DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,786

In re: 3120 Massachusetts Avenue, S.E., Unit 102

Ward 7

BARBARA KEMP
Tenant/Appellant

v.

MARSHALL HEIGHTS
COMMUNITY DEVELOPMENT
Housing Provider/Appellee

DECISION AND ORDER

August 1, 2000

PER CURIAM: This case is on appeal 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. PROCEDURAL BACKGROUND

Barbara Kemp, the tenant/appellant, filed Tenant Petition (TP) 24,786 with the Rental Accommodations and Conversion Division (RACD) on August 10, 1999. She subsequently amended her petition on August 27, 1999. According to the petition, the tenant alleged that the housing provider, Marshall Heights Community Development, Inc., violated the Rental Housing Act of 1985. The tenant alleged: 1) the housing provider failed to file the proper rent increase forms with the RACD; 2) the rent being

charged by the housing provider was in excess of the rent ceiling; 3) the rent ceiling was improper; 4) a rent increase was taken while her rental unit was not in substantial compliance with District of Columbia Housing Regulations; 5) related services or related facilities supplied by the housing provider for the rental unit were substantially reduced; and 6) the housing provider took retaliatory action against her.

On October 7, 1999, Gerald J. Roper presided as the hearing examiner and on January 11, 2000, he issued the decision and order. The hearing examiner concluded that the tenant's services and facilities supplied by the housing provider were substantially decreased and that the housing provider took retaliatory action against her. However, the hearing examiner found the tenant was not entitled to a refund for the reduction in services, because the rent charged was lower than the rent ceiling.[1] The hearing examiner imposed a fine for the housing provider's retaliatory actions against the tenant.[2]

On February 28, 2000, the tenant filed an appeal in the Commission and thereafter the housing provider filed a motion to dismiss arguing the appeal was untimely. On April 27, 2000, the Commission denied the housing provider's motion to dismiss the appeal.

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[1] See D.C. Code § 45-2591(a), which provides:

> Any person who knowingly . . . substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

[2] See id. § 45-2591(b), which provides:

> Any person who wilfully [sic] . . . (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation.

The Commission noted, excluding snow days and holidays,[3] the tenant filed the notice of appeal within the required ten days after the final decision of the Rent Administrator.[4]

II. ISSUES ON APPEAL

The tenant, in her notice of appeal, alleges the following: 1) the captions incorporated in the hearing examiner's decision and order are incorrect; 2) the hearing examiner erred by not officially closing the hearing and therefore was in violation of 4009.9 [sic];[5] 3) she was not given the opportunity to respond to findings before a final decision was made, and the certifying party was not the same person who wrote the document; 4) the formula used by the hearing examiner to calculate the housing provider's substantial decrease in related services or facilities was incorrect and in violation of D.C. Code §§ 45-2521, 2553(a) [sic],[6] 2591(a), and 2555 [sic];[7] 5) the rent ceiling for the tenant's rental unit should be decreased to reflect the substantial decrease in related services and facilities supplied by the housing provider; and 6) the rent ceiling should be decreased to reflect the retaliatory action taken against her.

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[3] In Kemp v. Marshall Heights Community Development, TP 24,786 (RHC Apr. 27, 2000) the Commission noted, "there were two (2) snow days or days when the District Government was closed for business due to snow accumulation and adverse weather conditions in the city [and] [t]hese days are treated as holidays and not business days." (citation omitted).

[4] See 14 DCMR 3802.2, which states: "A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed."

[5] 14 DCMR 4009.9 (concerns hearing examiners taking official notice of information contained in public records, and therefore is not relevant to this issue).

[6] D.C. Code § 45-2553 (concerning conciliation and arbitration services and therefore, is not relevant to the instant case).

[7] D.C. Code § 45-2555 (governing discrimination against elderly tenants or families with children, therefore this is not relevant to this case).

III. DISCUSSION OF THE ISSUES

A. Whether the hearing examiner violated 14 DCMR 3905 in his decision and order when he excluded Ms. Robin Williams from the caption.

In the tenant's notice of appeal, she stated that the caption was incorrect.[8] During the hearing on appeal the tenant expounded upon her argument by providing a rationale for her allegations. She argued the hearing examiner excluded Ms. Robin Williams from the caption of the decision and order. See 14 DCMR 3905.2.

The regulation, 14 DCMR 3905.2 provides, "[c]aptions shall contain the name of the housing provider as listed on the registration statement; Provided, however, that if the management agent represents the housing provider in any proceeding, the management agent shall also be listed in the caption and identified as the agent." In addition, "[i]f it appears to the Commission that the identity of the parties has been incorrectly determined by the Rent Administrator, the Commission may substitute or add the correct parties on its own motion." 14 DCMR 3809.3.

In the instant case, the tenant alleges that Ms. Williams' name, should have been included in the caption of the decision and order. Although the Commission has the authority to add the proper parties if it appears that the identity of the parties has been incorrectly determined by the Rent Administrator,[9] courts generally do not consider "[r]esident manager[s] of apartment[s] [to be] agent[s] of the landlord."[10] The record

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[8] See Notice of Appeal at 1 (appealing "the Rent Administrator's decision and order of 11 January 2000, and assert[ing] the following: incorrect captions . . . .").

[9] See 14 DCMR § 3809.3.

[10] Nelson v. Swift, 106 U.S. App. D.C. 238, (1959); quoted in Larry M. Rosen & Assocs., Inc. v. Hurwitz, 465 A.2d 1114, 1116 (D.C. 1983) (discussing the role of a resident manager in the context of proper service and displaying severe reluctance to classify a resident manager as an agent of the housing provider).

revealed Ms. Williams identified herself as the resident manager. Neither the tenant nor the hearing examiner objected or challenged Ms. Williams' status as a resident manager. The Commission's review found substantial evidence in the record that she was the resident manager. Therefore, we conclude Ms. Williams was not the management agent of the housing provider.

Accordingly, the hearing examiner did not violate 14 DCMR 3905 in his decision and order when he excluded Ms. Williams, the resident manager, from the caption. Therefore, this issue is denied, and the hearing examiner is affirmed.

B. Whether the hearing examiner officially closed the record, gave the tenant the opportunity to respond to findings before a final decision was made and whether the certifying party is the same party who wrote the document.

The Commission's regulation concerning the initiation of appeals, 14 DCMR 3802.5(b), provides that the notice of appeal shall contain the following: "[t]he Rental Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from, and a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator." (emphasis added).

In all of these appeal issues, the tenant did not expound upon her claims. The tenant merely stated the "[r]ecord was not officially closed[11] . . . [she] was not given the opportunity to respond to findings before a final decision was made,[12] and [the] certifying

[11] See generally Harris v. District of Columbia Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986) (stating "[o]rdinarily, the record closes upon termination of the hearing below, however, the record may be held open for the post-hearing submission of memoranda" and as such, this is inapplicable to the instant case).

[12] Neither the Act, nor the regulations support this particular proposition.

party [was] . . . not the same person who wrote the document."[13] Notice of Appeal at 1. The tenant's claims are without merit and are not supported by the Act or the Regulation. Furthermore, the tenant did not state a "clear and concise statement of the alleged error(s) in the decision of the Rent Administrator." Consequently, the claims are dismissed. 14 DCMR 3802.5(b); see also 14 DCMR 3802.13 (stating "[t]he Commission may dismiss the appeal for failure to comply with the requirements of 3802.5."); Jordan v. Spellios, TP 24,696 (RHC Sept. 8, 1999) (holding the notice of appeal stated no issues for review and therefore was in violation of 3802.5(b)).

C. Whether the rent ceiling in the tenant's rental unit should be decreased to reflect the alleged retaliatory action against her.

The tenant, in her notice of appeal, asserts the rent ceiling for her rental unit should be decreased to reflect the hearing examiner's finding of retaliatory action taken against her. Pursuant to D.C. Code § 45-2552(a), "[n]o housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any provision of law."[14] In addition, D.C. Code § 45-2591(b) provides, "[a]ny person who wilfully [sic] ... (3) commits any other act in violation of any provision of this chapter or of any final

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[13] See generally 14 DCMR 4012.4 (providing "if the person who renders the decision and order is not the same person who has heard the evidence, then the procedures of D.C. Code § 1-1509(d), shall be followed." However, 14 DCMR 4012.4 is inapplicable to the instant case, because the hearing examiner was the same person who rendered the decision and order and heard the evidence).

[14] D.C. Code § 45-2552(a) continues:

> Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, 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, refusal to renew 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.

administrative order issued under this chapter, or (4) fails to meet obligations under this chapter shall be subject to a civil fine of not more than $5,000 for each violation."

In the instant case, the tenant is not challenging the validity of the fine. Rather, the tenant is arguing that she is entitled to a decrease in her rent ceiling based on the retaliatory action taken against her by the housing provider and its agents. However, the Act does not provide for an adjustment in the rent ceiling upon a finding of retaliation. See D.C. Code § 45-2552. Rather, the housing provider's retaliatory acts taken against a tenant warrant a civil fine. See D.C. Code § 45-2591. Furthermore, "[i]t has long been established that administrative agencies may be authorized to impose penalties in the form of fines to enforce public rights created by statutes." Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007, 1021 (D.C. 1987). Therefore, the tenant is not entitled to a rent ceiling decrease, because the retaliatory action provision of the statute was created to enforce public rights; consequently, the housing provider is subjected to a civil fine.

Therefore, in accordance with D.C. Code § 45-2591(b), the Commission affirms the $1000.00 fine against the housing provider for violating D.C. Code § 45-2552. In addition, the Commission rejects the tenant's argument that based on the retaliatory actions taken against her, the rent ceiling should be decreased in her rental unit. Accordingly, this issue is denied, and the hearing examiner is affirmed.

D. Whether the rent ceiling in the tenant's rental unit should be decreased to reflect the substantial decrease of related services or facilities supplied by the housing provider.

The tenant, in her notice of appeal, asserts the rent ceiling in her rental unit should be decreased to reflect the substantial decrease in related services or facilities supplied by

the housing provider. According to D.C. Code § 45-2521, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect the changes in the services or facilities. In addition, D.C. Code § 45-2591(a) provides:

> Any person who . . . (2) substantially reduces or eliminates related services previously provided for a rental unit shall be held liable by the Rent Administrator or Rental Housing Commission . . . for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

The housing provider is liable for a rent refund only if the rent actually charged is higher than the reduced rent ceiling. Where the rent actually charged is equal to or lower than the reduced rent ceiling, there was no excess rent collected and no refund is required. See Hiatt Place Partnership v. Hiatt Place Tenants' Ass'n, TP 21,149 (RHC May 1, 1991).

The Commission has written frequently on the issue of calculating the reduction of services and facilities. In George I. Borgner, Inc. v. Woodson, TP 11,848 (RHC June 10, 1987) at 11, the Commission stated:

> [W]e hold that evidence of the existence, duration and severity of a reduction in services and/or facilities is competent evidence upon which the Rent Administrator . . . may fix the dollar value of a reduction in services or facilities without expert or other direct testimony on the dollar value of the reduction.

In addition, the Commission has held that the value of a reduction in services usually cannot be scientifically measured. Consequently, the Commission relies on the examiner's knowledge, expertise and discretion as long as there is substantial evidence in the record regarding the nature of the violation, duration and substantiality. See Calomiris v. Misuriello, TP 4809 (RHC Aug. 30, 1982); Nicholls v. Tenants of 5005, 07, 09 D Street, S.E., TP 11,302 (RHC Sept. 6, 1985).

Here, when we subtract the hearing examiner's award for the housing provider's reduction in services from the rent ceiling, the rent charged does not exceed the allowable rent ceiling. Therefore, there cannot be a refund. According to the record, the tenant's rent ceiling from the date she began her tenancy on July 7, 1996 to August 31, 1999, was $457.00, and the rent charged was $350.00. See Respondent's Exhibit 1. Also, according to the record, the tenant's rent ceiling from September 1, 1999, until the termination of her tenancy was $461.00 and her current rent charged was $380.00. See Id. The hearing examiner relying on his knowledge, expertise and discretion, stated,

> [T]he rent ceiling for Petitioner's rental unit . . . was $461.00 [sic][15] per month during the period 1998 and 1999. The rent charged during [that particular] violation period is $350.00 . . . . The formula for computing the damages is as follows: add [sic][16] the value of the decrease service of maintenance and repair (leaking bathroom ceiling) $100.00 to the current rent charged $350.00 . . . [that in turn] equals $450.00 [sic] . . . . Now for the kitchen sink and the water back up in 1999 [sic]. The value is $13.00 . . . [multiplied by] 5 days for [the month of] April . . . which equals a $65.00 value; and, $13.00 . . . [multiplied by] 5 days for [the month of] July . . . which equals a $65.00 value. When you add [sic] the $65.00 to each [of the] months rent charged [that is] ($350.00), the result is $415.00 [sic]. This is less than the rent ceiling therefore, this amount does not exceed the rent ceiling and no refund is required.[17]

The hearing examiner correctly stated that the rent charged by the housing provider was lower than the reduced rent ceiling. Therefore, there was no excess rent collected and no refund was required. See Hiatt Place Partnership, TP 21,149 at 26. However, the hearing examiner's method of calculation was in error. Instead of

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[15] See 14 DCMR 3807.4, which provides: "Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error." Instead of using the previous rent ceiling, the hearing examiner used the current rent ceiling and by doing so, he committed plain error, which the Commission corrected.

[16] See id. at 3807.4 (replacing add, with the term subtract and calculating the damages accordingly).

[17] Kemp v. Marshall Heights Community Dev., TP 24,786 (OAD Jan. 11, 2000) at 10.

subtracting the figures for the reduction of services from the rent ceiling, he added those figures to the rent charged, which is contrary to the Commission's method of calculation set forth in Hiatt Place, supra.

According to the record, the relevant periods for the various reductions in services and facilities are as follows: 1) the leaking bathroom ceiling for five months, which according to the housing provider was repaired on September 22, 1998, and which the hearing examiner valued at $100.00 per month; 2) in April 1999, the tenant was without her kitchen sink for five days and the hearing examiner valued the reduction of services at $13.00 per day or $65.00 per month; 3) the water back up and unsanitary conditions in the bathroom tub occurred between July 3, 1999 and July 7, 1999 and again the hearing examiner valued the reduction at $13.00 per day or $65.00 for the month of July 1999.[18]

Therefore, in correcting the hearing examiners calculations, the correct application of the standard is as follows: 1) the tenant's rent ceiling from the beginning of her tenancy to August 31, 1999, was $457.00; 2) the hearing examiner valued the decrease service of maintenance and repair for the leaking bathroom ceiling at $100.00 per month for five months in 1998; 3) thus $457.00 minus $100.00 yields a $357.00 rent ceiling; 4) next the $357.00 reduced rent ceiling minus the $350.00 rent charged yields a difference of $7.00, which is $7.00 more than the rent charged, which was $350.00; 5) since the $350.00 rent charged is less than the $357.00 reduced rent ceiling, there is no refund because the rent charged does not exceed the reduced rent ceiling; 6) the tenant's rent ceiling in April 1999 was again $457.00; 7) the tenant stated she was without her kitchen sink and the hearing examiner valued the reduction at $13.00 for the five day

[18] In the instant case, the violations occurred at different time periods and warrant the separate calculations.

period beginning April 7, 1999; 8) the hearing examiner multiplied the $13.00 by the five days the sink was not operational and this yielded $65.00; 9) $457.00 minus $65.00 yields $392.00; 10) next the $392.00 reduced rent ceiling minus the $350.00 rent charged yields a difference of $42.00, which is $42.00 more than the rent charged, which was $350.00; 11) since the $350.00 rent charged is less than the $392.00 reduced rent ceiling, there is no refund because the rent charged does not exceed the reduced rent ceiling; 12) the tenant's rent ceiling in July 1999 was $457.00; 13) the hearing examiner valued the back-up of water to be $13.00 for the five day period of July 3, 1999 to July 7, 1999; 14) the hearing examiner multiplied the $13.00 by the five days the bathroom tub was backed up and this yielded $65.00; 15) next $457.00 minus $65.00 yields $392.00; 16) next the $392.00 reduced rent ceiling minus the $350.00 rent charged yields a difference of $42.00, which is $42.00 more than the rent charged, which was $350.00; 17) since the $350.00 rent charged is less than the $392.00 reduced rent ceiling, there is no refund because the rent charged does not exceed the reduced rent ceiling.

IV. CONCLUSION

For the foregoing reasons, the decision and order issued on January 11, 2000, is AFFIRMED. The hearing examiner did not violate 14 DCMR 3905.2, when he omitted the resident manager from the caption, because a resident manager is not the housing provider's management agent. The tenant's claims that the record was not officially closed; that she was not able to respond to findings before a final decision was made; and that the certifying party was not the same party who wrote the document, were not made in accordance with 14 DCMR 3802.5. Accordingly, these issues are dismissed pursuant to 14 DCMR 3802.13. Also, the tenant is not entitled to receive a reduced rent ceiling for

the retaliatory acts taken against her, because pursuant to D.C. Code § 45-2591(b), these acts are punishable by the imposition of a civil fine. Finally, the tenant is not entitled to a rent refund as a result of the substantial decrease in related services or facilities, because the rent charged did not exceed the reduced rent ceiling. The hearing examiner's errors in his calculations were harmless errors, because the rent charged did not exceed the reduced rent ceiling, and therefore, the tenant is not entitled to a rent refund. Accordingly, the decision is hereby affirmed.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER