DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 26,185

In re: 110 Gallatin Street, N.W., Unit 201

Ward Four (4)

CROTON MANAGEMENT SERVICES, INC.
Housing Provider/Appellant

v.

GWENDOLYN FAIR
Tenant/Appellee

DECISION AND ORDER

December 11, 2003

LONG, COMMISSIONER. This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991), govern the proceedings.

I. PROCEDURAL HISTORY

Gwendolyn F. Fair filed Tenant Petition (TP) 26,185 with the Rental Accommodations and Conversion Division on December 28, 2000. In the petition, the tenant alleged that the housing provider, Croton Management Services, substantially reduced and permanently eliminated the services and facilities provided in connection with her rental unit.

The Office of Adjudication scheduled the matter for an evidentiary hearing on April 30, 2001. The tenant appeared pro se, and the housing provider appeared through counsel, Attorney Carl A. Silber. When Hearing Examiner Celio Young convened the hearing, the housing provider's attorney advised the hearing examiner that he filed a motion to dismiss shortly before the hearing. Since the housing provider's attorney filed the motion only minutes before the hearing, the hearing examiner recessed the hearing so that he and the tenant could read the motion. After a ten-minute recess, Hearing Examiner Young reconvened the hearing and informed the parties that he was inclined to grant the motion to dismiss the petition, because the agency did not have jurisdiction over the tenant's claims. However, the hearing examiner advised the parties that he would retain jurisdiction over the rent issue. Hearing Examiner Young, who subsequently left the agency, never issued a written decision or an order on the motion to dismiss.

On September 23, 2002, Hearing Examiner Desmond Brown issued a proposed decision and order.[1] Hearing Examiner Brown reversed Hearing Examiner Young's oral ruling dismissing the petition. Hearing Examiner Brown found that the oral ruling was clearly erroneous, because the agency had jurisdiction over the services and facilities claims that the tenant raised in the petition. Hearing Examiner Brown determined that

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[1] Since Hearing Examiner Brown did not personally hear the evidence, he issued a proposed decision and order in accordance with D.C. OFFICIAL CODE § 2-509(d) (2001), which provides:

> Whenever in a contested case a majority of those who are to render the final order or decision did not personally hear the evidence, no order or decision adverse to a party to the case (other than the Mayor or an agency) shall be made until a proposed order or decision, including findings of fact and conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the order or decision, who, in such case, shall personally consider such portions of the exclusive record, as provided in subsection (c) of this section, as may be designated by any party.

the tenant failed to prove that the housing provider permanently eliminated the related services and facilities. However, the hearing examiner held that the housing provider violated the Act when it substantially reduced the tenant's services and facilities and failed to reduce the tenant's rent. Hearing Examiner Brown ordered the housing provider to refund $1783.00 to the tenant. When Hearing Examiner Brown issued the decision, he advised the parties of their right to file exceptions to the proposed decision and order by October 10, 2002. Further, the hearing examiner advised the parties that the proposed decision would become final on October 11, 2002, if neither party filed exceptions.

The record reflects that neither party filed exceptions by October 10, 2002. Consequently, the proposed decision and order became the final decision and order on October 11, 2002, and each party had ten days to file a motion for reconsideration or notice of appeal.

On October 11, 2002, the housing provider filed a pleading with OAD entitled Exceptions/Motion for Reconsideration. Since the housing provider filed the pleading one day after the deadline for filing exceptions, the document could only be treated as a motion for reconsideration. "A motion for reconsideration shall be granted or denied in writing by the hearing examiner within ten (10) days after receipt …." 14 DCMR § 4013.2 (1991). "Failure of a hearing examiner to act on a motion for reconsideration within the time limit prescribed by §4013.2 shall constitute a denial of the motion for reconsideration." 14 DCMR § 4013.5 (1991). The housing provider's motion was denied by operation of law on October 28, 2002, because the hearing examiner did not act on the motion for reconsideration within ten days. The housing provider had ten days thereafter to file an appeal in the Commission.

On November 8, 2002, the housing provider filed a timely notice of appeal with the Commission. The Commission held the appellate hearing on February 4, 2003.

II. ISSUES ON APPEAL

A. Whether the hearing examiner conducted a full administrative hearing.

B. Whether the hearing examiner issued the decision and order sua sponte.

C. Whether the doctrines of res judicata, estoppel, and settlement of the cause of action bar the tenant from pursuing the tenant petition.

III. DISCUSSION

A. Whether the hearing examiner conducted a full administrative hearing.

The hearing examiner did not conduct an administrative hearing in accordance with the District of Columbia Administrative Procedure Act, as mandated by 14 DCMR § 4000.2 (1991). The DCAPA provides: "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." D.C. OFFICIAL CODE § 2-509(b) (2001).

When Hearing Examiner Young convened the hearing, the housing provider's attorney asked the hearing examiner to consider a written motion to dismiss the tenant petition. The hearing examiner recessed the hearing so that he and the tenant could review the motion. After a brief recess, the hearing examiner reconvened the hearing and informed the parties that he was inclined to grant the motion to dismiss the tenant petition.

The hearing examiner, who administered an oath to the tenant, permitted the tenant to respond to the housing provider's motion to dismiss. However, he did not

permit either party to present evidence on the claims raised in the tenant petition, and he did not conduct a full administrative hearing in accordance with D.C. OFFICIAL CODE § 2-509 (2001).

Hearing Examiner Young concluded the hearing by verbally informing the parties that he would issue an order dismissing the petition for failure to state a claim upon which relief could be granted. Hearing Examiner Young never issued a written decision or an order on the motion to dismiss as mandated by D.C. OFFICIAL CODE § 2-509(e) (2001)[2] and 14 DCMR § 4008.5 (1991).[3] See also Nezhadessivandi v. Ayers, TP 25,091 (RHC Nov. 1, 2002); Diaz v. Perry, TP 24,379 (RHC Apr. 20, 2001) (holding that the hearing examiner's failure to issue a written order on a motion constituted reversible error that required a remand).

More than a year after Hearing Examiner Young made the verbal rulings, Hearing Examiner Brown issued a written decision and order in accordance with D.C. OFFICIAL CODE § 2-509(e) (2001) and 14 DCMR § 4008.5 (1991). Hearing Examiner Brown found that Hearing Examiner Young's oral ruling that the tenant failed to state a claim upon which relief could be granted was clearly erroneous. Hearing Examiner Brown reversed Hearing Examiner Young's oral ruling and evaluated the reduction in services and facilities claims that the tenant raised in the petition.

In a section of the decision entitled Evidence and Pleadings Considered, Hearing Examiner Brown indicated that he considered the tenant petition, testimony given at the

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[2] "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." D.C. OFFICIAL CODE § 2-509(e) (2001).

[3] The hearing examiner shall render a decision in writing on each motion made which shall include the reasons for the ruling." 14 DCMR § 4008.5 (1991).

hearing, documents submitted when the tenant filed the petition, and exhibits that the hearing examiner described as being submitted by the housing provider and admitted into evidence. After evaluating the evidence, Hearing Examiner Brown found that the housing provider substantially reduced the tenant's services and facilities and ordered the housing provider to refund $1783.00 to the tenant.

Hearing Examiner Brown's decision reflects that he considered oral and documentary evidence. However, there is no record evidence that he conducted a hearing and received evidence from the parties. His written decision, in the absence of a hearing, denied the parties due process of law. In Citizens Assoc. of Georgetown, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 288 A.2d 666, 669 (D.C. 1972), the court held the following:

> [A]ny finding required by the statute ... must be based only upon substantial evidence. In addition to that, the participants in the proceeding must have an opportunity to address themselves to this evidence. Otherwise, the fundamentals of due process of law are denied. Furthermore, the District of Columbia Administrative Procedure Act ... specifically provides that the record shall consist *exclusively* of the testimony and exhibits and all material facts officially noticed; and that no decision shall be issued "except upon consideration of such exclusive record".... It is "a fundamental principle of all adjudication, judicial and administrative alike, that the mind of the decider should not be swayed by materials which are not communicated to both parties and which they are not given an opportunity to controvert." (citations omitted).

Hearing Examiner Young, who convened the only hearing on the petition, never received oral or documentary evidence from either party on the claims raised in the tenant petition. In violation of the fundamental principles enunciated in Citizen Association of Georgetown, Hearing Examiner Brown issued a decision and order, concerning the claims raised in the petition, in the absence of due process of law. Accordingly, the

Commission reverses Hearing Examiner Brown's decision and order as it relates to the claims raised in the tenant petition, and remands the matter for a hearing de novo.[4]

B. Whether the hearing examiner issued the decision and order sua sponte.

In the notice of appeal, the housing provider's attorney posits that Hearing Examiner Brown issued the decision and order sua sponte, because the tenant was not pursuing the petition. There is no record evidence to support counsel's assertion that the tenant did not wish to pursue the tenant petition. The tenant filed the petition, appeared for the hearing, opposed the motion to dismiss, and presented arguments in support of proceeding when Hearing Examiner Young stated he was inclined to grant the housing provider's motion to dismiss. Moreover, the tenant did not file a motion to withdraw the tenant petition. Since the tenant did not withdraw the petition and Hearing Examiner Young failed to issue a written decision or order, the matter remained pending in the agency.

When Hearing Examiner Brown issued the decision and order, his action was not sua sponte. The DCAPA and the agency's regulations required the hearing examiner to issue a written order on the motion to dismiss. Hearing Examiner Brown erred when he resolved contested issues in the absence of due process of law. See discussion supra Part III.A. However, when issued the written decision and order, he satisfied the mandatory requirements of D.C. OFFICIAL CODE § 2-509(e) (2001) and 14 DCMR § 4008.5 (1991),

[4] Hearing Examiner Brown's ruling on the motion to dismiss is not disturbed by the Commission's decision. Hearing Examiner Young held a hearing on the motion to dismiss, but never issued a written order on the motion. Hearing Examiner Brown issued a written ruling on the motion to dismiss as required by 14 DCMR § 4008.5 (1991). The Commission affirms the ruling. The Rent Administrator has jurisdiction over services and facilities claims.

which require the agency to issue written decisions and orders. Accordingly, the Commission denies Issue B.

C. Whether the doctrines of res judicata, estoppel, and settlement of the cause of action bar the tenant from pursuing the tenant petition.

In the notice of appeal, the housing provider, through counsel, maintains that the legal doctrines of res judicata, estoppel, and settlement of the cause of action prevent the tenant from pursing this action before the agency. Res judicata and collateral estoppel are affirmative defenses that the housing provider must raise and prove during the evidentiary hearing.[5] There is no record evidence that the housing provider raised these defenses before the hearing examiner. Moreover, the purported settlement of the cause of action was never submitted as record evidence. As a result, Hearing Examiner Brown did not address these issues in the decision and order.

The Commission reviews alleged errors in the hearing examiner's decision and order. Since the issues were not addressed in the decision and order, the Commission cannot review them. Accordingly, the Commission dismisses Issue C.

IV. CONCLUSION

For the foregoing reasons, the Commission reverses Hearing Examiner Brown's

[5] See Baker v. Bernstein Mgmt. Corp., TP 24,919 (RHC Sept. 29, 2000) for an exhaustive discussion of res judicata.

rulings on the claims raised in the tenant petition and remands the matter for a hearing de novo on those claims. The Commission does not disturb Hearing Examiner Brown's ruling on the motion to dismiss.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the D.C. Court of Appeals. The Court's Rule, D.C. App. R. 15(a), provides in part: "Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thirty days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed ... and by tendering the prescribed docketing fee

to the clerk." The Court may be contacted at the following address and phone number:

D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W.
6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 26,185 was mailed by priority mail with delivery confirmation, postage prepaid, this 11th day of December 2003 to:

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LaTonya Miles by cF
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