DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 24,970

In Re: 1100 Sixth Street, S.W., Unit 209

WONDIMU MERSHA
Tenant/Appellant

v.

TOWN CENTER LTD. PARTNERSHIP
Housing Provider/Appellee

DECISION AND ORDER

December 21, 2001

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. OFFICIAL CODE § 42-3501 et seq., and the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE § 2-501, et seq. The regulations, 14 DCMR § 3800 et seq., also apply.

I. THE PROCEDURES

The tenant petition (TP 24,970) was filed on May 10, 2000. The petition alleged: 1) improper rent increase, 2) 180 days had not passed since the last rent increase, 3) lack of proper 30 day notice before a rent increase, 4) the Housing Provider failed to file proper rent increase forms in the Rental Accommodations and Conversion Division

(RACD), 5) the rent charged exceeded the legal rent ceiling, 6) rent increase taken while the rental unit was not in substantial compliance with the housing code, 7) the housing accommodation was not properly registered, 8) coercion in the execution of a voluntary agreement, 9) ineligible signatures on the voluntary agreement, 10) retaliation by the Housing Provider against the tenant, and 11) improper notice to vacate. The tenant petition had an attachment, which stated allegations of: 1) an improper increase in rent, 2) intrusion into the tenant's rental unit and removal of rent receipts, 3) threats of eviction, although the tenant's rent was paid into the court registry, 4) housing code violations of vermin and leaking roof, 5) a tax controversy related to the rent increase, 6) loss of personal property due to roof leak, 7) retaliation due to complaints, and 8) violation of the first right of refusal to purchase the housing accommodation when it was sold; a violation of D.C. Law 3-86. Four (4) exhibits were behind the attachment. Exhibit 1 is the October 9, 1997, notification by the Housing Provider of rent due from the tenant. Exhibit 2 is a second notice dated April 5, 2000, demanding past due rent. Exhibit 3 is a notice to all residents at the housing accommodation about the extermination of rodents. Exhibit 4 is a notice to all

residents about a Department of Housing and Urban Development (HUD) inspection. There were three documents without numbers; they were all Superior Court documents related to Landlord and Tenant case number 97LT014562. The first unnumbered exhibit is a copy of a receipt for Superior Court ordered escrow rent payment of $607.00. The second unnumbered exhibit is a copy of disbursement of $3642.00 from the court registry. The third unnumbered exhibit is a copy of the "Case Transaction History" showing deposits and balances of the Tenant's rent into the court registry.

On August 11, 2000, the Housing Provider filed in OAD a motion to dismiss the tenant petition. The hearing on the petition was held on August 24, 2000, before Hearing Examiner Carl Bradford. The OAD decision and order was issued on May 1, 2001. In the decision and order the hearing examiner granted, in part, and denied, in part, the Housing Provider's motion to dismiss the petition. In the decision and order the hearing examiner made the following conclusions of law:

1. Petitioner did not sustain his burden of proof by demonstrating that the Respondent substantially reduced services and facilities in violation of D.C. Code Section 45-2511(1990)[1] [sic].

[1] In 2001 the code was recodified as the D.C. Official Code, and this section is now D.C. Official Code § 42-3502.01

2. Respondent did not fail to properly register the property, in violation of D.C. Code Section 45-2515(1990) [sic].

3. Petitioner failed to meet his burden of proving that Respondent increased his rent in violation of D.C. Code 25-2518 [sic].

The hearing examiner dismissed the petition.

On May 16, 2001, the Tenant filed in the Commission a notice of appeal with a document attached titled, "Petitioner's Brief in Support of Appeal."[2] On June 22, 2001, the Tenant filed another copy of the brief, however, this copy had more attachments than the first brief. On July 10, 2001, the Housing Provider submitted its Responsive Brief.

The Commission scheduled its hearing for August 22, 2001. However, the Tenant filed a motion for a continuance with the consent of the Housing Provider. The Commission's hearing was rescheduled to September 5, 2001. During the Commission's hearing, counsel for the Tenant filed a motion to submit a posthearing brief, due to the unavailability of a transcript of the OAD hearing and the necessity to present the Tenant's view of the record created in OAD, where the Tenant was pro se. The Commission granted the motion for the parties to file post hearing briefs, and

[2] Hereinafter, Tenant's Brief.

denied the Tenant's second motion for another continuance of the Commission's hearing.

At the hearing, the Commission notified the parties about missing sound and testimony on tape numbered two (2) of the OAD hearing. After the hearing, the Commission allowed the parties to listen to the OAD certified tapes of the OAD hearing.

For reasons explained in the Commission's decision, this case is remanded to OAD for allowance of the complete testimony of the Tenant's witness, Dia Khafra, and for consideration of the record testimony of Khafra, Linda Ellis, and Marilyn Killingham. The Commission granted the Housing Provider's motion to dismiss the notice of appeal, however, the issues raised and identified in the Tenant's Brief were timely filed as appeal issues.

II. THE APPEAL ISSUES

A. The Tenant's notice of appeal states the following:

> 1. Hearing Examiner Carl Bradford by making a critical misrepresentation of fact, short-circuited the administration process and cut off Wondimu Mersha's right.
>
> 2. The Hearing Examiner Carl Bradford by making a critical misrepresentation of material fact numerous and substantial erroneous statements and findings of fact.

3. Because of misrepresentations of the Hearing Examiner, it prevented the public from knowing the actual facts.

4. Some of the findings were left in the first order.

5. The Hearing Examiner rejected evidence presented by the petitioner.

6. The Hearing Examiner's GROSS ERRONEOUS FINDINGS OF FACT.

7. The brief is filed (attached) on the grounds that the above statements [sic].

B. The Tenant's Brief states the following errors from the decision and order. See Tenant's Brief pp. 1 of 6 - 3 of 6.[3]

1. Whether the description of the property was erroneous.

2. Whether the lot and square numbers for the property were erroneous, and whether the Commission can take judicial notice of the alleged lot and square numbers.

3. Whether the name of the owner and management company was erroneous.

4. Whether the reported testimony of Linda Ellis, housing inspector, was erroneous.

5. Whether the reported testimony of Marilyn Killingham, a witness, was erroneous.

6. Whether the "Ten name[sic] listed as management company did not fill [sic] a written notice of appearance stating at the

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[3] See Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1300 (D.C. 1990) (where the tenant filed a petition for review and a "Supplemental Memorandum in Lieu of Brief," which the court considered to determine the issues on appeal.)

individual's [sic] names, for whom appearance is made."

7. Whether the "Office of Adjudication [committed] for [sic] discrimination on the basis of race, color or national origin and disability in the [sic]in decision under the District of Columbia Human Rights Act of 19977 [sic], Section 1-2556."

8. Whether the "Hearing Examiner disregarding [sic] the existing regulations pertaining to ex parte communication."

9. Ms. Jonson [sic] admitted in her testimony that both rental complex [sic] were operated without current housing business licensees [sic].

10. There are literally dozens [sic] government attorneys and private power full [sic] attorneys to represent the landlord. It cast [sic] the petition considerable tim [sic] and resources clarifying the issue in this case, rendering a numbers [sic] page decision. The landlord, a profit-masking [sic] entity, it is not entitled to taxpayers-subsidized the wealthless [sic] property owner.

C. The Tenant's Brief also listed, "Issues Considered:"

1. False charge, retaliatory actions and deliberate Harassment [sic].

2. Housing Code violations - apartment 209, not abated from the June 5, 2000 inspection.

3. Housing Code violations - common areas of 1100-6th St. S.W.

Tenant's Brief, p. 3 of 6.

III. PRELIMINARY ISSUES

A. Incomplete OAD Hearing Tape

During the Commission's review of the three (3) OAD hearing tapes in this case, the Commission noticed that there was a significant gap at the beginning of the testimony on the second tape. Specifically, 322 revolutions of the Commission's tape counter occurred with no recorded testimony. The Commission concluded that sound and testimony were missing from the beginning of the second tape, because the first tape ended during the testimony of the Tenant's witness, Dia Khafra, and his testimony did not continue at the beginning of the second tape. Moreover, the hearing examiner's summary of Khafra's testimony in the OAD decision was more extensive than the testimony heard at the end of the first hearing tape. OAD Decision at 11-12.

On September 5, 2001, the Commission held its hearing and the Chairperson of the Commission notified the parties at the hearing that the second tape had missing sound. After the Commission's hearing concluded, the parties were allowed to listen to the OAD hearing tapes to confirm whether there was missing testimony and to provide the parties with the opportunity to file post hearing briefs on the issue of the missing testimony.

The Commission is limited by the Act, D.C. OFFICIAL CODE § 42-3502.16(g)-(h), in its review of the certified record of a petition on appeal. The Act, in pertinent parts, states:

> In the case of any direct, irreconcilable conflict between the provisions of this section and the District of Columbia Administrative Procedure Act, the District of Columbia Administrative Procedure Act shall prevail.
>
> Decisions of the Rent Administrator shall be made on the record relating to any petition filed with the Rent Administrator. … 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 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. (emphasis added).
>
> …

The DCAPA, D.C. OFFICIAL CODE § 2-509(e) states:

> Every decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence. A copy of the decision and order and accompanying findings and conclusions shall be given by the Mayor or the agency, as the case may be, to each party or to his attorney of record. (emphasis added.)

Cited in Bedell v. Clark, TP 24,979 (RHC June 27, 2001) at 9-10.

In this case the hearing examiner failed to preserve all of the recorded testimony of Khafra, the Tenant's witness. The failure of the hearing examiner to properly record all of the testimony of Khafra was error, because the Act, D.C. OFFICIAL CODE § 42-3502.16(g), requires all OAD proceedings to be in compliance with the DCAPA, D.C. OFFICIAL CODE § 2-509(c). It requires the preservation of record testimony. See Joyce v. Webb, TP 20,720 & TP 20,739 (RHC July 31, 2000); Youssef v. Cowan, TP 22,784 (RHC Sept. 27, 2000); Burnes v. Charles E. Smith Management, Inc., TP 23,962 (RHC June 18, 1999). Moreover, the Commission has remanded cases for failure to preserve the hearing tape or because of missing portions of testimony on a hearing tape, as in this case, or missing testimony in a transcript. See Mellon Property Management Co. v. Jimoh, TP 23,467 (RHC Apr. 24, 1997); Holberg v. Davis, TP 23,529 (RHC Apr. 11, 1996), Canon v. Stevens, TP 23,523 (RHC Apr. 11, 1996); Allen v. Yoon, TP 21,804 (RHC Aug. 7, 1992); Hashim v. Peerless Properties, TP 21,877 (RHC Aug. 5, 1992); Tenants of Park Monroe v. Hagans Management Co., TP 2760 (RHC Oct. 26, 1988). Similarly, when the agency lost records, the Commission ordered a remand due to the lack of a complete

certified record for review. Thibodeau v. Tenants of Emerson Gardens, TP 22,867(RHC Dec. 31, 1998).

The Commission concludes that the hearing examiner failed to preserve all of the testimony of Khafra as demonstrated by the amount of testimony on the hearing tape compared to the hearing examiner's summary of Khafra's testimony in the decision and order. This error violated the DCAPA and prevents the Commission from its review of the substantial evidence in the entire record before the hearing examiner. Thus, this issue is remanded for hearing to allow Khafra to testify again and for the hearing examiner to record and consider all of his testimony.

B. Whether the Appeal Should be Denied, Because the Tenant Has Not Provided A Clear and Concise Statement of the Alleged Errors

The Housing Provider's Responsive Brief, p. 1,[4] requested that the appeal be dismissed, because the Tenant had not complied with the Commission's rule, 14 DCMR § 3802.5(b).[5] The Housing Provider asserted, "the Tenant's Notice of Appeal, even if taken together with the brief, is

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[4] Housing Provider's Responsive Brief, hereinafter, referred to as "HP Brief."

[5] 14 DCMR § 3802.5 states, in part:

> The notice of appeal shall contain the following:

vague and confusing to the point of incomprehensibility. It is impossible to tell with confidence what the issues are that the Tenant is asking the Commission to consider. Therefore, the appeal should be denied for failure to comply with 14 DCMR § 3802.5(b)." HP Brief at 3.

The Tenant used the words, "GROSS ERRONEOUS FINDINGS OF FACT" as the sixth issue in the notice of appeal. As a follow-up, he listed issues 1-10 in the Tenant's Brief under the words, "GROSS ERRONEOUS FINDINGS OF FACT." Since the brief was attached to the notice of appeal, which referred to the brief in the seventh (7th) statement, the issues raised in the brief were timely filed. Cf. Assalaam v. Lipinski, TP 24,726 (RHC Apr. 18, 2000), (where the Commission disallowed an attempt to amend the notice of appeal after the time expired to file the notice of appeal.) The distinction in the instant case from Assalaam is the Tenant timely and simultaneously filed both the notice of appeal and the brief. Accordingly, the issues listed in the brief were timely filed for consideration on appeal.

(b) The 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 addition, the Commission denies the Housing Provider's motion to dismiss the Tenant's appeal for the following reasons. First, as noted in the first preliminary issue, the record is incomplete due to the hearing examiner's failure to completely record the testimony of the Tenant's witness, Khafra. Second, the record is flawed due to the failure of the hearing examiner to properly report and consider the testimony of two witnesses, as described below in section IV on testimonial errors. However, the Housing Provider's motion is granted, in part, on the Tenant's statements that do not present issues for review in the notice of appeal. See pp. 1 of 2 - 2 of 2 of the notice of appeal. Those statements follow:

> 1. The Hearing Examiner Carl Bradford by making a critical misrepresentation of material fact [sic] numerous and substantial erroneous statement and findings of fact.
>
> 2. The Hearing Examiner, Carl Bradford by making a critical misrepresentation of fact, short-circuited the administration process and cut off Wondimu Mersha's right.
>
> 3. Because of misrepresentations of the Hearing Examiner, it prevented the public from knowing the actual facts.
>
> 4. Some of the findings were left in the first order.
>
> 5. The Hearing Examiner rejected evidence presented by the petitioner.

6. The Hearing Examiner GROSS ERRONEOUS FINDING OF FACT [sic].

7. The brief is filed (attached) on the grounds that the above statements [sic].

8. And for such other and further relief as this Commission may deem appropriate.

The Tenant's Brief attached to the notice of appeal contains the three (3) statements below at p. 3 of 6.

1. Office of Adjudication for discrimination on the basis of race, color or national origin and disability in the in decision under the District of Columbia Human Rights Act of 19977 [sic], Section 1-2556.[6]

2. The Hearing Examiner disregarding the existing regulations partitioning [sic] to ex parte communication.

3. There are literally dozens government attorneys and private power full [sic] attorneys to represent the landlord. It cast [sic] the petition [sic] considerable tim [sic] and resources clarifying the issue in this case, rendering a numbers page decision. The landlord, a profit-masking [sic] entity, it is not entitled to taxpayers-subsidized the wealthless [sic] property owner.

The Commission determined that the eight (8) statements in the notice of appeal and that three (3) of the statements in the brief, a total of eleven (11) statements, do not refer to errors by the hearing examiner in the decision and order as required by 14 DCMR § 3802.5(b). Voltz v. Pinnacle Realty Management Co., TP 25,092 (Sept.

[6] The Act does not grant jurisdiction over housing discrimination cases involving race, color or national origin.

28, 2001) at 12-13; Hagner Management Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999) at 39. Accordingly, those eleven (11) statements are dismissed, because they fail to state issues in this appeal.

IV. Testimonial Errors

Whether the Examiner's Use of Testimonies of Two Witnesses in TP 24,302 Rather Than in TP 24,970 Constituted Error

The Tenant's Brief raised the issues of erroneous findings of facts[7] in the OAD decision and order. He attached his brief to the notice of appeal and referred to it in issue 7 of the notice of appeal by stating, "[t]he brief is filed (attached) on the grounds that the above statements [sic]." A reading of the brief attached to the notice of appeal revealed that the Tenant's assertions of erroneous findings of fact referred to issues 1-3 listed in the issues above, p. 6. Issues 4-5 in the brief, see p. 6 above, relate to whether the testimonies of two witnesses, Linda Ellis and Marilyn Killingham, were accurately reported by the hearing examiner and properly considered in the findings of fact and conclusions of law in the decision and order. Those issues are discussed below.

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[7] See issues 1, 2, 3, & 6 listed above in Section II at 6 & 7.

A. Whether the Examiner's Use of the Testimony of Linda Ellis in TP 24,302 Rather Than TP 24,970 Constituted Error

The Tenant wrote in his brief:

> The hearing examiner erroneously reported the testimony of Linda Ellis, Housing Inspector. Rather than report the actual testimony the hearing examiner erroneously copied verbatim the testimony of Linda Ellis from a May 8, 1997 hearing in case no. TP 24,302. (See attached copy of the page 5 of the Decision and Order in TP 24,302 issued August 27, 1997.)[8] The actual testimony of Ms. Ellis is [sic] this case was that there were numerous violations and submitted written findings of violations she found as a result of an inspection of the premises. (See attached violations notices.) The hearing examiner reported that she testified that there were no violations when the testimony in the case was that there were 17 violation [sic] in the unit and her filed report verifies such testimony. (emphasis added.)
>
> Petitioner requests that the Commission take judicial notice of such facts on the record.

Tenant's Brief, p. 2 of 6.

The Housing Provider wrote in its brief and argued to the Commission that the inspection by Ms. Ellis occurred on June 5, 2000, which was after the Tenant's petition was filed on May 10, 2000. Therefore, the Housing Provider did not receive notice in the petition of the housing code violations in inspector Ellis' report. Accordingly, the Housing Provider argued those violations cannot be

[8] Page 5 was missing as an attachment to the Tenant's Brief.

considered in this appeal and those violations must be dismissed. HP Brief at 6-9.

The Commission's review of the OAD decision in TP 24,302 showed the following summary of Ellis' testimony by the hearing examiner in that earlier case.

> Testimony of Linda Ellis, Housing Inspector:
>
> Inspector Ellis testified that on one occasion when she was requested to inspect the Petitioner's [Tenant's] apartment. [sic]. She could not remember very much about the inspection of the unit because she does not have her records. She does remember seeing some dampness, some cracking and peeling paint on a desk in the living room. She could not remember any other thing about the inspection of the unit.
>
> The Examiner based upon review of the record as a whole is persuaded that there were housing code violations in the accommodation as claimed by Petitioner. However, the examiner is not persuaded that they were substantial based on timely notice of violation and failure to timely correct or abate. Based on the testimony and evidence (pictures) provided by the Petitioner in this matter.
>
> The question becomes whether this reduction in related services in substantial as in Hagner Management Corp. v. Lewis, T/P #10,303 (RHC, Jan 25, 1983). The Examiner concludes the reduction was not substantial concerning the issue of [the] hole in the wall, lack of elevator service, leaking convector in the living room. The Housing inspection report did indicate the Respondent was cited for elevator deficiencies which is still outstanding. However that related to only one of the two elevators. There was a notice of peeling paint in Petitioners [sic] unit. However, there was no evidence that the violations were substantial. The record does reflect that the Respondent was attempting to

make repairs of all the units and common areas in the housing accommodations. Some tenants were inconveniences [sic] more then others during the renovation of the building. There is nothing in the record to suggest the conditions in the building were a threat to the health, safety and welfare of the tenants in the housing accommodation. The housing inspector did not indicate that was the case in their inspection reports or testimony regarding the common areas or Petitioner's unit.

The Examiner concludes that the Respondent continued to made [sic]repairs to the front door even though the tenants continued to break it.

As to the other violations the Examiner is persuaded that there were outstanding violations in the unit based on housing inspector Linda M. Ellis [sic] testimony related back to 1995. The inspector did not remember the leaking convector, the hole in the kitchen, the claimed roach infestation, the plaster debris alleged to be plied [sic] up on the floor and the security system. However, the Examiner cannot find based on the testimony that these violations were substantial in nature, duration and severity of the myriad conditions about which Petitioner's [sic] complained in his petition. Petitioners [sic] provided insufficient evidence as in Clark v. Capital Park Towers, T/P #11,101 (RHC, July 9,1984)to find substantial reduction in service based on the violation [sic] mentioned above. Allen v. District of Columbia Rental Housing Commission, 538 A.2d 752,754(D.C. 1988). The housing provider testified that there was some notice of housing code violations as testified by the inspectors. There may have been some inconvenience but no reduction in services because all violations were abated in a reasonable and timely manner. Based on the disputed testimony the Examiner is persuaded by the Respondent's testimony that any time there was notice of a problem in the housing accommodation, repairs were made in a reasonable and timely manner. The Examiner made a credibility determination in favor of the housing

> provider in spite of the conflicting testimony. Fazekas v. Dreyfuss, TP 20,394 (RHC Apr.14, 1989). It is the duty of the Examiner to determine the credibility of witnesses and weight given to their testimony. Accordingly, the issue of reduction in service is dismissed.

Mersha v. Marina View Towers Apartments, TP 24,302 (OAD Jan. 11, 2000) at 4-5.

In the instant decision and order, TP 24,970, the hearing examiner wrote:

> Testimony of Linda Ellis:
>
> Inspector Ellis testified that on one occasion when she was requested to inspect the Petitioner's apartment, she did not write up any housing code violations; however, she recalls to the best of her recollection that there was a hole in the Petitioner's kitchen wall. She does not recall any other violations in Petitioner's unit.

Mersha v. Marina View Tower Apartments, TP 24,970 (OAD May 1, 2001).

A summary of the testimony of Linda Ellis on the OAD hearing tape for this case follows. Ellis testified that she inspected the Tenant's unit on June 5, 2000. Her inspection revealed that a door had defective hardware, a hole was in the hall closet, the kitchen had a defective stove, and there was a hole in the wall in the bathroom. In the living room she saw the walls had cracks, loose paint, and dampness. The living room ceiling had loose and cracked paint and dampness. Ellis testified that the

Venetian blinds in the living room were defective. She saw two mice by the water closet in the bathroom and a water bug in the bathtub. Ellis recalled writing an earlier housing notice, but she did not remember the violations. She testified that the Housing Provider was given notice of the June 5, 2000 inspection on July 25, 2000.

In his Post Hearing Brief, pp. 5-6, the Tenant alleged that a portion of Ellis' testimony was not recorded. He noted that Ellis was testifying at the end of the first tape and there was silence and gap of no sound at the beginning of the second hearing tape.

The housing provider moved in its Brief to strike Ellis' testimony, because the inspection occurred on June 5, 2000, after the tenant petition was filed on May 10, 2000.

The Commission's summary of Ellis' testimony on the first OAD hearing tape clearly shows that housing inspector Ellis' testimony was different from the testimony the hearing examiner reported in his decision and order in this case. Moreover, the Tenant's allegation that a portion of Ellis' testimony was missing from the beginning of the second OAD hearing tape is not supported by the sound or testimony on the first hearing tape. Ellis was not

the witness who was testifying when the first tape ended. The Tenant's witness, Khafra, was testifying at the end of the first hearing tape. See discussion in preliminary issue A above.

This issue is remanded for accurate reporting of Ellis' testimony and consideration of that testimony, along with the argument of the Housing Provider about the relevance of Ellis' testimony, because Ellis' inspection occurred after the filing of the petition.

B. Whether the Examiner's Use of the Testimony of Marilyn Killingham in TP 24,302 Rather Than in TP 24,970 Constituted Error

The Tenant also wrote in his brief:

"The hearing examiner erroneously reported the testimony of Marilyn Killingham. Here again the hearing examiner copied the testimony of Killingham from her 1997 testimony as reported in Decision and Order in TP 24,302 ... and did not report or comment on her testimony in this hearing." Tenant's Brief, p. 3 of 6.

A comparison of Ms. Killingham's testimony in TP 24,302 with her testimony in the instant case follows:

Testimony of Marilyn Killingham [TP 24,302]:

> Mrs. Killingham testified on behalf of the Petitioner. She is a tenant in the building who has been involved in prior litigation with the Respondent. She testified that she has visited Mr. Mersha's apartment and observed the hole in

> the wall in the kitchen. Further, she observed insects (roach) infestation in his unit, water damage from a leaking convector. She testified further that, in her opinion, the elevators did not always operate satisfactorily. She stated that she is confined to a wheel chair, and that when the elevators does [sic] not stop at the same level as the floor, makes it very difficult for her to have access to all floors.

Mersha v. Marina View Tower Apartments, TP 24,203 (OAD Jan. 11, 2000) at 4.

> Testimony of Marilyn Killingham [TP 24,970]:
>
> Mrs. Killingham testified on behalf of the Petitioner. She testified that she has visited Mr. Mersha's apartment and observed the hole in the wall in the kitchen. Further, she observed insect infestation in his unit and water damage from a leaking convector. She further stated that, in her opinion, the elevators did not always operate satisfactorily. She stated that she is in a wheel chair and that when the elevators did not stop at the same level as the floor it was very difficult for her to access [sic] elevator.

Mersha v. Marina View Tower Apartments, TP 24,970 (OAD May 1, 2001) at 10.

It is clear from the two quotations of Killingham's testimony from two different cases that the hearing examiner copied her testimony from TP 24,302 into this case, TP 24,970. That violated the DCAPA requirement that the hearing examiner consider the testimony in each case separately. The findings of fact shall consist of a concise statement of the conclusions upon each contested

issue of fact. D.C. OFFICIAL CODE § 2-509(e) (emphasis added). The issues were different in each case, but the hearing examiner used the testimony from the first case, TP 24,302, in the second case, TP 24,970. That was error, because he did not make his findings on the substantial evidence in this record, especially from the testimony of the three witnesses discussed in this decision.

As stated in issue III A above, p. 9, the Commission must review all of the record and determine whether the decision and order is based on substantial evidence in the record. "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 Joyce v. Webb, TP 20,720 & TP 20,739 (RHC July 31, 2001); Burnes v. Charles E. Smith Management, Inc., TP 23,962 (RHC June 18, 1999). A vital part of the hearing record is the testimony of the witnesses. See D.C. OFFICIAL CODE § 2-509(b), which requires consideration of "oral … evidence." In addition, the official record of a contested case must contain "testimony." D.C. Official Code 2-509(c). Inherent in that requirement is that all the testimony in a case be properly recorded and considered, not allowing for missing testimony and not

allowing the substitution of testimony from another case. A reviewing court, like the Commission, must determine whether the decision flows from the findings of fact and whether those findings of fact have a substantial basis in the evidence, such as testimony. George Washington Univ. v. District of Columbia Bd. of Zoning Adjustment, 429 A.2d 1342 (D.C. 1981); Woodridge Nursery School v. Jessup, 269 A.2d 199 (D.C. 1970). In this appeal, the Commission determined that the findings of fact and conclusions of law did not flow from the substantial evidence in the record, because of the missing testimonies of Killingham, Khafra and Ellis. The Killingham testimony was neither properly reported nor properly summarized by the hearing examiner in the OAD decision and order. Accordingly, the hearing examiner is reversed and this issue is remanded for consideration of the testimonies of Khafra, Killingham and Ellis in this case.

V. OTHER ERRORS OF FACT

The Tenant's Brief and the Tenant's Post Hearing Brief stated and discussed the three issues below as errors of fact in the decision.

1. Description of the property was erroneous.

2. The lot and square for the property was erroneous.

3. The name of the management company was erroneous.

The Tenant provided his view of the correct facts for the description of the property, the lot and square numbers, and the name of the management company, as well as the owner. The Tenant also requested that the Commission take judicial notice of the correct facts as he presented them in his brief. (See Tenant's Brief at 1 & 2 of 6, Tenant's Post Hearing Brief at 2-4.) In addition, in the Post Hearing Brief, the Tenant stated that he cited eleven (11) different names of housing providers, "who were supposed to have been served a copy of the petition by the Office of Adjudication for their individual appearance at the hearing." Id. at 4.

The HP Brief acknowledged the three errors listed above and stated they were the result of the hearing examiner's use of another decision and order as the template for the decision in this case. (HP Brief Appendix (App.) at 1). Next the housing provider gave its view of the correct description of the property, as the response to the Tenant's assertion that the description of the property was erroneous. The Housing Provider did not address the

lot and square numbers, nor the correct name of the management company.

The Commission reviewed the Tenant Petition at page 2, and noted that the petition form required information on the name of housing provider or property manager, address, telephone number, and designation as either the housing provider or manager. The Tenant only provided the name, Andre Clanagan, as the property manager, along with his address and telephone number. Clanagan appeared and testified for the Housing Provider at the OAD hearing. The Tenant merely listed the names of other entities, which he now claims should have been served by OAD to appear at the hearing. However, the Tenant did not provide the addresses and telephone numbers for them, as required by the petition form. See 14 DCMR § 3903.4(c), which provides that the Rent Administrator may dismiss a petition if it is not prepared in accordance with the instructions of the Rent Administrator. Accordingly, the issue related to the service of the OAD notice of hearing on the other named entities in the petition that are alleged to be housing providers is denied, because the Tenant did not provide addresses and telephone numbers for them in compliance with the Rent Administrator's instructions on the petition form and the relevant regulation.

The two remaining issues relate to the description of the property, including the lot and square numbers. The Commission cannot make findings of fact. Meir v. District of Columbia Rental Accommodations Comm'n, 372 A.2d 566, 568 (D.C. 1977). The Commission is limited to a review of the Rent Administrator's decision and the determination whether that decision was: 1) arbitrary and capricious, 2) not in accordance with law, or 3) unsupported by substantial evidence. D.C. OFFICIAL CODE § 42-3502.16. Moreover, the Commission cannot use judicial notice to resolve contested issues. Johnson v. District of Columbia Rental Hous. Comm'n, 642 A.2d 135 (D.C. 1994). Accordingly, the first two issues listed above p. 25, are remanded to the Rent Administrator for findings of fact, and the third issue, that the name of the management company was erroneous, is denied, because the Tenant did not provide the addresses and telephone numbers for other alleged housing providers, as required by the tenant petition form.[9]

VI. MISCELLANEOUS

The Tenant requested in his Brief, p. 6 of 6, and in his Post Hearing Brief, p. 13, that the Commission order reimbursement for payment of damaged personal items, such

[9] This issue was decided because it does not depend on evidence adduced at the hearing. It related solely to the content of the tenant petition.

as furniture, carpet, linens, and other personal items. The Act does not grant jurisdiction over civil claims of property damages and losses. Whitmore v. Myers, TP 20,355 (RHC Sept. 17, 1987), cited in Assalaam v. Lipinski, TP 24,726 (RHC Aug. 31, 2000). Therefore, this issue is denied.

VII. THE SIX VIABLE ISSUES

The Tenant has six viable issues in his brief, and they are listed below:

A. Whether the Housing Provider made a false charge, retaliatory action and deliberate harassment.

B. Whether there were housing code violations in the Tenant's rental unit.

C. Whether there were housing code violations in the common areas of the housing accommodation.

D. [Whether error occurred when] "Ms. Jonson admitted in her testimony that both rental complex [sic] were operated without current housing business licensees."

Tenant's Brief at 3 of 6 - 4 of 6.

In addition, the two issues listed on p. 24, infra, are viable:

A. Whether the description of the property was erroneous.

B. Whether the lot and square for the property was erroneous.

The six viable appeal issues are rendered moot, because the record of Khafra's testimony was incomplete,

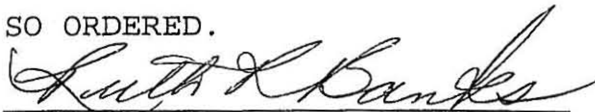
and the record testimony of Ellis and Killingham was not properly considered by the hearing examiner in the OAD decision. Based on the Commission's decision, on remand, the issues raised in the tenant petition must be decided after consideration of the complete testimony of Khafra, Ellis, and Killingham.

VIII. CONCLUSION

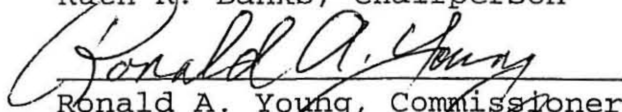
This case is remanded to the Rent Administrator for completion of the hearing record to include the entire recorded testimony of Khafra, and consideration of that testimony. The case is also remanded to the hearing examiner to correctly report and consider the record testimony of two witnesses, Killingham and Ellis. Finally, this case is remanded for the hearing examiner to make findings of fact and conclusions of law on the issues raised in the tenant's petition, listed above in Section I, pp. 1-3. The Commission dismissed the statements listed in the notice of appeal and in the Tenant's Brief, that did not give notice of errors by the hearing examiner in the OAD decision. However, the six viable issues from the Tenant's Brief are rendered moot, because the lack of a complete hearing record required the Commission to remand

this case for another decision and order, after consideration of the complete testimonies of Khafra, Ellis, and Killingham. A de novo hearing is not ordered.

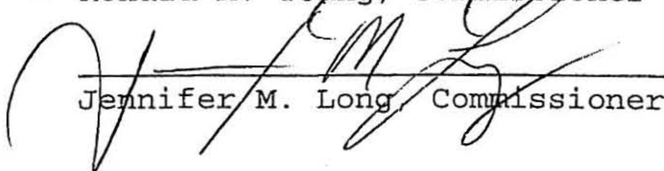
SO ORDERED.



Ruth R. Banks, Chairperson



Ronald A. Young, Commissioner



Jennifer M. Long, Commissioner

Certificate of Service

I certify that a copy of the foregoing decision and order in TP 24,970 was mailed postage prepaid this **21st day of December 2001**, to:

Mr. Wondimu Mersha
1100 Sixth Street, S.W.
Unit 209
Washington, D.C. 20024

Nathaniel Sims, Esquire
1912 Spruce Drive, N.W.
Washington, D.C. 20012

Eric Von Salzen, Esquire
Hogan & Hartson, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109

LaTonya Miles
Contact Representative