DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,146

In re: 1500 Massachusetts Avenue, N.W., Unit 718

Ward Two (2)

JACOB ALPAR
Tenant/Appellant

v.

POLINGER, SHANNON AND LUCHS
Housing Provider/Appellee

DECISION AND ORDER

August 8, 2003

BANKS, CHAIRPERSON. This case is on appeal to the Rental Housing Commission from a decision and order issued by the Rent Administrator. 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 (DCMR), 14 DCMR §§ 3800-4399 (1991) govern the proceedings.

I. PROCEDURAL HISTORY

On June 5, 2001, Jacob Alpar, Tenant, filed tenant petition (TP) 27,146. The petition alleged: 1) a rent increase larger than allowed by the Act; 2) the Housing Provider failed to file the proper rent increase forms with the Rental Accommodations and Conversion Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA); 3) the rent charged exceeds the applicable rent ceiling; 4) the rent ceiling filed with RACD is improper, and 5) retaliatory action taken by the Housing Provider against the Tenant. A hearing was scheduled and held on October 29, 2001. On

June 18, 2002, Administrative Law Judge Henry McCoy issued the decision and order, which contained the following findings of fact:

1. The subject housing accommodation, located at 1500 Massachusetts Avenue, N.W., is a 556-unit apartment building.

2. Petitioner resides in apartment #718.

3. Respondent manages the subject housing accommodation.

4. On April 27, 2001, Respondent personally served Petitioner with a notice of increase of general applicability for a 3.3% increase in the rent ceiling effective June 1, 2001.

5. On May 7, 2001, Respondent filed with the RACD the certificate of election of general applicability and affidavit of service for a rent adjustment effective June 1, 2001.

6. On October 25, 2001, Respondent filed with the RACD an amended certificate of election for the rent adjustment effective June 1, 2001.

7. Prior to the rent ceiling adjustment, Petitioner's rent ceiling was $741.00.

8. Petitioner's rent ceiling and rent charged were increased from $741.00 to $765.00, amounting to a 3.3% increase.

9. Respondent increased Petitioner's rent on Petitioner's anniversary date.

10. In 1996, Petitioner informed Respondent of noise generating devices.

11. Petitioner never requested a government inspection of his noise complaint.

12. Petitioner never contacted Respondent at any time while he was actually hearing the noise in his apartment.

13. Petitioner is the only person who has heard the noise that he has complained about.

OAD Decision at 4.

The decision and order contained the following conclusions of law:

1. The Respondent increased Petitioner's rent by the correct percentage, 3.3%, in accordance with 14 DCMR [sic] 4206.2(a) [sic].

2. Respondent filed the proper rent increase forms with the RACD as required by 14 DCMR [sic] 4205.4(d) [sic].

3. Respondent did not charge Petitioner rent in excess of the legally calculated rent ceiling for apartment #718 in violation of D.C. [Official] Code § 42-3502.06(a) [sic].

4. The rent ceiling filed with the RACD for Petitioner's apartment is in compliance with D.C. [Official] Code § 42-3502.06(a) [sic].

5. Petitioner failed to carry his burden of proof, pursuant to 14 DCMR § 4003 [sic], that Respondent substantially reduced Petitioner's services and/or facilities by causing harmful noise to be directed into his apartment in violation of D.C. [Official] Code § 42-3502.11 [sic].

6. Respondent did not retaliate against Petitioner in violation of D.C. [Official] Code § 42-3505.02 [sic].

OAD Decision at 10.

The petition was dismissed with prejudice in the decision and order dated June 18, 2002, and the Tenant filed in OAD a motion for reconsideration, which was denied in an order issued on July 15, 2002.[1] On July 25, 2002, the Tenant filed the notice of appeal in the Commission.[2]

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[1] On August 2, 2002, the Tenant filed in the Commission an appeal from the ALJ order denying reconsideration of the OAD decision. The Commission's rule, 14 DCMR § 4013.3 (1991), provides, "[t]he denial of a motion for reconsideration shall not be subject to reconsideration or appeal." Therefore, the Commission dismisses the notice of appeal from the order on reconsideration in this appeal, TP 27,146. See Wedderburn v. Thomas, TP 23,970 (RHC July 30, 1996).

[2] The Tenant's notice of appeal carried the Tenant Petition numbers TP 27,146 and TP 24,417. The latter case was disposed by the Commission's order dated October 21, 1999, which dismissed the appeal due to the failure of counsel for the Housing Provider/Appellant to appear at the Commission's hearing. Thus TP 24,417 is not before the Commission as an appeal. See Polinger Shannon & Luchs, TP 24,417 (RHC Oct. 21, 1999).

II. THE ISSUES

The notice of appeal (notice) is in narrative form and states the following as errors in the decision on TP 27,146:

1. Whether the Tenant's rent increase based on the CPI-W rent ceiling increase of 3.3% was an error or proper. See notice at 2.

2. What was the correct CPI-W rate for the increase of rent ceilings in 2001? See notice at 2 & 5.

3. Whether the amended Certificate of Election of Adjustment of General Applicability filed on October 25, 2001 is valid. See notice at 2.

4. Whether the hearing examiner committed error in the decision by stating he had no jurisdiction over the refund and in Housing Provider Exhibits 5-9. See notice at 5.

5. Whether the hearing examiner erred in his ruling on reduction of services and facilities related to disturbing noises. See notice at 5.

6. Whether error occurred with "the elimination of [Tenant's] document entitled "Tenant's Opposition to Housing Provider's Complaint." See notice at 5.

Notice of Appeal (July 25, 2002).

The Commission held its hearing on the notice of appeal on September 10, 2002.

III. COMMISSION'S DECISION ON THE ISSUES

1. **Whether the Tenant's rent increase based on the CPI-W rent ceiling increase of 3.3% was an error or proper.**

2. **What was the correct CPI-W rate for the increase of rent ceilings in 2001?**

3. **Whether the amended certificate of election of adjustment of general applicability filed on October 25, 2001 is valid.**

On the issue of the amount of the Tenant's rent increase, the ALJ made the following findings of fact:

5. On May 7, 2001, Respondent filed with the RACD the certificate of election of general applicability and affidavit of service for a rent adjustment effective June 1, 2001.

6. On October 25, 2001, Respondent filed with the RACD an amended certificate of election for the rent adjustment effective June 1, 2001.

...

8. Petitioner's rent ceiling and rent charged were increased from $741.00 to $765.00, amounting to a 3.3% increase.

OAD Decision at 4.

The ALJ made the following conclusions of law:

1. The Respondent increased Petitioner's rent by the correct percentage, 3.3%, in accordance with 14 DCMR [sic] 4206.2(a) [sic].

2. Respondent filed the proper rent increase forms with the RACD as required by 14 DCMR [sic] 4205.4(d) [sic].

3. Respondent did not charge Petitioner rent in excess of the *legally calculated rent ceiling* for apartment #718 in violation of D.C. [Official] Code § 42-3502.06(a) [sic] (emphasis added).

4. The rent ceiling filed with the RACD for Petitioner's apartment is in compliance with D.C. [Official] Code § 42-3502.06(a) [sic].

OAD Decision at 10.

The Commission must publish the annual adjustment of general applicability for rent ceilings regulated by the Act prior to March 1, each year. D.C. OFFICIAL CODE § 42-3502.02 (2001). The annual adjustment of general applicability is the change during the *previous* calendar year, in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the *previous* calendar year in the Washington D.C. metropolitan area. D.C. OFFICIAL CODE § 42-3502.06 (2001). That change is expressed by a percentage figure, which cannot exceed 10% per year. Id.

Moreover, "[n]o rent increases, … shall be effective until the first day on which rent is normally paid occurring more than 30 days after notice of the increase is given to the tenant." D.C. OFFICIAL CODE § 42-3509.04(b) (2001). The Commission certified the CPI-W rate of 3.3% on February 23, 2001. See D.C. Reg. 1856 (Feb. 23, 2001). That notice stated that the 3.3% CPI-W rate was effective on May 1, 2001. Id.

On April 27, 2001, the Housing Provider served the "Tenant Notice of Increase of General Applicability" Exhibit [Exh.] 1, Record (R.) at 29 & 54, which accurately stated the 2001 CPI-W increase was 3.3%. In addition, the notice stated that the Tenant's current rent ceiling was $741.00 and the increased rent ceiling was $765.00; and the current rent charged was $741.00 and the new rent to be charged was $765.00. The rent increase was effective June 1, 2001. On May 7, 2001 the Housing Provider filed the affidavit of service in RACD, which stated the Tenant was served with the notice earlier on April 27, 2001. Respondent's. Exh. 1.

The certified file contains a Certificate of Election of Adjustment of General Applicability (certificate), which states, "**THE 2000 CPI-W: 2.1%.**" R. at 30 & 69. This document does not have a RACD file stamp date, nor does it have an exhibit number, however, it was admitted into evidence at the hearing, as Respondent's Exhibit (Exh.) 2. (OAD Hearing CD Oct. 29, 2001). In addition, the 2.1% rate of change in the CPI-W effective May 1, 2000 was certified by the Commission. D. C. Reg. 1303 (Feb. 25, 2000). Therefore, the certificate and the notice to the Tenant had two conflicts consisting of different text for the CPI-W year (2000 versus 2001) and different percent or rate of increase in the CPI-W (2.1% versus 3.3%).

In other words, it is undisputed and uncontroverted in the record that the Housing Provider filed in RACD an inaccurate CPI-W certificate on May 7, 2001. The certificate contained errors in its text by stating the year for the CPI-W adjustment and increase was 2000; it should have stated the year was 2001, and the increase was 2.1% rather than 3.3%, as certified by the Commission in 2001. See D.C. Reg. 1856 (Feb. 23, 2001).

Therefore, the record shows that the respondent did not file an accurate and proper certificate, Respondent Exh. 2, to implement the 2001 CPI-W rent ceiling increase or adjustment within 30 days of the date it was first eligible to take the adjustment. See Collins v. Peter N.G. Schwartz Mgmt. Co., TP 23,571 (RHC Feb. 10, 2000) at 7-8; 14 DCMR § 4204.10(c) (1991), which requires that the certificate "be filed and served within 30 days following the date when the housing provider is first eligible to take the adjustment." The Commission certified that the 3.3% CPI-W rate was effective on May 1, 2001. D. C. Reg. 1856 (Feb. 23, 2001).

On October 25, 2001, the Housing Provider filed a second and amended certificate, which stated, "**THE 2000 CPI-W: 3.3%**," Respondent's Exh. 3, R. at 34. This statement was NOT accurate, because the rate of change in the CPI-W effective for 2000 was 2.1%, as certified by the Commission on February 25, 2000. See D.C. Reg. 1303 (Feb. 25, 2000). The amended certificate should have stated the year was 2001, instead of 2000.

The law requires that there be substantial evidence in the record to support the findings of fact by the ALJ. See RECAP – Bradley Gillian, TP 27,042 (RHC Dec. 19, 2002) citing D. C. OFFICIAL CODE § 42-3502.16(h) (2001), the Act,

which requires that the Commission review for substantial evidence in the record; D.C. OFFICIAL CODE § 2-509(e) (2001), the DCAPA, which also requires that findings of fact be supported by substantial evidence in the record. See also Meir v. D.C. Rental Hous. Comm'n, 372 A.2d 566 (1977); Temple v. D.C. Rental Hous. Comm'n, 536 A.2d 1024, 1038 (D.C. 1987) (for discussions of the requirement for substantial evidence in the record). In the instant appeal, the Housing Provider did not file a proper certificate with accurate 2001 CPI-W information within the 30-day period allowed by 14 DCMR § 4204.10(c) (1991), nor did it file an accurate and proper amended certificate on October 25, 2001. The latter could not be retroactive, or relate back, to the original 30-day period allowed by the rules. See Charles E. Smith Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 492 A.2d 875 (D.C. 1987), where the court affirmed the Commission's disallowance of a late filing and the court stated that to allow late filings to be considered "*nunc pro tunc*" would create a disincentive for landlords to provide timely, accurate and reliable information. Id. at 877-78. Therefore, the amended certificate filed on October 25, 2001 cannot legally be considered a substitution for the required initial filing within 30-days of the Housing Provider first becoming eligible to take the 2001 CPI-W increase adjustment (effective May 1, 2001), pursuant to 14 DCMR § 4204.9(c) (1991). Accordingly, the findings of fact, numbered 5 and 6, related to the two certificates, are reversed, because the substantial evidence in the record does not support that they were properly filed, since both contained inaccurate information in them. In addition, conclusions of

law numbered 2, 3, and 4, related to the filing of the certificates, are also reversed, because they do not rationally flow from the findings that are not supported by accurate substantial evidence in the record.

In conclusion, the certified record from OAD does not contain substantial evidence to support the findings and the conclusions of law do not flow from the ALJ findings, that the Housing Provider filed in 2001 an accurate and proper certificate for the 3.3% CPI-W adjustment increase of the Tenant's rent ceiling and rent. Therefore, these appeal issues are granted and this case is remanded to the ALJ for proper findings based on the certified record, and for calculation of the rent refund and interest owed to the Tenant due to the Housing Provider's two failures to file an accurate and proper CPI-W certificate to increase the Tenant's rent ceiling and rent in 2001. No remand hearing is ordered. See Wire Properties, Inc. v. District of Columbia Rental Hous. Comm'n, 476 A.2d 679 (D.C. 1984) at 682 (where the court affirmed the Commission's disallowance of a remand for a hearing on an issue previously before the Rent Administrator).

4. Whether the hearing examiner committed error in the decision by stating he had no jurisdiction over the refund and in Housing Provider Exhibits 5-9.

This issue refers to the rent refund of $942.00 ordered by Hearing Examiner Thomas Word in TP 24,417. The Tenant wrote two and a half pages of text in his brief to the Commission about the refund ordered in TP 24,417. The ALJ in this case ruled that he did not have jurisdiction over the enforcement of the refund claim. In addition, the Housing Provider submitted into evidence a calculation sheet showing that Petitioner was given a credit for the rent refund amount against rent due and owing to Respondent that

the Tenant paid into the Superior Court escrow account. Respondent Exh. 6 at ¶ 4, OAD See OAD Decision at 9.

The Commission affirms the ALJ for the following reasons. The ALJ had substantial evidence in the record to support his ruling on the rent refund, because that issue was before the Superior Court for the District of Columbia.

In addition, the Act provides that an order of the Commission must be enforced in the Superior Court. See D.C. OFFICIAL CODE § 42-3502.18 (2001), which states:

> The Rental Housing Commission, Rent Administrator, or any affected housing provider or tenant may commence a civil action in the Superior Court of the District of Columbia to enforce any rule or decision issued under this chapter. (emphasis added.)

These parties are litigating before the Superior Court a collateral issue that includes the identical $942.00 rent refund and the tenant may obtain relief or clarity about the rent refund from the court.

The Housing Provider's request for attorney's fees on the issue related to the rent refund to the Tenant is denied, since this matter is pending before the Superior Court.

5. Whether the hearing examiner erred in his ruling on reduction of services and facilities related to disturbing noises.

The ALJ wrote in the decision conclusion of law numbered 5:

> Petitioner failed to carry his burden of proof, pursuant to 14 DCMR § 4003 [sic], that Respondent substantially reduced Petitioner's services and/or facilities by causing harmful noise to be directed into his apartment in violation of D.C. [Official] Code § 42-3502.11 [sic].

Decision at 10.

The ALJ's analysis in the decision to support this finding of fact was:

> Petitioner was not exactly clear where the noise was coming from or who or what was generating the noise. Also, Petitioner couldn't say whether the noise was emanating from inside the building or from outside the building. He described the noise as similar to the sound you hear when you turn the television channel selector to a position that does not register a transmission signal. He further states that the noise hurts him, undermines his health, and that it is an assault. He claims that he has complained about the noise to the on-site manager, Michael Earley. He makes no claim that Mr. Earley is causing this noise but that it is his responsibility under the law to make sure it doesn't hurt him as a Tenant. In further statements, petitioner said that he is retired from the intelligence community and he thinks there may be a relationship between them and Mr. Earley. He posits that maybe someone comes in to Mr. Earley and tells him to direct the noise at Petitioner.
>
> ...
>
> In the instant case, the tenant has failed to reach the threshold of proving his claim for reduction in services and facilities by presenting competent evidence of the existence or duration of the reduced services and facilities. With all due respect to Petitioner, his testimony on the existence of the noise he hears is not found to be credible. He speaks of 'illegal noise generating devices' but is unable to say with any degree of certainty what these devices might be or where the noise is coming from, either inside the building where Respondent could be held accountable or outside the building and thus beyond Respondent's control. Petitioner was likewise unable to give the time of day the noise started and/or stopped or how long it lasted.
>
> In addition, Petitioner stated that he did not call the housing inspectors to complain and to have a noise reading taken. Neither did he call Respondent when he heard the noise so Respondent could hear first hand what he was complaining about. Also, there was no testimony that any other tenants in the building had complained of any type of regular, sustain [sic], or hurtful noise.

Respondent submitted a copy of a letter Petitioner wrote to them dated March 1, 1996, complaining of the noise. Respondent Exh. 10. The three-year statute of limitations provision in the Act, D.C. OFFICIAL CODE § 42-33502.06(e) 2001, presents an absolute bar to filing a tenant petition for reduction of services, when the reduced services began more than three years before the filing of the

tenant petition on June 5, 2001. See Peerless Properties v. Hashim, TP 21,159 (RHC Oct. 26, 1992); Kennedy v. District of Columbia Rental Hous. Comm'n, 709 A.2d 94 (D.C. 1998).

The Commission affirms the ALJ in the findings of fact and conclusions of law that the Tenant did not carry his burden of proof, as explained by the ALJ in the decision. Moreover, the noise claim was beyond the three-year statute of limitations, which bars consideration of the 1996 noise complaint made in the petition filed on June 5, 2001. The three-year statute of limitations on the 1996 noise complaint expired in 1999. The petition was filed more than a year after the expiration of the statute of limitations in 1999. Accordingly, there is no remedy or relief for the noise complaint. See D.C. OFFICIAL CODE § 42-3502.06 (2001); Borger Mgmt., Inc. v. Warren, TP 23,909 (RHC July 22, 1998); Stitt v. Outten, TP 22,809 (RHC Aug. 8, 1996).

6. Whether error occurred with "the elimination of [Tenant's] document entitled "Tenant's Opposition to Housing Provider's Complaint." Notice of Appeal at 6.

The ALJ wrote in the decision:

> On May 1, 2002, Petitioner filed a document entitled "Tenant's Opposition to Housing Provider's Complaint ..." with several attachments.[3] On May 6, 2002, Respondent filed a letter in opposition to this late filing. As already stated, the record in this matter officially closed when the hearing on October 29, 2001 adjourned. The submission of subsequent filings are only permitted by express leave of the court and is generally restricted to filing final arguments with proposed findings of fact and conclusions of law. The submission of additional documentary evidence is prohibited, as it does not afford the opposing party the opportunity to examine it and contest its consideration by the trier of fact before it is introduced into evidence. Therefore, Petitioner's May 1, 2002

[3] This document stated that the tenant: "incorporates his opposition of March 19, 2002, submitted to Landlord and Tenant Branch as a part of his Petition Complaint No. 27,146 submitted to RACD, a copy with exhibits is attached herewith."

> submission will not be given any consideration in the rendering of the decision in the instant matter. See Williams v. D.C. Board of Zoning Adjustment, 535 A.2d 910 (D.C. 1988); Tenants of the Winthrop House v. Wm. Calomiris Investment Corp., TP 22,533 (RHC April 7, 1994).

OAD Decision at 3.

The Commission agrees with the ALJ's analysis and decision not to consider the filing made by the Tenant after the hearing adjourned, because the court in Harris v. District of Columbia Rental Hous. Comm'n, 505 A.2d 66 (D.C. 1986) stated:

> Petitioner complains that the Examiner's failure to consider these affidavits [submitted post-hearing] when rendering her decision constitutes reversible error. We disagree.
>
> An administrative decision should rest solely upon evidence appearing in the public record of the agency proceeding. D.C. Code § 1-1509(b) (1981) [now D.C. OFFICIAL CODE § 2-509(b) (2001)]. Ordinarily, the record closes upon termination of the hearing below. However, the record may be held open for the post-hearing submission of memoranda. *See Monaco v. District of Columbia Board of Zoning Adjustment*, 407 A.2d 1091, 1102 (D.C. 1979) (where it was held to be proper for an agency to consider material submitted post-hearing which did not contain new evidence, but rather was merely a memorandum of conclusions which could be drawn from evidence already included in the record). New evidence 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. *Cary v. District of Columbia Unemployment Compensation Board*, 304 A.2d 18, 20 (D.C. 1973). (emphasis added.)

Harris at 69.

In the instant appeal, the Tenant attempted to introduce a document with exhibits for the purpose that they become a part of his tenant petition. See n.3. However, the law as stated by the court in Harris and quoted above, forbids the introduction of new evidence after the hearing is adjourned. Moreover, the effect of the Tenant's documents would be to amend the petition without allowing the

Housing Provider opportunity to respond, because the hearing was adjourned. Based on the law stated in Harris and the authorities cited by the ALJ, the ALJ is affirmed on this issue.

All other issues are denied as not clearly and concisely stated as required by 14 DCMR § 3802.5 (1991). The Commission in Thibodeau v. Lawal, TP 23,883 (RHC Aug. 19, 1997) stated:

> In accordance with 14 DCMR 3802.5(b), the notice of appeal shall contain "... a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator." Failure to comply with the provisions of 14 DCMR 3802.5 may result in the dismissal of the appeal. 14 DCMR 3802.13.... The Commission cannot speculate because review by the Commission is limited to the issues raised in the notice of appeal. 14 DCMR 3807.4.

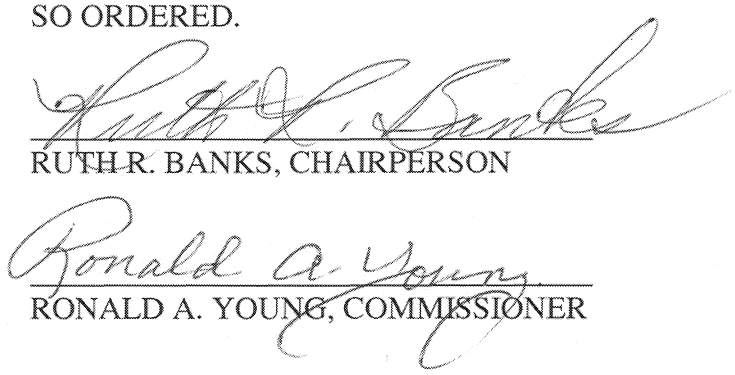
The Tenant's notice of appeal did not clearly raise other issues, as required by 14 DCMR § 3802.5 (1991).

IV. CONCLUSION

The ALJ, due to the lack of substantial evidence in the record, is reversed on his findings of fact and conclusions of law related to the filing of the two certificates of election of adjustment of general applicability, because of the errors on the certificates related to the year and percent (rate) of increase in the CPI-W. The original certificate and the amended certificate are not proper and valid to increase the rent ceiling or the rent charged the Tenant. The ALJ is affirmed on all other issues.

This case is remanded for calculation of the rent refund on the 3.3% rent increase charged and demanded of the Tenant, and for the calculation of interest on the refund.

SO ORDERED.



RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Decision and Order in TP 27,146 was mailed by priority mail, with confirmation of delivery, postage prepaid this **8th day of August, 2003**, to:

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