DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 27,878

In re: 1719 18th Street, N.W.

Ward Two (2)

LAWRENCE FLORIO
Tenant/Appellant

v.

TERRENCE VAN WYCK
Housing Provider/Appellee

DECISION AND ORDER

July 22, 2005

LONG, COMMISSIONER. This case is on appeal from the 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) and its amendments, govern the proceedings.

I. PROCEDURAL HISTORY

Lawrence Florio, who resides in the basement unit of 1719 18th Street, N.W., filed Tenant Petition (TP) 27,878 on June 13, 2003. The tenant alleged that the housing provider, Terrence Van Wyck, violated the Act, when he improperly increased the tenant's rent; failed to give the tenant a proper thirty day notice of the rent increase; failed

to file the proper rent increase forms; charged a rent that exceeded the legally calculated rent ceiling; increased the rent when the tenant's rental unit was not in substantial compliance with the housing regulations; failed to properly register the housing accommodation; reduced and permanently eliminated services and facilities; directed retaliatory action against the tenant; and served a notice to vacate which violated the requirements of § 501 of the Act.

Hearing Examiner Keith Anderson held the evidentiary hearing on July 17, 2003. The tenant and the housing provider appeared without counsel. On October 9, 2003, the hearing examiner issued the decision and order, which contained the following findings of fact and conclusions of law.

Findings of Fact

1. The subject housing accommodation is a two unit flat located at 1719 19th [sic] Street, N.W.

2. Lawrence Florio resides at [sic] the basement unit of the subject property, and is the Petitioner in this matter. Petitioner occupied the basement at all relevant times.

3. Terrance [sic] Van Wyck owns the subject property and is the Respondent in this matter.

4. Respondent never filed an RACD Registration/Claim of Exemption Form for the subject property.

5. The subject property is a multi-level structure, consisting of a bedroom, a kitchen, bath, living room, and dining room in the basement; and a kitchen, eight bedrooms and two bathrooms on the levels above the basement. A single front entrance door accesses the upper floors. Five to seven tenants use and occupy seven of the bedrooms on the upper floors. Petitioner uses the basement exclusively.

6. Respondent owns no other real property in the District of Columbia.

7. Respondent rents the eight-bedroom area of the property as a single-

unit apartment to a group of other individuals. All tenants pay Respondent their monthly rent separately. Respondent selects the persons to be tenants and determines how much they pay him for rent. There are no lease agreements between Respondent and the other tenants.

8. Petitioner rented the basement area through Respondent as a separate rental unit.

9. Respondent does not furnish meals or lunches to any transients at the subject premises. No transients occupy or have occupied the premises. The tenants have exclusive control over possession, use and occupancy of their bedrooms and the common areas of the rental unit.

10. No lease agreement exists between Respondent and Petitioner or Respondent and any other tenant at the subject property.

11. Respondent owns two rental units located at 1719 – 18th Street, N.W.

12. Respondent failed to file a claim of exemption with RACD prior to the time he began renting the subject property in 1976.

13. Respondent is a retired paralegal and law firm office manager who never presented himself as a real estate specialist. Respondent is not a real estate professional.

14. Respondent owns only the two units, does not employ real estate professionals to manage the property, and maintains the property himself. Respondent is not a landlord regularly.

15. Respondent was reasonably unaware of the requirement to file a claim of exemption with RACD.

16. Rental rates for rental housing in the Dupont Circle area are some the highest in the city. One-bedroom basement units rent upward from $950.00. The Examiner has knowledge and experience with rental rates in the Dupont Circle area via his experience as a rent control hearing officer, and as a former tenant in the District. The $950.00 rental rate Respondent charged for Petitioner's rental unit was reasonable.

Conclusions of Law

1. Respondent owns four or fewer rental units in the District of Columbia and, thereby, qualifies for the small landlord exemption pursuant to D.C. Official Code Sect. 42-3502.05(a)(3) (2001), for the property

located at 1719 – 18th Street, N.W.

2. Respondent's failure to file a claim of exemption is excused based on proof that "special circumstances" existed, namely, that Respondent 1) was not a real estate professional; 2) was not a landlord regularly; 3) was reasonably unaware of the requirement of filing a claim of exemption; and 4) that the rent charged was reasonable, as set forth in *Hanson v. District of Columbia Rental Housing Comm'n, 584 A.2d 592 (D.C. 1991)* and later developed case law.

3. The Rent Administrator lacks jurisdiction to adjudicate the Petitioner's Title II claims of reduced services and facilities and improper rent adjustment because the subject property is exempt from Title II of the Act, pursuant to D.C. Official Code Sect. 42-3502.05(a) (2001) and *Madison v. Clifton Terrace Ass'n. Ltd.*, TP 11,318 (RHC Apr. 22, 1985).

4. Petitioner's allegations that Respondent violated Sect. 501 and Sect. 502 of the Act are deferred to the DC Superior Court pursuant to the priority principle of concurrent jurisdiction based on LT 017757-03 filed by Respondent against Petitioner on May 20, 2003, more than 21 days to [sic] June 13, 2003, the date the instant petition was filed.

Florio v. Van Wyck, TP 27,878 (RACD Oct. 9, 2003) at 12-13. As a result of the above findings of fact and conclusions of law, the hearing examiner dismissed TP 27,878 with prejudice.

On October 23, 2003, the tenant filed a motion to extend the deadline to file an appeal with the Commission. The Commission denied the motion for extension of time to file an appeal. Thereafter, the tenant filed a motion for reconsideration with the Rent Administrator. The hearing examiner did not issue an order on the motion for reconsideration. Consequently, it was denied by operation of law. On October 29, 2003, the tenant filed a notice of appeal from the decision and order issued on October 9, 2003. The Commission held the appellate hearing on January 14, 2004; each party appeared pro se.

II. ISSUES ON APPEAL

The tenant raised the following five issues in the notice of appeal:

A. The Order improperly interpreted and applied D.C. Official [Code] Section 42-3502.05 (2001) including but not limited to the determination of the number of rental units at the subject property.

B. The Order improperly interpreted and applied Reich v. Scullin, TP 22,093 & TP 22,094 (RHC March 31, 1993) including but not limited to the determination of the number of rental units at the subject property.

C. The Order improperly interpreted and applied Sigal [sic] v. Snider Bros. Property Mgmt., Inc. TP 20,335 ([RHC] March 11, 1988) including but not limited to the determination of the number of rental units at the subject property.

D. The Order improperly interpreted and applied documentation from the Office of Tax & Revenue, Real Property Division.

E. The Order improperly interpreted and applied Hanson v. District of Columbia Rental Housing Commission, 584 A.2d [sic] including but not limited to Respondent's failure to file a Claim of Exemption from Rent Control. Issues here include whether the [l]andlord is a real estate professional, was a landlord regularly, was reasonably unaware of the requirement to file a claim of exemption and whether the rent charged was reasonable.

Notice of Appeal at 1-2.

On November 26, 2003, the tenant filed a brief in the Commission. The brief, which was an exhaustive twenty page document, contained arguments in support of the issues raised on appeal. However, the tenant impermissibly raised several additional allegations of error that the tenant did not raise in the notice of appeal. In Frye & Welch Assocs., P.C. v. District of Columbia Contract Appeals Bd., 664 A.2d 1230, 1233 (D.C. 1995), the court held that using the brief to raise additional issues on appeal "exceeds the permissible scope of the ... brief." See also Joyner v. Jonathan Woodner Co., 479 A.2d 308, 312 (D.C. 1984); Greer v. Davenport, TP 23,536 (RHC Feb. 19, 1998). The time

period for filing an appeal is jurisdictional, which means that the Commission does not have the power to consider appeal issues that are not filed within the time period for filing an appeal. Smith v. District of Columbia Rental Accommodations Comm'n, 411 A.2d 612 (D.C. 1980); Syndor v. Johnson, TP 26,123 (RHC Nov. 1, 2002). Consequently, the Commission's review is limited to the five issues that the tenant raised in the notice of appeal, which he filed during the appeal period. 14 DCMR §§ 3807.4 & 3802.2 (1991). The Commission cannot consider issues that the tenant raised in the brief, which the tenant filed after the appeal period. A discussion of the issues, which the tenant listed in the notice of appeal, follows.

III. DISCUSSION

A. Whether the order improperly interpreted and applied documentation from the Office of Tax & Revenue, Real Property Division.

The hearing examiner took official notice of the District of Columbia Office of Tax and Revenue, Real Property Assessment Division records for the housing accommodation. In the decision and order, the hearing examiner stated that he took official notice in accordance with § 2-509(c) [sic] of the DCAPA and 14 DCMR § 4009.9 (1991). Florio v. Van Wyck, TP 27,878 (RACD Oct. 9, 2003) at 3.

The applicable provision of the DCAPA, D.C. OFFICIAL CODE § 2-509(b) (2001), provides: "Where any decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary." The regulation, 14 DCMR § 4009.7 (1991), permits the hearing examiner to take official

notice of a broad category of records, including any information contained in the records of any District agency. The regulation, 14 DCMR § 4009.9, provides:

> If, after a hearing has been concluded, the hearing examiner takes official notice of information contained in public records, as described in this section, each party is entitled to be informed in writing of the fact found by the hearing examiner, and to be provided an opportunity to contest the fact(s) officially noticed before a decision is issued.

While the hearing examiner may take official notice of the records of sister agencies, "[t]hat does not mean that the agency must accept as true all facts set forth in the documents in its records." Renard v. District of Columbia Dep't of Employment Servs., 673 A.2d 1274, 1276 (D.C. 1996) (citations omitted). However, when the hearing examiner takes official notice and accepts as true the facts noticed, "it is essential that the parties be afforded an adequate opportunity to present information 'which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed.' C. McCormick, Law of Evidence § 333, at 771 (2d ed. 1972). ... The failure to afford such an opportunity is grounds for remanding the case ...." Banks v. Schweiker, 654 F.2d 637, 641 (9th Cir. 1981) (citations omitted).

When the hearing examiner issued the decision and order, he advised the parties that he was taking official notice of information contained in the property assessment issued by the Office of Tax and Revenue. The decision contained the following:

> As stated below in the Evaluation and Analysis of Evidence section, the Examiner takes official notice of the fact that the subject property has been classified as a 3-story, single-family, residential row house, based on the property assessment issued by the Office of Tax and Revenue. Official notice of this fact was taken after the hearing was concluded. Accordingly, pursuant to Sect. 4009.9, each party shall have the opportunity to contest the fact(s) officially noticed before this Decision and Order becomes final. Any and all contests must be filed in writing, within ten (10) days of this Decision and Order, on or before _____, excluding Saturdays, Sundays, and legal holidays,

> allowing three additional days for mailing pursuant to 14 DCMR Sect. 3912.5 (1991).

Decision at 3-4. Although the hearing examiner indicated that the parties could file written contests to the facts officially notice within ten days, the hearing examiner failed to place the date on the blank line in the decision and order. The decision and order did, however, contain a date for filing a motion for reconsideration.

On October 28, 2003, the tenant filed a motion for reconsideration of the hearing examiner's decision and order. In the absence of a date or means by which to contest the facts officially noticed, the tenant lodged his protest in the motion for reconsideration, where he stated:

> It is unclear whether the Order proposes to take notice of (1) the actual state of the occupancy of the premises or (2) the fact that the Office of Tax and Revenue records have that classification on their records <u>despite its not being a true description of the use and occupancy of the premises</u>.
>
> That the actual occupancy and use of the premises is not that of a single-family residential row house is universally conceded on the record and in the Order. So it is unclear why the Order would "rely" on any documentation suggesting otherwise.
>
> Alternately, if the Order is intended to state that it merely recognizes that the records of the Office of Tax and Revenue show such classification, then the Order simply acknowledges one more deception inflicted on the official bodies of the District of Columbia and its taxpayers.

Motion for Reconsideration at 1-2. The record does not contain an order on the motion for reconsideration nor a written response to the tenant's contest to the facts officially noticed. The tenant raised similar claims in the notice of appeal and the brief filed in support of the appeal.

"[O]rdinarily, the record closes upon termination of the hearing below...." "Where an agency deviates from this course, it must notify the parties to an

administrative hearing that new evidence is being officially noticed in order to give the parties sufficient opportunity to make an appropriate challenge or response." Davis v. District of Columbia Dep't of Employment Servs., 542 A.2d 815, 822 (D.C. 1988) (citations omitted).

> The hearing examiner did not take official notice until after the hearing.
>
> When official notice is taken after the hearing rather than at the hearing, the difference between information introduced as evidence and officially noticed information may be a large one, but the difference relates only to adequacy of opportunity "to show the contrary," and not to anything else. If the claimant has a chance to show the contrary at a reopened hearing and if he is not inconvenienced by having his chance at the reopened hearing instead of at the original hearing, then his procedural interest is as fully protected as it would have been by introducing the noticed facts as a part of the evidence at the original hearing.

Banks v. Schweiker, 654 F.2d 637, 641 (9th Cir. 1981) (citations omitted) (emphasis added).

The hearing examiner "must afford the [tenant] an opportunity to rebut any fact officially noticed [at a reopened hearing]. … If the issue is resolved favorably to the [tenant], the agency must consider the remaining issues not reached at the earlier hearing." Renard v. District of Columbia Dep't of Employment Servs., 673 A.2d 1274, 1277 n.7 (D.C. 1996) (citing Carey v. District Unemployment Compensation Bd., 304 A.2d 18 (D.C. 1973)). However, if the issue is not resolved favorably to the tenant, the hearing examiner shall reissue the decision and order.

For the foregoing reasons, the Commission vacates the decision and order and remands this matter to the hearing examiner. In accordance with the DCAPA and the cases cited herein, the hearing examiner shall give the tenant an opportunity to show facts contrary to those officially noticed, in a reopened hearing.

B. Whether the order improperly interpreted and applied D.C. OFFICIAL CODE § 42-3502.05 (2001) including but not limited to the determination of the number of rental units at the subject property.

C. Whether the order improperly interpreted and applied Reich v. Scullin, TP 22,093 & TP 22,094 (RHC March 31, 1993) including but not limited to the determination of the number of rental units at the subject property.

D. Whether the order improperly interpreted and applied Segal v. Snider Bros. Property Mgmt., Inc., TP 20,335 (RHC March 11, 1988) including but not limited to the determination of the number of rental units at the subject property.

E. Whether the order improperly interpreted and applied Hanson v. District of Columbia Rental Housing Commission, 584 A.2d 592 (D.C. 1991) including but not limited to the housing provider's failure to file a claim of exemption from rent control. Issues here include whether the [l]andlord is a real estate professional, was a landlord regularly, was reasonably unaware of the requirement to file a claim of exemption and whether the rent charged was reasonable.

The hearing examiner determined that the housing accommodation contained fewer than four units. Thereafter, the hearing examiner applied the special circumstances test in Hanson, and he ruled that the housing provider was entitled to a small landlord exemption from the rent stabilization provisions of the Act.

In the decision and order, the hearing examiner stated that he relied on officially noticed documentation from the District of Columbia Office of Tax and Revenue. However, he did not afford the tenant an adequate opportunity to contest the facts officially noticed. See discussion supra Part III.A.

Since the hearing examiner did not give the tenant an opportunity to contest the facts officially noticed, the Commission vacated the hearing examiner's decision and

remanded the matter to the hearing examiner. Accordingly, the Commission does not reach the remaining issues.[1]

IV. CONCLUSION

For the foregoing reasons, the Commission vacates the decision and order and remands this matter to the hearing examiner. The Commission directs the hearing examiner to reopen the hearing, and provide the tenant with an opportunity to show facts contrary to the facts officially notice.

SO ORDERED.

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

MOTION 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:

[1] Since this is a "case" remand, the parties are required to file a new notice of appeal if they wish to appeal any future decisions and orders issued by the Rent Administrator. Majerle Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 777 A.2d 785 n.2 (D.C. 2001) (quoting Bell v. United States, 676 A.2d 37, 41 (D.C. 1996)).

D.C. Court of Appeals
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(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 27,878 was mailed by priority mail with delivery confirmation, postage prepaid, this 22nd day of July 2005 to:

Lawrence Florio
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