DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,370

In re: 6600 14th Street, N.W., Unit 3

Ward Four (4)

ANGELES D. BAXTER
Tenant/Appellant

v.

DUANE JACKSON
Housing Provider/ Appellee

DECISION AND ORDER

September 15, 2000

PER CURIUM: This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), through the 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. PROCEDURAL HISTORY

The instant appeal arises from the four (4) unit housing accommodation located at 6600 14th Street, N.W., owned by Duane Jackson. Angeles Baxter, the tenant/appellant, filed Tenant Petition (TP) 24,370 through counsel on June 6, 1997. In the petition, the tenant alleged: (1) the housing provider, in violation of the Act, D.C. CODE § 45-2552,

directed retaliatory acts against the tenant for exercising her rights;[1] (2) the housing provider served the tenant with a notice to vacate her unit that violated the requirements of the Act; (3) the housing provider violated the provisions of § 45-2518(c) of the Act; and (4) services and facilities provided in connection with the rental unit were substantially reduced.

The hearing was scheduled for August 4, 1997 and September 11, 1997. The OAD scheduler continued both hearing dates for good cause. See 14 DCMR 4014. The matter was rescheduled for and heard on November 3, 1997. As a preliminary matter at the hearing, the hearing examiner discussed the issue of registration of the housing accommodation for exemption. Because he determined that the housing provider's property was exempt, the hearing examiner dismissed the two issues concerning substantial reduction in services and facilities and failure to provide written notice of the forthcoming inspection of the tenant's unit. There were two remaining issues before the examiner: (1) whether retaliatory action was taken against the tenant by the housing provider for exercising her rights under the Act; and (2) whether a notice to vacate, which was served on the tenant, Angeles Baxter, violated the requirements of the Act.

Hearing Examiner Gerald Roper issued the Decision and Order on April 2, 1998, and he issued an amended Decision and Order on April 10, 1998. The tenant filed an appeal with the Commission on April 24, 1998. In her appeal, the tenant raised the issue

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[1] D.C. CODE §45-2552(a) describes retaliatory action as including:

> [A]ny action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement, or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

of missing tenant documents that were introduced as exhibits at the hearing, but not found in the record. The tenant argued that at the 1997 hearing, she moved into evidence certain exhibits relevant to the retaliation issue. According to the tenant, because she did not have copies of the exhibits at the hearing, later that day she made copies of the exhibits, and gave the documents to the OAD desk clerk, who date stamped the documents. These documents were not found in the certified record on appeal.

The Commission issued an "Order on Remand" dated December 24, 1998. In its order, the Commission concluded, "[d]ue to the missing OAD record exhibits, the Commission remands this case for a hearing on only the limited issue of whether the tenant filed the exhibit documents in OAD." (emphasis added).[2] The Commission further provided, "[a]t the remand hearing, the tenant has the opportunity to prove that she filed the documents in OAD, but the documents were never filed in the case jacket."[3] (emphasis added). Id. at 10. The Commission's remand order served as a stay on the original Notice of Appeal pending the outcome of the examiner's Remand Decision and Order.

The OAD held a hearing on the remand on September 20, 1999. Hearing Examiner Gerald Roper presided at the remand hearing. The tenant appeared with counsel, and the housing provider appeared pro se. The issue on remand was whether the tenant filed her exhibits with the OAD on November 3, 1997. Specifically, the tenant posited that exhibits six (6) and seven (7) supported her contention that the housing

[2] See Baxter v. Jackson, TP 24,370 (RHC Dec. 24, 1998) at 9.

[3] See id.

provider retaliated against her for exercising her rights.[4] However, the hearing examiner considered whether all of the following exhibits were admissible:

Exhibit #1:	An August 4, 1997 notarized letter from Angela Hall, tenant's supervisor.
Exhibit #2:	An undated copy of a letter from Dr. Coleman.
Exhibit #3:	A copy of a letter from Charles H. Acker, III, Esquire, dated April 15, 1997, and the OAD date stamped letter dated November 3, 1997.
Exhibit #3a:	A copy of a letter from Charles H. Acker, III, Esquire, dated July 29, 1997.
Exhibit #3b:	A copy of a letter from Charles H. Acker, III, Esquire, dated August 14, 1997.
Exhibit #4:	A copy of a letter from the property owner to the tenant, dated July 21, 1997.
Exhibit #5:	A copy of a letter from the property owner to the tenant, dated August 14, 1997.
Exhibit #6:	A copy of an Opposition to Strike, dated June 30, 1997.
Exhibit #7:	A copy of a Praecipe dated June 30, 1997.

The hearing examiner found that the only evidence to support the tenant's contentions was the letter from the housing provider's attorney, Charles H. Acker, III, dated April 15, 1997. He further found, although the tenant introduced six (6) other documents that she alleged were exhibits she submitted to the OAD on November 3, 1997, only one document was date stamped.[5]

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[4] See id. at 7.

[5] The hearing examiner also considered the following in rendering his decision: (1) the fact that Exhibit 1 should have been the top date stamped document, but was actually located in the middle of the documents; and (2) the housing provider's failure to object to the date stamped exhibit. See Baxter v. Jackson TP 24,370 (OAD Jan. 6, 2000) at 4.

The hearing examiner issued the Remand Decision on January 6, 2000. Based on the evidence, the hearing examiner reached the following conclusions of law: (1) only one document, Exhibit 1, was filed with OAD; and (2) the tenant did not file eight (8) other documents with the OAD.[6] The Commission received the certified file from OAD on June 27, 2000.

II. ISSUES ON APPEAL

In her Notice of Appeal dated April 24, 1998, the tenant raised the following issues:

1. The examiner failed to place the burden upon the proper party when determining the issue of exemption.
2. The examiner failed to place the burden upon the proper party when determining the issue of retaliation.[7]
3. The conclusions reached were not supported by the evidence.

III. DISCUSSION

A. Whether the hearing examiner failed to place the burden on the proper party when determining the issue of exemption.

In his findings of fact, the hearing examiner determined:

1. The subject housing accommodation 6600 14th Street, NW [sic] is registered with RACD. A Registration/Claim of Exemption certificate was filed on February 12 1998, LR 507734.
2. The subject housing accommodation is a four-unit building and is exempt under D.C. CODE Section 45-2515(a)(3).[8]

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[6] Since the hearing examiner found that only Exhibit 1 was submitted to the OAD, it was the only document admitted as evidence. See Harris v. District of Columbia Rental Hous Comm'n 505 A.2d 66 (D.C. 1986) (finding the record may be held open for the post-hearing submission of memoranda, but post-hearing submission of documents or evidence is forbidden).

[7] Housing Provider's Notice of Appeal at 1.

[8] D.C. CODE § 45-2515(a)(3) provides in relevant part, that the registration and coverage provisions of the Act do not apply to, "any rental unit in any housing accommodation of 4 or fewer units, including any aggregate of 4 rental units whether within the same structure provided the housing accommodation is owned by not more than 4 natural persons...."

A housing provider bears the burden of proving qualification for exemption. See Revithes v. District of Columbia Rental Hous Comm'n, 536 A.2d 1007, 1017 (D.C. 1987), citing Bernstein v. Lime, 91 A.2d 841, 843 (D.C. 1952). However, the standard for satisfying a housing provider's burden of proof of exemption is "credible, reliable evidence."[9]

The housing provider in the instant case met his burden of providing credible, reliable evidence of an exemption. The Act provides that rent control shall apply to every rental unit in the District of Columbia except those exempted by the Act. One exemption is the small housing provider exemption in D.C. CODE § 45-2515(a)(3), which provides, in part:

> Any rental unit in any housing accommodation of 4 or fewer rental units, including any aggregate of 4 rental units whether within the same structure or not, provided:
> (A) The housing accommodation is owned by not more than 4 natural persons;
> (B) None of the housing providers has an interest, either directly or indirectly, in any other rental unit in the District of Columbia;
> (C) The housing provider of the housing accommodation files with the Rent Administrator a claim of exemption statement which consists of an oath of affirmation by the housing provider of a valid claim to the exemption....

In the instant case, the housing provider filed a Registration/Claim of Exemption, as provided in D.C. CODE § 45-2515(a)(3)(C).[10] The hearing examiner considered

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[9] See also Graybill v. Goodman, TP 11,578 (RHC, June 3, 1988), where the Commission wrote, "[a]nd we have consistently held that where there is a prima facie challenge to an exemption, the burden of proof shifts to the landlord ... to establish by a preponderance of credible evidence that he has removed a fifth unit from the building and that the exemption is warranted." (citations omitted).

[10] D.C. CODE § 45-2515(a)(3)(C) provides the following regarding filing for an exemption: "[t]he housing provider of the housing accommodation files with the Rent Administrator [sic] a claim of exemption that consists of an oath or affirmation.... It shall also contain the signatures of each person having an interest in the housing accommodation...."

the testimonial evidence,[11] RACD registration files, and the tenant's failure to rebut the housing provider's claim of exemption status. See Baxter v. Jackson, TP 24,370 (OAD Apr. 10, 1998) at 2.

As the hearing record indicates, the hearing examiner posed questions to the housing provider. He also took official notice of the housing provider's claim of exemption form. Thus, although the hearing examiner failed to clearly articulate which party had the burden, he successfully placed the burden of proof upon the housing provider on the exemption issue.

Further, the hearing examiner made an initial remark that decided the retaliation issue in a conclusory manner. The hearing examiner found, "[w]hat we have learned through the preliminary process is that this property is exempt," before he heard evidence on the record. Yet, shortly thereafter, the hearing examiner heard evidence from the housing provider regarding the exemption issue. Therefore, even though both of the hearing examiner's statements were flawed, they constituted harmless error,[12] as the hearing examiner's errors did not affect the outcome of this issue.

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[11] The OAD audio tape, dated November 3, 1997, provides the following testimonial evidence concerning the retaliation charge:

> Hearing Examiner (H.E.): Mr. Jackson, do you own the subject property?
> Mr. Jackson: Yes, I do.
> H.E.: And how many units are in that property?
> Mr. Jackson: That property contains four (4) units.
> H.E.: Do you own any other property in the District of Columbia, rental housing property?
> Mr. Jackson: No, I do not.
> H.E.: Have you filed a claim of exemption on this property?
> Mr. Jackson: Yes, I have.

[12] See Ford v. Dudley, TP 23,973 (RHC June 3, 1999), citing Black's Law Dictionary 646 (5th ed. 1979):

> Black's Law Dictionary defines harmless error as:
> An error which is trivial or formal or merely academic and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the outcome of the case....Harmless error is not grounds for granting a new trial or for setting aside a verdict or for vacating , modifying or otherwise disturbing a judgment or order, unless such refusal appears to the court inconsistent with substantial justice.

There was substantial record evidence to support the hearing examiner's finding that the housing accommodation was exempt, therefore, the Commission accordingly affirms the hearing examiner's decision on this issue.

B. Whether the hearing examiner failed to place the burden upon the proper party when determining the issue of retaliation.

D.C. CODE § 45-2552(b), provides in part:

> In determining whether an action taken by a housing provider against a tenant is retaliatory action, **the trier of fact shall presume retaliatory action has been taken**, and shall enter a judgment in the tenant's favor **unless the housing provider comes forward with clear convincing evidence to rebut this presumption** if within the six (6) months preceding the housing provider's action, the tenant:
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> (1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;
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> (2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the unit is located;
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> (3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulation;
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> (4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
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> (5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or
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> (6) Brought legal action against the housing provider. (emphasis added).

The Act places the burden on the housing provider, provided the tenant demonstrates she did one of the six acts detailed in §45-2552(b) of the Act in the six (6) months prior to the housing provider's action. Examples of tenant actions that trigger the presumption of retaliation to the housing provider include: (1) making a witnessed oral or written request for repairs; or (2) contacting D.C. government officials concerning existing violations.

The Act at D.C. CODE § 45-2552(b) provides, when determining if a housing provider has taken retaliatory action, "the trier of fact **shall presume retaliatory action** has been taken, if within six months preceding the retaliatory action," the tenant made a request for repairs or contacted D.C. officials regarding the housing provider's actions (emphasis added). It also provides that the hearing examiner "shall enter a judgment in the tenant's favor unless the housing provider comes forward with clear convincing evidence to rebut this presumption." See id. Thus, the housing provider has the burden of rebutting the presumption by clear and convincing evidence.

Again, to raise the presumption of retaliation, the tenant must allege that she made a request for repairs or contacted D.C. officials within six months preceding the housing provider's action. In the instant case, the tenant alleged that the [housing provider] retaliated against her by, "not providing maintenance and repairs; having the [tenant] take time from work; not showing up for scheduled repairs; sending [the tenant] threatening letters through [the housing provider's] attorney; having to always defend herself [sic]; and filing a Motion to Strike in a court case before the District of Columbia Superior Court."[13] Additionally, the tenant testified that the housing provider performed the aforementioned acts in response to the tenant's decision to report him to DCRA for housing code violations and for filing a tenant petition with RACD. Hearing Tapes (OAD, Nov. 3, 1997). The uncontroverted testimony of both the tenant and the housing provider demonstrates that there were housing code violations cited by the Housing Inspection Division. See id. See also Baxter, TP 24,370 (OAD Apr. 10, 1989) at 3.

[13] See Baxter v. Jackson, TP 24,370 (OAD Apr. 10, 1998) at 4.

The Commission, in Watson v. Coffer, TP 21,253 (RHC Nov. 1, 1990), held the presumption of retaliation was created by the tenant's request for repairs within six months of the alleged retaliation. Under the Act, the housing provider had to rebut this presumption by clear and convincing evidence. See D.C. CODE § 45-2552.

As written, the OAD Decision does not assign the burden of proof to the housing provider. On page three (3) of the Decision and Order, Examiner Roper maintains, "[t]he evidence shows that there was no attempt to retaliate against [the tenant] based upon [the tenant] requesting maintenance and repair services or legal action taken by [the housing provider] against [the tenant]."[14] The hearing examiner does not point to the clear and convincing evidence of the housing provider, but instead refers to the insufficiency of the evidence provided by the tenant. Furthermore, the hearing examiner found, "the [housing provider] was cited for housing code violations in [the tenant's] rental unit," and that the "[housing provider] immediately arranged to have the violations abated but had a problem gaining access ...to make repairs." Baxter v. Jackson, TP 24,370 (OAD Apr. 10, 1998). Although this finding more closely resembles the requisite clear and convincing standard, the examiner does not state any evidence the housing provider proffered at the hearing to support his position. Nor does the examiner clearly indicate that the housing provider rebutted the presumption of retaliation by clear and convincing evidence.

Moreover, the hearing examiner applies a substantial evidence standard when the Act requires "clear and convincing evidence" as the standard to overcome the presumption of retaliation. He found that, "[t]here is **insufficient evidence** to find that

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[14] See id. at 3.

any of the correspondence were [sic] retaliatory in nature or meant to retaliate against the tenant." Baxter v. Jackson, TP 24,370 (OAD Apr. 10, 1998) (emphasis added). Again, the examiner fails to relate his evidentiary finding to the requisite standard of "clear and convincing" evidence.

Most importantly, the hearing examiner failed to issue findings of fact concerning if and when the tenant made a request for repairs or contacted D.C. officials. On remand, the hearing examiner must set forth when the tenant requested repairs, and when the housing provider performed any acts that could be considered retaliatory, i.e.; issued the notice of eviction to the tenant. The hearing examiner cannot correctly address the retaliation issue until he determines whether in the six months preceding the housing provider's action: (1) the tenant made a witnessed oral or written request to the housing provider to make repairs; (2) contacted appropriate officials of the District government; (3) made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; (4) brought legal action against the housing provider; (5) made an effort to secure or enforce her rights under her lease or contract with the housing provider; or (6) brought legal action against the housing provider. D.C. CODE § 45-2552(b).

The hearing examiner has a responsibility to weigh the record evidence. He has "discretion to reasonably reject any evidence offered," and he does not have to list every piece of evidence considered when rendering a decision. Harris v. District of Columbia Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986). Furthermore, "[i]n rendering a decision, the Examiner is entrusted with a degree of latitude in deciding how he shall evaluate and credit the evidence presented." Harris, 505 A.2d at 69.

Still, the hearing examiner's findings and decision must be reasonable in light of the record facts and prevailing law. Oubre v. District of Columbia Dep't of Employment Servs., 630 A.2d 699 (D.C. 1993). As the hearing examiner's decision does not set forth whether the tenant offered evidence to trigger the presumption of retaliation and fails to address the clear and convincing evidence required to rebut the presumption of retaliation, this issue is remanded for further proceedings in accordance with § 45-2552(b) of the Act. The Commission therefore directs the hearing examiner to clarify the retaliation issue on remand, by making findings of fact and conclusions of law on the issue of the presumption of retaliation, and clear and convincing evidence required to rebut the presumption of retaliation.

C. Whether the conclusions reached were supported by substantial record evidence.

The Commission is empowered to reverse a hearing examiner's decision if it is not supported by substantial evidence. See D.C. CODE § 45-2526(h).[15] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Ferreira v. District of Columbia Dep't of Employment Services, 667 A.2d 310, 311 (D.C. 1995) quoting James v. District of Columbia Dep't of Employment Services, 623 A.2d 395, 397 (D.C. 1993) (citations omitted). The Commission will affirm the hearing examiner's "findings of fact and conclusions of law

[15] The Act, D.C. CODE § 45-2526(h), provides:

> The Rental Housing Commission may reverse in whole or in part, any decision of the Rent Administrator which it finds to be arbitrary, capricious, an abuse of discretion, not in accordance with the provisions of this chapter, or unsupported by the substantial evidence on the record of the proceedings before the Rent Administrator, or it may affirm, in whole or in part, the Rent Administrator's decision.

as long as they are supported by 'substantial evidence' notwithstanding that there may be contrary evidence in the record (as there usually is)."[16] (citations omitted).

The hearing examiner reached the following Conclusions of Law:

1. The housing accommodation is exempt pursuant to D.C. CODE Section 45-2515 (1991). Therefore, the Motion to Dismiss the registration issue shall be granted.
2. The housing provider has not violated D.C. CODE § 45-2552(a) by retaliating against the tenant.[17]

There was substantial evidence in the record to support the hearing examiner's finding that the housing provider owned an exempt housing accommodation, and the tenant did not present sufficient evidence to show the contrary. See discussion infra, Part A. The Commission is required to entrust the hearing examiner with "a degree of latitude in deciding how he shall evaluate and credit the evidence presented." Harris, 505 A.2d at 69. Consequently, the Commission will not reverse the hearing examiner's evaluation of the evidence that is in accordance with the substantial record evidence. Cf. Mersha v. Marina View Tower Apartments, TP 24,302 (RHC May 9, 2000) (where Commission reversed the hearing examiner when he misstated the evidence and omitted evidence that revealed the misstatements).

"The Court has noted the limited nature of its review of administrative proceedings and recognized that it should not disturb a decision if it rationally flows from the facts relied upon and those facts or findings are substantially supported by the

[16] 424 Q St. Ltd. Partnership v. Evans, TP 24,597 (RHC July 31, 2000) at 9.

[17] Baxter v. Jackson, TP 24.370 (OAD Apr. 10, 1998) at 22.

evidence of record." Mersha v. Marina View Tower Apartments, TP 24,302 (RHC May 9, 2000) Id. at 14, quoting Selk v. District of Columbia Dep't of Employment Services, 497 A.2d 1056, 1058 (D.C. 1985).

Here, the hearing examiner analyzed the evidence presented by the housing provider; namely, the claim of exemption. The testimonial and documentary evidence submitted by the tenant and the housing provider evinced the strength of the housing provider's argument. It was well within the hearing examiner's purview to make the determination that the housing provider was exempt. As there was substantial evidence in the record to support the examiner's conclusion regarding the housing provider's exemption status, this issue is denied. The hearing examiner's conclusion is affirmed.

The hearing examiner also concluded that the housing provider did not violate D.C. CODE § 45-2552(a) by retaliating against the tenant. First, in reaching his decision, Hearing Examiner Roper relied upon evidence that he excluded from the record. In his January 6, 2000 Order, the hearing examiner stated he, "could only conclude that only one document was filed with OAD."[18] Yet, in his Decision and Order dated April 10, 1998, the examiner noted that the evidence "shows that there was correspondence between the housing provider's attorney and the tenant."[19] He also considered that "Respondents [sic] attorney filed an Opposition to Strike in a District of Columbia Superior Court Landlord-Tenant case involving Petitioner." Baxter v. Jackson, TP 24,370 (OAD Apr. 10, 1998) at 3. However, on remand, the Opposition to Strike was excluded from the evidence of the hearing examiner.

[18] See Baxter v. Jackson, TP 24,370 (OAD Jan.6, 2000) at 4.

[19] See Baxter v. Jackson, TP 24,370 (OAD April 10, 1998) at 5, and list of exhibits p.4 supra.

Since the hearing examiner determined that only one of the missing documents was filed with OAD, the other exhibits were therefore not admitted as evidence.[20] It is improper to rely upon post-hearing submissions that the opposing party has not had the opportunity to examine and rebut. See Daro Realty, Inc. v. 1600 16th Street Tenants Ass'n, TP 4637 (RHC Dec. 18, 1987). Yet, the hearing examiner clearly relies upon several of these documents in rendering his decision. It was plain error[21] for the hearing examiner to rely on missing or inadmissible documents in his decision. See Baxter v. Jackson, TP 24,370 (RHC Dec. 24, 1998).

Moreover, the hearing examiner premised his conclusion regarding the retaliation issue on a faulty standard. Also, although based on the evidence available at the time, his decision was not rendered utilizing the evidence available in the corrected record. Accordingly, the retaliation issue is remanded for a second remand decision in accordance with the Act, because the original decision arrived at a conclusion based on a faulty record and an incorrect standard.

IV. CONCLUSION

The Commission affirms the hearing examiner in part, reverses in part, and remands for a determination regarding the retaliation issue using the correct standard. The Commission reverses the hearing examiner's findings of fact and conclusion of law relating to retaliation, because he did not properly apply the legal standard and burden of proof as required by D.C. CODE § 45-2552(b). The decision is also remanded to ensure that the hearing examiner's conclusion concerning retaliation was supported by

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[20] See n. 7 supra.

[21] Pursuant to 14 DCMR 3807.4, the Commission may notice plain error.

substantial record evidence. Again, if these matters can be resolved on the existing record, without further hearing testimony, then it is within the best interest of all parties involved to do so.

The Commission affirms the hearing examiner's finding that the housing provider properly registered the housing accommodation as exempt from the Act; moreover, the Commission affirms that the hearing examiner correctly assigned the burden when determining the issue of exemption.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER