

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,014

In re: 7 S Street, N.W.

Ward One

JANICE TURNER
Housing Provider/Appellant

v.

DANIEL TSCHARNER
CHARLEEN HARVEY
Tenants/Appellees

DECISION AND ORDER

June 13, 2002

PER CURIAM. This case is on appeal to the District of Columbia Rental Housing Commission (Commission) from the District of Columbia Department of Consumer and Regulatory Affairs, Office of Adjudication (OAD). The housing provider filed the appeal pursuant to the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001). The Act, the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-509-510 (2001), and Title 14 of the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991) govern these proceedings.

I. PROCEDURAL HISTORY

On November 1, 2000 Daniel Tscharner and Charleen Harvey, the tenants/appellees, entered a written one-year lease on a single family housing accommodation located at 7 S Street, N.W. On February 8, 2001, the tenants filed Tenant Petition (TP) 27,014 with the Rental Accommodations and Conversion Division

(RACD). In the petition, the tenants alleged that the housing provider: 1) permanently eliminated services and/or facilities in the housing unit; 2) substantially reduced services and/or facilities in the unit; 3) demanded a security deposit after the tenants moved into the unit where no deposit was previously demanded; 4) used coercion to obtain signatures on a Voluntary Agreement filed with the Rent Administrator; and 5) directed retaliatory action against the tenants for exercising their rights.

On May 22, 2001, the Office of Adjudication (OAD) conducted a hearing with Hearing Examiner Terry Michael Banks presiding. Both parties appeared pro se. On September 26, 2001, the hearing examiner issued the decision and order in TP 27,014 and made the following pertinent findings of fact:

1. The Registration/Claim of Exemption form for the housing accommodation, filed August 1, 1993 reflects that the housing accommodation is exempt from rent regulation.
2. Petitioners withheld their January rent payment because of their dissatisfaction with Respondent's delay in effecting repairs.
3. On or about January 22, 2001, Respondent entered the premises and took several items of Petitioner Tscharner's personal property including eyeglasses, a laptop computer, a TENS unit (backpack), personal documents, a family photograph, a Minox 35 mm reflex camera, stereo equipment, a DAT unit, a two-way radio, and GPS equipment. Respondent returned all items except the laptop computer two months later.

Tscharner v. Turner, TP 27,014 (OAD Sept. 26, 2001) at 3. The hearing examiner, however, dismissed most of the claims and ruled on the substantial reduction of services and retaliation issues only. The examiner made the following conclusions of law as to the two issues respectively:

1. The housing accommodation is exempt from rent regulation (footnote omitted), and Petitioners are not entitled to a rent refund for reduced services or facilities.

2. Respondent retaliated against Petitioners for their withholding of rent in January 2001 by removing and retaining items of their personal property.

Id. at 3. In accordance with these conclusions of law, the hearing examiner ruled in favor of the tenants and fined the housing provider \$1,000.00 to be paid directly to the tenants.

The housing provider, through counsel, filed a timely notice of appeal on October 16, 2001, and the Commission held a hearing on December 1, 2001.

II. ISSUES ON APPEAL

The housing provider raised the following issues in her notice of appeal:

1. Whether the hearing examiner erred in finding that respondent retaliated against petitioners.
2. Whether the hearing examiner erred in fining respondent one thousand dollars (\$1,000.00).
3. Whether the record supports the hearing examiner's decision and order.

Notice of Appeal at 1.

III. DISCUSSION

A. Whether the hearing examiner erred in finding that the housing provider retaliated against the tenants.

The Act, D.C. OFFICIAL CODE § 42-3505.02 (2001), prohibits a housing provider from retaliating against tenants who exercise one of several rights expressly enumerated within that section or by any other provision of law.¹ In order to trigger the protection of § 42-3505.02, a tenant must perform one of the six listed actions. Thereafter, any

¹ D.C. OFFICIAL CODE § 42-3505.02(b) provides:

In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:

- 1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;

apparent act of “threat or coercion” taken by the housing provider within the statutory time period of six months is *presumed* to be retaliation.²

In the instant case, the hearing examiner made a factual finding that the tenants withheld their rent because of alleged housing code violations, which is a protected action under § 42-3505.02(b)(3)³ and that in retaliation, the housing provider entered the housing accommodation and unlawfully took possession of Mr. Tschamer’s personal property.⁴ In accordance with § 42-3505.02, the examiner’s findings gave rise to a rebuttable presumption that retaliation occurred. In order to overcome the presumption,

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- 2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
 - 3) Legally withheld all or part of the tenant’s rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing of a violation of the housing regulations;
 - 4) Organized, been a member or, or been involved in any lawful activities pertaining to a tenant organization;
 - 5) Made an effort to secure or enforce any of the tenant’s rights under the tenant’s lease or contract with the housing provider; or
 - 6) Brought legal action against the housing provider.

² “Retaliatory action,” as it is defined under the statute, may take many forms and can be interpreted to include a housing provider’s taking possession of a tenant’s personal property without the tenant’s consent. D.C. OFFICIAL CODE § 42-3505.02(a) provides in pertinent part:

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

³ Although D.C. OFFICIAL CODE § 42-3505.02(b)(3) requires the tenant to give the housing provider “reasonable notice” of the housing code violations before withholding rent, the issue was not raised on appeal. The Commission observes, however, that the record contains uncontroverted testimony that the tenants gave notice by making numerous verbal complaints to the housing provider about defects in the housing accommodation. See *supra* note 1.

⁴ The hearing examiner denied the tenants’ claim of substantial reduction of services, finding that the unit was properly registered, and therefore exempt from the Act’s rent control provisions pursuant to D.C.

the housing provider has to offer clear and convincing evidence that her actions were motivated by some purpose other than retaliation. The hearing examiner's conclusion of law was that the housing provider "retaliated against [the tenants] for their withholding of rent in January 2001 by removing and retaining items of their personal property" and that she "failed to offer credible evidence to rebut the presumption." Tscharner v. Turner, TP 27,014 (OAD Sept. 26, 2001) at 3.

The housing provider argues that the hearing examiner erred in finding that retaliation occurred for two reasons. First, the housing provider asserts that the tenants' failure to pay rent was not a result of a lawful withholding of the rent, but that the tenants failed to pay rent simply because they were unable or otherwise unwilling to do so. Simply neglecting to pay rent, the housing provider argues, does not constitute a "legal withholding" and therefore does not trigger the protection afforded by § 42-3505.02. Second, the housing provider argues that she lacked the requisite intent to demonstrate "retaliatory action," because Mr. Tscharner gave her permission to enter the premises and take his valuables as collateral for the unpaid rent.

OFFICIAL CODE § 42-3509.01(b). The hearing examiner thereby concluded that he did not have jurisdiction to award a rent refund for any alleged reduction of services or facilities. See Blakney v. Atlantic Terrace/Winn Mgt., TP 24,972 (Mar. 28, 2002); See also Turner v. Jackson, TP 11, 977 (Feb. 18, 1987) (affirming the hearing examiner's application of § 42-3505.02 to a rental unit that was exempt from the Act's Title II rent ceiling provisions).

The housing provider argues that there is "clear & convincing evidence in [the] record that Petitioners [the tenants] mean to live for free at any cost." Housing Provider's Brief at 11. To support her argument that the tenants simply neglected to pay the rent, the housing provider points to the following facts: that appellee Tscharner paid neither a security deposit nor rent for November and December 2000, nor for January 2001; the tenants never deposited any rent in escrow; and that tenant/appellee Harvey admitted at the hearing below that she did not have any funds at her disposal to pay the back rent. Housing Provider's Brief at 10. Moreover, the housing provider maintains that the tenants' position is not credible, because the tenants gave conflicting testimony at the OAD hearing as to whether Mr. Tscharner was withholding or simply failing to pay rent, or whether he had made attempts to pay the rent for November and December 2000.

The hearing examiner summarized the evidence and testimony regarding the issue of retaliation as follows:

Petitioners testified that from the beginning of the lease term, they experienced serious problems with the plumbing in the housing facility and with damaged walls and ceilings caused, in part, by leaks from the faulty plumbing fixtures. Because they were not satisfied with Respondent's apparent indifference to their requests for repairs, Petitioners withheld their January 2001 rent payment. Petitioners allege that Respondent retaliated against them by removing and retaining certain items of Petitioner Tscharner's personal property on or about January 22, 2001 Respondent concedes that she removed Petitioners' personal effects, but contends that Petitioner Tscharner gave her permission to take something of value as collateral for the nonpayment of rent The testimony of Petitioners is more credible than Respondent on her motivation to remove Petitioner's items. It is not credible that Petitioners, who withheld their rent in a dispute over alleged housing defects, would then accede to the landlord's request for collateral for the rent payment. Moreover, it is not credible that Mr. Tscharner would give his eyeglasses and a family photograph as collateral. Since I do not find Respondent's testimony credible as to her motivation for taking Petitioner's property, I also find her testimony that she returned Petitioner's laptop computer equally dubious.

Tscharner v. Turner, TP 27,014 (OAD Sept. 26, 2001) at 4.

The hearing examiner's finding of retaliation was based on his conclusion that the credibility of the tenants outweighed that of the housing provider. The housing provider challenges the examiner's finding that the tenants were more credible than she because at times during the OAD hearing, Mr. Tscharner and Ms. Harvey seemed to contradict each other. While the record does reflect conflicting testimony between the two tenants as to whether or not Mr. Tscharner was actually "withholding" rent for November and December 2000, the hearing examiner limited his finding of retaliation to January 2001, the month in which *both* tenants withheld the rent and the housing provider took the items. OAD Hearing Tape (May 22, 2001); Tscharner v. Turner, TP 27,014 (OAD Sept. 26, 2001) at 3.

Moreover, the Commission held when one party's testimony contains some conflicting details, the hearing examiner does not necessarily abuse his discretion by accepting the totality of that party's testimony over that of the opposing side. Fazekas v. Dreyfuss, TP 20,394 (RHC Apr. 14, 1989) cited in Hudley v. McNair, TP 24,040 (RHC June 30, 1999).

It is the duty of the hearing examiner to determine the credibility of witnesses. Citywide Learning Ctr. v. William C. Smith, 488 A.2d 1310 (D.C. 1985). "The Commission is required to entrust the hearing examiner with 'a degree of latitude in deciding how he shall evaluate and credit the evidence presented.'" Harris v. District of Columbia Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986) cited in Q St. Ltd. P'ship v. Evans, TP 24,957 (RHC July 31, 2000); see also Eilers v. Bureau of Motor Vehicles Servs., 583 A.2d 677, 684 (D.C. 1990). The hearing examiner found credible the tenants' assertion that they were withholding rent based on the alleged housing code violations.

within the unit. He also determined that the housing provider failed to offer credible proof to show that the tenants simply neglected to pay the rent.

Accordingly, the Commission affirms the decision of the hearing examiner that the housing provider retaliated against the tenants for withholding their January 2001 rent.

B. Whether the hearing examiner erred in fining the housing provider one thousand (\$1,000.00).

The Act, D.C. OFFICIAL CODE § 42-3509.01(b) authorizes an examiner to impose a “*civil fine* of no more than \$5,000” against any person who has committed an action in violation of the Act. (emphasis added). In accordance with his finding that the housing provider violated the statutory prohibition against retaliation, the examiner imposed a fine of \$1,000 to be paid directly to the tenants.

Notwithstanding the housing provider’s contention that the evidence in the record does not support a finding of retaliation, the housing provider argues that in awarding the fine directly to the tenants, the examiner committed error. The Commission agrees.

In Twyman v. Johnson, 655 A.2d 850, 857 (D.C. 1995), the District of Columbia Court of Appeals held that D.C. OFFICIAL CODE § 42-3509.01(a) does not create an independent cause of action for damages based on retaliation. The Court stated:

The Rental Housing Act confers an entitlement to damages on tenants, but it does so in a highly restricted fashion. Only the Rent Administrator and Rental Housing Commission are expressly authorized to award damages, and then only for two forms of conduct – albeit important ones – among the many that may constitute retaliatory action: unlawful rent increases and unlawful reduction or elimination of services.

However, the tenants, through counsel, counter that the language in Twyman is mere dicta, stating: “the D.C. Court of Appeals in Twyman, in holding that a tenant in a

civil case could not recover damages for retaliation, does not in any way preclude the imposition of civil fines, penalties and fees in a matter before the Hearing Examiner.”
Tenant’s Brief at 6.

In conjunction with § 42-3509.01(b), subsection (f) provides in part: “Civil fines, penalties, and fees may be imposed as alternative sanctions for any infraction of subsections (b), (d), and (e) of this section.” Ordinarily, a civil “penalty” implies a statutory or regulatory fine of some sort to be paid to a particular jurisdiction as punishment for a violation of its laws.⁵ However, counsel for the tenants argues that the term “penalties” could be interpreted to mean monies paid by one party to the other, as is true in contract law when one party fails to meet a specific obligation within the contract. Moreover, the tenants argue that absent this broader interpretation of the term, the words “penalties” and “fines” as used in § 42-3509.01(f) would be needless redundancy. However, the Commission settled the issue in Johnson v. Moore, TP 23,705 (RHC Mar. 23, 1999), holding that D.C. OFFICIAL CODE § 42-3509.01 does not provide that litigants are entitled to fines as a remedy for retaliation.

“In reviewing the construction of a statute by the agency charged with its interpretation and enforcement, the agency’s interpretation is controlling unless it is plainly erroneous or inconsistent with the statute.” Slaby v. District of Columbia Rental Hous. Comm’n, 685 A.2d 1166 (D.C. 1996) (quoting Totz v. District of Columbia Rental Accommodations Comm’n, 412 A.2d 44, 46 (D.C. 1980)). Therefore, the Commission’s

⁵ BLACK’S LAW DICTIONARY 1133 (6th ed. 1990), defines “penalty” as a “sum of money which the law exacts payment of by way of punishment for doing some act which is prohibited or for not doing some act which is required to be done. See Hidden Hollow Ranch v. Collins, 406 P.2d 365, 368 (Mont. 1965).

interpretation of § 42-3509.01 in Johnson controls in the instant case.

Accordingly, we affirm the examiner's imposition of the \$1,000.00 fine, but reverse the order that the fine be paid directly to the tenants. Instead, the housing provider must pay the fine to the Government of the District of Columbia.

C. Whether the record supports the hearing examiner's decision and order.

The housing provider claims that the hearing examiner's finding of retaliation is not supported by the evidence in the record.

The DCAPA, D.C. OFFICIAL CODE § 2-509(e) (2001), requires administrative agencies to make findings of fact based on reliable, probative and substantial evidence, and its conclusions of law must flow rationally from these findings. Perkins v. District of Columbia Dep't of Employment Servs., 482 A.2d 401, 402 (D.C. 1984). The Commission may reverse decisions which contain "findings of fact unsupported by substantial evidence on the record of the proceedings." 14 DCMR § 3807.1 (1991). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." King v. District of Columbia Dep't of Employment Servs., 560 A.2d 1067, 1072 (D.C. 1989) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)).

The record contains eighteen photographs of the various defects throughout the housing accommodation. After careful consideration of the tenants' testimony along with the photographs, the examiner determined that the problems in the unit were serious enough to prompt the tenants to withhold their rent as the tenants had testified. Given the

testimony presented by both sides, the examiner did not find it credible that tenants who were withholding rent would then give personal belongings such as eyeglasses and items of sentimental value such as family photos as collateral for the unpaid rent.

The issue of substantial evidence raised by the housing provider questions the propriety of the examiner's credibility findings. As discussed supra, on credibility determinations, the Commission defers to the hearing examiner, who alone, as the trier of fact, "has an opportunity to observe the witnesses" and to get a "feel for the evidence." Gray v. Davis, TP 23,081 (RHC Dec. 7, 1993) (quoting Eilers v. Bureau of Motor Vehicles Servs., 583 A.2d 677, 684 (D.C. 1990)). Furthermore, as the reviewing body, the Commission's role in reviewing decisions is not to weigh the testimony and substitute its judgment for that of the factfinder who received the evidence and determined the weight to be accorded such evidence. Communication Workers v. District of Columbia Comm'n on Human Rights, 367 A.2d 149, 152 (D.C. 1976) cited in Gray, TP 23,081 at 5.

Accordingly, the Commission concludes that there is substantial evidence in the record to support the hearing examiner's decision.

IV. CONCLUSION

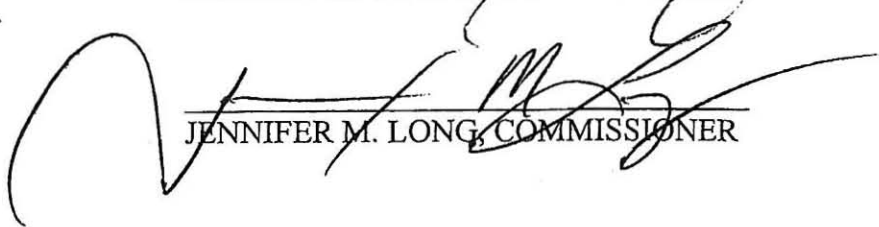
For the foregoing reasons, the Commission affirms the hearing examiner's finding that retaliation occurred and his order that the housing provider pay a fine of \$1,000.00. However, we reverse the examiner's order that the fine be paid directly to the tenants. Instead, the housing provider shall forward the fine to the Office of the Chief Financial

Officer, Accounting Division, 941 North Capitol Street, N.E., Suite 9607, Washington, D.C. 20002. The housing provider shall present to the Commission proof of payment within 30 days of the date of this decision and order.

SO ORDERED.


RUTH R. BANKS, CHAIRPERSON


RONALD A. YOUNG, COMMISSIONER

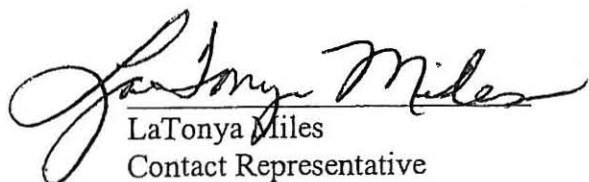

JENNIFER M. LONG, COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DECISION and ORDER** in TP 27,014 was mailed by priority mail with delivery confirmation this 13th day of June, 2002 to:

Mary Todd, Esq.
1130 K Street, N.W.
Suite 304
Washington, DC 20001

Jason Gluck, Esq.
Bread for the City
1525 7th Street, N.W.
Washington, DC 20001


LaTonya Miles
Contact Representative

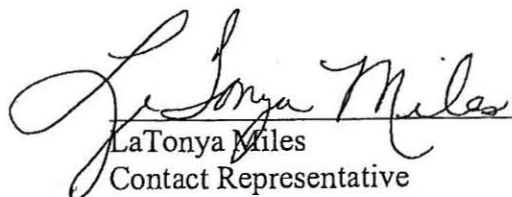
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **DECISION and ORDER** in TP 27,014 was mailed by priority mail with delivery confirmation this 13th day of June 2002.⁶ On June 28, 2002, the Commission received the copy of the Decision and Order that it sent to Mary Todd, Esq. The United States Postal Service returned the order to the Commission because the address was incorrect.

Accordingly, I hereby certify that a copy of the Decision and Order in TP 27,014 was re-mailed by priority mail with delivery confirmation on this 28th day of June 2002 to:

Mary Todd, Esq.
1730 K Street, N.W.
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LaTonya Miles
Contact Representative

⁶ The Commission recognizes the typographical error in the date at the bottom of each page of the decision. The actual date of issuance was June 13, 2002 as reflected on the first page of this decision and order and on the Certificate of Service.