DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,145

In re: 1633 28th Street, S.E., Unit 3

Ward Seven (7)

WILLIAM R. AUSTIN
Housing Provider/Appellant

v.

CATHERINE A. PAIGE
Tenant/Appellee

DECISION AND ORDER

December 12, 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 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 these proceedings.

I. PROCEDURAL HISTORY

On June 5, 2001, Catherine A. Paige, the tenant of Unit 3 at the housing accommodation located at 1633 28th Street, S.E., filed Tenant Petition (TP) 27,145 with the Rental Accommodations and Conversion Division (RACD). In her petition the tenant alleged that the housing provider, William R. Austin: 1) took a rent increase larger than the amount of increase permitted by the Act; 2) charged rent which exceeded the legally

calculated rent ceiling for her unit; 3) substantially reduced services and/or facilities provided in connection with her unit; 4) directed retaliatory action against her for exercising her rights in violation of § 502 of the Act; and 5) violated the provisions of §§ 501 and 502 of the Act. On August 2, 2001, the tenant filed an amendment to her petition wherein she alleged that: "Services and/or facilities, as set forth in a Voluntary Agreement filed with and approved by the Rent Administrator under Section 215 of the Rental Housing Emergency [sic] Act of 1985, have not been provided as specified."

An Office of Adjudication (OAD) hearing on the petition was held on October 25, 2001. Hearing Examiner Henry W. McCoy conducted the OAD hearing. The hearing examiner issued the decision and order on September 30, 2002. The decision contained the following findings of fact:

1. The subject property is located at 1633-28th Street, S.E., apartment #3. It is a five-unit housing accommodation, located in Ward 7.

2. Catherine A. Paige has resided at the subject premises at all relevant times and is the Petitioner in this matter.

3. William R. Austin purchased the property in August 1999 and is the Respondent in this matter.

4. Respondent filed a Certificate of Election of Adjustment of General Applicability with RACD, date stamped October 19, 2000, which increased the rent ceiling for Petitioner's unit from $454.00 to $464.00, effective December 1, 2000, and listed the monthly rent charged at $525.00.

5. Petitioner paid $525.00 for monthly rent for her unit from October 31, 1996, the inception of her tenancy, until February 1, 2001, when she reduced her monthly payment to $464.00, pursuant to the $464.00 rent ceiling listed on the October 19, 2000 Certificate of Election of Adjustment of General Applicability.

6. The $525.00 monthly rent payment exceeded the $464.00 rent ceiling listed for unit #3 on the October 19, 2000 Certificate of Election of Adjustment of General Applicability by $61.00

7. Both the legal rent ceiling and monthly rent charged for Petitioner's unit were $464.00, effective December 1, 2000.

8. Petitioner paid $61.00 in excess monthly rent from August 1, 1999, the date Respondent purchased the subject property, to July 1, 2001.

9. Respondent initiated and filed a 70% Voluntary Agreement that was approved by the Rent Administrator, effective July 1, 2001, by Order dated June 8, 2001.

10. Respondent admitted that he did not serve Petitioner with a copy of the written petition that described the proposed 70% voluntary Agreement, the proposed rent ceilings that would be established and the proposed altered levels of related services and facilities.

11. Petitioner received a notice of rent increase dated May 31, 2001 filed by Respondent pursuant to the proposed 70% Voluntary Agreement. The notice proposed to increase the rent ceiling for Petitioner's unit from $463.00 to $1000.00 and the monthly rent charged from $463.00 to $790.00 effective July 1, 2001.

12. Petitioner did not negotiate this rent adjustment with Respondent or otherwise participate in the 70% Voluntary Agreement. Petitioner did not pay the increase at any time.

13. Respondent filed a Complaint for Possession of Real Estate in the Landlord and Tenant Branch of Superior Court against Petitioner on July 7, 2001 for nonpayment of the increased rent of $790.00 demanded pursuant to the 70% Voluntary Agreement.

14. Petitioner notified Respondent at various times about the lack of heat, hot water, water, gas, a hole in the wall, and ceilings throughout the apartment with loose and peeling paint, and a defective toilet in her apartment.

15. Respondent did not promptly abate the violations Petitioner notified him about and did not proportionally reduce Petitioner's monthly rent.

16. The unabated housing code violations were substantial because of the aggregate number and the nature of the unabated repairs.

17. Respondent knew or should have known about the unabated housing code violations that existed in Petitioner's unit.

18. Despite Petitioner's requests, Respondent refused to take measures to reduce the dust and debris which permeated Petitioner's unit when Respondent installed the heating ducts; failed to restore her gas when he restored the gas to all other tenants' units; failed to repair the defective toilet; and to leave her unit upon request.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 4-6. The hearing examiner concluded as a matter of law:

1. Petitioner's rent increase was larger than the amount of increase allowed by any applicable provision of the Act and 14 DCMR § 4205.7.

2. Respondent charged Petitioner rent that exceeded the legally calculated rent ceiling for her apartment in violation of D.C. § 42-3502.06(a).

3. The increase in the rent ceiling and rent charged pursuant to a 70% Voluntary Agreement implemented by Respondent and approved by the Rent Administrator is not applicable to Petitioner's unit for failure of Respondent to comply with 14 DCMR §§ 4213.3 and 4213.4 as to Petitioner.

4. Respondent substantially reduced Petitioner's repair service by failing to timely restore the unabated housing code violations without proportionally reducing Petitioner's rent, in violation of D.C Code § 42-3502.6.

5. Respondent retaliated against Petitioner in violation of D.C. Code § 42-3505.02 and 14 DCMR 4303.4.

Id. at 15.

II. ISSUES ON APPEAL

On October 18, 2002, the housing provider filed a timely notice of appeal in the Commission. The Commission held its hearing on January 22, 2003. The housing provider raised the following issues on appeal:

1. The hearing examiner's ruling that the rent increase amount was larger than the amount of increase allowed by the Act was not supported by substantial evidence, and was contrary to law.

2. The hearing examiner's ruling that rent charged the Tenant exceeded the legally calculated rent ceiling was not supported by substantial evidence. The rent charged was not in violation of D.C. Code Ann. Sec. 42-3502.06(a).

3. The hearing examiner's ruling that Respondent's failure to comply with 14 DCMR section 4213.4 regarding notice to the Tenant of the 70% Voluntary Agreement and, therefore, the rent ceiling and charge set by the Voluntary Agreement was inapplicable, was not supported by substantial

evidence, and was contrary to law.

4. The hearing examiner's ruling that the Housing Provider substantially reduced repair service by failing timely to restore and/or abate housing code violations without proportionally reducing Petitioner's rent was not supported by substantial evidence.

5. Evidence adduced at the hearing demonstrated that rent was neither improperly demanded nor paid.

6. The hearing examiner's ruling in affixing dollar values of the violations was not supported by substantial evidence and was an abuse of discretion.

7. The hearing examiner's ruling that the Housing Provider knowingly reduced the Tenant's services and facilities was not support [sic] by substantial evidence and, therefore, treble damages should not have been awarded.

8. The hearing examiner's ruling that the Housing Provider took retaliatory action against the Tenant was not supported by substantial evidence.

9. The Tenant's claims regarding increases and rent charges should have been disallowed as substantial evidence in the record showed that the Tenant paid the increased rent amount for at least three (3) years prior to the filing of her Tenant Petition and therefore, the claim was time-barred.

10 The hearing examiner erred in denying the Housing Provider's request to submit photographs after the hearing.

Notice of Appeal at 1-3.

III. DISCUSSION OF THE ISSUES

A. The hearing examiner's ruling that the rent increase amount was larger than the amount of increase allowed by the Act was not supported by substantial evidence, and was contrary to law.

The hearing examiner's decision stated:

Petitioner's rent increase was larger than the amount of increase allowed by any applicable provision of the Act and 14 DCMR § 4205.7.[1]

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[1] The regulation, 14 DCMR § 4205.7 (Feb. 6, 1998), provides:

> Unless otherwise ordered by the Rent Administrator, each adjustment in rent charged may not exceed the amount of one (1) rent ceiling increase perfected but not implemented by the housing provider.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 15. The evidence in the record (R. at 2) reflects that on May 31, 2001, the housing provider filed a Tenant Notice of Increase of General Applicability, increasing the tenant's rent from $463.00 to $790.00. The increase was taken pursuant to a 70% Voluntary Agreement approved by the Rent Administrator in an order dated June 8, 2001 with an effective date of July 1, 2001. The record (R.34) further reflects that on July 7, 2001, the housing provider filed in the Superior Court of the District of Columbia, Landlord and Tenant Branch, a Complaint for Possession of Real Estate against the tenant claiming that she failed to pay for the month of July 2001 her total rent of $790.00.

The hearing examiner found, and the Commission agrees, that the housing provider failed to notify the tenant of the 70% Voluntary Agreement as required by the District of Columbia Court of Appeals (DCCA) in Jerome Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 682 A.2d 178, 183 (D.C. 1996), and the regulations, 14 DCMR §§ 4213.3 and 4213.4 (1991), thereby invalidating the increase. See discussion infra Part III.C.

Because the housing provider took a rent increase without complying with the regulations, the increase was larger than the amount of increase allowed by the Act. Accordingly, the decision of the hearing examiner is affirmed and the housing provider's appeal of this issue is denied.

B. The hearing examiner's ruling that rent charged the Tenant exceeded the legally calculated rent ceiling was not supported by substantial evidence. The rent charged was not in violation of D.C. Code Ann. Sec. 42-3502.06(a).

In his decision and order the hearing examiner made finding of fact numbered four (4). The decision stated:

> Respondent filed a Certificate of Election of Adjustment of General Applicability with RACD, date stamped October 19, 2000, which increased the rent ceiling for Petitioner's unit from $454.00 to $464.00, effective December 1, 2000, and listed the monthly rent charged at $525.00.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 5. The unrebutted testimony by the tenant at the OAD hearing was that she paid the housing provider $525.00 until February, 2001 when she reduced her rental payment to $464.00, the rent ceiling as of December 1, 2000.

The Act, D.C. OFFICIAL CODE § 42-3502.06(a) (2001) provides, in relevant part:

> Except to the extent provided in subsection (b) and (c) of this section, no housing provider of any rental unit subject to this chapter may charge or collect rent for the rental unit in excess of the amount computed by adding to the base rent not more than all rent increases authorized after April 30, 1985, for the rental unit by this chapter, by prior rent control laws and any administrative decision under those laws, and by a court of competent jurisdiction. (emphasis added).

The Act, D.C. OFFICIAL CODE § 42-3509.01(a) (2001), further 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, … shall be held liable by the Rent Administrator or 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. (emphasis added).

The unrebutted evidence of record shows that the housing provider filed a Certificate of Election of Adjustment of General Applicability with RACD on October 19, 2000. The filing increased the rent ceiling for the tenant's unit from $454.00 to $464.00, effective December 1, 2000. However, the housing provider continued to collect rent from the tenant in the amount of $525.00, an amount which exceeded the maximum allowable rent applicable to her rental unit. The housing provider's failure to reduce the tenant's rent to an amount equal to or less than $464.00 was a violation of the

Act, D.C. OFFICIAL CODE § 42-3502.06(a) (2001). Accordingly, the decision of the hearing examiner is affirmed and the housing provider's appeal of this issue is denied.

C. The hearing examiner's ruling that Respondent's failure to comply with 14 DCMR section 4213.4 regarding notice to the Tenant of the 70% Voluntary Agreement and, therefore, the rent ceiling and charge set by the Voluntary Agreement was inapplicable was not supported by substantial evidence, and was contrary to law.

The record[2] reflects that on May 23, 2001, the housing provider submitted a 70% Voluntary Agreement Petition to RACD. The petition reflects agreement with the tenants in units one (1), two (2), and four (4) of the housing accommodation to increase the rent ceilings at the accommodation in order to make proposed changes to include a security door and a central heating system. The voluntary agreement was approved by the Rent Administrator in an order dated June 8, 2001 with an effective date of July 1, 2001. On May 31, 2001, citing the 70% Voluntary Agreement, the housing provider filed a "Tenant Notice of Increase of General Applicability" with RACD. The notice proposed to increase the tenant's rent ceiling from $464.00 to $1,000.00 and raised her rent charge from $464.00 to $790.00 effective July 1, 2001.

At the OAD hearing the tenant argued that the housing provider improperly attempted to increase her rent ceiling from $464.00 to $1,000.00 and her rent charge from $464.00 to $790.00. In his decision and order the hearing examiner stated:

The Rules, at 14 DCMR §§ 4213.3 and 4213.4,[3] require a housing

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[2] R. at 32.

[3] The regulations provide:

> If a housing provider initiates a voluntary agreement, the housing provider shall distribute a copy of the proposed agreement to each tenant accompanied by a written notice that describes in detail the proposed rent ceilings that would be established, the proposed changes in related services or facilities, and the proposed capital improvements and ordinary maintenance and repairs.

14 DCMR § 4213.3 (1991)

> provider who initiates a voluntary agreement to distribute a copy of the proposed agreement to each tenant and provide each tenant 14 days to consider the proposal before the agreement is submitted to the Rent Administrator for approval. Respondent admitted that he did not give a copy of the proposed voluntary agreement to Petitioner, in violation of sections 4213.3 and 4213.4.
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> Accordingly, the Examiner rules that the 70% Voluntary Agreement approved by the Rent Administrator in this matter did not apply to Petitioner's rent levels due to Respondent's failure to provide her with a copy for comment as required by the regulations. See Jerome Management, Inc. v. District of Columbia Rental Housing Commission, 682 A.2d 178, 183 (D.C. 1996). As such, the attempted increase in Petitioner's rent ceiling and monthly rent to $1,000.00 and $790.00, respectively, was invalid. Petitioner's rent ceiling and monthly rent shall remain at $464.00 until such time as Respondent implements a rent adjustment in compliance with the Act and the Rules. In addition, Petitioner is due a refund for the excess demand in rent.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 7 (emphasis added). As the hearing examiner noted in his decision, the court in Jerome upheld a Commission decision to invalidate the effect of a 70% Voluntary Agreement on tenants who had not been notified of the agreement or "notified of [their] right to challenge the voluntary agreement." Jerome 682 A.2d at 183. In the instant case, as the evidence of record reflects, the housing provider did not submit a copy of the 70% Voluntary Agreement to the tenant, as required by the regulations. Therefore, the hearing examiner's decision to invalidate the agreement as it applied to the tenant was supported by substantial evidence in the record and was not contrary to law. Accordingly, the decision of the hearing examiner on this issue is affirmed.

D. The hearing examiner's ruling that the Housing Provider substantially reduced repair service by failing timely to restore and/or abate housing

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> Each tenant shall be permitted a minimum of fourteen (14) days to consider the proposal, confer with other tenants, and respond to the housing provider.

14 DCMR § 4213.4 (1991)

code violations without proportionally reducing Petitioner's rent was not supported by substantial evidence.

The Commission has set forth the burden of the tenant when asserting a claim of reduction or elimination of services under the Act.[4] The Commission stated:

> [F]or a tenant to successfully pursue a claim of reduction or elimination of services, a three-prong test must be satisfied. First, the tenant must provide evidence of a reduction or elimination of services, and the fact-finder must find that the housing provider eliminated or substantially reduced a service or services at the tenant's rental unit. Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1988). Second, the tenant must establish the duration of the reduction in services, and present evidence to support his allegations. Daro Realty, Inc. v. 1600 16th St. Tenants Ass'n., TP 4,637 (RHC Oct. 20, 1988) cited in Cobb v. Charles E. Smith Mgmt. Co., TP 23,889 (RHC July 21, 1998). Third, the tenant must show that the housing provider had knowledge of the alleged reduction of services. Gelman Co. v. Jolly, TP 21,451 (RHC Oct. 25, 1990).

Ford v. Dudley, TP 23,973 (RHC June 3, 1999) at 5-6 (footnote omitted). In his decision and order the hearing examiner stated:

> As to the alleged unabated repairs, Petitioner provided an abundance of evidence 1) that each of the conditions existed in her unit during periods of time after Respondent became owner of the subject premises in August 1999; 2) that she discussed them with Respondent when they occurred; 3) that they were abated at the times indicated; and 4) that Respondent did not proportionally reduce her monthly rent. In support of her allegation, Petitioner proffered numerous photographs of the unabated repairs. Petitioner also proffered letters to Respondent in which she complained of the repairs in question and housing deficiency notices issued for her unit by D.C. Housing Inspection officials.
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> Based on Petitioner's expansive and credible testimonial, documentary and photographic evidence, the Examiner finds that Petitioner has proven by a preponderance of the evidence without rebuttal that Respondent substantially reduced her services and facilities when he failed to abate the housing code violations in the apartment, without proportionally reducing the rent. The Examiner also finds that Petitioner provided testimonial proof that the unabated repairs adversely affected her health, welfare and safety and were substantial. The unabated housing code violations exposed

[4] The Act, D.C. OFFICIAL CODE § 42-3501.03(27)(2001), provides: "Related services means services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance...."

> Petitioner and her family to hazardous loose paint and plaster; left them without water for three days; forced her to deal with the unsanitary conditions created by a toilet that wouldn't flush properly; and caused Petitioner the general discomfort experienced by having to suffer with the defective windows, cabinets and doors, lack of heat and holes in the wall.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 8. The hearing examiner held that the tenant met her burden of proving services and facilities provided in connection with the housing accommodation had been substantially reduced and that she established the facts essential to her claim.

The Commission concludes that there was substantial evidence in the record to support the hearing examiner's decision. The tenant testified regarding her requests for repairs in her unit, including repairs of cited housing code violations in the housing accommodation. Further, she provided evidence, including inspection notices and letters to the housing provider requesting repairs, which provided the relevant dates and times of the reductions in services or the length of time that the services were reduced without repairs, which are essential elements of a claim of reduction in services. See Russell v. Smithy Braedon Property Co., TP 23,361 (RHC July 20, 1995). Accordingly, the decision of the hearing examiner on this issue is affirmed.

E. Evidence adduced at the hearing demonstrated that rent was neither improperly demanded nor paid.

For the reasons stated in the Commission's decision in Issue "B" this appeal issue is denied and the decision of the hearing examiner is affirmed. See discussion supra Part III.B.

F. The hearing examiner's ruling in affixing dollar values of the violations was not supported by substantial evidence and was an abuse of discretion.

The District of Columbia Court of Appeals has established a standard when reviewing damages awarded for reduction of services and/or facilities. The court in Bealer v. District of Columbia Rental Hous. Comm'n, 472 A.2d 901, 903 (D.C. 1984), remanded to the Commission a decision by the Rent Administrator ordering a refund, which, "had no basis in the record, as the hearing examiner did not explain how he arrived at that figure." In Washington Realty Co. v. 3030 30th St. Tenant Ass'n, TP 20,749 (RHC Jan. 30, 1991), the Commission determined, in reviewing a decision concerning reduction in services and/or facilities, "[t]he presentation of the examiner's findings and conclusions is so lacking in detail, explanation and analysis that there is…no rational connection made between the facts and the ultimate conclusions arrived at." However, in Taylor v. Chase Manhattan Mortgage, TP 24,303 & TP 24,420 (RHC Sept. 9, 1999), citing Bernstein/H&M Enters. v. Estrill, TP 21,792 (RHC Aug. 12, 1991), the Commission held that the value of a reduction in services cannot be scientifically measured and, therefore, we rely on the hearing examiner's knowledge, expertise and discretion, as long as there is substantial evidence in the record regarding the nature of the violation, its duration and substantiality. See also Calomiris v. Misuriello, TP 4809 (RHC Aug. 30, 1982).

In the instant case, the hearing examiner made findings of fact numbered 14 through 18 (See supra p. 3), based on the evidence in the record regarding the extent and severity of the tenant's reduced services and facilities. A review of the examiner's decision does not show that it was lacking in detail, explanation and analysis or that there was no rational connection made between the facts and the ultimate conclusions, numbered 14 through 18. Therefore, as was the case in Bernstein/H&M Enters. and

Calomiris, the Commission relies on the hearing examiner's knowledge, expertise and discretion regarding the value of the reduced services in the tenant's unit. Accordingly, the decision of the hearing examiner is affirmed on this issue.

G. The hearing examiner's ruling that the Housing Provider knowingly reduced the Tenant's services and facilities was not support [sic] by substantial evidence and, therefore, treble damages should not have been awarded.

In his decision and order the hearing examiner stated:

> In this case, Respondent knew or should have known that he ... 3)substantially reduced Petitioner's repair services by failing to timely abate housing code violations. Respondent knew or should have known that such conduct constitutes violations under the Act. Therefore, the Examiner concludes that Respondent knowingly violated the Act.
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> As to whether the housing provider acted in bad faith, and is liable for treble damages, the Rental Housing Commission has established a two-pronged test. First is a determination that there was a knowing violation of the Act; that determination has been made. Second is a determination that the housing provider's conduct was egregious enough to warrant a finding of bad faith. See Fazekas v.Dreyfuss Brothers. Inc., TP 20,394 (RHC Apr. 14, 1989).
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> In this case, the record is replete with Petitioner bringing to Respondent's attention on numerous occasions the poor conditions in her apartment. Respondent repeatedly failed to take corrective action in a timely manner, if at all.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 10. The record evidence contains a letter from the tenant to the housing provider (R. 1) which details the tenant's attempts to have the housing provider make repairs in her unit. The record (R. 8) also contains a Housing Deficiency Notice dated January 30, 2001, and Housing Violation Notice dated February 9, 2001 (R. 9), detailing housing code violations in the tenant's unit. The unrebutted testimony of record also reflects that numerous housing code violations existed in the tenant's unit.

The Act, D.C. OFFICIAL CODE § 42-3509.01(a) (2001), provides:

> Any person who knowingly ... (2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or 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.

The hearing examiner found a substantial reduction in services and facilities, and determined the housing provider's conduct was egregious, because the housing provider failed to correct known housing code violations. The record revealed there was substantial evidence to support the imposition of treble damages. Accordingly, the Commission affirms the hearing examiner's imposition of treble damages.

H. The hearing examiner's ruling that the Housing Provider took retaliatory action against the Tenant was not supported by substantial evidence.

In his decision and order the hearing examiner provided the following analysis in support of his conclusion that the housing provider retaliated against the tenant. The hearing examiner stated:

> Based on record evidence including the testimony provided at the hearing by Petitioner and Petitioner's documentary proof, the Examiner determines that Petitioner established a presumption of retaliatory action taken against her by Respondent.
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> Petitioner repeatedly complained to Respondent and government officials of unabated repairs, from September 30, 1999, when Respondent began installation of the new heating ducts in Petitioner's unit, until the housing code violations were abated two weeks prior to the hearing in this matter. Petitioner's request to have repairs made were never timely abated by Respondent, particularly her request to have her gas turned back on when all other tenants in the building had their gas operating, and her request to have her toilet repaired. In both instances, Respondent was in Petitioner's unit and/or the building making less urgent repairs and could have heeded Petitioner's calls. Moreover, Respondent refused to leave Petitioner's home upon request and deliberately excluded Petitioner from the negotiations concerning the 70% Voluntary Agreement he initiated.
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> Respondent's failure to make timely repairs decreased the repair and maintenance services provided to Petitioner's unit and, his deliberate decision not to leave her rental unit and not to include Petitioner in the process involving the 70%

> Voluntary Agreement constituted harassment and violated both Petitioner's privacy and her rights under her lease with respect to rent ceiling and monthly rent adjustments. As such, Respondent's conduct created a presumption of retaliation, as Respondent's failure to make the repairs timely, leave the unit upon request, and include Petitioner in 70% Voluntary Agreement process occurred well within six months after Petitioner's complaints of unabated repairs were registered.
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> Respondent proffered no evidence to rebut the presumption of unlawful retaliation established by Petitioner. Finding no bases to discredit Petitioner's testimonial and documentary evidence presented on the issue, the Examiner determines that after Petitioner complained about housing code violations at her unit, Respondent retaliated against her by 1) refusing to timely abate many of the housing code violations, specifically, the defective toilet and gas outage, 2) refusing to leave Petitioner's unit upon demand by Petitioner; and 3) excluding Petitioner from the 70% Voluntary Agreement Process.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 14-15.

The Act, D.C. OFFICIAL CODE § 42-3505.02(b) (2001),[5] provides, when determining if a housing provider has taken retaliatory action, "the trier of fact shall presume retaliatory action has been taken, if within six months preceding the retaliatory action," the tenant made a request for repairs or contacted D.C. officials regarding the housing provider's actions. It also provides that the hearing examiner "shall enter a

[5] D.C. OFFICIAL CODE § 42-3505.02(b), provides in part:

> 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 a judgment in the tenant's favor unless the housing provider comes forward with clear convincing evidence to rebut this presumption if within the six (6) months preceding the housing provider's action, the tenant:
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> (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;
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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 unit is located;
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> (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 regulation;
>
> (4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
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> (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
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> (6) Brought legal action against the housing provider.

judgment in the tenant's favor unless the housing provider comes forward with clear convincing evidence to rebut this presumption." See id. (emphasis added).

In the instant case the hearing examiner determined, based on the testimony at the hearing, that the housing provider failed to rebut the presumption of retaliation by presenting clear and convincing evidence regarding his failure to make timely repairs, refusing to exit the tenant's unit, and excluding the tenant from the 70% Voluntary Agreement process. The hearing examiner based his conclusion on the credibility of the testimony of the tenant as opposed to that of the housing provider. The Commission has previously held that findings of credibility by the hearing examiner will be given deference by the Commission, and will not be disturbed absent evidence in the record to the contrary. Gray v. Davis, TP 23,081 (RHC Dec. 7, 1993); See also Eilers v. Bureau of Motor Vehicles Servs., 583 A.2d 677, 684 (D.C. 1990). Accordingly, the decision of the hearing examiner on this issue is affirmed.

I. The Tenant's claims regarding increases and rent charges should have been disallowed as substantial evidence in the record showed that the Tenant paid the increased rent amount for at least three (3) years prior to the filing of her Tenant Petition and therefore, the claim was time-barred.

In his decision, the hearing examiner limited the tenant's recovery for rent overcharges to the period from August 1, 1999, the date the housing provider acquired the housing accommodation, to June 30, 2001. The decision stated:

> Petitioner is entitled to a rent refund for past overcharges where the $525.00 monthly rent she was charged exceeded the legal rent ceiling of $464.00 by $61.00, in violation of D.C. Code § 42-3502.06(a) and 14 DCMR § 4200.3. Petitioner was overcharged $61.00 by Respondent from August 1, 1999 to June 30, 2001, a period of twenty-three months for a total of $1,403.00.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 10.

The Act prohibits a tenant from challenging any rent adjustment implemented more than three (3) after the effective date of the adjustment. D.C. OFFICIAL CODE § 42-3502.06(e) (2001). The record reflects that on October 19, 2000, the housing provider filed a Certificate of Election of Implementation of Adjustment of General Applicability with the RACD. In that filing, the housing provider indicated that the prior rent ceiling was $454.00, that the new rent ceiling was $464.00, and that the rent charged was $525.00. The tenant filed her tenant petition on June 5, 2001. While the tenant was prohibited from filing a petition with respect to any rent adjustment which occurred prior to June 5, 1998, the October 19, 2000, filing was not time-barred by the Act. See Kennedy v. District of Columbia Rental Hous. Comm'n, 709 A.2d 94 (D.C. 1998); see also Redmond v. Majerle Mgmt., Co., TP 23,146 (RHC Mar. 26, 2002). Accordingly, the decision of the hearing examiner is affirmed.

J. The hearing examiner erred in denying the Housing Provider's request to submit photographs after the hearing.

In his decision and order the hearing examiner stated:

> In his post hearing submission on October 29, 2001, the Respondent also included a series of photographs of the interior of the Petitioner's apartment purporting to show the completed work that had been done. The Respondent had requested at the hearing for permission to submit these photographs after the hearing along with government inspection stickers. Permission to do so was denied.

Paige v. Austin, TP 27,145 (OAD Sept. 30, 2002) at 4.

"An administrative decision should rest solely upon evidence appearing in the public record of the agency proceeding. Ordinarily, the record closes upon termination of the hearing below. … [E]vidence submitted post-hearing may not be admitted into the record and, therefore, may not provide a basis upon which an agency may issue a decision." Harris v. District of Columbia Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C.

1986) (citations omitted). In Harris, the examiner held the record open for eleven days after the hearing closed. During the eleven-day period, the former landlord submitted two sworn affidavits pertaining to evidence not in the record. The hearing examiner refused to admit the post-hearing submissions or to consider them as part of the official record on which she based her decision and order. The DCCA held: "Since the documents submitted post-hearing contained new evidence not a part of the public record, the Examiner did not err in excluding them from her consideration." Harris, 505 A.2d at 69, cited in McKinney v. King, TP 27,264 (RHC July 24, 2002).

Accordingly, the decision of the hearing examiner on this issue is affirmed, and the housing provider's appeal of this issue is denied.

IV. CONCLUSION

The decision of the hearing examiner is affirmed.

SO ORDERED.

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 District of Columbia 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 telephone 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 certify that a copy of the foregoing Decision and Order in TP 27,145 was mailed postage prepaid by priority mail, with delivery confirmation on this **12th** day of **December, 2003** to:

Elizabeth Figueroa, Esquire
Blumenthal & Shanley
1700 - 17th Street, N.W.
Suite 301
Washington, D.C. 20009

Catherine A. Paige
1633 – 28th Street, S.E.
Apartment #3
Washington, D.C. 20020

LaTonya Miles
Contact Representative