

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TPs 20,720 & TP 20,739

In re: 1468 Harvard Street, N.W.

B. BRENDA JOYCE
T/A BEJAY ENTERPRISES
Housing Provider/Appellant

v.

JOSEPH WEBB
SHIRLEY WALKER
Tenants/Appellees

DECISION AND ORDER

July 31, 2000

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, "the Act," D.C. Law 6-10, D.C. Code § 45-2501 et seq., and the District of Columbia Administrative Procedure Act (DCAPA), D.C. Code § 1-1501, et seq. The regulations, 14 DCMR 3800 et seq., also apply.

I. PROCEDURAL HISTORY

Shirley Walker filed Tenant Petition (TP) 20,720 on November 10, 1986. The tenant petition alleged: 1) the housing accommodation was not properly registered, 2) services and facilities were substantially reduced, 3) retaliation, and 4) improper notice to vacate. Joseph Webb, Ph.D., filed

Tenant Petition (TP) 20,739 on December 1, 1986. The tenant petition alleged: 1) the housing provider failed to file the proper rent increase forms, 2) a rent increase was implemented while the rental unit was not in substantial compliance with the housing code, 3) the housing accommodation was not properly registered, 4) services and facilities were substantially reduced, 5) retaliation, and 6) bad faith. Hearing Examiner Thomas Word consolidated the petitions and held hearings on the consolidated petitions on May 21, 1987, June 4, 1987, July 23, 1987, August 25, 1987, October 19, 1987, October 20, 1987, December 2, 1987, January 19, 1988, and January 20, 1988. On May 18, 1988, the hearing examiner issued an order denying the Housing Provider's motion for disqualification of the hearing examiner, and on June 13, 1988 the hearing examiner issued the OAD decision and order.

This case has a long procedural history, which is stated in the Commission's decision and order dated April 3, 1997 and order on motion for reconsideration of decision and order dated January 30, 1998, which were appealed to the DCCA.

On November 24, 1999, the DCCA issued its decision,¹ which reversed the Commission's April 3, 1997 decision and order, and required the Commission to re-issue the OAD

¹ B. Brenda Joyce v. District of Columbia Rental Hous. Comm'n, 741 A.2d 24 (D.C. 1999).

decision and order dated June 13, 1988, and re-issue the OAD order dated May 18, 1988.

On January 7, 2000, the Housing Provider filed a motion requesting compliance with the November 24, 1999 DCCA order that the Commission reissue the OAD decision and order dated June 13, 1988, and the OAD order dated May 18, 1988, in accordance with D.C. Code § 45-2526(j). On January 21, 2000, the Commission re-issued the OAD decision and order dated June 13, 1988, and the OAD order dated May 18, 1988, and served them by certified mail upon the parties in compliance with D.C. Code § 45-2526(j). In addition, the Commission vacated its decision and order dated April 3, 1997 and vacated the order on reconsideration dated January 30, 1998. On February 3, 2000, the Housing Provider filed a notice of appeal in the Commission from the reissued OAD decision and order and OAD order on motion for disqualification of the hearing examiner. On March 9, 2000, the Commission held its hearing on the appeal issues.

II. THE ISSUES ON APPEAL

A. Whether the OAD decision and order dated June 13, 1988, and order dated May 18, 1988 are arbitrary, capricious, an abuse of discretion, not in accordance with the provisions of the Act, and unsupported by substantial evidence in the record, because:

1. The examiner erred in the denial of the Housing Provider's claim of exemption from rent control based on Section 205(a) of the 1977 Act, which exempts housing accommodations that were vacant and not subject to a rental agreement for a period of at least six months, including January 1, 1977.
2. The examiner erred in the findings of fact that the Housing Provider reduced services and facilities.
3. The examiner erred in the findings of fact that the Housing Provider implemented invalid rent increases.
4. The examiner erred in the findings of fact that the Housing Provider acted in bad faith.
5. The examiner erred in the findings of fact that Tenant Walker received an illegal notice to vacate.
6. The examiner erred in the findings of fact that the Housing Provider retaliated against the Tenants.
7. The examiner erred in the assessment of a \$500.00 fine against the Housing Provider.

B. Whether the hearing examiner erred in the denial of the Housing Provider's motion to disqualify himself, and whether he conducted the hearings in a manner that denied due process to the Housing Provider.

II. PRELIMINARY ISSUE

Whether the Commission can review an issue first raised in the Housing Provider's brief, rather than in the notice of appeal.

The Housing Provider raised in the appeal brief, instead of in the notice of appeal, the issue that the Commission did not have a complete record for review and issuance of a decision and order, because the defective hearing tapes caused the inability of the court reporter to transcribe significant portions of the hearing tapes.

The Commission's rule, 14 DCMR 3807.4, states, "[r]eview by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error." Another rule is that a party may not raise an issue in a brief, because it must be raised in the notice of appeal. Johnson v. District of Columbia, 728 A.2d 70 (D.C. 1999), Frye & Welch Assoc., P.C. v. District of Columbia Contract Appeals Board, 664 A.2d 1230, 1233 (D.C. 1995); and Joyner v. Jonathan Woodner Co., 479 A.2d 308, 312 (D.C. 1984). The Commission determined that the failure of OAD to properly record all of the testimony is "plain error," because the Act,

D.C. Code § 45-2526(g), requires all OAD proceedings be held in compliance with the DCAPA, and the DCAPA requires the preservation of testimony, D.C. Code § 1-1509(c). Plain error involves errors that are clear under current law and affect fairness of the hearing. Brawner v. United States, 745 A.2d 354 (D.C. 2000). The agency, OAD, had the duty under law, in the Act and in the DCAPA, to preserve the testimony of the witnesses. In other words, OAD committed plain error when it failed to preserve properly all the testimony on the hearing tapes, causing the inability of the court reporter to transcribe the tapes and the inability of the Commission to review the complete hearing record for substantial evidence to decide the appeal issues in accordance with D.C. Code § 45-2526(h). One of the procedural safeguards for a fair hearing is "a determination based on the evidence adduced at the [hearing]." Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise, § 9.1 (3rd ed. 1994) cited in Burns v. Charles E. Smith Management, Inc., TP 23,962 (RHC June 18, 1999). Therefore, incomplete transcripts of hearing tapes prevent "a determination based on the [testimonial] evidence adduced at the hearing." Id. Accordingly, the Commission can consider the "plain error" issue raised in the brief, pursuant to 14 DCMR 3807.4, since the error of incomplete hearing tapes negatively affects the fairness of

the proceedings. The cited rule and cases against raising an issue for the first time in a brief must yield to the plain error rule to ensure the fairness of the administrative hearing and decisional processes. Accordingly, the Commission will review the issue first raised in the Opening Brief.

IV. DISPOSITIVE ISSUE

Whether the Commission has a complete hearing record for review.

The Housing Provider, though counsel, stated in the opening brief dated February 6, 2000:

Substantial parts of the hearing tapes are inaudible, garbled, or simply blank so that the Commission's record does not contain all of the evidence presented at the hearing. Tapes that contain inaudible sections include: October 20, 1987 Tr. No. 2 (on page 27 of the transcript, the court reporter indicates that an entire side of a tape is distorted and cannot be transcribed; January 19, 1988 Tr. (on page 30 of the transcript, the court reporter indicates that a portion of the tape could not be transcribed because of distortions and interference); August 25, 1987 Tr.; and October 19, 1987 Tr. No. 2. These sections involve substantive parts of the housing provider's case as well as significant portions of the tenants' case relating to points on which the hearing examiner relied in making his decision. Among the gaps in the record that clearly relate to the crucial exemption issue are these:

- Some of the testimony of PEPCO representative Nannie Monk is missing; the hearing examiner relied heavily on PEPCO records in reaching his conclusion that the building was occupied at a time when Ms. Joyce said it was vacant.
- Portions of testimony by Ms. Joyce, and statements by tenant Webb and tenant Walker,

with respect to whether the building was vacant are also missing.

- Portions of the testimony of several of the witnesses that Ms. Joyce presented to support her contention that the building was vacant are garbled.
- Comments by the hearing examiner about the non-enforcement of a subpoena requested by Ms. Joyce are missing.

Furthermore, a portion of Ms. Joyce's testimony about the renovation of the building, and the time when it was vacant, may be missing from the transcript.²

There is no way to know for sure what testimony is missing, because there is no record of the testimony that was presented in the parts of these lengthy hearings that are missing from the record.

The Administrative Procedure Act requires that contested cases be decided exclusively on the basis of the official record, including the testimony presented at the hearing. D.C. Code Ann § 1-1509(c) (1981). Without a complete record of the testimony, it is obviously impossible to determine whether the hearing examiner considered all of the evidence presented or whether his findings of fact are supported by substantial evidence. The inadequacy of the record in itself requires that the hearing examiner's decision on the exemption issue be vacated...

² The Opening Brief stated:

"Ms. Joyce began to testify about the renovation of the building on October 20, 1987 (Oct. 20, 1987 Tr. No. 2 at pp. 47-55), but her testimony was interrupted for several pages of colloquy by the hearing examiner and counsel. At pp. 61-62, Ms. Joyce's counsel received permission from the examiner to continue her questioning of Ms. Joyce. The transcript, however, then jumps immediately to a discussion between counsel and the hearing examiner about subpoenas, and there is no further testimony by Ms. Joyce that day. On January 20, 1988, the last hearing day, the hearing examiner stated that Ms. Joyce's direct testimony had been completed at a previous hearing, and she was now to be cross-examined by the Tenants. Jan. 20, 1988 Tr. At p. 6-134. Either the conclusion of Ms. Joyce's direct examination on the exemption issue is missing from the record, or she was not permitted to complete her testimony." Opening Brief at p. 26.

If the Commission is not inclined to dismiss these petitions, it ought to remand the case for further hearings because the record simply does not contain all the evidence the housing provider adduced in support of her position.

Opening Brief pp. 25-27.

IV. THE COMMISSION'S DECISION

The Commission agrees with the Housing Provider that the law in the DCAPA prevents it from making a decision based on the incomplete hearing tapes of the record in this case. 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, ... The testimony and exhibits, ... shall constitute the exclusive record for order or decision. No sanction shall be imposed or rule or order or decision be issued except upon consideration of such exclusive record, or such lesser portions thereof as may be agreed upon by all the parties to such case. (emphasis added.)

DCAPA, D.C. Code 1-1509(c).

In the instant case, the recorded testimony of the parties is incomplete. Inherent in the DCAPA requirement that "testimony" be preserved is that all of the testimony be preserved, unless the parties agree to a lesser portion. In this case, the parties have not agreed to a lesser portion of the testimony. The Commission, sua sponte, has held in many cases that it cannot review the record without hearing tapes.

Mellon Property Management v. Tenants of 111 Columbia Road, N.W., HP 20,745 (RHC May 19, 1997) (citations omitted), Dorchester House Asso. v. Tenants of Dorchester House, CI 20,672, TP 22,558, TP 23,520, TP 23,909, TP 23,973 (RHC June 3, 1997) (five consolidated cases remanded for lack of hearing tapes and other missing evidence); Holberg v. Davis, TP 23,529 (RHC Apr. 11, 1996); Cannon v. Stevens, TP 23,523 (RHC Apr. 11, 1996). In this case, the hearing tapes were transcribed in sixteen (16) transcripts and the court reporter noted problems with portions of the tapes. The Commission reviewed the transcripts identified by the Housing Provider, and noted the court reporter stated that problems with the hearing tapes prevented complete transcription of the hearing tapes. In chronological order, the tapes for the hearings held on August 25, 1987, October 19, 1987, October 20, 1987, and January 19, 1988 were discussed in the Housing Provider's brief as having problems related to missing testimony.

The Commission reviewed the August 25, 1987 transcript³ and noted the court reporter wrote the word "unclear" numerous times on almost every page in the text of the August 25, 1987 transcript.

³ The Commission numbered the files containing the transcripts. The file for August 25, 1987 is numbered "nine of sixteen."

In the October 19, 1987 transcript No. 2,⁴ the court reporter did not note substantial problems with the tapes. Nor did the Housing Provider identify to the Commission what was the problem with the tape(s) for that day.

The Housing Provider identified transcript No. 2 for October 20, 1987 as the third problem transcript. In the October 20, 1987 transcript No. 2, page 27, the court reporter wrote, "(This tape cuts off here -- Side 2 is distorted -- unable to transcribe.)" (referring to tape 3, side 1). The remark, "this tape cuts off here--" leads to the conclusion that the tape did not record all of the testimony, especially since the transcript of tape 4, side 1, (Tr. 27) picks up at a point that does not flow from tape 3.

The last problem transcript is dated January 19, [sic] 1988,⁵ page 30.⁶ The court reporter stated, "BECAUSE OF DISTORTIONS & INTERFERENCES IN THIS TAPE, TRANSCRIBER WAS UNABLE TO CONTINUE THIS PORTION.]" (referring to the balance

⁴ The file jacket is "eleven of sixteen."

⁵ The actual date is January 20, 1988.

⁶ It appears that hearings for two dates were on one tape. The first part of the transcript states it is January 19, 1988. However, on p. 30 the hearing examiner states, "[y]esterday, January 19, 1988, Dr. Joyce had some personal problems and I gave her a day to handle those. She's here with the petitioners today, January 20, 1988."

of the tape for January 20, 1987, Tr. 30).⁷

The relevant Commission regulation, 14 DCMR 3820.6, provides, "[a] transcript based on a certified duplicate tape, may be used in proceedings before the Commission if the qualified stenographer who produced the transcript certifies it as being complete, accurate, and based upon the certified duplicate tape."⁸ The Commission held in Burns v. Charles E. Smith Management, Inc., TP 23,962 (RHC June 18, 1999) that off the record discussions and lack of sworn testimony on the hearing tapes could not be the basis for a decision and that the Commission could not review such a case. A de novo hearing was ordered, due to off the record discussions and missing testimony that was the basis for the OAD decision.

⁷ The entire transcript for January 20, 1987, reads:
MR. WORD: Good morning, my name is Thomas Word, I'm the Hearing Examiner in the matter of Tenant Petitions 200720/200739. [sic]. These cases are consolidated cases, they have become before me at different times. Generally the reason we have to continue the hearings is because of the expiration of the working day, for the most part. Yesterday, January 19, 1988, Dr. Joyce had some personal problems and I gave her a day to handle those. She's here today, January 20, 1988. Are you prepared to go forward (inaudible) with the petitioners today?

DR. JOYCE: Yes.

MR. WORD: (Inaudible) Pro Se. Attorneys Deering and

[BECAUSE OF DISTORTIONS & INTERFERENCES IN THIS TAPE, TRANSCRIBER WAS UNABLE TO CONTINUE THIS PORTION.]

⁸ The original OAD tapes cannot be located and are presumed lost. However, the transcripts can be properly accepted as evidence of the testimony and proceedings. D.C. Code § 1-1509(c) and 14 DCMR 4006.6.

Similarly, here, sworn testimony is missing from the tapes, which prevents a complete review of the OAD decision and order by the Commission. However, here there are 16 transcripts involved in this case. Most of the transcripts show no significant problem with the certified hearing tapes. In this case, only the problem tapes, identified in the Housing Provider's Opening Brief, need to be reconstructed, because the court reporter could not transcribe the tapes. See Hagner Mangagement v. Dorchester, TP 3788 (RHC Feb. 4, 1999) at 37-40, where the Commission sua sponte determined that some tapes had missing testimony and remanded, inter alia, for reconstruction of the testimony missing from the tapes.


Accordingly, we hold that incomplete certified tapes, which contain significant gaps or other problems in the testimony of witnesses, cannot be the basis for a decision based on the review of that witness' testimonial evidence, because the record of the testimony for review is incomplete. However, when weighing the complexity of this case and the availability of the current transcripts, it is unnecessary to remand this case for a de novo hearing. Several of the transcripts have complete testimony of many witnesses. They do not need to repeat their testimony, because their testimony is complete and preserved in the transcripts. Therefore, the Commission remands this case for a reconstruction of the

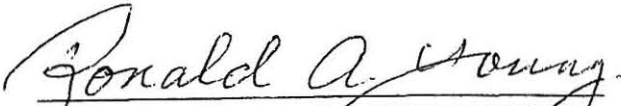
missing testimony for the identified witnesses. Those transcript dates, witnesses, and transcript (Tr.) references are as follows:

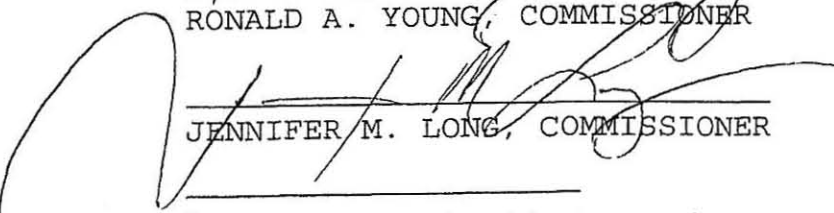
- August 25, 1987 is replete with the word "unclear"⁹
- October 20, 1987 Ms. Nannie Monk Tr. 27
- January 20, 1988 B. Brenda Joyce Tr. 30

Similarly, the Commission cannot review the appeal issue that the hearing examiner conducted the hearing in a manner that deprived the Housing Provider of her due process rights, because the tapes are incomplete for review. Therefore, this case is remanded to OAD for hearing to reconstruct the testimony of witnesses for whom there is no complete transcript of direct and cross examination. The Housing Provider's Opening Brief lists the areas of concern. See p. 13 above. Finally, all eight (8) of the appeal issues are denied as moot for review due to the transcript problems.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER


JENNIFER M. LONG, COMMISSIONER

⁹ The witnesses in this transcript are: Barbara D. Jennifer, John P. Payne, Jr., Joseph Webb, Shirley Walker, Arnold Young, and B. Brenda Joyce.

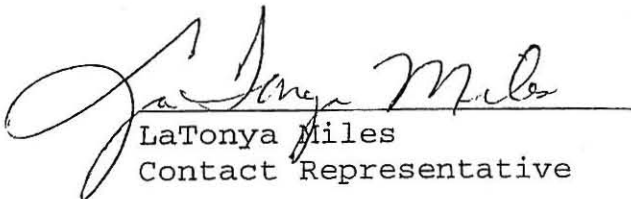
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing decision and order in TP 20,720 and TP 20,739 was mailed certified mail postage prepaid this **31 day of July, 2000**, to:

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