DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 25,092

In re: 1801 16th Street, N.W., Unit 707

Ward One

JAMES VOLTZ
Tenant/Appellant

v.

PINNACLE REALTY MANAGEMENT COMPANY
Housing Provider/Appellee

DECISION AND ORDER

September 28, 2001

LONG, COMMISSIONER. This case is on appeal to the District of Columbia Rental Housing Commission from the Rent Administrator's decision in TP 25,092. The tenant filed the appeal pursuant to the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE § 42-3501.01 (2001) et seq.[1] The Act, the District of Columbia Administrative Procedure Act, D.C. OFFICIAL CODE § 2-509 (2001) et seq., and Title 14 of the District of Columbia Municipal Regulations, 14 DCMR §§ 3800 - 4399 (1991) govern the proceedings.

I. OVERVIEW

On September 19, 2000, the tenant filed a petition in which he alleged that the housing provider permanently eliminated services and facilities that were previously

[1] The government of the District of Columbia authorized the compilation of the laws of the District of Columbia in the 2001 Edition of the District of Columbia Official Code. The 2001 Edition represents a recodification of the 1981 Edition of the District of Columbia Code. Many of the numbers, which represented the titles, chapters, subchapters, and sections in the 1981 Edition, were changed in the 2001 Edition. Consequently, the titles, chapters, subchapters, and sections numbers in the Rental Housing Act of 1985 and the District of Columbia Administrative Procedure Act bear new numbers. See Preface to the 2001 Edition, D.C. OFFICIAL CODE.

provided in connection with his rental unit. In response, the housing provider filed a motion to dismiss the tenant petition, alleging that the statute of limitations barred the claim for a reduction in services and/or facilities.[2] The hearing examiner permitted the housing provider to argue the motion to dismiss at the scheduled hearing. After receiving evidence on the motion to dismiss, the hearing examiner concluded the hearing. The hearing examiner subsequently granted the housing provider's motion and dismissed the petition with prejudice. The tenant appeals that decision. For the reasons provided below, the Rental Housing Commission (Commission) reverses the hearing examiner's decision and remands the petition for a hearing de novo.

II. PROCEDURAL HISTORY

James Voltz, who is a tenant at The Somerset House, 1801 16th Street, N.W., unit 707, filed Tenant Petition (TP) 25,092 with the Rental Accommodations and Conversion Division on September 19, 2000. In the petition, the tenant alleged that the housing provider permanently eliminated a service or facility that was previously provided in connection with his rental unit.[3] The housing provider, Pinnacle Realty Management Company, manages the housing accommodation. On October 12, 2000, the housing provider filed a motion to dismiss the petition. On November 7, 2000, the parties appeared for the scheduled hearing. The tenant appeared pro se, and the housing provider appeared with counsel, Richard Luchs. The housing provider argued the motion to dismiss during the November 7, 2000 hearing. On February 28, 2001, the hearing

[2] The housing provider also moved to dismiss a miscellaneous waiting list claim, because it was not within the Rent Administrator's jurisdiction.

[3] The tenant also raised a miscellaneous waiting list claim. During the OAD proceeding, the tenant acknowledged that the Rent Administrator did not have jurisdiction over the wait list claim.

examiner issued the decision and order and dismissed the petition with prejudice. See Voltz v. Pinnacle Realty Management Co., TP 25,092 (Feb. 28, 2001). On March 16, 2001, the tenant filed a notice of appeal from the hearing examiner's decision. The Commission held the appellate hearing on April 30, 2001.

III. ISSUES ON APPEAL

The tenant raised the following issues in the notice of appeal.

A. Whether the hearing examiner erred in finding that the Petitioner assumed occupancy in December of 1998.

B. Whether the hearing examiner erred in determining that the statute of limitations began tolling on or about July 1997.

C. Whether the hearing examiner erred in reaching a decision contrary to the evidence.

D. Whether the hearing examiner erred in reaching a decision that was arbitrary and capricious.

E. Whether the hearing examiner erred in not reaching the issue of whether or not the housing provider reduced or permanently eliminated the tenant's services or facilities when a roof deck was permanently removed from the housing accommodation.

F. Whether the hearing examiner erred in not reaching the issue of whether the tenant is entitled to an adjustment in the rent ceiling at the housing accommodation.

G. Whether the hearing examiner erred in not reaching the issue of whether the tenant is entitled to a reduction in his monthly rent and is entitled to a rent refund for any and all overpayment of rent and accumulated interest since November 1, 1997.

H. Whether the hearing examiner erred in reaching a decision that failed to comply with the law of the District of Columbia, including the DC [sic] Administrative Procedures [sic].

I. Whether the counsel for Pinnacle "failed to disclose a legal authority in this jurisdiction[,]...known to the lawyer to be dispositive of a question and directly adverse to the position of his client[,]" to this Commission.

Notice of Appeal at 3-4.

IV. DISCUSSION

A. Whether the hearing examiner erred in finding that the tenant assumed occupancy in December of 1998.

The hearing examiner erred when he found that the tenant "assumed occupancy in December 1998." Finding of Fact 4, OAD Decision at 4. When the tenant offered testimony in response to the housing provider's motion to dismiss, the tenant stated that he assumed occupancy in November 1997. The housing provider did not offer conflicting evidence. Moreover, the tenant petition and the lease, which was attached to the petition, list November 1997 as the date that Mr. Voltz assumed occupancy. Accordingly, the hearing examiner's finding that the tenant assumed occupancy in December 1998 is reversed, because the substantial record evidence did not support it.[4]

B. Whether the hearing examiner erred in determining that the statute of limitations began tolling in July 1997.

The hearing examiner erred when he concluded as a matter of law that the statute of limitations barred the tenant's claim, because the substantial record evidence did not support his decision. Moreover, the hearing examiner failed to issue adequate findings of fact on the statute of limitations or the underlying claim. Consequently, the conclusion of law did not flow rationally from the findings of fact.

The Act contains a three-year statute of limitations, which provides that no petition may be filed with respect to any rent adjustment more than three years after the

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[4] See D.C. OFFICIAL CODE § 42-3502.16(h), which provides in relevant part:

> 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 of the Rent Administrator, or it may affirm, in whole or in part, the Rent Administrator's decision.

effective date of the adjustment. See D.C. OFFICIAL CODE § 42-3502.06(e).[5] When the tenant alleges that the housing provider violated the Act, the tenant must file a petition within three years of the alleged violation. The tenant filed TP 25,092 on September 19, 2000. Since the tenant filed the petition on September 19, 2000, the alleged violation must have occurred between September 19, 1997 and September 19, 2000.

When the tenant initiated the petition, he completed the Rent Administrator's Tenant Petition/Complaint form.[6] The tenant completed the portion of the form entitled "SERVICES AND/OR FACILITIES,"[7] which contained the following relevant sections:

> (✓) Services and/or facilities provided in connection with the rental of my/our unit(s) have been permanently eliminated.
>
> ( ) Services and/or facilities provided in connection with the rental of my/our unit(s) have been substantially reduced.

Tenant Petition at 4. The check mark on the petition evinced the tenant's desire to allege that the housing provider permanently eliminated related services and/or facilities. In the

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[5] D.C. OFFICIAL CODE § 42-3502.06(e) provides:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment.

In Peerless Properties v. Hashim, TP 21,159 (RHC Oct. 26, 1992), the Commission held that the statute of limitations, codified at D.C. OFFICIAL CODE § 42-3502.06(e), applied to reduction in services and facilities claims.

[6] "The petition shall be filed with the Rent Administrator on a form provided by the Rent Administrator containing the information the Rent Administrator or the Renal Housing Commission may require." D.C. OFFICIAL CODE § 42-3502.16(a).

[7] The services and facilities provision of the Act, D.C. OFFICIAL CODE § 42-3502.11, provides:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in the services or facilities.

motion to dismiss, the housing provider argued that the statute of limitations barred the tenant's reduction in services and facilities claim. However, the tenant alleged a permanent reduction in services and facilities. The tenant's September 19, 2000 action could only survive a statute of limitations challenge, if the housing provider permanently eliminated a related service or facility between September 19, 1997 and September 19, 2000.

At the beginning of the scheduled hearing, Hearing Examiner Word asked the housing provider to present the motion to dismiss. The housing provider's attorney, Richard Luchs, presented oral argument in support of the motion to dismiss. Mr. Luchs argued that the hearing examiner was compelled to dismiss the tenant petition as a matter of law, because "the claims for a reduction in services and/or facilities is [sic] barred by the applicable statute of limitations...." Motion to Dismiss at 1. Mr. Luchs argued that the statute of limitations barred the reduction in services and facilities claim, because the previous property manager removed the roof deck on July 1, 1997. His client, Pinnacle Realty Management Company, became the property manager in March or April of 1998. Pinnacle Management Company did not intend to replace the roof deck.

Mr. Luchs argued that the statute of limitations barred the tenant's claim, because the tenant did not file the petition within three years of the July 1, 1997 removal. In support of his argument, counsel submitted a copy of a decision that he identified as Pearl-Alice Marsh v. Pinnacle Management Co., TP 24,827.[8] The hearing examiner marked this decision as Respondent's Exhibit (R. Exh.) 1 and accepted it as record

[8] The citation for R. Exh. 1 is Castro v. Pinnacle Management Co., TP 24,827 (OAD Mar. 30, 2000). Migel Castro, Asensork Teklehaimanot, Pearl-Alice Marsh, Ruth E. Jones, and Linda E. Dalton appear as the Tenants/Petitioners in the caption of R. Exh. 1.

evidence.[9] When Mr. Luchs completed his remarks, the hearing examiner asked the tenant to respond to Mr. Luchs' argument on the motion to dismiss.

The tenant testified that he signed his lease in October 1997, and began his tenancy in November 1997. When he signed the lease, the property manager told the tenant that he had a great apartment, because it was across from the roof deck. The housing provider indicated that it would reinstall the roof deck in April 1998. The tenant stated that the housing provider placed material on the roof for the reinstallation of the roof deck. The tenant further testified that the management company changed, and the new management company advised the tenants that it would not reinstall the roof deck.

After the tenant presented his testimony, Hearing Examiner Word indicated that he would grant the housing provider's motion to dismiss the petition. When the tenant asked if he could appeal the examiner's decision, the hearing examiner told the tenant that he would lose. The hearing examiner engaged in a lengthy exchange with the tenant. See discussion infra pp. 15-18. Thereafter, the hearing examiner stated that he needed to receive testimony from the housing provider's witness, because the hearing examiner "wanted it to be a fact that the deck was removed when he indicated that it was." OAD Tape Recording (Nov. 7, 2000). Mr. Luchs asked Myles Levin, Investment Manager for Pinnacle Management Company, the following:

> Mr. Luchs: "Is it correct that there used to be a roof deck on that building?"
> Mr. Levin: "That is true."
> MR. Luchs: "Is it also correct that that roof deck was removed on July 1, 1997."

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[9] In the section of the decision entitled "Evidence and Pleadings Considered," the hearing examiner indicated that he considered the "[t]estimony and documentary evidence admitted at the hearing." OAD Decision at 2. R. Exh. 1 was the only documentary evidence that the hearing examiner admitted during the OAD proceeding.

Mr. Levin: "That's correct."
Mr. Luchs: "And that it has not been replaced?
Mr. Levin: "That is so."

Id.

When Hearing Examiner Word issued the decision, it contained the following findings of fact:

1. The subject property is located at 1801-16th Street, N.W.

2. Petitioner is a tenant at [the] subject housing accommodation, where he occupies Apartment [sic] 707.

3. The subject property is managed by Pinnacle Realty Management Company.

4. Petitioner assumed occupancy in December of 1998.

5. Petitioner filed his complaint on September 19, 2000.[10]

Immediately following the findings of fact, was a section of the decision entitled "Conclusions of Law," which stated:

> After a careful evaluation of the evidence and findings of fact, the Examiner concludes, as a matter of law, that:
>
> Petitioner's claim is barred by the 3-year statute of limitations set forth in D.C. Code §45-2526(E)[11] [sic].[12]

In Finding of Fact 5, the hearing examiner found that the tenant filed the complaint on September 19, 2000. However, there were no additional findings of fact relative to the statute of limitations or the permanent elimination claim. The hearing

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[10] Voltz v. Pinnacle Realty Management Co., TP 25,092 (Feb. 28, 2001) at 4.

[11] The statute of limitations, D.C. CODE § 45-2516(e) was re-codified at D.C. OFFICIAL CODE § 42-3502.06(e) (2001).

[12] Id. (emphasis in original).

examiner concluded as a matter of law that the statute of limitations barred the tenant's claim. However, there was no rational connection between the findings of fact and the conclusion of law, because the hearing examiner did not make a finding concerning the date that the statute of limitations began to toll on the tenant's permanent elimination claim.

In the body of the decision, the hearing examiner wrote, "the evidence reflects that the roof deck was removed in July of 1997, prior to Petitioner assuming occupancy of the housing accommodation. Petitioner did not file his Tenant Petition until September 19, 2000, more than three years after the roof deck was removed, i.e. in July of 1997. To have a cause of action, Petitioner needed to have filed his complaint by July of 2000. However, he did not file it until September 2000, approximately [sic] two months after the statute of limitations had tolled." OAD Decision at 3-4.

The Commission may reverse in whole or 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 the Act, 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. See D.C. OFFICIAL CODE § 42-3502.16(h). When the Commission reviewed the record, it determined that the substantial record evidence did not support the hearing examiner's decision.

When the Commission reviewed R. Exh. 1, it noted that Hearing Examiner Gerald Roper made the following pertinent findings of fact in TP 24,827:

> 3. Petitioner [Alice Marsh] took possession of apartment 405 in 1994 and used the roof deck on a regular basis until the housing provider notified the tenants in July 1997 that it was being closed for revocations [sic].

4. Management has advertised vacant rental units in the housing accommodation as having a roof deck available for the tenants.

7. On June 6, 1998, the Petitioner and tenants of the housing accommodation were notified by management that the roof deck would not be installed.

Castro v. Pinnacle Management Co., TP 24,827 (OAD Mar. 30, 2000) at 12.

The record evidence, R. Exh. 1, revealed that the housing provider closed the roof deck for renovations in July 1997, and that on June 6, 1998, the housing provider notified the tenants that it would not reinstall the roof deck. In the petition, the tenant claimed that Pinnacle Realty Management Company permanently eliminated related services and/or facilities. The date that the housing provider closed the roof deck for repairs, cannot be the date from which one measures the tenant's claim that Pinnacle Realty Management Company permanently eliminated the roof deck, particularly when the notice of permanent removal was dated June 6, 1998.

The housing provider based its motion to dismiss on a reduction in services claim, which was not raised in the tenant's petition. The housing provider's election to move to dismiss based on a reduction in services claim did not change the tenant's permanent elimination of a service or facility claim into a reduction in services claim. In the instant case, the tenant's claim that the housing provider permanently eliminated the roof deck did not accrue until the housing provider notified the tenant that it would not reinstall the roof deck. See Cevenini v. Archbishop of Washington, 707 A.2d 768, 770-71 (D.C. 1998) (holding that what constitutes the accrual of a cause of action is a question of law; the actual date of accrual, however, is a question of fact).

The tenant testified that the roof deck was closed for repairs when he assumed occupancy in November 1997. He also stated that the housing provider told him that he had a great apartment, because it was across from the roof deck that would reopen in April 1998. The tenant did not dispute the housing provider's testimony that the roof deck was closed for repairs on July 1, 1997. A temporary closure for repairs in July 1997, coupled with testimony of an expressed intention to reopen the roof deck following the repairs, was not tantamount to a permanent elimination of the roof deck in July 1997. There was no basis for a claim that the housing provider permanently eliminated the roof deck, until the housing provider advised the tenant that it would not reopen the roof deck.

The record evidence, R. Exh. 1, Finding of Fact 7, revealed that on June 6, 1998, the housing provider notified the tenants that the roof deck would not be reinstalled. The Commission affirmed Finding of Fact 7 in Pinnacle Management Company v. Marsh, TP 24,827 (RHC Sept. 7, 2000) at 9. The Commission held that "[i]n this case, the tenants were notified that the roof deck was discontinued on June [6], 1998, and the tenant's [Marsh] petition was filed on October 13, 1999, which was within the three (3) year statute of limitations in the Act." Id.

The statute of limitations, D.C. OFFICIAL CODE § 42-3502.06(e), bars the filing of a petition more than three years after the effective date of the underlying claim. On September 19, 2000, the tenant filed a petition and alleged a permanent reduction in related services and/or facilities. The statute of limitations would serve as a bar to the tenant's claim if the record evidence reflected that the housing provider permanently eliminated the roof deck more than three years before the tenant filed the petition. There

was no evidence that the housing provider permanently eliminated the roof deck more than three years before the tenant filed the petition.

Evidence relative to the statute of limitations and the tenant's permanent elimination claim, was found the testimony and documentary evidence. The tenant testified that the roof deck was closed for repairs when he assumed occupancy. However, the housing provider advised him that it would reinstall the roof deck following the repairs. Finding of Fact 7, in R. Exh. 1, revealed that on June 6, 1998, the housing provider notified the tenants that the roof deck would not be installed. The substantial record evidence did not support the hearing examiner's determination that the statute of limitations barred the tenant's claim that the housing provider permanently eliminated related services and facilities. Accordingly, the hearing examiner's decision that the statute of limitations barred the tenant's claim is reversed.

C. Whether the hearing examiner erred in reaching a decision contrary to the evidence.

D. Whether the hearing examiner erred in reaching a decision that was arbitrary and capricious.

The regulation, 14 DCMR § 3802.5, provides that the notice of appeal shall contain a clear and concise statement of the alleged errors in the hearing examiner's decision. This regulation requires parties to clearly state the nature of the alleged error. In Hampton House North Tenants Ass'n v. Shapiro, CIs 20,669-20,670 (RHC Feb. 9, 1998), the Commission held that an issue, which merely alleged that the hearing examiner's decision was arbitrary and capricious, did not comply with 14 DCMR § 3802.5. The Commission held that the issue was too vague for review, because the appellant did not specifically state what was arbitrary and capricious.

In Issue C, the tenant alleged that the decision was contrary to the evidence. In Issue D, the tenant alleged that the decision was arbitrary and capricious. These issues were too vague for review, because the tenant did not state what was arbitrary and capricious, and he did not allege which portion of the decision was contrary to any specific evidence.[13] Accordingly, the Commission cannot review Issues C and D, because they did not comply with 14 DCMR § 3802.5.

E. Whether the hearing examiner erred in not reaching the issue of whether the housing provider reduced or permanently eliminated the tenant's services or facilities when the housing provider permanently removed a roof deck from the housing accommodation.

The hearing examiner erred when he failed to reach the issue of whether the housing provider permanently eliminated the tenant's services or facilities when the housing provider permanently removed a roof deck from the housing accommodation. The hearing examiner permitted the tenant to respond to the housing provider's motion to dismiss. However, the hearing examiner did not afford the tenant an opportunity to present his claim by oral or documentary evidence, as required by 14 DCMR § 4000 and the DCAPA, D.C. CODE § 2-509.

The regulation, 14 DCMR § 4000, governs the Rent Administrator's hearings. Pursuant to a delegation of authority from the Rent Administrator, hearing examiners conduct the Rent Administrator's hearings.[14] The regulations describe the manner in which the hearing examiners must conduct the hearings. For example, 14 DCMR § 4000.3 provides that "at each hearing, the hearing examiner shall explain the nature of the

[13] The tenant filed a twelve-page notice of appeal. The tenant listed the issues on appeal and included a detailed discussion of several of the issues. However, he did not include Issues C and D in the discussion.

[14] See D.C. OFFICIAL CODE § 42-3502.04(d).

proceedings, state the contested issues involved, and administer an oath or affirmation to all persons who will testify." In addition, 14 DCMR § 4000.2, provides that "all hearings shall be conducted in accordance with the procedures for contested cases set forth in the D.C. Administrative Procedure Act [DCAPA]."

The DCAPA prescribes the parties' right to a hearing, and it sets forth the manner in which the hearing examiner must conduct the hearing. The DCAPA, D.C. OFFICIAL CODE § 2-509, provides:

> (a) In any contested case, ...[a]n opportunity shall be afforded all parties to present evidence and argument with respect [to the issues involved].
>
> (b) ... Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

In accordance with 14 DCMR § 4000.3, Hearing Examiner Word stated the contested issue when he convened the hearing. The hearing examiner indicated that the tenant alleged a permanent reduction in services and facilities. During the introductory remarks, Hearing Examiner Word stated that the Act, regulations, and the DCAPA were controlling. In addition, he advised the parties that he would provide the tenant with an opportunity to present his case, and then provide the housing provider an opportunity to present its case. The hearing examiner acknowledged the housing provider's motion to dismiss, which the hearing examiner stated that he planned to address at the hearing.

Following the hearing examiner's introductory remarks, he invited the housing provider to present the motion to dismiss. Mr. Luchs presented argument in support of the motion to dismiss. After the hearing examiner received counsel's argument, the hearing examiner asked: "Is there a response from you sir, you being the Petitioner?"

OAD Hearing Tape (Nov. 7, 2000). The hearing examiner then administered an oath and asked the tenant to respond to Mr. Luchs' argument in support of the motion to dismiss. Following the tenant's testimony, the hearing examiner received the housing provider's testimony in support of the motion to dismiss. After receiving the arguments of counsel and testimony from the parties concerning the motion to dismiss a reduction in services claim, the hearing examiner concluded the hearing.

The hearing examiner did not conduct the hearing in accordance with the DCAPA, because he did not allow the tenant to present his case, submit rebuttal evidence, or conduct cross-examination for a full and true disclosure of the facts. In the petition, the tenant alleged that the housing provider permanently eliminated services or facilities provided in connection with his rental unit. In direct contravention of the DCAPA, the hearing examiner did not afford the tenant an opportunity to present evidence or arguments with respect to the issue raised in the tenant petition.

At the beginning of the hearing, Hearing Examiner Word indicated that he would hear the case in accordance with the DCAPA. In addition, he indicated that he would give the tenant an opportunity to present his case. However, the hearing examiner only afforded the housing provider an opportunity to present its motion to dismiss. Although he indicated his intention to hold the dismissal with prejudice in abeyance, the hearing examiner did not afford the tenant an opportunity to present evidence of the permanent elimination of a service or facility claim. This was reversible error.

Moreover, the hearing examiner's attitude and remarks during the proceeding exceeded the bounds of 14 DCMR § 4000 and created an atmosphere that prevented a fair hearing. When Hearing Examiner Word convened the scheduled hearing, he advised

the parties that he was not scheduled to work on the day of the hearing. Hearing Examiner Word indicated that he called the office from Fairfax and learned that he had two hearings. When he arrived, he had two hearings at the same time. He told the parties that he would work through the problem and apologized for the delay.

After the hearing examiner completed these remarks, he indicated that he received the housing provider's motion to dismiss, which he "planned all along to handle at the hearing." OAD Tape Recording (Nov. 7, 2000). Then, he asked the housing provider to present the motion. Mr. Luchs, the housing provider's attorney, presented an argument in support of the motion to dismiss, but he did not initially call a witness to testify. When Mr. Luchs completed his argument, the hearing examiner asked the tenant to respond to Mr. Luchs' remarks. After the tenant testified, the hearing examiner indicated that he was going to grant the housing provider's motion to dismiss. When the hearing examiner indicated that he would grant the housing provider's motion to dismiss, the housing provider had not presented any testimony in support of the motion to dismiss. The tenant asked if he had the right to appeal, and the hearing examiner stated, "You are not going to win ... you don't need to waste your time..." Id. Thereafter, the hearing examiner stated that he wanted to hear from the housing provider's witness, because the hearing examiner "wanted it to be a fact that the deck was removed when he indicated that it was." Id.

After the hearing examiner received the housing provider's testimony, he stated that he had "no choice but to dismiss this case as it relates to the roof, with prejudice." Id. After making these remarks, the hearing examiner asked the parties to submit proposed decisions and orders. Mr. Luchs indicated that he would submit his decision by November 17, 2000, which was within ten days of the hearing. The tenant advised the

hearing examiner that he needed additional time, because he wanted to retain an attorney. The hearing examiner denied the tenant's request for additional time to retain an attorney and stated, "Maybe you could talk to some of the law school people or read the statute and satisfy yourself." Id. Thereafter, the hearing examiner indicated that he would hold his decision in abeyance. However, the hearing examiner did not provide an opportunity for the tenant to present the permanent elimination of a service or facility claim.

In Price v. Price, 174 A.2d 83 (D.C. 1961), the court reversed and remanded for a new trial when the trial judge prejudged the issues and made remarks that demonstrated hostility toward a party. The court held that "the trial judge by his attitude and remarks created 'an atmosphere of hostility which prevent[ed] the fair and impartial trial to which a litigant is entitled.'" Id. at 83-84 quoting Home Insurance Co. v. Eggleston, 170 A.2d 781, 783-784 (D.C. 1961).

In the instant case, the hearing examiner prejudged the case, exceeded the bounds of 14 DCMR § 4000, and created an atmosphere that denied the tenant a right to a fair hearing. The hearing examiner prejudged the case by stating that he would grant the housing provider's motion before receiving evidence from the housing provider, and when he advised the tenant that the tenant would lose an appeal. In addition, Hearing Examiner Word's comments that the tenant could read the statute himself or talk to "the law school people," in response to the tenant's request for time to retain counsel, were inappropriate. In addition, the hearing examiner exceeded the bounds of 14 DCMR § 4000 when he stated that he "wanted it to be a fact that the roof deck was removed when you [Mr. Luchs] stated it was." Hearing Examiner Word then permitted Mr. Luchs to ask

his witness a series of leading questions, which "put into [the witness'] mouth words to be echoed back."[15] See discussion supra at pp. 7-8. Hearing Examiner Word's remarks created an atmosphere, which denied the tenant a fair hearing. Equally egregious, however, was the fact that the hearing examiner failed to afford the tenant an opportunity to present the claim that he raised in the petition, as mandated by the DCAPA.

Accordingly, the hearing examiner's decision is reversed, and this matter is remanded for a hearing de novo.

F. Whether the hearing examiner erred in not reaching the issue of whether the tenant is entitled to an adjustment in the rent ceiling at the housing accommodation.

The hearing examiner erred in not reaching the issue of whether the tenant is entitled to an adjustment in the rent ceiling at the housing accommodation.

The services and facilities provision of the Act, D.C. OFFICIAL CODE § 42-3502.11, provides:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in the services or facilities.

Before the hearing examiner can determine whether the tenant is entitled to a rent ceiling adjustment, the hearing examiner must first determine if the housing provider substantially increased or decreased a related service or facility. If the housing provider substantially increased or decreased a related service or facility, the hearing examiner may increase or decrease the rent ceiling.

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[15] BLACK'S LAW DICTIONARY 800 (5th ed. 1979) defining leading question.

In the instant case, the hearing examiner erred when he failed to conduct a DCAPA hearing and permit the tenant to present evidence on the claim that he raised in the petition. As a result, the hearing examiner could not determine if the housing provider substantially decreased a related service or facility. Since the hearing examiner did not make this threshold determination, he could not determine whether the tenant was entitled to a rent ceiling adjustment.

On remand, the hearing examiner is instructed to conduct a hearing de novo in accordance with the Act, the regulations, and the DCAPA. The hearing examiner must make findings of facts and conclusions of law on the permanent elimination of a service or facility claim that the tenant raised in the petition. If the hearing examiner determines that the housing provider substantially decreased a related service or facility, he may decrease the rent ceiling to reflect the value of the change. If there is a substantial decrease in related services or facilities, the hearing examiner's decision should contain findings of fact and conclusions of law concerning the legal rent ceiling for the tenant's rental unit. The findings should indicate whether the rental unit is eligible for a rent ceiling adjustment. The hearing examiner should also determine whether the tenant is entitled to a rent adjustment or rent refund. See discussion infra Issue G.

G. Whether the hearing examiner erred in not reaching the issue of whether the tenant is entitled to a reduction in his monthly rent and is entitled to a rent refund for any overpayment of rent and accumulated interest since November 1, 1997.

The penalty provision of the Act, D.C. OFFICIAL CODE § 42-3509.01(a), provides:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, or (2) substantially reduces or eliminates related services previously provided of a rental init, shall be held liable by the Rent Administrator or the

> 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.

As indicated in Issue F, the hearing examiner must conduct a DCAPA hearing on the issue raised in the tenant petition, and issue findings of facts and conclusions of law on the contested issues. If the hearing examiner determines that the housing provider permanently eliminated a service or facility, he may reduce the rent ceiling in accordance with the Act. If the rent charged is higher than the reduced rent ceiling, the housing provider is liable for a rent refund or for treble that amount in the event of bad faith. However, if the rent charged is equal to or lower than the reduced rent ceiling, no rent refund is required. See Hiatt Place Partnership v. Hiatt Place Tenant's Ass'n, TP 21,149 (RHC May 1, 1991). Accordingly, on remand, the hearing examiner shall conduct the analysis described in Issue F supra. In addition, the hearing examiner shall determine whether the tenant is entitled to a rent refund and/or a rent roll back and issue findings of fact and conclusions of law on the rent refund issue. If the hearing examiner imposes a rent refund, or treble that amount, the hearing examiner shall impose interest in accordance with 14 DCMR § 3826.

H. Whether the hearing examiner erred in reaching a decision that failed to comply with the laws of the District of Columbia, including the District of Columbia Administrative Procedure Act.

The hearing examiner did not render the decision and order in accordance with the DCAPA, because the decision did not contain findings of fact and conclusions of law on each contested issue.

The DCAPA requires the hearing examiner to issue findings of fact and conclusions of law on the contested issues of fact.[16] Pursuant to the DCAPA, D.C. OFFICIAL CODE § 2-509(e):

> 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.

The District of Columbia Court of Appeals announced a three-part test based on the requirements of D.C. OFFICIAL CODE § 2-509(e). The court held that administrative decisions must state findings of fact on each material, contested factual issue; 2) those findings must be based on substantial evidence; and the conclusions of law must flow rationally from the findings.[17] Additionally, the court held that "[t]he ALJ's [Administrative Law Judge's] findings of fact are not supposed to be perfunctory; rather, they must reflect 'a meaningful attempt to come to grips with the difficult factual questions raised by th[e] record.'"[18] In Aquino v. Knox, 60 A.2d 237, 240 (D.C. 1948), the court held that the "required findings of fact are no mere technicality. It is not necessary for the findings to be set out in detail, but they must be shown with substantial particularity to enable ... the reviewing court to follow the path which has been used."

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[16] See Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Comm'n, 402 A.2d 36 (D.C. 1979) cited in Tenants of 4501 Connecticut Ave., N.W. v. Albermarle Tower Co., CI 20,523 (RHC June 25, 1992).

[17] See Washington Times v. District of Columbia Dep't of Employment Servs., 724 A.2d 1212, 1216 (D.C. 1999); Perkins v. District of Columbia Dep't of Employment Servs., 484 A.2d 401, 410 (D.C. 1984).

[18] Banks v. District of Columbia Dep't of Consumer and Regulatory Affairs, 634 A.2d 433, 441 (D.C. 1993) (Schwelb, J., dissenting) quoting Eilers v. District of Columbia Bureau of Motor Vehicle Servs., 583 A.2d 677, 685 (D.C. 1990).

The decision in the instant case contained the following findings of fact:

> 1. The subject property is located at 1801-16th Street, N.W.
>
> 2. Petitioner is a tenant at [the] subject housing accommodation, where he occupies Apartment [sic] 707.
>
> 3. The subject property is managed by Pinnacle Realty Management Company.
>
> 4. Petitioner assumed occupancy in December of 1998.
>
> 5. Petitioner filed his complaint on September 19, 2000.

The hearing examiner concluded as a matter of law that:

> Petitioner's claim is barred by the 3-year statute of limitations set forth in D.C. Code §45-2526(E) [sic].[19]

Voltz v. Pinnacle Realty Management Co., TP 25,092 (Feb. 28, 2001) at 4.

In the decision, the hearing examiner indicated that the "single allegation raised by the Petitioner is that Respondent permanently eliminated a related service and/or facility ... by removing a roof deck." OAD Decision at 2. However, the hearing examiner's decision was not accompanied by findings of fact on the tenant's claim that the housing provider permanently eliminated related services or facilities. The first three findings of fact concerned the address of the property, the tenant's unit number, and the name of the property manager. The fourth finding of fact concerned the date that the tenant assumed occupancy, and the fifth finding of fact listed the date that the tenant filed the petition. The decision did not contain findings of fact on the contested issue, the permanent elimination of the roof deck.

In addition, the findings were not set out in a manner that logically led to the conclusion that the housing provider's motion to dismiss a reduction in services claim

[19] D.C. CODE § 45-2516(e) was recodified at D.C. OFFICIAL CODE § 42-3502.06(e).

warranted the dismissal of the tenant's permanent elimination claim. The hearing examiner concluded as a matter of law that the statute of limitations barred the tenant's claim. When the Commission followed the path from the findings of fact to the conclusion of law, it discovered that the conclusion of law did not flow rationally from the findings. See Aquino, 60 A.2d at 240. The hearing examiner issued a finding of fact concerning the date that the tenant filed the petition. However, the hearing examiner did not issue a finding of fact concerning the date that the tenant's claim accrued.[20] Since the hearing examiner failed to issue a finding of fact concerning the date that the tenant's claim accrued, his conclusion that the statute of limitations barred the tenant's claim did not flow rationally from the findings of fact. The court has addressed this "fact finding gap," by holding the following:

> There must be one or more affirmative, written findings on "each [material] contested issue of fact." The court cannot properly fill the gap itself by inferring findings on a party's objections through inspection of the record, the agency's other findings, and the ultimate decision. We concluded, rather, that the agency's other findings, must support the end result in a discernible manner, and the result reached must be supported by subsidiary findings of basic facts on all material issues.

Citizens Ass'n of Georgetown, Inc. v. District of Columbia Zoning Comm'n, 402 A.2d 36, 42 (D.C. 1979) quoting Dietrich v. Board of Zoning Adjustment, 293 A.2d 470, 472-473 (D.C. 1972) (alteration in original) (citations omitted) (emphasis added).

After reviewing an administrative agency's decision, which did not contain adequate findings of fact, the court wrote the following:

> As we remarked more than twenty years ago, '[t]his court has admonished administrative agencies on several occasions that a reiteration of the evidence is

[20] See Executive Sandwich Shoppe, Inc. v. Carr Realty Corp., 749 A.2d 724 (D.C. 2000) (holding that the date of accrual is a question of fact).

> not a finding of fact. Neither will generalized, conclusory or incomplete findings suffice. There must be a finding on each material fact necessary to support the conclusions of law.... We will continue to order that administrative agencies specify the precise findings and conclusions which support their decisions.'

Newsweek Magazine v. District of Columbia Comm'n on Human Rights, 376 A.2d 777, 784 (D.C. 1977) quoted in Braddock v. Smith, 711 A.2d 835, 838 (D.C. 1998). In Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1988), the Commission held that failure to issue findings of facts on a contested issue is reversible error.[21] See also Tyler v. Byrd, TP 21,821 (RHC Nov. 27, 1991) where the Commission reversed and remanded the hearing examiner's decision, because he failed to make adequate findings of fact.

The hearing examiner's responsibility to issue findings of fact and conclusions of law in the decision and order is well settled in this jurisdiction. In order to meet the requirements of the DCAPA, D.C. OFFICIAL CODE § 2-509(e), "(1) the decision must state findings of fact on each material, contested, factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." Perkins v. District of Columbia Department of Employment Servs., 482 A.2d 401, 402 (D.C. 1984) quoted in Nursing Servs. v. District of Columbia Dep't of Employment Servs., 512 A.2d 301, 302-303 (D.C. 1986). When a decision and order does not contain findings of fact, the reviewing body is compelled to remand the matter, because the record is insufficient for review. See Hedgman v. District of Columbia Hackers' License Appeal Bd., 549 A.2d 720 (D.C. 1988); Nursing Services, 512 A.2d at 303.

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[21] See Tyler v. Byrd, TP 21,821 (RHC Nov. 27, 1991) where the Commission reversed and remanded the hearing examiner's decision because he failed to make adequate findings of fact.

When the examiner fails to issue findings of fact in accordance with the DCAPA, the reviewing body ordinarily remands the case with instructions to issue findings of fact and conclusions of law on the existing record. However, in the instant case, a remand on the existing record is not an appropriate remedy.[22] In the instant case, the hearing examiner failed to hold a hearing on the issue raised in the tenant petition, as required by the DCAPA. See supra Issue E. Consequently, the hearing examiner's decision is reversed and remanded for a hearing de novo.

I. Whether the attorney for Pinnacle "failed to disclose [to the Commission] a legal authority in this jurisdiction ... known to the lawyer to be dispositive of a question and directly adverse to the position of his client."

In the notice of appeal, the tenant asked the Commission to determine if the housing provider's attorney, Mr. Luchs, violated Rule 3.3 of the Professional Rules of Conduct because he "failed to disclose a legal authority in this jurisdiction...known to the lawyer to be dispositive of a question at issue and directly adverse to the position of his client." Notice of Appeal at 9.

Rule 3.3 of the District of Columbia Rules of Professional Conduct, governs the attorney's duty of candor to the tribunal. Rule 3.3(a)(3) provides that a "lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction not disclosed by opposing counsel and known to the lawyer to be dispositive of a question at issue and directly related to the position of the client."

The Rules of Professional Conduct are not "intended to confer rights on an adversary of a lawyer to enforce the Rules in a proceeding other than a disciplinary proceeding." However, a tribunal presented with claims concerning the conduct of a

[22] See e.g., Braddock, 711 A.2d 835 (D.C. 1998) (where the court held that a remand on the existing record was an insufficient remedy).

lawyer appearing before that tribunal, may take such action as it deems appropriate. DISTRICT OF COLUMBIA BAR RULES, RULES OF PROF'L CONDUCT, D.C. BAR APPX. A, SCOPE (2000).

The tenant argues that Mr. Luchs violated Rule 3.3, because he failed to disclose the Commission's ruling in Pinnacle Management Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000). In Pinnacle, the "Commission held 'that the roof deck was closed to tenants on July 1, 1997...' '...[T]he tenants access to the roof deck was curtailed by the housing provider in order to effect repairs to the roof. However, as the June 8, 1998 memorandum reflects, access to the roof deck was later permanently eliminated.'" Notice of Appeal at 6 quoting Pinnacle at 5. The tenant asserts that Mr. Luchs, who was the housing provider's attorney in Pinnacle, which involved the same housing accommodation and cause of action as the instant case, is "prohibited from asserting that the statute of limitations began tolling before June 8, 1998." Notice of Appeal of 5.

The Commission issued the decision and order in Pinnacle Management Co. v. Marsh, TP 24,827 on September 7, 2000 and sent a copy by certified mail to Mr. Luchs, Pinnacle's attorney. The Commission remanded the decision to the hearing examiner for a correction of mathematical errors and to permit the parties to show the contrary of facts officially noticed. In Pinnacle, the Commission held that the housing provider notified the tenants that the roof deck was discontinued on June [6], 1998, and the tenant's [Marsh] petition was filed on October 13, 1999, which was within the three (3) year statute of limitations in the Act." Id. at 9. When Mr. Luchs filed the motion to dismiss on October 12, 2000, he did not reference the Commission's decision in Pinnacle.

The parties appeared for the hearing in the instant case on November 7, 2000. During the adjudicatory proceeding in the instant case, Mr. Luchs introduced Mr. Roper's

decision in TP 24,827. He advised Hearing Examiner Word that the Commission affirmed TP 24,827 in part, reversed it in part, and remanded Hearing Examiner Roper's decision. Mr. Luchs stated that the only reason that TP 24,827 is important is that it established that the roof deck was removed on July 1, 1997. Mr. Luchs did not comment upon the findings in TP 24,827 concerning the housing provider's June 8, 1998 notice of the permanent elimination of the roof deck. During the Commission's hearing, Mr. Luch also argued the Pinnacle decision in the light most favorable to his client.

This issue is denied because Mr. Luchs disclosed the decision in TP 24,827 to the hearing examiner and the Commission in his arguments before each tribunal.

V. CONCLUSION

The hearing examiner's decision and order is reversed, and this matter is remanded for a hearing de novo. The substantial record evidence did not support the hearing examiner's determination that the statute of limitations barred the tenant's claim. In addition, the findings of fact were not shown with substantial particularity to enable the Commission to follow the path that the hearing examiner used to conclude that the statute of limitations barred the tenant's claim.

In addition, the hearing examiner did not hold a hearing on the contested issue raised in the petition, as required by the DCAPA. During the proceedings, the hearing examiner made a series of comments that indicated that he prejudged the case and created an atmosphere, which denied the tenant a fair hearing. Moreover, the hearing examiner's decision did not comport with the requirements of the DCAPA, because it did contain findings of fact and conclusions of law on the contested issue.

Accordingly, the hearing examiner's decision and order is reversed and this matter is remanded for a hearing de novo. Hearing Examiner Word retired from the Department of Consumer and Regulatory Affairs. Accordingly, the Commission requests that the Rent Administrator assign this case to a new examiner.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Decision and Order in TP 25,092 was mailed by certified mail, postage prepaid, this 28th day of September 2001 to:

James Voltz
1801 16th Street, N.W.
Apartment 707
Washington, D.C. 20009
Tenant/Appellant

Richard W. Luchs, Esq.
Greenstein Delorme & Luchs, P.C.
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036
Housing Provider/Appellee's Attorney

LaTonya Miles
Contact Representative