DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 22,784

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

Ward Four (4)

Farouk Youssef, et al.
Tenants/Appellants

v.

Oliver Cowan Jr., et al.
Housing Providers/Appellees

DECISION AND ORDER

September 27, 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, "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. THE PROCEDURES

The Tenant Petition was filed on August 28, 1991, after court action by the Housing Provider to obtain possession of the Tenants' units for alleged failure to pay a two (2%) percent rent increase effective April 1, 1991. The allegations

in the Tenant Petition were: 1) improper thirty (30) day notice of rent increases, 2) failure by the housing provider to file proper rent increase forms with RACD, 3) improper rent ceilings, and 4) rent increases while substantial housing code violations existed in rental units. Originally, the Tenant Petition was filed by three Tenants, Dorothy Weinburger, Farouk Youssef, and John C. Hagan, who lived in three different units, 327, 411, 414, respectively. However, over the years one tenant moved, and another tenant died, leaving only Hagan to proceed with the case.[1]

Initially, hearings were held in May 1992, by former Hearing Examiner Leslie Johnson, who issued the OAD decision on October 15, 1993. Examiner Johnson made the following relevant findings:

> 4) Petitioners, Wineburger and Youssef, were served with improper thirty day rent increase notices on February 26, 1991 because they did not contain the amount of the rent adjustment, the date and authorization for the most recent rent ceiling adjustment taken and perfected, and a certification that the rental unit and common elements of the housing accommodation are in substantial compliance with the housing regulations.
>
> 5) Petitioners Youssef, Weinberger and Hagan all have housing code violations in their rental units, but none of the Petitioners presented testimony on how

[1] Pursuant to 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." Therefore, the caption of this case continues with the name, Farouk Youssef" although he did not appeal to the Commission. Hagan was a party in the initial proceedings.

the existence of these violations threatened their health, safety or welfare. Nor was there testimony that showed that the housing code violations were so numerous as to find that the aggregate violations may be substantial.

6) Petitioners presented no clear evidence as to their rent ceilings.

7) The rent rollback and rent refund with regard to the thirty-day rent increase notice issue will be decided after a future hearing because the record is not clear on the rent histories of Petitioners Youssef and Weinberger.

The hearing examiner's conclusions of law were:

1) Petitioners did not prove their rents were increased when the subject rental units were not in substantial compliance with 14 DCMR Section 4205.05 or 4216.2.

2) Petitioners Youssef and Weinberger were served with improper thirty-day rent increase notices in violation of 14 DCMR 4205.4.

Youssef v. Cowan, TP 22,784 (OAD Oct. 15, 1993) at 5-6.

The Tenants appealed the hearing examiner's decision to the Commission, which issued its remand decision on June 3, 1997. The Commission concluded:

> The hearing examiner erred when she failed to make findings of fact that the insect infestation was substantial. She further erred when she failed to make findings of fact and conclusions of law on the issue of whether Hagan established by a preponderance of evidence that he received a defective thirty (30) day notice of rent increase. Finally, the hearing examiner erred when she failed to make findings of fact on the issue of whether the time period expired for no rent increases pursuant to the 70% voluntary agreement between the housing provider and the tenants at the housing accommodation.

> Accordingly, because the hearing examiner failed to make findings of fact and conclusions of law on each material issue of fact and law raised in the tenant petition, the Commission concludes that the hearing examiner's October 15, 1993, decision and order in TP 22,784 is REMANDED to OAD for further action consistent with this decision.

Youssef v. Cowan, TP 22,784 (RHC June 3, 1997) at 9.

On February 1, 2000, Hearing Examiner Gerald Roper held the remand hearing. At the hearing, the examiner listed three (3) issues the Commission remanded:

1. Whether the rent increase of February 26, 1991 was improper or premature.

2. Whether the Tenant, Hagan, received improper notice of rent increase.

3. Whether there was a violation of the 70% [voluntary] agreement.

On the notice issue, at the remand hearing on February 1, 2000, before Examiner Roper, John Hagan testified with hearsay[2] about the content of the testimony of the property manager of the housing accommodation at the hearing on May 21, 1992. Hagan testified that Rena Hatim, the property manager, testified that all tenants received the identical notices in February 1991 for the rent increases effective April 1991.

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[2] In Hagner Management Corp. v. Brookens, TP 3788 (Feb. 4, 1999) at 23-24, the majority of the Commission held that prior testimony could not be proven by hearsay from a witness, as was done by Hagan in this case. The rule is that prior testimony must be proven by a transcript. See Hutchinson v. District of Columbia Office of Employee Appeals, 710 A.2d 227 (D.C. 1998) where a transcript was allowed to prove the testimony of an unavailable witness. Cf. Sup. Ct. Civ. R. 80, which also requires a transcript for proof of prior testimony.

Hagan stated that he discarded his notice of rent increase, but earlier at the initial hearing had submitted an identical notice received by another unnamed tenant. The hearing examiner asked Hagan, "What did the notice say?" He testified that the notice was in the normal format listing the existing ceiling, new rent, new ceiling, but it was defective, because it was not according to the terms of the voluntary agreement. The hearing examiner asked Hagan for a copy of the notice, but he did not have it. Hagan testified that the property manager testified before Hearing Examiner Johnson that all tenants received the identical type of rent increase notice in 1991. Hagan testified that the February 1991 notice of rent increase effective April 1991 was a violation of the tenants' voluntary agreement, pursuant to D.C. CODE § 45-2525, which put a moratorium on rents until August 1991. Again, the Examiner asked for a copy of the voluntary agreement, but Hagan did not have a copy.

On the second issue, whether there were housing code violations at the time the rent was increased, Hagan testified that there was an infestation of insects. Hagan also testified that the doors and windows did not fit tightly. He had a representative from PEPCO to visit his rental unit, and learned that his average electric bill should be $50.00 and not more than $80.00. However, his electric bill was approximately

$150.00 per month, with the highest electric bill of $220.00 one month. He attributed his electric bills to the fact that the doors and windows did not fit tightly.

On the issue of the voluntary agreement, Hagan testified the voluntary agreement did not have the requisite number of signatures. However, Hagan continued to insist that the voluntary agreement was breached due to the premature increase in his rent in April 1991.

The hearing examiner issued the OAD remand decision on April 17, 2000. He made the following relevant findings of fact and conclusions of law:

3) Petitioner, Hagan appeared at the February 1, 2000, hearing. Counsel for Petitioner, Bernard Gray did not appear at the hearing.

4) Petitioner Hagan received a rent increase notice dated February 1, 1991 effective May 1, 1991 from the Respondents.

5) The time period had not expired for no rent increases pursuant to the 70% voluntary agreement between the housing provider and the tenants at the housing accommodation.

6) The 70% agreement was executed in August 1988.

7) Petitioner Hagan's rental unit was infested with insects and mice on February 1, 1991 and May 1, 1991.

Conclusions of Law

1) The evidence shows that the time period had not expired for no rent increases pursuant to the 70% voluntary agreement between the housing provider and the tenants at the housing accommodation.

2) The Petitioner's rental unit had substantial housing code violations pursuant to 14 DCMR 4216.2 on May 1, 1991.

3) Petitioner Hagan received a rent increase notice from the Respondent dated February 1, 1991 effective May 1, 1991.

Youssef v. Cowan, TP 22,724 (OAD Apr. 17, 2000) at 5-6.

On May 4, 2000, a motion for reconsideration was filed in OAD, however, Examiner Roper did not act on it and it was denied by operation of law pursuant to 14 DCMR 4013.5. On May 30, 2000, only Hagan, one of the three original tenants, appealed the OAD remand decision to the Commission. The OAD file was certified to the Commission on June 21, 2000, with one tape of the complete OAD hearing held on February 1, 2000, and one of the three tapes for the previous hearing held by Hearing Examiner Leslie Johnson on May 21, 1992. The Commission held its second hearing on August 3, 2000, after appeal of the remand decision.

II. THE APPEAL ISSUES

The Tenant raised the following issues in his notice of appeal.

A. Errors of Law

1. Whether the Examiner erred by failing to either award damages or schedule the case for further hearing on the issue of damages.

2. Whether the Examiner erred by failing to address the issue of heat and window installation.

3. Whether the Examiner failed to follow the instructions of the Rental Housing Commission, failed to provide for the hearing date left open in Examiner Leslie Johnson's decision, and failed to make the finding of facts necessary on the issue of damages.

4. Whether the hearing examiner committed a more serious error by ignoring the implications of finding of fact 7, which states that the petitioner's rental unit had an insect infestation both on February 1, 1991, the date of the premature notice of rent increase, and on April 1, 1991, the date the premature rent increase took effect.

5. Whether the Hearing Examiner also failed to recognize the implications of Conclusion of Law 3, which concludes that Petitioner Hagan received a rent increase notice from the Respondent dated February 1, 1991 effective April 1, 1991, because the RHC has made it clear that a housing provider may not take a rent increase, including an annual C.P.I. adjustment that normally goes into effect automatically, when substantial housing code violations exist.

6. Whether the hearing examiner failed to make findings of fact and conclusions of law on the contested issues of rent ceiling, rent, rent rollback, rent refund, and treble damages, including simple interest.

B. Errors of Grammar, Word-processing, and Law

7. Whether on page 1, the text of the first sentence of the second full paragraph which reads, "[t]he above-captioned Tenant Petition, T/P 22,784, was filed with RACD on August 28, 1989 [sic]," should be corrected to read, "[t]he above-captioned Tenant Petition, T/P 22,784 was filed with RACD on August 28, 1991."

8. Whether on page 2, where the sixth full paragraph reads, "[i]n a Decision and Order dated June 3, 1997 the RHC remanded this case to the OAD concluding that a former Hearing Examiner, Leslie Johnson, who wrote the Rent Administrator's [sic] erred when she failed to make certain findings of fact," should be corrected with the words "Decision and Order" inserted between "Rent Administrator's" and "erred."

9. Whether the seventh full paragraph on page 2, which begins, "[t]he erred [sic] in the findings of

fact were," should be corrected by changing the word "erred" to read "errors."

10. Whether the second full paragraph on page 4 which reads, "[t]he unrefuted evidence shows that Petitioner Hagan's [sic] was a tenant at the subject housing accommodation on April 1, 1991, and that he received a notice of rent increase on April 1, 1991, from the Respondent according to the former (sic) testimony of the Respondent's office manager" should be corrected to read:

> The unrefuted evidence shows that Petitioner Hagan was a tenant at the subject housing accommodation on February 1 and on April 1, and that he received a notice of rent increase on February 1, 1991, effective on April 1, 1991, from the Respondent according to the testimony of the Respondent's former office manager.

11. Whether the third full paragraph of page 4, which begins with the words "Petitioner Hagan's [sic]", should be corrected to read "Petitioner Hagan."

12. Whether the fourth full paragraph of page 4, which ends with the sentence, "[s]pecifically, Petitioner testified that he was given a rent increase notice [on] February 1, 1991, effective May 1, 1991 [sic]." should be corrected to read, "[s]pecifically,

Petitioner testified that he was given a rent increase notice February 1, 1991, effective April 1, 1991."

13. Whether the sixth full paragraph of Page 4, that carries over to Page 5, and ends with the sentences, "[t]he evidence further shows that in February 1991 Petitioner was given a rent increase notice effective May 1991. Based on this evidence the Petitioner's rent increase was three (3) months premature according to the terms of the 70% agreement," should be corrected to read, "[t]he evidence further shows that in February 1991 Petitioner was given a rent increase notice effective May [April] 1991. Based on this evidence the Petitioner's rent increase was four (4) months premature according to the terms of the 70% agreement."

14. Whether the beginning of finding of fact 1, on page 5, which reads, "Petitioner's Farouk Youssef, should be corrected to read, "Petitioners Farouk Youssef,…."

15. Whether finding of fact 4, on page 6, which currently reads, "[p]etitioner Hagan received a rent increase notice dated February 1, 1991 effective May 1, 1991 from the Respondents," should be corrected to read, "[p]etitioner Hagan received a rent

increase notice dated February 1, 1991 effective April 1, 1991 from the Respondents."

16. Whether finding of fact 7, on page 6, which currently reads, "[p]etitoner Hagan's rental unit was infested with insects and mice [sic] on February 1, 1991 and May 1, 1991" should be corrected to read, "[p]etitioner Hagan's rental unit was infested with insects on February 1, 1991 and April 1, 1991."

17. Whether Conclusion of Law 3, on page 6, which currently reads, "[p]etitioner Hagan received a rent increase notice from the Respondent dated February 1, 1991 effective May 1, 1991," should be corrected to read, "[p]etitioner Hagan received a rent increase notice from the Respondents dated February 1, 1991 effective April 1, 1991."

18. Whether finding of fact 2, which currently reads, "Petitioner, Hagan appeared at the February 1, 2000 hearing. Counsel for Petitioner, Bernard Gray did not appear at the hearing" should be amended to read: "[p]etitioner Hagan appeared at the February 1, 2000 hearing. Counsel for Petitioner, Bernard Gray did not appear at the hearing. Respondents Oliver Cowan and United Management Company did not appear at the hearing."

III. PRELIMINARY ISSUES

A. Whether Examiner Roper properly certified the OAD record to the Rental Housing Commission without all of the hearing tapes for the hearing held on May 21, 1992, prior to the remand hearing on February 1, 2000 held by Examiner Roper.

B. Whether Examiner Roper committed plain error related to the findings of fact and conclusions of law raised on appeal by the Tenant Hagan.

On June 21, 2000, Hearing Examiner Gerald Roper certified the OAD file for this appeal to the Commission with two hearing tapes. One hearing tape was labeled, "TP 22,784 5/21/92 Tape 2 of 3 6101 16th St. [sic] N.W. Johnson" for the original hearing held by Hearing Examiner Leslie Johnson prior to the remand hearing Roper held on February 1, 2000. (emphasis added). Tapes 1 of 3, and 3 of 3 for the May 21, 1992 hearing were missing from the OAD certified record. The second tape found in the certified record was labeled, "TP 22,784 Rittenhouse 2-1-00 Roper Tape 1 of 1 [sic]," which held the complete remand testimony of the hearing Examiner Roper held on February 1, 2000.

The DCAPA prevents the Commission from issuing a decision based on the transmission of 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).

The Commission recently held:

> 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).

Joyce v. Webb, TP 20,720 & TP 20,739 (RHC July 31, 2000) at 9-10.

The failure of OAD to preserve all the hearing tapes for the May 21, 1992 hearing results in a de novo remand hearing, because the Commission is unable to review not only the relevant testimony of the property manager, but also is unable to determine whether the relevant documents were entered into evidence at that hearing. Therefore, the problems with the two missing tapes from the original hearing in May 1992, in this

case, are two fold. The problems are compounded by the hearsay testimony of Hagan about the testimony of the property manager, and the Commission was unable to review the testimony of the property manager in the prior hearing before Examiner Johnson. Hagan's testimony was also inconsistent with the certified documents in the official OAD record. For example, Hagan relied on the voluntary agreement between the Housing Provider and the tenants for the proof of the allegation of improper increase in rent charged the tenants by the Housing Provider. He testified that the voluntary agreement provided for a freeze on rent increases for three years until August 1991. Hagan posits that under the February 1991 notice of rent increase effective April 1991, the rent increase was improper, because it was four (4) months premature before August 1991.

The Commission reviewed the certified file.[3] There are two (2) copies of an undated document in the certified file (Record) (R.) at 95 & 157[4] with the title "VOLUNTARY AGREEMENT,"

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[3] D.C. CODE § 1-1509(b) states: "Where any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary." In this case, Hagan was not given the opportunity to show the contrary to the text of the voluntary agreement in the certified file, because Examiner Roper did not take official notice of the documents in the OAD file of Examiner Johnson.

[4] The file copy of the voluntary agreement at R. 157 has a handwritten notation, R 8, in the upper right corner of the document. The other copy of the voluntary agreement, at R. 95, does not have a handwritten notation.

which has text stating:[5]

> In consideration of the foregoing conversion, the Rittenhouse will forego the next two years of the rent increases of general applicability for present residents as provided by Section 206 of the District of Columbia Rental Housing Act. The last such increase was taken in January 1986. Additionally, the Rittenhouse will freeze the rents at the current level for the same time period. However, in order to preserve the right to the rent increases on vacant units, we will file each year a Certificate of Implementation with the Rental Accommodation and Conversion Division to protect our right to vacant unit rent increases. (emphasis in original).

Also, in the certified record are two copies of an addendum to the voluntary agreement dated July 2, 1986. (R. at 88 & 150). The addendum states:

> If all the required signatures are obtained by 5:00 pm [sic] on July 30, 1986, *the present rent for all current residents shall be frozen for the next three (3) years.* That is:
>
> 1987 . . . . . 0 percent increase.
> 1988 . . . . . 0 percent increase.
> 1989 . . . . . 0 percent increase.
>
> Also, for present tenant, [sic] rental payments shall not be increased by more than two percent for each of the following two years. That is:
>
> 1990 . . . . . increase shall not exceed 2 percent of your current rent.
> 1991 . . . . . increase shall not exceed 2 percent; [sic] of your current rent.

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[5] Voluntary agreements between housing providers and tenants are a method to raise rent ceilings, and ultimately the tenants' rents. They require signatures of 70% of the tenants, D.C. CODE § 45-2525, Davenport v. Rental Hous. Comm'n, 579 A.2d 1155 (D.C. 1990).

There are no signatures on the voluntary agreement nor on the addendum in the OAD file.

Finally, there are several copies of the rent increase notices in the certified file. They have identical text, except for the name(s) of the tenant(s), and state, in relevant part:

> Dear Mr. & Mrs. Youssef"[6]
>
> As your are aware, Management froze rent as per agreement in 1986 and in 1990 could have taken an increase but did not. However, as costs keep escalating it is important that we take the 2% for 1991 as per agreement.

Examiner Roper relied upon the hearsay in Hagan's testimony to prove the contents of the voluntary agreement and his notice of rent increase, rather than relying on the documents Hagan testified were in the OAD file. At the February 1, 2000 hearing, Examiner Roper did not take official notice of the relevant documents in the May 21, 1992 hearing file, specifically the voluntary agreement and notices of rent increase, nor did he state in his decision and order that he took official notice of those documents when he wrote his decision. These documents were in the file used by Examiner

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[6] The above quoted notice was addressed to tenants, "Mr. & Mrs. Farouk Youssef," R. 47, and three other notices were addressed to Dorothy Weinberger (R. at 27, 121, & 191). A third notice was addressed to Ms. Carla Washington, R. 129, and it has the notation R 2 on it. A fourth notice was addressed to Gretchen Jones, R. at 97.

Johnson. Hagan testified that the voluntary agreement was not validly executed by 70% of the tenants as required by the Act. However, on appeal he asks for a correction related to the voluntary agreement.[7] See Appeal Issue 13.

Examiner Roper's decision and order stated:

> In the absence of the best evidence in this case which would be the 70% agreement, the Hearing Examiner shall consider as secondary evidence the testimony of the Petitioner as to the terms of the 70% agreement. According to the testimony, the tenant's [sic] of the housing accommodation entered into a 70% Agreement in August 1988. The terms of the agreement provided for a rent moratorium for three years from the time the 70% agreement was executed in August 1988. The evidence further shows that in February 1991 Petitioner was given a rent increase notice effective May 1991. Based on this evidence the Petitioner's rent increase was three (3) months premature according to the terms of the 70% agreement. (emphasis added).

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[7] D.C. CODE § 45-2525 provides:

(a) Seventy percent or more of the tenants of a housing accommodation may enter into a voluntary agreement with the housing provider:

(1) To establish the rent ceiling;
(2) To alter levels of related services and facilities; and
(3) To provide for capital improvements and the elimination of deferred maintenance (ordinary repair).

(b) The voluntary agreement must be filed with the Rent Administrator and shall include the signature of each tenant, the number of each tenant's rental unit or apartment, the specific amount of increased rent each tenant will pay, if applicable, and a statement that the agreement was entered into voluntarily without any form of coercion on the part of the housing provider. If approved by the Rent Administrator the agreement shall be binding on the housing provider and on all tenants.

(c) Where the agreement filed with the Rent Administrator is to have the rent ceiling for all rental units in the housing accommodation adjusted by a specified percentage, the Rent Administrator shall immediately certify approval of the increase. (July 17, 1985, D.C. Law 6-10, § 215, 32 DCR 3089.)

Youssef v. Cowan, TP 22,784 (OAD Apr. 17, 2000) at 4-5.

The law is "[t]o prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress." Fed. R. of Evid. 1002, cited in STEFFEN W. GRAAE & BRIAN T. FITZPATRICK, THE LAW OF EVIDENCE IN THE DISTRICT OF COLUMBIA (1989) at 10-2. This rule is followed by the courts of the District of Columbia, as reflected in case law. Id. citing Davenport v. Ourisman-Mandell Chevrolet, Inc., 195 A.2d 743 (D.C. 1963), Anderson v. District of Columbia, 48 A.2d 710 (D.C. 1946), Gurley v. MacLennon, 17 App. D.C. 170 (D.C. 1900). Testimony about the contents of a document is properly excluded under this rule, especially when the contents of the document must be proved, and there is no satisfactory evidence on the absence of the document. Therefore, hearsay is inadmissible to prove the content of the text of a document.

According to the case law cited herein on proof of documents, Examiner Roper erred when he relied on Hagan's hearsay testimony to prove the text of the voluntary agreement on the rent increase, rather than consider the text of the voluntary agreement found in the OAD file used by Examiner Johnson. Moreover, in considering Hagan's testimony Examiner Roper failed to evaluate the fact that Hagan testified the voluntary agreement was not signed. That could mean the

voluntary agreement was not valid to represent the consent of 70% of the tenants at the housing accommodation for a rent increase. D.C. CODE § 45-2525, n.7, supra.

Nevertheless, Hagan had the burden of proof on the issue of a validly executed voluntary agreement, and the subsequent alleged invalid rent increase notice in violation of the voluntary agreement. He failed to request that the hearing examiner take official notice of the voluntary agreement and the notices of rent increases in the May 1992 certified file. In addition, Hagan failed to produce another copy of the voluntary agreement or a copy of a notice of rent increase.

The Commission's rules permit it to notice plain error, 14 DCMR 3807.4,[8] especially plain error related to or connected to issues raised in the notice of appeal. Proctor, at 550. Moreover, D. C. CODE § 45-2526(h) grants the Commission the power to reverse the hearing examiner when the record lacks substantial evidence to support the findings. Accordingly, the Commission noticed plain error in the following findings of fact that were not supported by evidence in the OAD record before Examiner Roper, because these findings of fact were central to the issues raised in the notice of appeal:

[8] 14 DCMR 3807.4 provides: "[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." See Proctor v. District of Columbia Rental Hous. Comm'n, 484 A.2d 542 (D.C. 1984) (citing with approval the Commission's predecessor rule with the identical text).

- Finding number 4, "Petitioner Hagan received a rent increase notice dated February 1, 1991 effective May 1, 1991 from the Respondents," (see appeal issues 5, 10, 12, 13, 15, and 17 on correction of the text in Examiner Roper's decision related to the document that was the notice of rent increase). See pp. 8-11, supra. There was no document before Examiner Roper to support this finding.
- Finding number 5, "[t]he time period had not expired for no [sic] rent increases pursuant to the 70% voluntary agreement between the housing provider and the tenants at the housing accommodation." See appeal issue 13 seeking a correction that the tenant's rent increase was four (4) months premature under the document that is in the OAD file and titled voluntary agreement, quoted at pp. 15-16, supra, but the quoted text of the voluntary agreement in the OAD file does not support this finding of fact. See pp. 10-11, supra. The voluntary agreement was not admitted into evidence at the hearing held by Examiner Roper, and he did not take official notice of the voluntary agreement in the OAD file. The Commission is unable to review the OAD record made before Examiner Johnson, because the hearing tapes are missing from the OAD file. Therefore, nothing supports this finding.
- Finding number 6, "[t]he 70% agreement was executed in August 1988," (see appeal issue 13 raising the issue of the

premature notice of rent increase, based on the date of the voluntary agreement, but the voluntary agreement in the file does not have a date, and no signed voluntary agreement is in evidence. See pp. 10-11. Under case law, Hagan could not prove the date with his testimony, because the document speaks for itself, and the OAD file copy that was not in evidence has no date. Therefore, nothing supports this date.

- Finding number 7, "Petitioner Hagan's rental unit was infested with insects [and mice] [sic] on February 1, 1991 and May 1, 1991." See appeal issues 4 and 16 related to the rent increase while an infestation of insects existed in the tenants rental unit, but Hagan did not introduce any notice of rent increase and Examiner Roper did not officially notice the rent increase documents in the May 1992 hearing file. See pp. 8, & 11-12. Therefore, Examiner Roper did not have evidence in the record to support this finding.

Youssef v. Cowan, TP 22,784 (OAD Apr. 17, 2000) at 6.

Because Examiner Roper failed to take official notice of the certified documents in the OAD file, the above quoted findings are based on the impermissible hearsay in Hagan's testimony that was used to attempt to prove the contents of two documents: the notice of rent increase and the voluntary agreement. The above quoted text from both the voluntary agreement and the notice of rent increase, at 15-16, supra,

show the danger of relying on parole evidence to prove written documents. Hagan's testimony conflicts with the text of the documents in the OAD certified file, which Examiner Roper failed to officially notice. The voluntary agreement in the certified file allowed a two (2%) percent increase in rent in 1991, as stated in the notices of rent increases in the files. See pp. 15-16, supra. However, the Commission cannot resolve the conflict between the hearsay testimony and the documents, because the Commission cannot make the findings of fact. The Commission's authority is limited to review of the findings of fact by the Rent Administrator through the hearing examiners, as stated in D.C. CODE § 45-2526(h). The Commission's duty is to determine whether the findings are supported by substantial evidence in the record. Meir v. District of Columbia Rental Hous. Comm'n, 372 A.2d 566 (D.C. 1977). In this case, there is nothing before the Commission for review due to the missing tapes. In addition, Hagan's hearsay testimony is unreliable as proof of the content of writings such as the text of the voluntary agreement and the notice of rent increases like those in the OAD file, and those two documents were not in evidence.

Normally, a case such as this is summarily reversed, not only because of the failure of the proponent, Hagan, to meet the burdens of proof, but also due to the failure of an examiner to take official notice of documents in the OAD

record, after a witness such as Hagan testified that the documents were in the OAD file. However, in this case, super imposed above the errors of Hagan and Examiner Roper, is the error of the OAD lost hearing tapes from the May 1992 hearing. Those tapes contained the basis for the earlier rulings and testimony of another witness, the property manager, who issued the notices of rent increase. Examiner Roper's record evidence consists of Hagan's impermissible and inadmissible hearsay testimony about the content of the testimony of the property manager on the notices of rent increases.

Further, since Examiner Roper did not have in evidence the voluntary agreement and the notice of rent increase, he could not make findings of fact that the voluntary agreement was violated by the notice of rent increase. Generally, courts do not disturb findings of fact, unless there is no evidence to support them or they are plainly wrong. City Wide Learning Center v. William C. Smith & Co., 488 A.2d 1310, 1313 (citing D.C. CODE § 17-305(a) (1981)). Here, there is no evidence to support the findings related to the voluntary agreement or notice of rent increase, since Hagan did not introduce them from the certified file and Examiner Roper did not officially notice them when he was in the hearing or when he wrote the OAD

decision. These errors are shown by Examiner Roper's decision stating:

> In the absence of the best evidence in this case which would be the 70% agreement, the Hearing Examiner shall consider as secondary evidence the testimony of the Petitioner as to the terms of the 70% agreement... The evidence further shows that in February 1991 Petitioner was given a rent increase notice effective May 1991. Based on this evidence the Petitioner's rent increase was three (3) months premature according to the terms of the 70% agreement."

See p. 18, supra.

IV. CONCLUSION

Due to the lost hearing tapes, the hearing record is incomplete from the May 1992 OAD hearing, and a de novo hearing is ordered. Neither Examiner Roper nor the Commission had a complete record of the first hearing by Examiner Johnson in this case. The lost tapes prevented the Commission from its statutory duty to review the complete record of the initial 1992 OAD hearing to determine the prior testimony of the property manager on the rent increase notices and what documents were entered into evidence. Therefore, the Commission resolved this case with its powers under plain error that related to the issues raised on appeal, Proctor, 484 A.2d at 550.

Accordingly, the Commission remands[9] this case for a de novo hearing, because of the lost tapes of the May 1992 hearing. At the next hearing, because of the incomplete record of the May 1992 hearing, Examiner Roper must consider relevant documents, if proffered by the Tenant.

All eighteen (18) of the issues raised on appeal are denied as moot, since the hearing record is incomplete. Specifically, the issues seeking "corrections" cannot be decided, because the relevant testimony from the May 1992 hearing was not in the record, and Examiner Roper did not officially notice the documents, which he wrote about in his decision, instead he used inadmissible hearsay, in lieu of the documents in the OAD certified record.

On the second remand to OAD, Examiner Roper is ordered: 1) to follow-up to ensure that the notice of hearing is issued by certified mail or other form of service that ensures delivery of the hearing notice to the parties in accordance with D.C. CODE § 45-2526(c), and 2) perform all other hearing examiner duties consistent with the discussion and instructions in this decision and order.

[9] The court in Kitchings v. District of Columbia Rental Hous. Comm'n, 588 A.2d 263 (D.C. 1991) remanded a dispute involving a voluntary agreement, because the resolution of that case was fact specific. Kitchings at 264-265. Likewise, here, there are specific facts that must be found and based on substantial record evidence related to the voluntary agreement and notice of rent increase.

Examiner Roper's April 17, 2000 decision and order is vacated, and a de novo hearing is ordered so Examiner Roper can make the proper findings of fact, and conclusions of law not inconsistent with this decision. He should avoid the type of grammatical and word processing errors noted in the appeal issues for corrections.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

Concurring in the result:

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing decision and order in TP 22,784 was mailed, certified mail postage prepaid on **September 27, 2000** to the following:

Oliver Cowan, Jr
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and

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LaTonya Miles
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