DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TPs 27,995, 27,997, 27,998, 28,002, 28,004

In re: 1401 N Street, N.W.

Ward One (1)

CHRISTINE GRANT, et al.
Tenants/Appellants

v.

GELMAN MANAGEMENT COMPANY
Housing Provider/Appellee

DECISION AND ORDER

February 24, 2006

LONG, COMMISSIONER. This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Housing Regulation Administration (HRA), 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 (DCMR), 14 DCMR §§ 3800-4399 (2004), govern the proceedings.

I. PROCEDURAL HISTORY

On November 26, 2003 and December 1, 2003 six tenants, who resided in the multi-unit housing accommodation located at 1401 N Street, N.W., filed tenant petitions with the Housing Regulation Administration. Each petition listed Gelman Property Management Company as the housing provider, and each tenant raised a series of

complaints concerning their respective rent increases and/or rent ceiling adjustments. Four tenants filed their petitions on November 26, 2003. Christine Grant, who resided in unit 204 filed Tenant Petition (TP) 27,995, and alleged that the housing provider: 1) imposed rent increases that exceeded the maximum amount permitted by the Act; 2) failed to provide a proper thirty day notice before the rent increases became effective; and 3) failed to file the proper rent increase forms with the RACD. Brenda Gibbons, who resided in unit 815, filed TP 27,996. Jeannine Wray resided in unit 703 and filed TP 27,997. Ms. Gibbons and Ms. Wray raised the same three claims in their petitions that Ms. Grant raised in TP 27,995. Blaine Carvalho, who resided in unit 809, filed TP 27,998. Mr. Carvalho alleged that the housing provider: 1) imposed rent increases that were larger than the amount of increase which was allowed by the Act; 2) failed to provide a proper thirty day notice before the rent increases became effective; 3) failed to file the proper rent increase forms with the RACD; and 4) filed an improper rent ceiling with the RACD.

On December 1, 2003 Donald Delauter, who rented unit 804, filed TP 28,002 and made the following claims: 1) the rent increase was larger than the amount of increase which was permitted by the Act; 2) one hundred eighty (180) days had not passed since the last rent increase; 3) the housing provider failed to provide a proper thirty day notice before the rent increases became effective; 4) the housing provider failed to file the proper rent increase forms with the RACD; 5) the housing provider filed an improper rent ceiling with the RACD; and 6) the services and facilities provided in connection with his rental unit were permanently eliminated. The tenant who resided in unit 502, Olaniyan Tayo, filed TP 28,004 on December 1, 2003. Mr. Tayo claimed that the housing

provider: 1) imposed rent increases that were larger than the amount of increase which was allowed by the Act; 2) failed to provide a proper thirty days notice before the rent increases became effective; 3) failed to file the proper rent increase forms with the RACD; and 4) filed an improper rent ceiling with the RACD.

On December 8, 2003, the Rent Administrator consolidated TPs 27,995, 27,996, 27,997, 27,998, 28,002, and 28,004. Hearing Examiner Carl Bradford convened the adjudicatory hearing on February 17, 2004. The tenants appeared pro se. Richard Luchs, Esquire and Nicholas Pitsch appeared on behalf of the housing provider. On July 12, 2004, the hearing examiner issued the decision and order for the consolidated petitions. The hearing examiner denied TPs 27,995, 27,997, 27,998, 28,002 and 28,004, and he granted TP 27,996, in part. The decision contained the following findings of fact and conclusions of law.

Findings of Fact

1. The [h]ousing [a]ccommodation is located at 1401 N Street, N.W., Washington, D.C.

2. The [h]ousing [a]ccommodation is managed by Gelman Management Company.

3. The [h]ousing [a]ccommodation contains 146 rental units.

4. At least 180 days lapsed between each increase in the rent for the units.

5. Each rent ceiling increase implemented during each Petitioner's tenancy did not exceed the legally allowable rate.

6. The rent charged for each unit did not exceed the legally calculated rent ceiling.

7. Petitioners were provided proper notices of all increases in the rent more than thirty (30) days in advance of the respective rent increases.

8. The Housing Provider did overcharge Ms. Gibbons $10.00 a month effective November 1, 2001, as to Apt. 815.

Conclusions of Law

1. The increases in rent charged to the Petitioners were implemented in conformity with the provisions of the Act, with the exception of the rent increase implemented on November 1, 2002 with respect to Apartment 815 occupied by Ms. Gibbons, which increase should have been limited to $70, rather than the $80 charged.

2. The Petitioners failed [to] prove by a preponderance of the evidence that they had been overcharged with the exception of Mr. [sic] Gibbons, who is entitled to an award of Three Hundred Ninety and 00/100 ($390.00 plus interest at 4%), and a rent reduction in the amount of Ten Dollars ($10) per month beginning in March 2004… [sic]

Grant v. Gelman Mgmt. Co., TPs 27,995-998, 28,002, 28,004 (RACD July 12, 2004) at 14-15.

On July 29, 2004 the tenants, Grant, Gibbons, Wray, Carvalho, Delauter, and Tayo, filed notices of appeal with the Rental Housing Commission. Thereafter, Joel M. Cohn, Esquire filed a notice of appearance on behalf of the tenants Christine Grant, TP 27,995, Jeannine Wray, TP 27,997, Blaine Carvalho, TP 27,998, Donald Delauter, TP 28,002, and Olaniyan Tayo, TP 28,004. No one entered an appearance for Brenda Gibbons, TP 27,996. After entering his appearance, and after the time for filing an appeal lapsed, Attorney Cohn moved to amend his clients' notices of appeal. Additionally, Mr. Cohn filed a motion for summary reversal. The housing provider's attorney, Richard Luchs, filed an opposition to the motion to amend the appeals and the motion for summary reversal. In an order dated August 31, 2004, the Commission denied the motion to amend the notices of appeal. In response, the tenants' counsel filed a motion for reconsideration, which the housing provider opposed, and the Commission

denied. On October 13, 2004, the Commission denied the tenants' motion for summary reversal.

On September 28, 2004, the Commission convened the appellate hearing. Richard Luchs, Esquire appeared on behalf of the housing provider, and Joel Cohn, Esquire appeared for the tenants Grant, Wray, Carvalho, Delauter, and Tayo. Brenda Gibbons, the only party who was not represented by counsel, did not appear for the Commission's hearing. The Commission held the appellate hearing and received oral arguments from the attorneys representing the housing provider and five of the tenants. The Commission rescheduled Ms. Gibbons' hearing for October 26, 2004, because there was no record proof that the United States Postal Service delivered the Commission's hearing notice to her correct address. When the Commission convened the hearing on October 26, 2004, Mr. Luchs appeared on behalf of the housing provider; however, Ms. Gibbons failed to appear. Mr. Luchs made an oral motion to dismiss Ms. Gibbons' appeal for want of prosecution. The Commission issued an order granting the motion to dismiss Ms. Gibbons appeal, TP 27,996.

II. ISSUES ON APPEAL

On July 29, 2004, the tenants filed separate notices of appeal for their respective tenant petitions. The tenants listed several issues in the notices of appeal and recounted the evidence and arguments presented during the adjudicatory hearing to support their specific claims. The Commission has quoted, in the text that follows, the issues raised in the notices of appeal. The Commission also included the tenants' statements and arguments concerning the evidence and highlighted appeal issues that were within the tenants' statements.

A. **TP 27,995**
Christine Grant, Unit 204

1. I am requesting a review by the Commission because the decision is not supported by the evidence.

2. On page 10 of the Decision and Order, section 1, the statement of an increase of general applicability of 1%, section 2, an increase of general applicability of 2.1%, and section 3, an increase of general applicability of 3.3% refers to the section 206(b) of the Rental Housing Act of 1985. The increase of General Applicability is equal to the percentage increase in the Consumer Price Index for [U]rban [Wage] Earners and Clerical Workers (CPI-W) for the Washington, DC area during the previous year.

3. On page 11 of the Decision and Order, in respect to the rent increase on April 1, 2001, in the amount of $35.00; Mr. Pitsch testified that the increase was based on a vacancy adjustment in the amount of $121.00 effective December 1, 1986 (exhibit #2). This same exhibit was used to justify the rent increase the following year, April 1, 2002.

4. Lastly, I was very surprised to see that the Decision and Order written by Mr. Carl Bradford the hearing examiner, reads almost exactly like the one submitted by Richard Luchs who appeared as counsel for the respondent.

TP 27,995 Notice of Appeal at 1.

B. **TP 27,997**
Jeannine Wray, Unit 703

1. It was evident throughout the decision and order that the factual calculations regarding the accusations of the rent increases were not taken into account in the decision and order, and the tenant petitioners, in the words of the Hearing Examiner, 'failed [prove] by a preponderance of the evidence that they had been overcharged....'

2. This Tenant Petitioner believes that the mathematical calculations, based upon the numbers evident within the documents provided, show a consistent miscalculation (as stated in the petitions) on the part of the Housing Provider and these calculations were uniformly dismissed by the Hearing Examiner without proper preponderance of each individual case:

Summary of the Evidence

1) On May 1, 2000, an increase of general applicability of 1% in the rent ceiling was implemented for my unit, raising the rent ceiling by $12.00. However, the increase in the rent charge was $30.00, raising my rent from $500.00 to $530.00 - an increase of 2.6%. The Gelman Company overcharged me for this increase. The increase on the rent charged should have been $12.00, raising my rent to $512.00. I was overcharged from November 2000 until April 2001, by $18.00 per month, for a total overcharge of $90.00.

2) On May 1, 2001, an increase of general applicability of 2.1% was implemented for my unit, raising the rent ceiling by $24.00. The Gelman Company overcharged me for this increase. However, the monthly rent increase was $45.00, raising my rent from $530.00 to $575.00 - an increase of 3.8% on the rent ceiling of $1,186.00. The rent increase should have been $24.00, raising my rent to $536.00. I was overcharged from May 2001 until April 2002 by $39.00 per month, for a total overcharge of $468.00 for the year.

3) On May 1, 2002, an increase of general applicability of 2.6% was implemented for my unit, raising the rent ceiling by $31.00. The Gelman Company overcharged me for this rent increase. However, the monthly rent increase was $95.00, raising my rent from $575.00 to $670.00 - an increase of 7.8% on a rent ceiling of $1,217.00. The increase should have been $31.00, raising rent to $567.00. I was overcharged from May 2002 until April 2003 by $93.00 per month, for a total overcharge of $1,116.00 for the year.

4) On May 1, 2003 I received an unimplemented rent increase of $41.00, or 7.6%, raising my rent from $670.00 to $711.00. My rent should have only been raised to $608.00. Consequently I was overcharged $515.00 from May 2003 to October 2003. **This unimplemented increase was from March 1991 and is indicated as a 5.6 CPI increase. Furthermore, a copy of this rent increase notice was not filed with the RACD. Consequently, this increase should be rescinded.** My rent should have remained at $567.00. I was therefore overcharged by a total of $864.00 for this period.

5) In November 2003, I received a second unimplemented rent increase of $60.00, or 4.8%, raising the rent from $711.00 to $771.00. **This unimplemented increase was a 12% vacancy increase from August 1994. However, it was not filed with the RACD in 1994. The November 2003 notice was also not filed with the RACD. Consequently, this rent increase was not proper. This increase should be withdrawn.** I was overcharged by $204.00 for November

2003.

TP 27,997, Notice of Appeal at 1-2 (emphasis added).

C. TP 27,998
Blaine Carvalho, Unit 809

1. The Hearing Examiner's decision and order contained an ambiguous statement of allowing for 10 (ten) days for filing and serving of papers but having a date-stamped date of July 29th, 2004 for appeal of this decision and order **[ATTACHMENT 1]**.

2. It was evident throughout the decision and order that the factual calculations regarding the accusations of the rent increases were not taken into account in the decision and order, and the tenant petitioners, in the words of the Hearing Examiner, 'failed [prove] by a preponderance of the evidence that they had been overcharged…'

3. This Tenant Petitioner believes that the mathematical calculations, based upon the numbers evident within the documents provided, show a consistent miscalculation (as stated in the petitions) on the part of the Housing Provider and these calculations were uniformly dismissed by the Hearing Examiner without proper preponderance of each individual case:

…

4. This Tenant Petitioner strongly believes that the lack of preponderance of the evidence and the uniform dismissal of tenant petitioner[s'] arguments and evidence explained above is due to an ominously strong influence upon the Hearing Examiner and this decision and order by the law offices of the Counsel for the Respondent.

5. The Tenant Petitioners were not made aware of their right to submit their own version of a decision and order to the Hearing Examiner written on behalf of the Hearing Examiner accompanied by the same document on a computer disk in Microsoft Word format.

TP 27,998, Notice of Appeal at 1 and 3.

D. TP 28,002
Donald Delauter, Unit 804

1. It was evident throughout the decision and order that the factual calculations regarding the accusations of the rent increases were not taken into account in the decision and order, and the tenant petitioners, in the

words of the Hearing Examiner, 'failed [prove] by a preponderance of the evidence that they had been overcharged…'

2. This Tenant Petitioner believes that the mathematical calculations, based upon the numbers evident within the documents provided, show a consistent miscalculation (as stated in the petitions) on the part of the Housing Provider and these calculations were uniformly dismissed by the Hearing Examiner without proper preponderance of each individual case:

   1) On October 1, 2000, an increase of general applicability 2.1% in the rent ceiling was implemented for the Tenant Petitioner's unit, raising the rent ceiling by $20. However, the increase in the rent charged was $40, raising the rent from $549.00 to $589.00, an increase of 4.2%. A second unspecified rent increase was added within 180 days. The Gelman Company overcharged me for this rent increase. The increase on the rent charged should have been $20, raising the Tenant Petitioner's rent to $569.00.

   2) On October 1, 2001, an increase of general applicability of 3.3% was implemented for the Tenant Petitioner's unit, raising the rent ceiling by $31. However, the monthly rent increase was $61, raising the rent from $589 to $650, an increase of 6.2% on the rent ceiling of $980. A second unspecified rent increase was added within 180 days. The Gelman Company overcharged me for this increase. The increase on the rent charged (according to the calculations in item 1) should have been $31, raising the rent to $600.

   3) On December 1, 2002, the Tenant Petitioner received an unimplemented rent increase of $75 or 7.6%, raising the rent from $650 to $725. The unimplemented increase was from April 1991 and is indicated as a 53.1% vacancy comparable unit increase. Unit 513 was used for the comparison, but it is not a comparable unit. **A copy of this increase notice was not filed with the RACD within 30 days of its implementation date in 1991. Tenant Petitioner was not informed of the 1991 increase in the rent ceiling until this notice of rent increase was received for December 2002.** The rent should have remained at $600.00 (according to the calculations in item 2) for this period.

   4) In August 2003, the Tenant Petitioner received an unimplemented rent increase of $54.00 or 5.5%, raising the rent from $725 to $779. This unimplemented rent increase was also from April 1991 and is indicated as the same 53.1%

vacancy comparable unit increase. As stated, Unit 513 was used for the comparison, but it is not a comparable unit. **A copy of this increase notice was not filed with the RACD within 30 days of its implementation date in 1991. Tenant Petitioner was not informed of the 1991 increase in the rent ceiling until the notice of rent increase was received for December 2002.** The rent should have remained at $600 for this period.

TP 28,002, Notice of Appeal at 1-2 (emphasis added).

E. TP 28,004
Tayo Olaniyan, Unit 502

1. It was evident throughout the decision and order that the factual calculations regarding the accusations of the rent increases were not taken into full account in the decision and order, and the tenant petitioners, in the words of the Hearing Examiner, 'failed [prove] by a preponderance of the evidence that they had been overcharged ....'

2. This Tenant Petitioner believes that proper ponderence [sic] of the submitted documents was not performed, that the submitted documents provided the necessary evidence, and would like to take this opportunity to remit that:

    1) In TP #28,004, I submitted evidence that on April 1st, 2001, and [sic] increase of general applicability of 2.1% was implemented for my unit, which was an overcharged [sic] by the Gelman Company. They increased my rent by $40 from $680 to $720, which represents an increase of 3.6% on the rent ceiling of $1106 and enacted a second unidentified increase within less than 180 days. The increase should have been $23, raising my rent to $676. There was no specific evaluation of the evidence given by either side, only a general dismissal.

    2) In April 2003, I received an unimplemented rent increase of $48 or 4.2% raising my rent from $810 to $858. This unimplemented increase was from August 1991 and is indicated as a 12% vacancy increase on a comparable unit. **I re-iterate that this notice was not filed with the RACD as required by law in a timely manner. The notice for this increase was filed with the RACD on September 16, 1991, which was more than 30 days after the implementation of the rent ceiling adjustment that was supposed to take effect. I was not informed about this potential 'unimplemented' rent increase when I moved into the unit. Consequently, the landlord is not**

eligible for this "unimplemented increase" from 1991. This increase should be withdrawn.

3) In November 2003, I received a notice of a second unimplemented rent increase form 1991 for $35. My rent was raised to $898. I have not paid this increase. My rent instead should be $801.

4) This tenant petitioner believes that the uniform lack of evaluation of the evidence provided is universal to all points raised in Tenant Petition # 28,004 and prays that the Rental Housing Commission reviews all points as it reviews the Decision and Order of July 12th, 2004.

TP 28,004, Notice of Appeal at 1-2 (emphasis added).

III. DISCUSSION

A. Whether the hearing examiner's decision and order contained an ambiguous statement of allowing for 10 (ten) days for filing and serving of papers but having a date-stamped date of July 29, 2004 for appeal of this decision and order.[1]

The hearing examiner issued the decision and order on July 12, 2004. In accordance with D.C. OFFICIAL CODE § 42-3502.16(h) (2001), the hearing examiner informed the parties of their right to file an appeal ten days after he issued the decision and order on July 12, 2004. The date cited as the last day to file the appeal, July 29, 2004, was more than ten days after the date he issued the decision, because the hearing examiner properly applied the rule governing the computation of time. The rule, 14 DCMR § 3912 (2004), provides:

3912.1 In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated time period begins to run shall not be included.

3912.2 The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the next day which is not a Saturday, Sunday, or a legal holiday.

[1] Blaine Carvalho, TP 27,998, Notice of Appeal at 1.

3912.3 When the time period prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

3912.4 Legal holidays shall be those provided in D.C. Official Code § 1-612.02 (2001).

3912.5 If a party is required to serve papers within a prescribed period and does so by mail, three (3) days shall be added to the prescribed period to permit reasonable time for mail delivery.

3912.5 The RACD, for good cause shown, may enlarge the time prescribed, either on motion by a party or on its own initiative.

The hearing examiner allowed three days for mailing the decision and order issued on July 12, 2004, and he excluded intermediate Saturdays and Sundays since the time prescribed for filing a motion for reconsideration or notice of appeal was ten days. Accordingly, the hearing examiner did not err when he indicated that parties had ten days to file the appeal and cited July 29, 2004 as the last day to file the appeal.

B. Whether the decision and order written by Hearing Examiner Carl Bradford reads almost exactly like the one submitted by Richard Luchs who appeared as counsel for the housing provider.[2]

C. Whether the lack of preponderance of the evidence and the uniform dismissal of tenant petitioners' arguments and evidence ... is due to an ominously strong influence upon the hearing examiner and this decision and order by the law offices of the attorney for the housing provider.[3]

When the tenant Blaine Carvalho filed the notice of appeal in TP 27,998, he included a letter from the housing provider's attorney and a copy of the housing provider's proposed decision and order. The housing provider's attorney, Richard Luchs, addressed the letter to Hearing Examiner Carl Bradford and sent copies of the letter and the proposed decision and order to the tenants. In the letter dated March 4, 2004, Mr.

[2] Christine Grant, TP 27,995, Notice of Appeal at 1.

[3] Blaine Carvalho, TP 27,998, Notice of Appeal at 3.

Luchs wrote: "In accordance with your instructions at the conclusion of the hearing in the above-referenced matter, I am enclosing herewith a proposed Decision and Order, together with a diskette containing the Decision and Order in Microsoft Word format." The hearing examiner did not include the letter, the proposed decision and order, or the diskette in the case dockets for any of the tenant petitions. As a result, those items were not included in the official files that the Rent Administrator transmitted to the Commission. The Commission learned of the letter, proposed decision and order, and diskette, after reading the following statement in Mr. Carvalho's notice of appeal.

> On March 4th, 2004, OVER FOUR MONTHS prior to the 'decision and order' of July 12th, 2004, the law office of the Counsel for the Respondent sent an 18 page decision and order proposal to the Hearing Examiner, written under the name of the Hearing Examiner, which throughout its length is nearly an identical document in the evaluation of the evidence, references, findings, and the decision and order **[ATTACHMENT #3]**. The line-by-line, page by page similarities between the decision as offered by the counsel and the decision 'rendered' by the Hearing Examiner exhaust all attempts to dismiss them as coincidental and lead the Appellant to inquire of the Rental Housing Commission—as the impartial appellant [sic] commission in this process—that they determine and confirm that an impartial and thorough preponderance of the evidence by the office of the Hearing Examiner lead to an independent and impartial decision and order originating SOLELY from the office of the Hearing Examiner and not under the influence of the Counsel of the Respondent.

TP 27,998, Notice of Appeal at 3 (emphasis added). The tenant attached a copy of the housing provider's proposed decision and order and a copy of the letter that referenced the diskette, when he submitted the notice of appeal.

The Commission reviewed the decision and order issued by the hearing examiner

and the proposed decision and order submitted by the housing provider's attorney.[4] The Commission discovered that the documents were nearly identical, with even typographical errors being repeated, verbatim. As a result, the Commission cannot determine or confirm that the hearing examiner engaged in an impartial or thorough evaluation of the evidence. Moreover, there is no evidence upon which the Commission can conclude that the hearing examiner issued an independent and impartial decision and order that originated solely from his office. To the contrary, the decision and order, with its latent and patent defects, reflects what the tenants suspected: "that [the decision and order] was rendered under the influence of the Counsel of the Respondent." TP 27,998, Notice of Appeal at 3. The decision and order issued by the hearing examiner and bearing his name, is no more than a wholesale adoption of the decision and order prepared by the housing provider's attorney.

The court confronted a similar scenario in Bright v. Westmoreland, 380 F.3d 729 (3rd Cir. 2004), where the District Court's opinion was "essentially a verbatim copy of the appellee's proposed opinion." The court noted the distinction between the adoption of proposed findings of fact and conclusions of law and the wholesale adoption of a proposed opinion. Citing Anderson v. Bessemer City, N.C., 470 U.S. 564, 572, 84 L.Ed. 2d 518, 105 S. Ct. 1504 (1985), the court stated: "We have held that the adoption of proposed findings of fact and conclusions of law supplied by prevailing parties after a

[4] The proposed decision and order, cover letter, and diskette were not included in the certified record. As a result, the Commission takes official notice of the proposed decision and order and cover letter that were attached to the notice of appeal in TP 27,998 and purportedly submitted by Richard Luchs, Esquire. The Commission takes official notice pursuant to D.C. OFFICIAL CODE § 2-509(b) (2001), which provides: "Where the 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 a case shall on timely request be afforded an opportunity to show the contrary." In accordance with § 2-509(b), the parties have ten (10) days to show the contrary. See also Carey v. District Unemployment Compensation Bd., 304 A.2d 18, 20 (D.C. 1973).

bench trial, although disapproved of, is not in and of itself reason for reversal. .... However, we made clear that the findings of fact adopted by the court must be the result of the trial judge's independent judgment." Bright, 380 F.3d at 731.

> [While] there is authority for the submission to the court of proposed findings of fact and conclusions of law by the attorneys for the opposing parties in a case, and the adoption of such of the proposed findings and conclusions as the judge may find to be proper, ... there is no authority in the federal courts that countenances the preparation of the opinion by the attorney for either side. *That practice involves the failure of the trial judge to perform his judicial function.*

Chicopee Mfg. Cor. v. Kendal Co., 288 F.2d 719, 725 (4th Cir. 1961) (emphasis in original) quoted in Bright, 380 F.3d at 732.

> Judicial opinions are the core work product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed decision as its own, the court vitiates the vital purposes served by judicial opinions.

Bright, 380 F.3d at 732 (emphasis added).

Administrative hearing examiners, like judges, are required to issue decisions that are born out of the hearing examiner's independent evaluation of the record evidence. The hearing examiner must be a neutral arbiter of the facts and an impartial referee who applies the facts to the law. The written decision and order chronicles the hearing examiner's evaluation of the evidence, his findings of fact on each material contested issue, and the conclusions of law that flow rationally from the findings. Perkins v. District of Columbia Dep't of Employment Servs., 482 A.2d 401, 402 (D.C. 1984); DCAPA, D.C. OFFICIAL CODE § 2-509(e) (2001). The decision and order serves as tangible proof that the hearing examiner conducted an independent review and exercised

his independent judgment. When the hearing examiner adopts the decision and order written by an advocate for one of the parties, "there is no record evidence which would allow us to conclude that the [hearing examiner] conducted [his] own independent review, or that the [decision and order] is the product of [his] own judgment." Bright, 380 F.3d at 732.

Since Hearing Examiner Bradford adopted the proposed decision and order submitted by the housing provider's attorney, there is no record proof that the hearing examiner evaluated the evidence, conducted an impartial and independent review, or issued a decision and order that was the product of his own judgment. The hearing examiner's adoption of the housing provider's proposed decision and order was improper and requires reversal and a remand. On remand, the hearing examiner shall evaluate the record evidence and issue a decision and order that is the product of independent review and independent judgment. Because this is a "case" remand, any aggrieved parties are required to file new notices of appeal if they wish to appeal any future decisions and orders issued by the hearing examiner. See 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. Whether the tenant petitioners were made aware of their right to submit their own version of a decision and order to the hearing examiner written on behalf of the hearing examiner accompanied by the same document on a computer disk in Microsoft Word format.[5]

In a section of the adopted decision and order entitled "Post-Hearing Submission" the hearing examiner stated the following: "Both Petitioners and Respondent were requested to and submitted proposed decisions and orders." Decision and Order at 4.

[5] Blaine Carvalho, TP 27,998, Notice of Appeal at 3.

The tape recording of the hearing revealed that "[t]he Tenant Petitioners were not made aware of their right to submit their own version of a decision and order to the Hearing Examiner written on behalf of the Hearing Examiner accompanied by the same document on a computer disk in Microsoft Word format." TP 27,998, Notice of Appeal at 3. At the conclusion of the hearing, the hearing examiner stated the following to the housing provider's attorney, Richard Luchs, and the tenants, who were not represented by counsel.

Hearing Examiner Bradford: What I am going to do is uh, Mr. Luchs and Tenants. I'm a give uh, you an opportunity to submit me a document which would just basically – [sic] what your calculation should be as to what your rent based on your review of the documents. [sic] I'm a review the documents myself, meaning what's in the registration files, but what you calculate your bottom line should be, the results should be.

Is that clear to everyone?

Everyone is giving me this face like they don't understand.

Unidentified Female Voice: Repeat that again.

Unidentified Male Voice: When do you need this document by?

Hearing Examiner: Ten working days. It's basically just a proposed order just saying that based on the evidence that's been presented and that's in the files, my rent should be, as what you said that you have in your petition basically that's all that is. Each tenant could do it, or you could just have one person provide the documents.

Tape Recording (RACD Hearing Feb. 17, 2004), Tape 2 of 2 (emphasis added).

As the quoted statements from the hearing reflect, the hearing examiner did not advise the tenants that they could submit a proposed decision and order on a disk, written

in his name and for his signature. After providing cryptic instructions concerning the submission of a "document" containing their calculation of what their rent should be, the hearing examiner stated that the parties were "giving [him] this face like they [did not] understand." Id. As a result, the hearing examiner provided another set of instructions. In the second set of instructions the hearing examiner used the term proposed order. However, he did not define the term, and he did not inform the tenants that he would accept a proposed decision and order in his name, complete with findings of fact, conclusions of law, and a line for his signature.

While the law does not countenance the adoption of proposed decisions and orders,[6] hearing examiners permit the parties to submit proposed findings of fact and proposed decisions and orders. Fundamental notions of fairness mandate that hearing examiners, who accept proposed findings or decisions, clearly explain the process to all parties. When one side is represented by counsel and the other side is not, the practice of accepting proposed decisions and orders, even when fully disclosed and explained, is inherently inequitable.

In the instant case, the hearing examiner accepted and adopted a proposed decision and order submitted by the attorney representing the housing provider. The hearing examiner did not disclose or clearly explain the practice of accepting proposed decisions and orders to the tenants who were not represented by counsel.

> Courts and judges, [administrative tribunals, and hearing examiners] exist to provide neutral fora in which persons and entities can have their professional disputes and personal crises resolved. Any degree of impropriety, or even the appearance thereof, undermines our legitimacy and effectiveness. We therefore hold that the [hearing examiner's] adoption of the appellee's proposed [decision] and order, coupled with the

[6] See discussion supra Part III.B-C.

procedure it used to solicit [it], was improper and requires reversal with a remand....

Bright v. Westmoreland, 380 F.3d 729, 732 (3rd Cir. 2004).

On remand, the hearing examiner shall listen to the tape recordings of the hearing and review the documentary evidence submitted at the hearing. After reviewing the record, the hearing examiner shall issue a decision and order, on the existing record, that is the product of his or her independent review and independent judgment. The hearing examiner shall not conduct a new hearing or receive additional evidence.

E. Whether it was evident throughout the decision and order that the factual calculations regarding the accusations of the rent increases were not taken into account in the decision and order, and the tenant petitioners, in the words of the Hearing Examiner, 'failed [prove] by a preponderance of the evidence that they had been overcharged.'[7]

F. Whether there was specific evaluation of the evidence given by either side or only a general dismissal.[8]

When the hearing examiner issued the decision and order, he summarized the evidence that the parties introduced during the hearing. However, he did not analyze or evaluate the oral or documentary evidence. In the section of the decision entitled "Evaluation of the Evidence," the hearing examiner provided cursory and generalized statements and simply stated that the tenants did not prove their claims.

Each tenant filed a separate petition and alleged numerous claims in each petition; some tenants alleged three claims, while others raised as many as six. The tenants' claims were not identical in number, substance, or proof. For example, some tenants

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[7] This issue appeared in the notices of appeal in the following petitions: Jeannine Wray, TP 27,997, Notice of Appeal at 1; Blaine Carvalho, TP 27,998, Notice of Appeal at 1; Donald Delauter, TP 28,002, Notice of Appeal at 1; Tayo Olaniyan, TP 28,004, Notice of Appeal at 1.

[8] Tayo Olaniyan, TP 28,004, Notice of Appeal at 1.

raised issues concerning their rents and rent ceilings while others only made allegations concerning their rent. The tenants also alleged that the housing provider failed to file the proper rent increase forms with the RACD, failed to provide notice to the tenants, and increased the rent in less than 180 days after a previous rent increase.

The Rent Administrator consolidated the cases in accordance with 14 DCMR § 3909 (2004) to expedite processing. However, the hearing examiner is required to evaluate each tenant's individual claims in accordance with the DCAPA, D.C. OFFICIAL CODE § 2-509 (2001). The decision and order was devoid of proof that the hearing examiner evaluated the tenants' claims in accordance with the DCAPA.

As a result, and for the reasons stated in Issues B, C, and D supra, the Commission reverses the hearing examiner's decision and order. On remand, the Commission directs the hearing examiner to evaluate the evidence offered by each tenant and the housing provider. While the hearing examiner does not have to comment upon every piece of evidence, the decision and order should reflect that the hearing examiner considered each party's claims and evaluated the substantial record evidence. See Tenants of 329 Rhode Island Ave., N.E. v. Auxier, HP 10,702 (RHC Dec. 1, 1988) at 6-7.

G. Whether the May 1, 2003 rent increase should be rescinded because it was based upon an unimplemented 5.6% CPI increase from March 1991 that was not filed with the RACD.[9]

H. Whether the November 2003 rent increase of $60.00 should be withdrawn because the November 2003 notice was not filed with the RACD and it was based on an unimplemented 12% vacancy increase from August 1994 that was not filed with the RACD in 1994.[10]

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[9] Jeannine Wray, TP 27,997, Notice of Appeal at 2.

[10] Id.

I. **Whether the December 1, 2002 rent increase should be rescinded because it was based on an unimplemented 53.1% vacancy comparable unit increase from April 1991 that was not filed with the RACD within 30 days of its implementation date in 1991 and the tenant was not informed of the 1991 increase in the rent ceiling until this notice of rent increase was received for December 2002.**[11]

J. **Whether the August 2003 rent increase should be rescinded because it was based on an unimplemented rent increase of $54.00 from April 1991 and is indicated as the same 53.1% vacancy comparable unit increase that was not filed with the RACD within 30 days of its implementation date in 1991 and the tenant was not informed of the 1991 increase in the rent ceiling until the notice of rent increase was received for December 2002.**[12]

K. **Whether the April 2003 rent increase should be withdrawn because it was based upon an unimplemented increase from August 1991 and is indicated as a 12% vacancy increase on a comparable unit that was not filed with the RACD as required by law in a timely manner. The notice for this increase was filed with the RACD on September 16, 1991, which was more than 30 days after the implementation of the rent ceiling adjustment that was supposed to take effect. I was not informed about this potential 'unimplemented' rent increase when I moved into the unit. Consequently, the landlord is not eligible for this "unimplemented increase" from 1991.**[13]

The tenants raised several issues concerning the propriety of various rent increases. At the heart of the tenants' claims is the assertion that the housing provider failed to perfect the rent ceiling adjustments, which were used to increase their rents, within thirty days of the date that the housing provider was first eligible to take the rent ceiling adjustments. Consequently, the tenants argue, the rents increases should be withdrawn or rescinded.

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[11] Donald Delauter, TP 28,002, Notice of Appeal at 2.

[12] Id.

[13] Tayo Olaniyan, TP 28,004, Notice of Appeal at 2.

The District of Columbia Court of Appeals recently addressed this very issue in Sawyer v. District of Columbia Rental Hous. Comm'n, 877 A.2d 96 (D.C. 2005). In the Commission's decision and order that was appealed to the court, the Commission "disallowed a rent increase for a rent-controlled apartment because ... the increase did not implement a properly perfected upward adjustment of the rent ceiling for the apartment." Id. at 100. The Commission held that its regulations require housing providers to perfect the adjustment by filing adjustments of applicability[14] and vacancy adjustments[15] within thirty days of the date the housing provider was first eligible to take

[14] "The adjustment of general applicability allows housing providers the option to increase rent ceilings annually in order to keep up with inflation. The adjustment 'shall be equal to the change during the previous calendar year, ending each December 31, in the Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the preceding calendar year,' subject to a cap of ten percent. D.C. Code § 42-3502.06(b). It is the RHC's duty to determine the amount of the general applicability adjustment annually and publish it by March 1 of each year. *See id.* and D.C. Code § 42-3502.02(a)(3). The adjustment is published annually in the D.C. Register with an effective date of May 1." Sawyer v. District of Columbia Rental Hous. Comm'n, 877 A.2d 96, 104 (D.C. 2005) (footnotes omitted).

[15] D.C. OFFICIAL CODE § 42-3502.13. Vacant accommodation

> (a) When a tenant vacates a rental unit on the tenant's own initiative or as a result of a notice to vacate for nonpayment of rent, violation of an obligation of the tenant's tenancy, or use of the rental unit for illegal purpose or purposes as determined by a court of competent jurisdiction, the rent ceiling may, at the election of the housing provider, be adjusted to either:
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> (1) The rent ceiling which would otherwise be applicable to a rental unit under this chapter plus 12% of the ceiling once per 12-month period; or
>
> (2) The rent ceiling of a substantially identical rental unit in the same housing accommodation, except that no increase under this section shall be permitted unless the housing accommodation has been registered under § 42-3502.05(d).
>
> (b) For the purposes of this section, rental units shall be defined to be substantially identical where they contain essentially the same square footage, essentially the same floor plan, comparable amenities and equipment, comparable locations with respect to exposure and height, if exposure and height have previously been factors in the amount of rent charged, and are in comparable physical condition.
>
> (c) No rent increase under subsections (a)(1) and (a)(2) may be sought or granted within the 12-month period following the implementation of a hardship increase under § 42-3502.12.

the adjustment.[16] When a housing provider does not file the required documents with the RACD or does not meet the thirty day filing requirement, the housing provider fails to perfect the rent ceiling adjustment. Therefore the housing provider forfeits the right to the rent ceiling adjustment, and he cannot utilize the adjustment to increase the tenant's rent. The court affirmed the Commission's decision.

In Sawyer, the court reviewed the filing requirements for adjustments of general applicability and vacancy adjustments, which are the types of rent ceiling adjustments that the housing provider used to increase the tenants' rents in the instant case. On the issue of the requirements that a housing provider must meet in order to take and perfect a rent ceiling adjustment of general applicability, the court stated the following:

> In order to "take and perfect" a rent ceiling adjustment of general applicability, a housing provider must file with the Rent Administrator and serve on affected tenants a "Certificate of Election of Adjustment of General Applicability." D.C. MUN. REGS. tit 14, § 4204.10. This certificate of election must be filed and served "within thirty (30) days following the date when the housing provider is first eligible to take the adjustment." *Id.* § 4204.10 (c). ... Because the provider had filed his certificates of election more than thirty days after May 1 each year, the RHC declared that he could not increase his rent ceiling based on the general applicability adjustments for those years.

Id. at 104 (citation omitted). On the issue of perfecting a vacancy adjustment, the court held:

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[16] In Sawyer v. District of Columbia Rental Hous. Comm'n, 877 A.2d 96, 103 (D.C. 2005), the court held:

> In order to obtain one of the several upward rent ceiling adjustments authorized by law, a housing provider must "take" and "perfect" the adjustment in accordance with the requirements of the housing regulations. D.C. MUN. REGS. tit. 14, § 4200.5. To do that, as discussed in further detail below, the provider must either petition for, or report its election to take, the rent ceiling adjustment in a timely and appropriate manner, and it must provide appropriate notification to tenants who may be affected by the adjustment. D.C. MUN. REGS. tit. 14, §§ 4204.9, 4204.10. The provider must perfect its entitlement to a rent ceiling adjustment in accordance with regulatory requirements in order to "implement" the adjustment in a rent increase. *See* D.C. MUN. REGS. tit. 14, § 4205.7. (emphasis added).

> The vacancy adjustment permits a housing provider to increase the rent ceiling for a rental unit if the tenant vacates the unit on her own initiative or as a result of a notice to vacate for nonpayment of rent, violation of an obligation of her tenancy, or use of the unit for an illegal purpose. D.C. Code § 42-3502.13(a). Upon the occurrence of one of those triggering events, the provider may elect either to raise the rent ceiling for the unit by 12% or to increase the ceiling to equal that of a substantially identical unit in the same housing accommodation. "A housing provider who so elects shall take and perfect a vacancy rent ceiling adjustment in the manner set forth in [D.C. MUN. REGS. tit. 14,] § 4204.10 [addressing perfection of rent ceiling adjustments of general applicability] . . . ." D.C. MUN. REGS. tit. 14, § 4207.5. As we have seen, § 4204.10 requires the housing provider to perfect a general applicability adjustment within thirty days after it is "first eligible" to do so. Therefore, as both the hearing examiner and the RHC in this case concluded, a housing provider must perfect a vacancy adjustment within thirty days of the rental unit becoming vacant.

Id. at 109 (citations omitted) (emphasis added).

In accordance with the court's holding in Sawyer, the housing provider in the instant case cannot utilize an adjustment of general applicability or vacancy adjustment to increase the tenants' rents or rent ceilings if the housing provider failed to take and perfect the rent ceiling adjustment within thirty days of first becoming eligible to take an adjustment of general applicability or within thirty days of a vacancy. The regulations, 14 DCMR §§ 4204.10 and 4207.5 (2004), prescribe the requirements that a housing provider must meet in order to take and perfect rent ceiling adjustments of general applicability and vacancy adjustments.

The regulation, 14 DCMR § 4204.10 (2004), provides:

> Notwithstanding § 4204.9, a housing provider shall take and perfect a rent ceiling increase authorized by § 206(b) of the Act (an adjustment of general applicability) by filing with the Rent Administrator and serving on the affected tenant or tenants in the manner prescribed in § 4101.6 a Certificate of Election of General Applicability, which shall do the following:
>
> (a) Identify each rental unit to which the election applies;

(b) Set forth the amount of the adjustment elected to be taken, and the prior and new rent ceiling for each unit; and

(c) Be filed and served within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.

14 DCMR § 4204.10 (2004).

> A housing provider who so elects shall take and perfect a vacancy rent ceiling adjustment in the manner set forth in §4204.10, and the date of perfection shall be the date on which the housing provider satisfies the notice requirements of § 4101.6.

14 DCMR § 4205.7 (2004). If a housing provider does not file the required documents in a timely manner or provide the required notice to the tenants, the housing provider forfeits the rent ceiling adjustment, and he cannot utilize the adjustment to increase the rent ceiling or the rent.

The Commission instructs the hearing examiner to review the oral and documentary evidence and issue findings of fact concerning the dates that the housing provider perfected the various rent ceiling adjustments that the housing provider used to justify the rent increases. If the housing provider failed to file the appropriate documents, failed to serve the tenants, or filed the documents more than thirty days after the housing provider was first eligible to take the rent ceiling adjustment, the hearing examiner shall disallow the rent increase in accordance with the applicable regulations and the court's ruling in Sawyer. See also Parreco v. District of Columbia Rental Hous. Comm'n, 885 A.2d 327 (D.C. 2005) (quoting Sawyer's holding that housing providers must "perfect" rent ceiling adjustments before they may implement them as rent increases). In the tenant petitions that allege an improper rent ceiling, the Commission instructs the hearing examiner to rule on the propriety of the rent ceiling.

The Commission cautions the hearing examiner not to confuse the three year statute of limitations, which the Act imposes on the tenants,[17] with the threshold requirement that the housing provider take and perfect rent ceiling adjustments within thirty days. Citing the Unitary Rent Ceiling Adjustment Act,[18] the court stated the following with respect to the thirty day filing requirement:

> The fact that subsection(h)(2) [Unitary Rent Ceiling Adjustment Act] allows a housing provider to delay *implementing* any rent ceiling adjustment in a rent increase without forfeiting the adjustment does not mean, as Sawyer contends, that the provider is free to delay *perfecting* its entitlement to the adjustment as well. The Unitary Act did not address the requirements for perfection, as opposed to implementation, of rent ceiling adjustments. The Act thus did not supersede or in any way affect the thirty-day perfection requirement of D.C. Mun. Regs. tit 14, § 4204.10.

Sawyer, 877 A.2d at 107 (emphasis added).

A housing provider, who fails to meet the thirty day perfection requirement by filing the required documents within thirty days and notifying the tenants in accordance with § 4101.6, fails to perfect the rent ceiling adjustment. A rent ceiling adjustment that is not perfected is forfeited. A rent ceiling adjustment that is forfeited cannot be used to increase a tenant's rent or rent ceiling. The hearing examiner shall disallow any rent

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[17] See D.C. OFFICIAL CODE § 42-3502.06(e) (2001).

[18] The Unitary Rent Ceiling Adjustment Act, codified at D.C. OFFICIAL CODE § 42-3502.08 (2001), provides:

> (h) (1) One year from March 16, 1993, unless otherwise ordered by the Rent Administrator, each adjustment in rent charged permitted by this section may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment. If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.
>
> (2) Nothing in this subsection shall be construed to prevent a housing provider, at his or her election, from delaying the implementation of any rent ceiling adjustment, or from implementing less than the full amount of any rent ceiling adjustment. A rent ceiling adjustment, or portion thereof, which remains unimplemented shall not expire and shall not be deemed forfeited or otherwise diminished.

increase where the increase did not implement a properly perfected rent ceiling adjustment.

IV. CONCLUSION

For the foregoing reasons, the Commission reverses and remands this matter to the Rent Administrator. The hearing examiner who is assigned this matter shall not convene a new hearing or accept new evidence. The hearing examiner shall issue a decision and order, on the current record, that is a product of his or her independent judgment. The decision and order shall contain findings of fact concerning, among other things, the perfection of the rent ceiling adjustments utilized to increase the tenants' rents. The hearing examiner shall disallow any rent increases that implemented rent ceiling adjustments that the housing provider did not perfect. Moreover, the hearing examiner shall consider and evaluate each tenant's individual claims, and provide findings of facts and conclusions of law concerning each contested issue.

Since the Commission reversed the hearing examiner and vacated the decision and order, the remaining issues raised in the notices of appeal are dismissed as moot.

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), 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 hereby certify that a copy of the foregoing Decision and Order in TPs 27,995, 27,997, 27,998, 28,002, and 28,004 was mailed by priority mail with delivery confirmation, postage prepaid this 24th day of February 2006 to:

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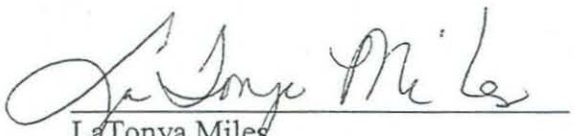

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