1977).¹⁴ The Housing Provider may file objections. A de novo hearing is not ordered, only a hearing to address the errors discussed in this order.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON

CERTIFICATE OF SERVICE

I certify that a copy of the **ORDER ON MOTION TO DISMISS APPEAL AND MOTION TO AMEND THE CAPTION OF THE APPEAL AND/OR TO IDENTIFY THE PARTIES TO THE APPEAL** in CIs 20,753 and 20,754 was served by priority mail with confirmation of delivery on 14th day of March 2001 on:

Bernard Gray, Esquire
2009 18th Street, S.E.
Washington, D.C. 20020-4201

Eric Von Salzen, Esquire
555 13th Street, N.W.
Washington, D.C/ 20004-1109


LaTonya Miles
Contact Representative

¹⁴ "Because this is a 'case' remand, review by this [Commission] of any future final decision by the [Rent Administrator] will require the filing of a new petition for review. See Bell v. United States, 676 A.2d 37, 41 (D.C. 1996)." Majerle v. District of Columbia Rental Housing Commission, 777 A.2d 785 (D.C. 2001) n.2.