`DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,730

In re: 3636 16th Street, N.W., Unit B-1066

Ward One (1)

JONATHAN WOODNER COMPANY
Housing Provider/Appellant

v.

HELEN ENOBAKHARE
Tenant/Appellee

DECISION AND ORDER

February 3, 2005

YOUNG, COMMISSIONER. This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD), 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

Helen Enobakhare filed Tenant Petition (TP) 27,730, with RACD, on January 17, 2003. In the petition, the tenant alleged that her housing provider, the Jonathan Woodner Company, the owner of the housing accommodation, the Woodner, located at 3636 16th Street, N.W.: 1) took a rent increase while her unit was not in substantial compliance

with the D.C. Housing Regulations; and 2) substantially reduced services and/or facilities provided in connection with her unit.

A RACD hearing on the petition was held on March 12, 2003, with Hearing Examiner Saundra M. McNair, Esquire, presiding. Hearing Examiner McNair issued her decision and order on July 8, 2003. The decision contained the following findings of fact:

1. The Petitioner took possession of apartment # B-1066 on September 16, 2000, and has resided at the subject premises at all relevant times, without interruption.

2. The Petitioner moved out of the subject premises on or about January 31, 2003.

3. The Respondent, Earl Jones, manages the subject property; and Respondent Kolawole Saheed oversees pest control for the subject property.

4. The Respondent, Jonathan Woodner Company owns the subject property.

5. The Examiner has jurisdiction to address the Petitioner's claims concerning the rental increases, and substantial reduction of services or facilities of the unit, since the [h]ousing [a]ccommodation is not exempt pursuant to the Rental Housing Act of 1985.

6. The current rent ceiling for Petitioner's rental unit is $1,681.00 per month. The rent charged Petitioner during the period of September 2000 through September 2001 was $1,000.00; from October 2001 through September 2002 the rent charged was $1,033.00; and from September 2002 through January 2003 the rent charged was $1,060.00 a month.

7. The Petitioner provided notice to the Respondent or the Respondent's agents, Mr. Earl Jones (building manager) and Mr. Wolly [sic] Saheed, (maintenance and pest control) of repairs and extermination needed to the interior of her unit.

8. The Respondent failed to provide adequate maintenance and repairs to [the] interior of Petitioner's unit of the subject property once notified of the infractions by way of notice from the Petitioner.

9. The Petitioner has proven, by a preponderance of the evidence, that the Respondent demanded or implemented rental increases while the housing

accommodation was not in substantial compliance with the Housing Regulations.

10. The Petitioner has proved by a preponderance of evidence, that the Respondent has substantially reduced the services or facilities [provided] in connection with the rental of her unit in violation of D.C. Official Code § 42-3501.11 [sic].

Enobakhare v. Jonathan Woodner Co., TP 27,730 (RACD July 8, 2003) at 4-5. The hearing examiner concluded as a matter of law:

1. The Petitioner has proven, by a preponderance of the evidence, that the Respondent demanded or implemented a rental increase while Petitioner's rental unit was not in substantial compliance with the Housing Regulations.

2. The Respondent substantially reduced Petitioner's facilities and other amenities service [sic] by failing to: (1) promptly repair molded cabinets in both the kitchen and bathroom; and (2) provide successful extermination services for Petitioner's unit at the subject property, therefore adversely affecting Petitioners [sic] health, welfare, or safety.

3. The Petitioner has proven, by a preponderance of law [sic], that the Respondent has knowingly, and willfully substantially reduced the services or facilities in her rental unit, in violation of D.C. Official Code § 42-3502.11.

4. The Petitioner is entitled to a rent rollback and a rent refund for Respondent's substantial reduction in the services or facilities for the failure to repair the molded cabinets for twenty-five (25) months; and failure to exterminate the bug and rodent problem in Petitioner's unit for twenty-two (22) months. The total amount due to the Petitioner is $17,242.97, including interest in the amount of $864.77 on the $16,378.20 overcharge amount, for Respondent's substantial reduction in his repair service pursuant to D. C. Official Code § 42-3501.11[sic].

Id. at 18.

II. ISSUES ON APPEAL

On July 24, 2003, the housing provider filed a Notice of Appeal in the Commission. The housing provider filed a Brief on Appeal on August 22, 2003. In its notice of appeal the housing provider raised the following issues:

1. The evidence did not support the conclusion that the rent increases

were taken while Petitioner's unit was not in substantial compliance with the D.C. Housing Regulations.

2. The evidence did not support the conclusion that Respondent substantially reduced Petitioner's facilities and other amenities by failing to make repairs to the premises.

3. The evidence did not support the conclusion that Respondent knowingly and willfully substantially reduced the services or facilities in her rental unit.

4. A reduction in the rent ceiling was not justified. Alternatively, the reduction in the rent ceiling was excessive.

5. Petitioner is not entitled to a rent rollback and rent refund.

6. Even if the adjustment of the rent ceiling is upheld, the rent overcharge was erroneously calculated and excessive.

7. The Hearing Examiner demonstrated bias in favor of Petitioner by acting as an advocate for her.

8. The Hearing Examiner failed to provide a complete record of the proceedings as required by D.C. Law.[1]

Notice of Appeal at 1-2. The Commission held the appellate hearing on the appeal on September 23, 2004.

III. DISCUSSION OF THE ISSUES

A. The evidence did not support the conclusion that rent increases were taken while the tenant's unit was not in substantial compliance with the D.C. Housing Regulations.

The housing provider argues that the evidence in the record reflects the first rent increase taken by the housing provider in October, 2001 was taken during a period when the tenant testified that she saw no mice in her unit. In fact, the tenant testified that she continuously saw the evidence of mice in her unit, that is, that she constantly discovered mouse droppings in her unit; that she informed members of the Woodner staff, and that

[1] Counsel for the housing provider withdrew this issue at the Commission's appellate hearing.

she was repeatedly told that the mouse droppings were old. The tenant also testified, without rebuttal from the housing provider, that she had a continuous problem with a roach infestation in her unit from the time she took occupancy of her unit until she moved from the housing accommodation.

The housing provider avers that the rodent infestation existed in the tenant's unit when the second rent increase became effective in September 2002. However, the housing provider argues:

> [T]he landlord's tireless efforts to resolve the alleged rodent problem, evidence of the cleanliness of Petitioner's apartment, and evidence that the pest problem was limited to Petitioner's apartment outweighs any argument that the apartment was not in substantial compliance with the housing code.

Brief of Appellant (Brief) at unnumbered page 8. The Commission's regulation, 14 DCMR § 4216.2 (1991), provides:

> .... 'substantial compliance with the housing code' means the absence of any substantial housing violations as defined in § 103(35) of the Act, including but not limited to, the following:
>
> ....
>
> (i) Infestation of insects or rodents.

The substantial evidence in the record reflects that housing code violations existed in the housing accommodation when the tenant's rent was increased effective in October 2001, and in September 2002. While the tenant testified that she saw no live mice during the period of her tenancy in October 2001, she testified that she continually found fresh mouse droppings in her unit. She also testified that she routinely found roaches in the kitchen of her unit. The Commission has determined that a housing provider may not implement a rent increase for a rental unit in which substantial housing code violations exist, even where the housing provider has made substantial, but unsuccessful, efforts to

abate the violations. See Hutchinson v. Home Realty, Inc., TP 20,523 (RHC Sept. 5, 1989). Based on the tenant's testimony, which was found to be credible, and the documentary and video taped evidence presented by the tenant, the hearing examiner determined that the tenant's unit had substantial housing code violations when her rent was increased. The hearing examiner's findings were supported by the substantial evidence in the record.[2] Accordingly, the housing provider's appeal of this issue is denied, and the decision of the hearing examiner is affirmed.

B. The evidence did not support the conclusion that the housing provider substantially reduced the tenant's facilities and other amenities by failing to make repairs to the premises.

The housing provider argues that the evidence of record does not support the finding that the tenant's facilities were reduced.

In the application of the reduction of services and facilities provision of the Act, D.C. OFFICIAL CODE § 42-3502.11 (2001),[3] the Commission stated that the failure of a housing provider to furnish the services and facilities required by the D.C. Housing Code amounts to a reduction of services and facilities. Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993).

---

[2] The Act, D.C. OFFICIAL CODE § 42-3502.16(h) (2001), provides:

> The Rental Housing Commission may reverse, in whole or in part, any decision of the Rent Administrator which it finds to be arbitrary, capricious, an abuse of discretion, not in accordance with the provisions of this chapter, or unsupported by substantial evidence on the record of the proceedings before the Rent Administrator, or it may affirm, in whole or in part, the Rent Administrator's decision.

[3] The Act, D.C. OFFICIAL CODE § 42-3502.11 (2001), provides:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

To counter the finding by the hearing examiner of reduced services and facilities, the housing provider offered evidence of the lengths it employed to correct the rodent infestation problem complained of by the tenant. In Cascade Park Apts. v. Walker, TP 26,197 (RHC Jan. 14, 2005), where the housing provider offered testimony of its efforts to correct housing code violations as evidence to defeat the claims of the tenant petitioners, the Commission stated:

> Confronted with a similar scenario in Interstate General Corp. v. District of Columbia Rental Hous. Comm'n, 501 A.2d 1261 (D.C. 1985), the court held: 'These matters are irrelevant to the question of whether the tenants were substantially deprived of a service which the landlord contracted to provide.' The court rejected the housing provider's argument that § 42-3502.11 'is couched in such a way as to imply that the landlord's conduct must constitute willful neglect or affirmative wrongdoing before a reduction in service can be termed substantial. This is not the case. Id. (emphasis in original).

Cascade Park Apts. at 44.

The tenant testified at the RACD hearing that leaks had caused dampness to occur in both the kitchen and bathroom sinks in her unit. She further testified that she believed the dampness led to a "moldy" smell in the cabinets in both areas of her unit. Further, the undisputed evidence of record was that the tenant's unit was infested with mice. Therefore, the hearing examiner did not err when she found that the substantial evidence of record showed that the housing provider violated the services and facilities provision of the Act. Accordingly, the decision of the hearing examiner on this issue is affirmed.

C. The evidence did not support the conclusion that the housing provider knowingly and willfully substantially reduced the services or facilities in the tenant's rental unit.

In her decision the hearing examiner stated:

> The evidence in the instant case demonstrates that the Respondent acted willfully, intentionally, voluntarily, and deliberately when Respondent failed to

> abate or correct housing code violations, i.e., making necessary repairs and extermination services indicated previously in the analyses.
>
> Similarly, the inference can be drawn from Respondents' conduct in this instance that they either deliberately or negligently refused to provide repair services or other amenities without just or reasonable cause or excuse. Accordingly, the Examiner finds that the Respondent knowingly and willfully violated the Act; <u>however, the Examiner does not award treble damages to the Petitioner.</u> (emphasis added.)

Decision at 15.

The conclusion drawn by the hearing examiner reflects her confusion regarding the standard to be applied for an award, to the tenant, of treble damages. 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 ... for the amount by which the rent exceeds the applicable rent ceiling or <u>for treble that amount (in the event of bad faith)</u> and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines. (emphasis added.)

Therefore, for an award of treble damages the Act requires a finding that a housing provider has substantially reduced or eliminated related services previously provided for a rental unit, and a finding that he did so in bad faith.

The Act, D.C. OFFICIAL CODE § 42-3509.01(b) (2001), further states:

> Any person who wilfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) <u>commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter</u>, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation. (emphasis added.)

The District of Columbia Court of Appeals (DCCA) quoted the legislative history of the penalty section of the Act to explain the distinction between a "knowing" violation

of the Act under § 42-3509.01(a) as distinct from § 42-3509.01(b), which requires a housing provider to act "willfully" in violation of the Act. The distinction is found in the legislative history of the provision, which states:

> From the context it is clear that the word 'willfully' as it is used in [§ 42-3509.01(b)] demands a more culpable mental state than the word 'knowingly' as used in [§ 42-3509.01(a)] .... There is a difference. 'Willfully' goes to intent to violate the law. 'Knowingly' is simply that you know what you are doing. A different standard. If you know that you are increasing the rent, the fact that you don't intend to violate the law would be 'knowingly.' If you also intended to violate the law, that would be 'willfully.' Knowingly [is a] lower ... standard.

Quality Mgmt. Inc. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73, n.6 (D.C. 1986), quoted in RECAP v. Powell, TP 27,042 (RHC Dec. 19, 2002).

In the instant case, the substantial record evidence does not contain any facts the housing provider acted willfully to violate the law by reducing the tenant's extermination or repair services. In fact, the record evidence reflects that the housing provider engaged professional extermination services, baited the tenant's unit for rodents 58 times, removed dead mice, and removed cabinetry from the walls to determine the point of entry for the mice. While the housing provider's efforts did not resolve the rodent infestation problem, they do point to a lack of substantial evidence in the record to support the finding of the hearing examiner. The absence of substantial record evidence to support a finding is contrary to the provisions of the Act, D.C. OFFICIAL CODE § 42-3502.16(b) (2001), which provides that the Commission may review for substantial evidence in the record. See King v. District of Columbia Dep't of Employment Servs., 742 A.2d 460 (1999). Accordingly, the decision of the hearing examiner finding that the housing provider acted willfully in reducing the tenant's services and facilities is reversed.

D. A reduction in the rent ceiling was not justified. Alternatively, the reduction in the rent ceiling was excessive.

The Commission held in Bernstein v. Estrill, TP 21,792 (RHC Aug. 12, 1991), 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). The Commission has determined that a hearing examiner may fix the dollar value of a reduction in services without expert testimony or other direct testimony on the dollar value of the reduction once the existence, duration, and severity of the reduction in services is established. The dollar value derived by the examiner should rationally flow from the duration and severity of the reduction in services established. Norman Bernstein Mgmt., Inc. v. Plotkin, TP 21,182 (RHC May 8, 1989); George I. Borgner, Inc. v Woodson, TP 11,848 (RHC June 10, 1987). See also Bernstein v. Estrill, TP 21,792 (RHC Aug. 12, 1991), and Washington Realty Co. v. 3030 30th St. Tenant's Ass'n, TP 20,749 (RHC Jan. 30, 1991), wherein the Commission upheld the hearing examiner's valuation of reduction in services, where the determination was based on the substantial record evidence as to the nature, duration and substantiality of the violations.

In the instant case the hearing examiner found, supported by the testimony and video taped evidence presented at the hearing by the tenant, that housing code violations did in fact exist. She further determined that various housing code violations existed from the inception of the lease, and finally, she concluded that the housing code violations, including rodent and roach infestation and lack of repairs to the mold in the

cabinets in both the kitchen and bathroom, were present in the tenant's unit and were severe.

Accordingly, we find no error in the hearing examiner's reduction of the rent ceiling for substantial reductions in the tenant's services and facilities. Further, the hearing examiner's determinations regarding the amount of the reduction in the rent ceiling are supported by substantial evidence in the record and are affirmed.

E. The tenant is not entitled to a rent rollback and rent refund.

The Commission has held to prove a claim for reduction in services, the tenant must present competent evidence of the existence, duration, and severity of the reduced services. Hamilton v. Massachusetts Mutual Life Insurance Co., TP 24,805 (RHC July 31, 2000); Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000). Further, if the reduced service is within the tenant's unit she must show that she notified the housing provider that service was required. Burns v. Charles E. Smith Mgmt., TP 23,962 (RHC June 18, 1999). In her decision the hearing examiner stated, "there exists credible testimonial, documentary, and videotaped evidence that the Petitioner provided oral and written notice to the Respondent on several occasions of the housing code violations, and that the violations were not promptly corrected or abated." Decision at 15.

In the instant case, the tenant offered evidence, which the hearing examiner found to be credible, that 14 or 15 mice were caught in her unit, that she called members of the housing provider's staff approximately 25 times when she saw mice in her unit, and that when she did not see live mice, she saw mouse droppings in various parts of her unit. She further testified that she continuously encountered roaches in her kitchen sink and that cabinets in her bathroom and kitchen, which were moldy when she began her occupancy of the unit in September of 2000, were not replaced until October 2002. The housing provider also offered evidence regarding its unsuccessful attempts to eradicate

the rodent infestation problem in the tenant's unit, including the fact that its on site exterminator, Mr. Saheed, baited the tenant's unit 58 times for mice during her tenancy.

Pursuant to D.C. OFFICIAL CODE § 42-3502.11 (2001), the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect the substantial changes in the services or facilities. In addition, the Act 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 ... 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.

D.C. OFFICIAL CODE § 42-3509.01(a) (2001). The substantial record evidence shows that the housing provider substantially reduced the tenant's services. Where the hearing examiner finds that the tenant's services have been reduced, the remedy is to reduce the rent ceiling not the rent. The tenant is entitled to a rent refund only to the extent that the rent charged exceeded the reduced rent ceiling. See Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000). In the instant case the hearing examiner awarded the tenant a rent refund of $16,378.20, plus $864.77 in interest. However, the Commission determined that the calculation utilized by the hearing examiner was incorrect. See Discussion Part III, F, supra.

Accordingly, the appeal of this issue is denied.

F. Even if the adjustment of the rent ceiling is upheld, the rent overcharge was erroneously calculated and excessive.

The housing provider argues in its brief on appeal:

> Even if the Rental Housing [Commission] accepts the Hearing Examiner's draconian reduction of the rent ceiling, the calculation is not correct. The Examiner reduced the rent ceiling to $672.40. However, she essentially doubles the refund to the tenant. (Please see pages 16 and 17 of the Decision and Order).

> First, she provides a refund based on the $672.40 rent ceiling for the months she concluded there was a substantial reduction of services pertaining to mold. Then, she provides an additional refund based on the $672.40 rent ceiling for the months she concluded there was a substantial reduction in services pertaining to mice and roaches. The total is $16,378.20, plus $864.77 in interest, far exceeding the refund that should be awarded for a 60 percent reduction of the rent ceiling.

Brief at unnumbered page 8.

In her decision the hearing examiner stated:

> In determining the value of the failure to exterminate the rodent infestation problem in Petitioner's rental unit, the Examiner notes that there is no mathematical formula for determining or calculating the precise value of the reduction of this service. The Examiner believes that a sixty per cent (60%) reduction of the rent ceiling for the failure to exterminate the rodent infestation problem in Petitioner's unit for the protection of the health, welfare, or safety of the tenants is a reasonable deduction for failure to exterminate the rodents is [sic] a reasonable use of her discretionary powers. Accordingly, the Examiner finds that because the Petitioner's health, welfare, or safety was adversely affected during the twenty-two month period that the Respondent failed to exterminate the rodent infestation problem in Petitioner's unit, the value of the reduction in services is One Thousand Eight dollars and Sixty cents ($1,008.60)[1] per month. Accordingly, the Examiner finds that because the rodent infestation problem was not repaired in a timely manner; and that the Petitioner's health, welfare, or safety was adversely affected during the twenty-two month period, that the total value of the reduction in [services] is Twenty-two Thousand One Hundred and Eighty-nine dollars and Twenty cents ($22,189.20)
>
> [1] This figure was reached by subtracting 60% of the Petitioner's monthly rent ceiling of $1,681.00 per month for the 22-month period of the violation, to arrive at $22,189.20

Enobakhare v. Jonathan Woodner Co., TP 27,730 (RACD July 8, 2003) at 11-12. The hearing examiner also stated, regarding the refund awarded for mold in the tenant's cabinets that, "[t]his figure was reached by subtracting 25% of Petitioner's monthly rent ceiling of $1681.00 per month for the 25-month period of the violation, to arrive at $10,506.25." Id. Therefore, in the case of the rodent infestation, the hearing examiner was required to establish a new rent ceiling by performing the following calculation:

$1681.00 (current rent ceiling) -$1008.60 (60% for reduced service) = $672.40 ("new" rent ceiling). The hearing examiner was also required to perform the same calculation to determine the reduced rent ceiling for the reduction of services related to mold in the tenant's cabinets, that is: $1681.00 (current rent ceiling) -$420.25 (25% for reduced service) = $1260.75 ("new" rent ceiling).

"The housing provider is liable for a rent refund only if the rent charged is higher than the reduced rent ceiling. Where the rent actually charged is equal to or lower than the reduced rent ceiling, there was no excess rent collected and no refund is required." Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000), citing Hiatt Place P'ship v. Hiatt Place Tenants' Ass'n, TP 21,149 (RHC May 1, 1991).

In the decision the hearing examiner used the reduced rent ceiling of $672.40 to determine the amount of refund owed the tenant for both the rodent infestation and for mold in her cabinets. The hearing examiner erred when she utilized $672.40 as the "new" rent ceiling in the calculation for *both* the rodent infestation and the reduction of services for mold in the tenant's cabinets. On remand, the hearing examiner is ordered to calculate the refund due the tenant for reduction of services regarding the mold in the tenant's cabinets utilizing the "new" rent ceiling she calculated, by reducing the rent ceiling for the tenant's unit, $1681.00 by 25% or $420.25 to arrive at the "new" rent ceiling of $1260.75. For those periods where the dates of the reductions of service for rodent infestation and mold in the cabinets overlap, the hearing examiner is ordered to reduce the rent ceiling of $1681.00 by 60% and 25% to determine a "new" rent ceiling for the tenant's unit.

Therefore, in correcting her calculation error, the hearing examiner should apply the following standard: 1) determine the tenant's rent ceiling for the period in question; 2) place a value on the decreased services and/or facilities per month; 3) reduce the rent ceiling for the period in question by the amount of the monthly value of reduced services and/or facilities, thereby creating a "new" rent ceiling; 4) determine the amount of the monthly rent charged; and 5) determine whether the monthly rent charged was higher than the "new" rent ceiling. See Kemp, at 10-11. The decision of the hearing examiner is reversed and remanded for a recalculation of the rent refund.

The Commission notes the hearing examiner committed plain error[3] when she calculated the interest on the rent refund. The hearing examiner erred by using the total amount of the rent overcharge held by the housing provider rather than a separate, descending, calculation for each month that the rent overcharge was held by the housing provider. She also erred when she used varying interest rates in determining the amount of interest owed. Interest is calculated by multiplying the overcharge by the number of months the housing provider held the rent overcharge, by the judgment interest rate used by the Superior Court of the District of Columbia on the date that the hearing examiner issued the decision and order. 14 DCMR § 3826.3 (1998); see also Joseph v. Heidary, TP 27,136 (RHC July 29, 2003); Redmond v. Majerle Mgmt., Inc., TP 23,146 (RHC Mar. 26, 2002); The Rittenhouse, LLC v. Campbell, TP 25,093 (RHC Dec. 17, 2002). Therefore, the interest calculation in the decision and order is reversed and the decision is remanded for a recalculation of the interest due the tenant on the corrected rent refund.

[3] The Commission's rule, 14 DCMR § 3807.4 (1991) provides: "Review by the Commission shall be limited to the issues raised in the notice of appeal; Provided, that the Commission may correct plain error."

Accordingly, the decision of the hearing examiner is reversed on this issue. The decision is remanded for a recalculation of the rent refund awarded the tenant and a recalculation of the interest due the tenant.

G. **The hearing examiner demonstrated bias in favor of the tenant by acting as an advocate for her.**

The housing provider argues that comments made by the hearing examiner during the RACD hearing reflect a bias in favor of the tenant. The housing provider raised this issue in its Notice of Appeal to the Commission, however, the regulations reflect that the housing provider was required to seek a remedy for the alleged bias in the RACD.

The applicable regulation, 14 DCMR § 4001 (1991), provides:

> Any party may file a motion with the hearing examiner requesting a hearing examiner to withdraw from a proceeding or hearing on the basis of conflict of interest or other disqualification.

14 DCMR § 4001.1 (1991).

> The hearing examiner shall rule on the motion within ten (10) days of the filing of the motion.

14 DCMR § 4001.2 (1991).

> Denials of motions filed pursuant to §4001.2 may be reviewed by the Rent Administrator upon request of the moving party and rulings by the Rent Administrator shall be issued within ten (10) days of the request for review.

14 DCMR § 4001.3 (1991).

> In the event that a hearing examiner is disqualified, he or she shall withdraw from the proceeding or hearing, stating on the record the reasons for withdrawal, and shall immediately notify the Rent Administrator in writing.

14 DCMR § 4001.4 (1991).

> In the event a hearing examiner is disqualified for any reason, the matter shall be heard *de novo* before a different hearing examiner.

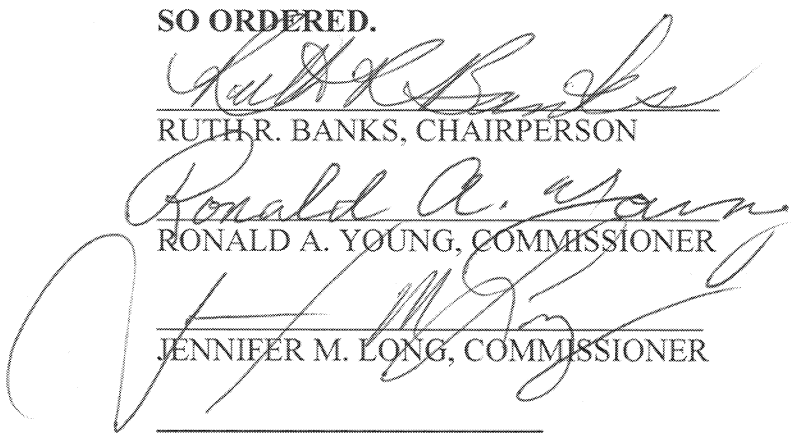
14 DCMR § 4001.5 (1991).

The housing provider's filing of a notice of appeal with the Commission removed jurisdiction over this matter from the Rent Administrator to the Commission. See 14 DCMR § 3802.3 (1991).[4] The law is that an appeal issue must be raised at the hearing level, and if a party fails to raise an issue at the hearing, that party cannot raise that issue on appeal. 1880 Columbia Rd. Tenants' Assoc. v. District of Columbia Rental Hous. Comm'n, 400 A.2d 330, 339 (D.C. 1979), cited in Dev v. L.J. Dev., Inc., TP 26,119 (RHC Aug. 29, 2003). Because the housing provider failed to raise this issue before the Rent Administrator, the Commission now lacks authority to review it on appeal. Accordingly, this issue is dismissed.

IV. CONCLUSION

The decision of the hearing examiner is affirmed, in part, reversed, in part, and remanded to the Rent Administrator for a recalculation of the rent refund due the tenant for reduction of services and facilities, and for a recalculation of the interest due on the refund in accordance with 14 DCMR § 3826.3 (1998).

SO ORDERED.



RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

[4] The applicable regulation, 14 DCMR § 3802.3 (1991), states:

> The filing of a notice of appeal removes jurisdiction over the matter from the Rent Administrator; Provided, that if both a timely motion for reconsideration and a timely notice of appeal are filed with respect to the same decision, the Rent Administrator shall retain jurisdiction over the matter for the purpose of deciding the motion for reconsideration, and the notice of appeal shall take effect at the end of the ten (10) day period provided by §4013.6.

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 may be contacted at the following address and telephone number:

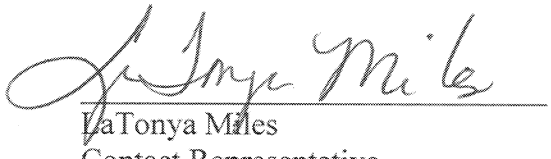
D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **Decision and Order** in TP 27,730 was mailed postage prepaid by priority mail, with delivery confirmation on this **3rd day of February, 2005** to:

Jonathan Schuman, Esquire
Schuman & Felts
4804 Moorland Lane
Bethesda, MD 20814

Helen Enobakhare
1245 K Street, S.E.
Washington, D.C. 20003



LaTonya Miles
Contact Representative
(202) 442-8949