DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 11,629

GEORGE M. HARRIS, Landlord/Appellant

v.

DENISE DAVIS, Tenant/Appellee

On Remand from the District of Columbia
Court of Appeals

(Decided May 7, 1986)

DECISION AND ORDER

Newsome, Chairperson: This matter comes before the Rental Housing Commission (Commission) pursuant to the Order of the District of Columbia Court of Appeals (Court), filed March 11, 1986, remanding the matter to the Commission. The order of remand was granted pursuant to a motion of the Commission seeking remand on two bases, the discovery that the witnesses were not sworn at the hearing 1/ and to reconsider the notice argument of the Landlord/Appellant (landlord). Although the failure to swear the witnesses mandates the remand for a hearing de novo in this matter,

1/ See Curtis v. D.C. Department of Employment Services, 490 A.2d 178, 180 (D.C.App. 1985), which states, "[e]ither of these errors-inadequacy of findings of fact or failure to swear witnesses-would mandate reversal."

the Commission will consider the arguments of the landlord in rendering its decision in order to help in bringing this matter to a final resolution.

This matter was initiated by the filing of a tenant petition on August 9, 1984, in which the Tenant/Appellee (tenant) alleged that the landlord failed to file the proper rent increase forms with the Rental Accomodations and Conversion Division (RACD) and that the building was not properly registered with RACD. The petition also alleged that the services and facilities had been reduced and that the landlord had violated §209 of the Rental Housing Act of 1980 (1980 Act), D.C. Code §45-1519 (1981 ed.). Attached to the petition was a memorandum outlining the reductions in service and facilities 2/, a copy of the lease agreement dated April 23, 1979, copies of notices of rent increases dated July 28, 1980, June 27, 1981, June 15, 1982, and June 30, 1984; and, various notices related to changes in ownership and management.

A hearing was held in the matter on October 2, 1984 before Hearing Examiner Thomas Word who, prior to identifying or swearing the parties, began a rent history of the property. The landlord requested an opportunity to check with the prior owners for missing

---

2/ The allegations concerning reduction in services and facilities included flooding, backup from the laundry room into the tenant's apartment, termites on March 12, 1984, a request for new blinds and better laundry facilities.

documentation, but the request was not granted. In his Decision and Order issued on October 24, 1984, the hearing examiner found that the two issues before him were whether the present rent and/or proposed rent increase exceeded the rent ceiling and whether there had been a substantial reduction in service or facilities.3/ The hearing examiner found that there was no documentation in the landlord registration (LR) file to document a 1975 "Judge Moore" increase 4/ and denied the rent increase premised on the passthrough. A rent increase under §203 of the 1980 Act was also denied because of lack of documentation. The hearing examiner found no further documentation in the LR file to support any rent increases after 1980 although the tenant had copies of notices of rent increases attached to the petition. Based upon this lack of documentation, the hearing examiner found the legal rent ceiling to

---

3/ Although the tenant petition raised the issue of proper registration, the hearing examiner did not determine the propriety of the registration of the property.

4/ In Apartment Owners and Builders Assoc. (AOBA) v. Moore, 359 A.2d 140, 142 (D.C.App. 1976), the Court allowed the pass-through by landlords of increased expenses which had not been permitted by the then current rent control regulation. The Court stated:

> In essence, we permit rent adjustments to become effective under the old program upon the filing with the court and the Rent Administrator a certified statement showing the current annual costs, base period annual costs, annual amount of cost increase, monthly amount of cost increase, unit pass-through amount, and the amount of the adjusted rent ceiling allowed under the order. (footnote omitted).

be $169.00, and awarded treble damages and interest amounting to $4995.00. Further, the hearing examiner held that the tenant had sustained her burden of proof concerning the reduction of services and facilities and awarded the tenant $18.00.

The landlord timely filed a notice of appeal citing as error as follows: (1) the denial of due process because he was not informed of all the charges against him and therefore was denied a full and fair hearing; (2) the denial of due process because he was not informed that he would have to rebut charges dating back eight years and through four prior property managers; (3) that the hearing examiner erred in finding a violation of the rent ceiling since the landlord was in substantial compliance because (a) all rent increases were within the percentages allowed by the law, (b) no increases were taken more often than allowed by law, and (c) the landlord had given the tenant the notice to challenge each rent increase in the notice of rent increase; (4) that the hearing examiner had erred in finding a substantial reduction in services and facilities; and, (5) that the hearing examiner abused his discretion by awarding a refund and treble damages and to order a rollback in rents without a showing of willfulness.

In a Decision and Order issued July 18, 1985, a majority of the Commission found no merit in the landlord's due process argument, held that the three year statute of limitations was not applicable, held that there was no error in imposing treble damages, held that the issues of substantial compliance had not

been raised below and could not be heard on appeal, affirmed the finding of substantial reduction in services, and held that the issues of waiver, estoppel and remedial legislation were not raised below and could not be heard on appeal.5/ In a dissenting opinion, it was argued that the decision and order should be reversed because: (1) a line of cases holding that the failure to file documentation in 1975 does not prevent the implementing of the "Judge Moore increase" now; (2) the missing documentation occurred under a previous landlord and may well have been the result of agency disorganizaton and negligence; (3) the five year lapse between the tenant's occupancy and the filing of the complaint; and, (4) the failure to provide a basis for the value attached to the reduction in service.

On August 5, 1985, the landlord moved for reconsideration, arguing that the decision of the Commission condoned the denial of due process, that the hearing examiner never notified the landlord of the magnitude of the penalties, that failure to raise the issues below did not preclude their consideration by the Commission, that failure of the tenant to bring the petition for five years prejudiced the landlord, that no value was attached to the

---

5/ In a Memorandum of Law submitted February 7, 1985, the landlord argued additionally that the 1980 Act was remedial legislation and should be construed liberally, and that the equitable doctrines of waiver and estoppel prevented the tenant from complaining.

reduction in service, that the tenant had failed to meet her burden of proof, that lack of documentation did not deprive the landlord of the "Judge Moore increase," and the Commission's decision failed to adequately respond to the issues of law raised on appeal.6/ The landlord made these same arguments in his petition for review filed with the Court on August 16, 1985.

Although this case must be remanded so that substantial evidence upon which to base a final decision can be developed by swearing in the witnesses, the Commission will deal with the major arguments raised by the landlord to guide the Rent Administrator in the hearing de novo. Beginning with the "Judge Moore increase," the Commission notes that a long line of cases requires the reversal of the hearing examiner's disallowance of this rent increase. In AOBA v. Moore, supra at 144, the Court stated in the Appendix:

6/ On July 22, 1985, pursuant to the Rental Housing Act of 1985 (1985 Act), D.C. Code §45-2501 et seq. (1986 supp.), three new Commissioners were appointed. Numerous motions for reconsideration were filed during that period, and the new Commission did not rule on all of them within the timeframe provided 14 DCMR 3320.6. However, in the instant matter, the landlord filed his petition for review prior to the expiration of the fifteen business day period, provided by 14 DCMR 3320.6.

> FURTHER ORDERED, that the government defendants, and all persons acting under their authority or on their behalf are permanently enjoined from enforcing on any landlord any rent ceiling for any housing accommodation lesser in amount than the amount authorized by this Order.7/

In one of the first Commission decisions interpreting this case, the Commission reversed the Rent Administrator in Frank Union Trust Co., Trustee v. Tenants, Units 1-83, HP 506 (RAC, 12/30/77) and held that the landlord was entitled to the increase if the tenants were given proper notice of the rent increase and if the property was properly registered under D.C. Regulation 74-20.

In Clairborne v. H.B.D. Management Co., TP 1095 (RAC, 3/17/78), the Commission stated:

> Second, the fact that the previous landlord did not file a certification of pass-through costs does not provide a sufficient basis to invalidate the increase. Where the evidence is sufficient to show that the tenant got proper notice, it is sufficient for the landlord to supply the certification and update the rent schedule upon request by the [RAO]. (citation omitted).

Relying on these two cases, the Commission held in Phalom et al. v. Emes, TP 4802 (RHC, 9/29/82), that the pass-through was authorized by the Court and that the landlord could not be divested of the right to this rent increase solely by failure to file the certified statement of eligibility. Finally, in a case decided nearly two years before the hearing examiner's decision in this matter, the

---

7/ In Auxier v. Wilson, TP 3047/3048 (RHC, 10/14/83), the Commission recognized the permanency of the injunction and held the landlord could implement the increase even in 1983 as long as a certificate of calculation was properly filed and the appropriate notice was given to the tenant.

Commission reversed the same hearing examiner in Enterprise Realty Co. v. Benjamin, TP 4916 (RHC, 10/5/82). In that case, the hearing examiner had denied the pass-through based upon records of the Rental Accommodations Office (RAO). The Commission held that the landlord must have the opportunity to rebut the records, which had not been given, and, citing the previous cases, held that the landlord could not be divested of the right to the increase. Based upon this review of the caselaw including a similar case involving the same hearing examiner, the Commission holds that the landlord could not be divested of his right to the pass-through and that the landlord should have been given the opportunity to rebut the LR file.8/

Although the landlord is entitled to the pass-through, the resolution of this issue does not answer the fundamental due process question of notice of the issues to be heard in an administrative proceeding. In Smith v. D.C. Rental Accommodations

---

8/ In this proceeding the landlord requested the opportunity to contact the previous owners to attempt to locate the missing documents, but the request was not granted. However, in Harrod v. Waggaman-Brawner Realty Co., TP 10,636 (RHC, 11/30/83), the Commission explained Phalom, supra, to mean that the landlord must file the certificate of eligibility, but the landlord could do so after 1976. Additionally, the case held that the landlord had rebutted the alleged failure to file because the document was not in the LR file by producing a photocopy of the certificate and by direct testimony. The Commission had held in Waggaman-Brawner Realty Co. v. Horton, TP 4950 (RHC, 7/27/83), that the absence of the required registration statement from the official file created a rebuttable presumption that the document was not filed.

Commission, 411 A.2d 612, 618 (D.C.App. 1980), where the Commission had ruled that although the landlord had not correctly noticed a rent increase, that the landlord was entitled to the rent increase, the Court stated:

> The thrust of the ruling seemed to reflect an attitude which permeated the Commission's opinion and provided a main basis for the oral argument presented before us. Contrary to what are well-intentioned notions held by the Commission, it is not empowered to tread on individual rights in order to achieve "substantial justice." . . . If the administrative proceedings are geared to the amorphous concept of "substantial justice," then many of those [due process] limits will be ignored and rights will be abrogated to the detriment of both lessors and lessees.

In the instant proceeding, the tenant did not move into the rental unit until 1979 and all of the allegations of the petition indicated violations of the 1980 Act. Accordingly, as for the missing documentation preceding the tenant's occupancy, we hold that the landlord did not have sufficient notice of the issues to be resolved and was not given an opportunity to rebut the presumption that documents not in the file were not filed. See Waggaman-Brawner Realty Co. v. Horton, supra.

Additionally,in Alexander v. Lenkin Management, Inc., TP 11,831 (RHC, 4/11/86), the Commission held that there was no authority for doing a rent history for every tenant petition filed unless the landlord had been placed on notice of the allegation of improper rent ceiliings or rents charged. Even then in Thompson v. Yavalar,TP 11,188 (RHC, 4/11/86), the Commission has held that the petitioner must meet the burden of proof of presenting sufficient

credible and relevant evidence to cast reasonable doubt on the accuracy and legality of the ceiling. If the petitioner makes such a showing, then the burden shifts to the respondent to introduce contrary evidence including the documentation in the LR file to rebut the petitioner's proof. Although the hearing examiner in this matter stated that the issue before him was whether the rent charged was higher than the proper rent ceiling, this was not an issue raised by the tenant's petition.

The tenant petition did, however, allege that the landlord had failed to file the proper forms to increase the rent for her rental unit. The LR file suggests that the landlord did not file any Certificates of Implementation of Automatic Rent Increases for 1981 through 1984 until January 16, 1985. The landlord argues that he was in substantial compliance since he gave the tenant's the required notices of rent increase, that no rent increase was taken more often than allowed by law, and that the notice from the landlord gave the tenant notice that a challenge could be made against each rent increase. However, the landlord's argument does not distinguish for the time periods in question those for which he was required by regulation to file certificates of implementation and those when his actions complied solely with the applicable law. The hearing examiner's decison also suffers from this deficiency.

The 1980 Act became effective on May 1, 1981; however, final regulations were not promulgated under the 1980 Act until December

2, 1983 (30 DCR 6179). 9/ During that period, the Commission proposed regulations on May 8, 1981 (28 DCR 2044), February 25, 1983 (30 DCR 911), and April 1, 1983 (30 DCR 1493). Custom and practice made the second set of proposed rules published in February and April 1983 the common procedures utilized by the Commission, RACD, and the parties. 10/ Proposed Rule 3303.5 required a certificate of implementation for automatic rent increases pursuant to §207 of the 1980 Act. 11/ In determining what the landlord was required to file in order to implement the automatic rent increases, the Rent Administrator should consider

---

9/ On March 1, 1981, the District of Columbia Office of Documents issued a Certified Compilation of the Rules of the D.C. Rental Accommodations Commission. See 28 DCR 1144 (1981). However, the regulations cited were promulgated under the Rental Housing Act of 1977, D.C. Law 2-54, D.C.Code 1973 Supp.VII §45-1681 et seq. In Hija Lee Yu v. D.C. Rental Housing Commission, 505 A.2d 1310, (D.C.App. 1986), the Court held that those regulations expired on the effective date of the 1980 Act. The Court stated, "[w]e disagree; mere publication cannot resurrect rules adopted under an expired statute." Id. at 1311.

10/ Support for this proposition can also be found in Hija Lee Yu, supra, because in footnote 5, the Court stated: "[a]lthough proposed rules are not 'determinative of issues or rights addressed,' they nevertheless 'express the agency's intended course of action, its tentative view of the meaning of a particular statutory term...' (citation and footnote omitted).

11/ A similar provision was found in the May 8, 1981 proposed regulations at §217.3(b); and the 1977 Act regulations had also required a certificate be filed with the Rent Administrator for automatic rent increases. See §265 of 28 DCR 2044 (1981).

the fluctuating state of the regulations during the period involved, especially the fact that final regulations were not promulgated until December 2, 1983. In the instant case, the anniversary date for automatic increases appears to beAugust 1; therefore, if substantive evidence similiar to that stated at the first hearing is adduced, the only certificate of implementation that the landlord might have been required to file to implement an automatic rent increase was the one for the August 1, 1984 automatic rent increase. Since the petition was filed on August 2, 1984, the issue before the hearing examiner at the hearing de novo may well be whether the failure to file that document was a violation of the 1980 Act requiring the imposition of sanctions.

The Commission reaffirms the importance of the filing of the certificate of implementation. The entire continuity of the Rent Administrator's landlord registration files depends upon such filing. Further, the parties involved depend upon their availability as does the Commission. The Commission considers the ruling in Charles E. Smith Management Inc. v. D.C. Rental Housing Commission, 492 A.2d 875, 878 (D.C.App. 1985), analgous since the Court upheld the Commission's regulation that required amending registration statements to show changes in the comparable unit for implementing vacancy increases stating that:

> Reporting requirements play an essential role in ensuring compliance with the rent laws. The failure to timely file reports and amended registration statements can seriouly impede, if not prevent, appropriate enforcement action, by depriving the

> Administrator of information which is needed to determine if a violation has occurred. Morrof v. District of Columbia Rental Accomodations Commission, [449 A.2d 1089 (D.C.1982).] In addition, it can lead to unnecessary litigation and proceedings, due to tenant challenges based on inadequate files.

The situtation that the Court anticipated is presented in this matter because the tenant well might not have filed a petition if the certificate of implementations had been present in the file.

If, in the hearing de novo The Rent Administrator adduces substantial evidence to conclude that the landlord had met all of the statutory requirements of §209 of the 1980 Act by giving the tenants the proper notice, by being properly registered, and by being in substantial compliance with the housing code, then the Rent Administrator should in conformity with this decision not subject the landlord to the penalties of §901. Nothing in this decision should be construed to not require the filing of certificates of implementation after December 2, 1983. Further, the Commission notes that in those cases where rent ceilings are at issue and rent histories are properly made the absence of such certificates may lend credence to tenant allegations in some cases.

The Commission need not reach the other issues raised concerning the tenant petition such as laches, waiver and estoppel. The Commission has ruled in several cases that the burden of proof is on the petitioner to establish the value of the reduction in the

services and facilities alleged. In the hearing de novo, the hearing examiner is instructed to follow those precedents and determine if the reduction is substantial and if the reduction is found to be substantial, then to determine the value of reduction.12/

Accordingly, it is this 7th day of May, 1986, ORDERED that the Decision and Order of the Rent Administrator issued on October 24, 1984, be, and hereby is, VACATED; and it is

FURTHER ORDERED that a hearing de novo be held in this matter in accordance with this decision.

Belva D. Newsome, Chairperson

Isaiah T. Creswell, Jr., Commissoner

Daniel B. Jordan, Commissioner

12/ See Hagner Management Corp. v. Lewis, TP 10,303 (RHC, 5/26/83), where the Commission held that a substantial reduction in services is required and stated "[m]ere inconvenience is not enough."

Copies to:

A. Howard Metro, Esq.
Walker, Greenfeig & Metro
25 West Middle Lane
Rockville, MD 20850

Eric Rome, Esq.
1523 L Street, N.W.
Suite 307
Washington, DC 20005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing decision and order was mailed to the above-named persons first class, postage prepaid, on this 7th day of May, 1986.

Ed Marden