

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,104

In re: 40 G Street, S.W., Unit 1

Ward Six (6)

DEBORAH A. REDMAN
Tenant/Appellant

v.

PHILIP A. GRAHAM
Housing Provider/Appellee

DECISION AND ORDER

April 30, 2003

YOUNG, COMMISSIONER. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of 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 these proceedings.

I. PROCEDURAL HISTORY

Deborah A. Redman, the tenant/appellant, filed Tenant Petition (TP) 27,104, with the Rental Accommodations and Conversion Division (RACD), on May 9, 2001. In her petition Ms. Redman, who occupied the downstairs unit at the 2-unit housing accommodation at 40 G Street, S.W., alleged that Philip A. Graham, the housing provider/appellee: 1) in violation of section 502 of the Act, directed retaliatory action

against her for exercising her rights; and 2) served on her a Notice to Vacate which violated the requirements of section 501 of the Act.

An Office of Adjudication (OAD) hearing on the petition was held on October 1, 2001. Administrative Law Judge (ALJ) Lennox Simon conducted the OAD hearing. The ALJ's decision and order was issued on April 10, 2002. The tenant filed a timely notice of appeal in the Commission from the April 10, 2002, OAD decision.

The tenant raised three (3) issues on appeal. The second issue raised by the tenant stated: "The Hearing Examiner discriminated against the disabled Tenant and refused to withdraw from the matter after Tenant filed a timely Motion Requesting the Hearing Examiner Withdraw." Notice of Appeal at 1. The Commission remanded TP 27,104 to Administrative Law Judge Simon for an order in response to the tenant's motion for his withdrawal, the Commission stated:

Due to the ALJ's failure to rule on the tenant's motion for his withdrawal or disqualification, the Commission remands this case to OAD for the limited purpose of a ruling on the motion. Accordingly, this case is remanded to the ALJ for a ruling on the tenant's motion for withdrawal. The ALJ is instructed to decide the tenant's motion for disqualification, on the present record, in accordance with the provisions of 14 DCMR § 4001 (1991). See Parkwell Assocs. v. Bikoy, TP 24,383 (RHC Dec. 30, 1999) (where the Commission remanded a decision to the Rent Administrator for a response to a motion for disqualification filed pursuant to 14 DCMR § 4001 (1991)). The tenant's remaining appeal issues are stayed pending the ALJ's decision on the motion. After a ruling on the motion and a review of the ruling by the Rent Administrator, if any, the ALJ is directed to certify and transmit the OAD record, including his order in response to the motion, to the Commission for further processing of the appeal. See Baxter v. Jackson, TP 24,370 (RHC Dec. 24, 1998).

Redman v. Graham, TP 27,104 (RHC Jan. 31, 2003) at 4-5. On March 31, 2003, the certified record in TP 27,104 was returned to the Commission including the ALJ's order on the tenant's motion for withdrawal.

II. ISSUES ON APPEAL

The remaining issues in the tenant's notice of appeal stated:

1. TP-27,104 should never have been heard as an independent tenant petition because it is obviously integrally connected to Tenant's other 2 cases—TP-24,681 and TP-24,681-A—and was marked as linked by the Tenant on the bottom of the cover page. The Tenant Petitioner's case should not be prejudiced because of Agency administrative error (i.e., Hearing Examiner Word's retirement without fully hearing the matter, after which TP-27,104 was not linked to the other 2 petitions in the subsequent chaos).
2. The Hearing Examiner abused his discretion and made numerous erroneous findings inconsistent with the law, facts, and pleadings and documents submitted to the Rent Administration (sic), the most obvious of which was a failure to find retaliation from the facts presented at the hearing.

Notice of Appeal at 1.

III. DISCUSSION OF THE ISSUES

A. Whether the ALJ erred when he conducted the hearing in TP 27, 104 as an independent tenant petition.

The tenant asserts on appeal that it was error for the ALJ to adjudicate her complaint in TP 27,104, without also considering her tenant petitions in TP 24,681 and TP 24,681-A, formerly TP 26,174, because all three petitions were designated "linked" by the tenant on the petition in TP 27,104.

The Rent Administrator's rules on consolidation of petitions, 14 DCMR § 3909 (1991), provide:

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| 3909.1 | The Rent Administrator may consolidate two (2) or more petitions where they contain identical or similar issues or where they involve the same rental unit or housing accommodation. |
| 3909.2 | The Rent Administrator may consolidate petitions on the motion of a party to a petition, if consolidation would expedite the processing of the petition and would not adversely affect the interests of the parties. |

A review of the record in this case reflects neither an order by the Rent Administrator consolidating the petitions in TP 24,681 and TP 24,681-A with TP 27,104, nor a motion submitted by the tenant requesting consolidation of the three petitions before the hearing in TP 27,104. Therefore, the tenant's designation of the petitions as "linked" had no effect in law. Because she failed to follow the applicable rule, 14 DCMR § 3909.2 (1991), the Rent Administrator had no motion to grant the tenant's desire that her cases be "linked." Generally, pro se litigants, like the tenant, must comply with all the applicable rules and procedures, and cannot expect preferential treatment. See Abell v. Wang, 697 A.2d 796, 804 (D.C. 1997); Terrace Manor Ltd. P'ship v. Tillery, No. SC 13391-98 (D.C. Super. Ct. May 29, 2001) cited in Bedell v. Clark, TP 24,979 (RHC June 27, 2001).

Absent an order by the Rent Administrator consolidating the appeals, the ALJ properly limited his inquiry to the issues raised in TP 27,104. Accordingly, this appeal issue is dismissed and the decision of the ALJ is affirmed on this issue.

B. Whether the ALJ erred when he failed to find that the housing provider retaliated against the tenant.

In his decision and order the ALJ stated:

The Petitioner asserts that the Respondent has engaged in retaliatory action against her in the following manner:

1. Subjecting the Petitioner to repeated security risks at her unit;
2. Refusing to inform Petitioner of security risks at her housing accommodation in general; and
3. Serving Petitioner a Notice to Vacate, seeking to gain possession of Petitioner's unit for Respondent's own personal use and occupancy in D.C. Superior Court despite a Drayton stay.

Redman v. Graham, TP 27,104 (RHC Jan. 31, 2003) at 4. In his decision, the ALJ dismissed TP 27,104, after concluding as a matter of law:

1. The Petitioner has failed to prove, by a preponderance of the evidence that the Respondent has retaliated against her, in violation of D.C. [Official] Code Section 42-3505.02 [(2001)].
2. The Petitioner has failed to prove, by a preponderance of the evidence, that the Respondent has served an illegal or invalid Notice to Vacate on her, in violation of D.C. [Official] Code Section 42-3505.01(a) [(2001)].

Redman v. Graham, TP 27,104 (OAD Apr. 10, 2002) at 7.

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 apparent act of “threat or coercion” taken by the housing provider within the statutory

¹ D.C. OFFICIAL CODE § 42-3505.02(b) (2001) 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;
- 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 of, 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.

time period of six months is presumed to be retaliation.² Accordingly, the housing provider must provide clear and convincing evidence to rebut the presumption of retaliatory action, beyond the defense that a law permitted the alleged retaliatory act. Meaning that the housing provider has the burden of producing clear and convincing evidence that his action was not motivated by a retaliatory purpose. The housing provider may for example, rebut the presumption by showing that his actions were taken for an economic reason and not in response to a tenant's behavior.

In De Szunyogh v. William C. Smith & Co., 604 A.2d 1, 4 (D.C. 1992), the Court held: "If a tenant alleges acts which fall under the retaliatory eviction statute, D.C. [OFFICIAL] CODE § [42-3505.02 (b) (2001)], the statute by definition applies, and the landlord is presumed to have taken 'an action not otherwise permitted by the law' unless it can meet its burden under the statute." See also Youssef v. United Mgmt. Co., Inc., 683 A.2d 152, 155 (D.C. 1996). The presumption of retaliation is triggered when the tenant demonstrates that he engaged in any one of six protected acts in the six months preceding the alleged retaliatory conduct. The Act however provides a presumption of retaliation, only if the tenant engaged in one of the six protected acts, within the six months preceding the housing provider's action.

In his decision, the ALJ summarized the testimony and evidence as follows:

² "Retaliatory action," as it is defined under the statute, may take many forms, D.C. OFFICIAL CODE § 42-3505.02(a) (2001), 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.

A. Security Risks

Further, the evidence does not demonstrate that the Respondent has retaliated against the Petitioner based upon the allegations advanced by the Petitioner. Specifically, the record evidence does not demonstrate that the Respondent retaliated against the Petitioner by intentionally subjecting the Petitioner to threats to her safety and security, deliberately refusing to inform Petitioner of alleged security risks existing at her building, or by seeking possession of Petitioner's unit for his personal use and occupancy. Respondent does not refute the fact that Petitioner's upstairs neighbor, a Ms. Gavelli was a tenant whose visitors and guests were disruptive, noisy, and sometimes unruly. However, Respondent vehemently denies that he was unresponsive to Petitioner's concerns about her safety and the security of her unit, based upon the boisterous and inappropriate conduct of her neighbor's frequent guests. Respondent provided credible testimony and evidence that he changed the front door code to Petitioner's duplex to minimize the access to the front door by Ms. Gavelli's former co-tenants and guests. Petitioner has failed to provide any credible evidence that Respondent subjected her to these conditions intentionally as an act of retaliation. The record is void of any supporting proof by Petitioner that Respondent deliberately failed to inform her of alleged security risks at her building. Thus, the ALJ concludes, that Petitioner has not proven that the Respondent has engaged in retaliatory action against her in the instant matter.

Id. at 5

In the instant case, the ALJ concluded, as a matter of law, that the housing provider did not direct retaliatory action against the tenant related to her security. The ALJ did not find the tenant proved the exercise of a right that triggered the presumption of retaliation. In Brookens v. Hagner Mgmt. Corp., TP 4284 (RHC Aug. 31, 2000), the Commission addressed the same issue raised in the instant appeal, that is, whether the tenant proved that he had engaged in one of the six acts enumerated in D.C. OFFICIAL CODE § 42-3505.02(b), thereby triggering the presumption of retaliation. The Commission stated:

Confronted with a similar scenario in Aikens v. Modern Property Management, Inc., TP 23,179 (RHC Oct. 15, 1993), the Commission affirmed the hearing examiner, who concluded the housing provider did not engage in retaliatory conduct against the tenant. The Commission concluded that the tenant failed to

prove the housing provider engaged in retaliatory conduct, because the tenant did not prove the exercise of any right that triggered the presumption.

Brookens at 13-14. Similarly, in the instant case, the ALJ found, and the Commission agrees, that the tenant failed to prove, at the OAD hearing, that she had engaged in any of the protected acts enumerated in the statute.

B. Notice to Vacate

In her petition the tenant asserted that the housing provider served on her, as a retaliatory act, a bad faith Notice to Vacate.

In his decision and order the ALJ stated:

[R]ecord evidence demonstrates that Petitioner has failed to produce any such Notice to Vacate at the hearing on October 1, 2001. Therefore, the ALJ is unable to determine if the alleged Notice to Vacate satisfied all the requirements as set forth in the D.C. [Official] Code Section 42-3505.01(a) and 14 DCMR Section 4302.1.

Redman v. Graham, TP 27,104 (OAD Apr. 10, 2002) at 6. The record evidence in the instant case does not contain a copy of the Notice to Vacate that the tenant asserted was served on her as a retaliatory act. A review of the recording of the October 1, 2001, OAD hearing reflects that the tenant stated that a copy of the Notice to Vacate was in the record of another tenant petition filed with the DCRA, Rental Accommodation and Conversion Division.

Pursuant to the Act, D.C. OFFICIAL CODE § 2-509(b) (2001), “[i]n contested cases,...the proponent of a rule or order shall have the burden of proof.” In this case the tenant, who is the proponent, must carry the burden of proving her entitlement to the relief she requested. Where the proponent of a rule or order fails to put sufficient competent evidence into the record to support his or her claim, it is properly denied.

Redding v. Williams, TP 27,137 (RHC Aug. 12, 2002); McKinney v. King, TP 27,264

(RHC July 24, 2002).³ Because the tenant failed to present evidence of the Notice to Vacate served on her by the housing provider, she both failed to meet her burden of proof by a preponderance of the evidence, and failed to show that the Notice was served on her within the time frame provided by the statute, thus triggering the presumption of retaliation. Therefore, the decision of the ALJ on this issue is affirmed.

IV. CONCLUSION

The tenant's appeal issue that the ALJ erred when he heard TP 27,104 as an independent petition is dismissed. The decision of the ALJ concluding that the tenant failed to prove, by a preponderance of the evidence, that the housing provider retaliated against her, in violation of D.C. OFFICIAL CODE § 42-3505.02 (2001), is affirmed. Further, the decision of the ALJ concluding that the tenant failed to prove, by a preponderance of the evidence, that the housing provider served on the tenant a retaliatory Notice to Vacate is also affirmed.

SO ORDERED.



RONALD A. YOUNG, COMMISSIONER



JENNIFER M. LONG, COMMISSIONER

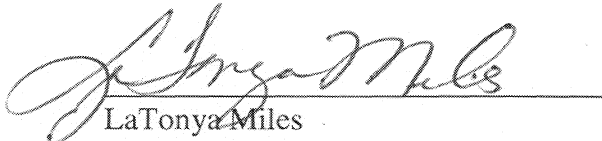
³ "The proponent of a rule or order shall have the burden of establishing each finding of fact essential to the rule or order by a preponderance of the evidence." 14 DCMR § 4003.1 (1991). In other words, a party must come to a hearing prepared to prove his or her own case. Administrative hearings are similar to civil court proceedings in that they adhere to the traditional adversarial system, guided by principles of due process. As part of that system, the Rent Administrator sits as a neutral, unbiased trier of fact while the parties present evidence to support a claim or defend against one. The District of Columbia Court of Appeals has consistently held that "the essence of the judicial role is neutrality." Byrd v. United States, 377 A.2d 400, 404 (D.C. 1977) cited in Garrett v. United States, 642 A.2d 1312, 1315 (1994). Therefore, the onus is on each of the contesting parties to offer the necessary evidence to prove their respective cases.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Decision and Order** in TP 27,104 was mailed postage prepaid by priority mail, with delivery confirmation on this **30th day of April, 2003** to:

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LaTonya Miles
Contact Representative