DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 3788

In re: 2480 16th Street, N.W.

Ward Three (3)

HAGNER MANAGEMENT CORPORATION
Housing Provider/Appellant/Cross-Appellee

v.

BENOIT BROOKENS, et al.
Tenants/Appellees/Cross-Appellants

DECISION AND ORDER

September 28, 2001

YOUNG, COMMISSIONER: This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission), pursuant to the Rental Housing Act of 1985, D.C. Law 6-10, D.C. OFFICIAL CODE § 42-3501.01 et seq.,[1] and the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE § 2-509, et seq. The regulations, 14 DCMR § 3800 et. seq., also apply.

I. PROCEDURAL HISTORY

A. Procedural History

The appeals in this case are before the Commission pursuant to a decision and order issued by Hearing Examiner Gerald Roper in Brookens v. Hagner Management

[1] The "supersedure" section of the 1985 Act, D.C. OFFICIAL CODE § 42-3509.03, provides:

> [T]his chapter shall be considered to supersede the Rental Accommodations Act of 1975, the Rental Housing Act of 1977, and the Rental Housing Act of 1980, except that a petition filed with the Rent Administrator under the Rental Housing Act of 1980 shall be determined under the provisions of the Rental Housing Act of 1980. (emphasis added.) See Marshall v. District of Columbia Rental Hous. Comm'n, 533 A.2d 1271 (D.C. 1987).

Corp., TP 3788 (OAD Feb. 14, 2001). The OAD decision and order was issued in response to a remand from the Commission in Hagner Management Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999). The complete procedural history of this case prior to the instant Notices of Appeal is contained in four earlier decisions and orders issued by the Commission and OAD. The decisions and orders are Brookens v. Hagner, TP 3788 (OAD May 22, 1984), Hagner v. Brookens, TP 3788 (RHC Aug. 9, 1988), and Brookens v. Hagner, TP 3788 (OAD Aug. 30, 1995), and the Commission's February 4, 1999, decision and order.

B. The Commission's February 4, 1999 Decision

In Hagner Management Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999), (Long, Commissioner, dissenting) the Commission identified four (4) issues raised by the housing provider in response to the Rent Administrator's decision in Brookens v. Hagner, TP 3788 (OAD Aug. 30, 1995). The majority Commission decision stated:

> The housing provider raised the following issues on appeal:
>
> A. Whether the hearing examiner erred by making awards of damages to persons who did not appear and/or testify in the proceedings.
>
> B. Whether the hearing examiner erred by considering testimony presented by a witness who was not sworn under oath.
>
> C. Whether the hearing examiner erred in awarding interest, compounding the interest, and in awarding prejudgment interest.
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> D. Whether the Decision and Order of the Rent Administrator is arbitrary, capricious and an abuse of discretion, or is otherwise not in accordance with law, and is unsupported by substantial evidence in the record.

Hagner Management Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999) at 11.

The majority Commission decision responded to the issues raised on appeal and affirmed the hearing examiner on issues A and B; remanded issue C to the hearing

examiner to make findings of fact and conclusions of law on the rent overcharges involving each tenant and to explain how the rent refunds ordered by the hearing examiner were supported by the evidence in the record on the amount of damages for each tenant. Finally, the Commission dismissed issue D raised in the housing provider's Notice of Appeal as violative of the Commission's regulations at 14 DCMR § 3802.5.[2]

C. OAD Remand Decision and Order

On February 14, 2001, the Rent Administrator's decision was issued by OAD. The hearing examiner concluded as a matter of law:

1. The named Respondent, Hagner Management Corporation has violated the Rental Housing Act of 1977, D.C. Law 2-54, section 213(b) by failing to file an Amended Landlord Registration Form within the required 30 days after implementing the vacant rent adjustments during the period June 1, 1977 to June 18, 1981.

2. The named Respondent, Hagner Management Corporation has violated the Rental Housing Act of 1977, D.C. Law 2-54, section 206(b) by charging and collecting rent in excess of the rent ceiling during the period June 1, 1977 to June 18, 1981.

3. The total amount of the rent overcharge, interest and treble damages is one hundred forty two thousand five hundred thirty five dollars and four cent [sic] ($142,535.04).

Brookens v. Hagner Management Corp., TP 3788 (OAD Feb. 14, 2001) at 16.

III. ISSUES ON APPEAL

The housing provider and the tenants filed timely Notices of Appeal with the Commission.

A. Housing Provider's Issues on Appeal

[2] The applicable regulation, 14 DCMR § 3802.5, provides that the notice of appeal shall contain:

(b) The Rental Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from, and a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator.

In its notice of appeal the housing provider argues:

1. The Hearing Examiner erred by making awards of damages to persons who did not appear and/or testify in the proceeding.

2. The Hearing Examiner erred by considering testimony presented by a witness who was not sworn under oath.

B. Tenant's Issues on Appeal.

In their notice of appeal the tenants argued:

1. The Decision is in error in its failure to recalculate the refund interest utilizing the statutory variable rate provided for by the DC [sic] Superior Court.

2. The Decision is in error to the extent it fails to provide a rent ceiling for each affected apartment unit whether or not a refund was awarded for the tenant.

IV. DISCUSSION OF THE ISSUES

A. Discussion of the Housing Provider's Issues on Appeal.

1. Whether the Hearing Examiner erred by making awards of damages to persons who did not appear and/or testify in the proceeding.

2. Whether the Hearing Examiner erred by considering testimony presented by a witness who was not sworn under oath.

These issues, raised by the housing provider's notice of appeal of the February 14, 2001, Rent Administrator's decision and order, are identical to the issues initially raised before the Commission and disposed of in the Commission's decision and order in Hagner Management Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999).[3] The Commission consolidated these issues for review. The majority decision stated, in part:

[3] Because the Commission's decision in Hagner Management Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999), was a remand to OAD, and did not dispose of all the issues raised by the parties, no final order was issued. Therefore, the issues raised by the housing provider were not ripe for judicial review by the DCCA. The housing provider's entitlement to review of the issues raised and disposed of by the Commission in its Feb. 4, 1999, decision ripened when the Rent Administrator on February 14, 2001, issued her decision on

2. The 1995 OAD Decision

The housing provider raised at the OAD hearings, the issue that some tenants were not entitled to damage awards, because they did not appear at the hearing and did not testify.

The hearing examiner addressed the issue of tenants who did not appear or testify at the hearings in the 1995 OAD decision at 59-63, section "3. Motion to Dismiss." Primarily, the issue is pointed at Benoit Brookens, the representative of the tenants. It is an uncontested fact that Brookens was not sworn during the hearings. However, he used "official notice" and introduced into evidence at the hearings several documents, which were agency and housing provider documents filed under the Act in the Rental Accommodations Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA). The hearing examiner denied the motion to dismiss for the following reasons.

First, Brookens was the tenants' representative, who appeared in a representative capacity and did not need to be sworn, D.C. Code 1-1509(b). Secondly, the housing provider had the opportunity at the hearing to demonstrate that the documentary evidence did not meet the requirements of D.C. Code § 1-1509(b) in that it should have been excluded as irrelevant, immaterial, or unduly repetitious evidence. The hearing examiner concluded he admitted the documentary evidence, because the housing provider had not persuaded him that the documentary evidence should be excluded. (1995 OAD Decision at 61.) The hearing examiner gave greater weight to the fact that some of the documents were created by the housing provider and filed with the agency. (1995 OAD Decision at 61.)

Thirdly, the hearing examiner reasoned that administrative hearings are not limited by the rules of evidence, and that hearsay evidence was not only admissible, but also, capable of serving as substantial evidence on which to base findings of fact or the decision. The hearing examiner cited Simmons v. Police & Firefighters' Retirement Bd., 478 A.2d 1093, 1095 (D.C. 1994). (Decision at 61.)

3. The Commission's Decision

(a) Statements of Brookens and Official Notice

The tenants' representative, Brookens, requested the hearing examiner to admit documentary evidence into the record by official notice. D.C. Code § 1-1509(b). After the hearing examiner admitted the documents by official notice, Brookens, a tenant and the tenants' representative, read extensively from the

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the issues remanded by the Commission.. See Tenants of 1255 New Hampshire Avenue, N.W. v. District of Columbia Rental Hous. Comm'n., 647 A.2d 70 (D.C. 1994); see also Brandywine Ltd. Partnership, et. al v. District of Columbia Rental Hous. Comm'n,, 631 A.2d 415 (D.C. 1993).

documents the housing provider's data in the documents for several hearing days on contested issues, such as rent ceilings, rent charged, amount of rent increases, and air conditioning charges. He also read data from the housing provider's floor plan (T. Exh. 42) to show that some units were not comparable to other units, when the housing provider implemented vacancy rent increases based on the highest comparable unit, pursuant to D.C. Code § 45-2523(b). The floor plan contained floor dimensions and arrangement of rooms in rental units in the housing accommodation. The housing provider objected to the reading into the record of the data from the documents and the floor plan, and characterized it as unsworn testimony by Brookens.

The Commission agrees with the analysis and conclusions of the hearing examiner on this issue for the following reasons. There is no requirement that representatives of parties be sworn before they submit documents by official notice. Indeed, the Commission has taken official notice of agency records, and provided the parties an opportunity to show the contrary, as required by the DCAPA, D.C. Code § 1-1509(b). The Commissioners were not sworn witnesses when they took official notice, and the DCCA approved the procedure of the Commission taking official notice with an opportunity to the parties to show the contrary. Radwan v. District of Columbia Rental Housing Commission, 683 A.2d 478 (D.C. 1996).

In the instant case, the Housing Provider's attorney was present at all hearings. He made the appropriate objections to the introduction of evidence. He also had the "opportunity" to show the evidence admitted was irrelevant, repetitious, or immaterial. Therefore, due process and the DCAPA were not violated in this case.

Official notice of agency records is a proper method of receiving record evidence. D.C. Code § 1-1509. There is no rule that the person offering the document for official notice must be under oath. In this case, several of the documents were admitted by official notice, and Brookens read from the documents at the hearings, after the documents were admitted in evidence. The court in Hutchinson v. District of Columbia Office of Employee Appeals, 710 A.2d 227 (D.C. 1998), stated, '[a]ppellate review is limited to matters appearing in the record before us, and we cannot base our review of errors upon statements of counsel which are unsupported by that record.' (Citations omitted.)

In the context of this case, the housing provider objected to Brookens reading at the hearing into the record data from documents, which were already admitted into evidence by official notice. The unsworn statements in this case were not comparable to "statements of counsel," which are not allowed as a basis for a decision. Hutchenson, supra. For example, the data contained in the housing provider's amended registration form (T. Exh. 12A) dated May 30, 1978, and housing provider's amended registration statement dated June 25, 1979 (T. Exh. 12B), were already in the record when Brookens read the data from them.

Therefore, the Commission does not find error in the unsworn statements of Brookens, because the data in those documents were already properly in the record as evidence by official notice. The findings of fact, 7 and 8, at p. 6, show the hearing examiner relied on the housing provider's documents and not the unsworn statements of the tenants' representative for the determination that the housing provider violated the Act. Therefore, the hearing examiner is affirmed on this issue.

(b) Tenants Who Did Not Testify

The housing provider objects to the awards to 27 tenants who did not appear to testify at the hearings. (Housing Provider Brief at 2-3). However, based on the law, the tenants were not required to personally appear, since they had joined together on the tenant petitions, agreed to one representative, and had documentation admitted by official notice to support each tenant's claims.

In D.C. Code § 1-1509(b), parties are guaranteed the opportunity to appear at the hearing. The use of the word "opportunity" does not indicate that parties are required to appear in person. Here, the parties appeared through their representative, Brookens, as allowed by 14 DCMR 4009.5. Therefore, the tenants were not required to individually appear to obtain an award, because they were properly represented and "appeared" through their representative.

The tenants followed a procedure suggested by the Commission in Brandywine Tenants Association v. Charles E. Smith Co., TP 20,126 (RHC May 4, 1989), where we stated:

> The simplest way to prove what rent increases were demanded ... would be to subpoena the housing provider's records or to introduce copies of the notices filed with the Rent Administrator. These records would constitute the best evidence of the housing provider's actions and would *avoid parading a long line of tenants before the Rent Administrator each of whom would swear to the amount and date of his or her increase*, there is no record that the association's counsel ever sought to use either source, but this illustrates why rent increase notices must be filed with the Rent Administrator (emphasis added).

The Housing Provider relies on the Commission's decision in Pinkie Malone v. Patt Chaney, TP 21,372 (RHC Mar. 26, 1992) 12-13, for its position that the agency's documents should not have been admitted into evidence. However, that case did not involve evidence admitted into the record by official notice. Therefore, it is distinguishable from this case, where the evidence was admitted by official notice.

The housing provider also relies upon Lenkin Company Management, Inc. v. District of Columbia Rental Housing Commission, 642 A.2d 1282 (D.C. 1994).

However, the instant case is distinguishable from Lenkin, because in Lenkin there was only one tenant who appealed to both the Commission and the DCCA. Nevertheless, it was argued in Lenkin that all tenants in the housing accommodation should benefit from the decision in Lenkin. There was neither a tenant association nor a joining together of other tenants as parties on the tenant petition to contest the increased rent ceilings in Lenkin. To the contrary, in this case, the tenants joined together as parties on the petitions, and united with one representative, Brookens, for all of them. Moreover, Brookens presented evidence related to rents and rent increases for each tenant's rental unit. That was not done in Lenkin.

As stated above in Brandywine Tenants' Association, the Commission has recommended the tenants proceed in the manner used in this case. That was to use the exhibits produced under subpoena at the hearing by the housing provider or filed by the housing provider with the agency.

In conclusion, pursuant to the DCAPA, D.C. Code § 1-1509(b), parties have the right to present their case in person or by representative. The use of the word "right" does not indicate that parties are required to appear. The court in Brookens[4] determined "by counsel" in the DCAPA allowed the agency the right to issue rules to include "lay representation" under RACD regulations. There is not a requirement in the agency rules or the DCAPA that as the representative of the tenants Brookens had to be sworn. He was not a witness. Here, some of the parties appeared through their representative, Brookens, others appeared personally to testify. Under the law, once the tenants signed the petitions, and obtained a representative, the tenants were not required to individually appear to obtain an award, because they were properly represented and "appeared" through their representative, Brookens. The extensive use of official notice of agency documents filed by the housing provider, made it unnecessary for each individual tenant to personally appear at the hearing and give testimony, because the agency documents admitted by official notice related to the individual units of tenants who signed the petition and appeared through their representative. The hearing examiner is affirmed on this issue.

Hagner Management Corp. v. Brookens, TP 3788 (RHC Feb. 4, 1999) at 15-23 (emphasis in original) (footnotes omitted). At the August 7, 2001, Commission hearing, counsel for the housing provider stated that the appeal in the instant case was in the nature of a "protective appeal," preserving the right of the housing provider to appeal to the District of Columbia Court of Appeals the two (2) issues it raised on appeal and

[4] Brookens v. Committee on Unauth. Pr. Of Law, 538 A.2d 1120 (D.C. 1988).

decided by the Commission in its February 4, 1999 decision and order. No new or additional evidence was presented at the OAD remand hearing which causes the Commission to alter its February 4, 1999 decision and order with respect to these issues. Accordingly, the decision of the hearing examiner in Brookens v. Hagner, TP 3788 (OAD Aug. 30, 1995), with respect to these two (2) issues is again affirmed.

B. Discussion of the Tenant's Issues on Appeal.

1. Whether the hearing examiner erred by failing to recalculate the refund interest utilizing the statutory variable rate provided for by the DC [sic] Superior Court.

On appeal to the Commission the tenants argue that the hearing examiner erred when he calculated the interest due the tenants using a judgment interest rate of six (6) percent from the date of the initial decision awarding them a rent refund until the date of the February 14, 2001, Rent Administrator's decision. The tenants argue that rather than the flat six (6) percent interest rate the hearing examiner used for the entire period he should have utilized "the judgment rate of interest used by the Superior Court of the District of Columbia pursuant to D.C. Code 28-3302(c)." The tenants assert that the interest should have been calculated using the fluctuating interest rates that were in effect on the dates of the overcharges.

The hearing examiner's decision and order reflects that he utilized a single interest rate of six (6) for the entire period of the violation. While his decision did not so state, the hearing examiner clearly based his interest calculations on the Commission's rule at 14 DCMR § 3826.3,[5] which provides: "The interest rate imposed on rent refunds or treble that amount, if any, shall be the judgment interest rate used by the Superior

[5] See 45 D.C. Reg. 686 (Feb. 6, 1998) for the amendment of interest regulations in Title 14 of the District of Columbia Municipal Regulations.

Court of the District of Columbia pursuant to D.C. Code § 28-3302 (c),[6] on the date of the decision." (Emphasis added.) Neither party has challenged the hearing examiner's decision that the prevailing interest rate at the time of his decision and order was six (6) percent, nor have they challenged the accuracy of the hearing examiner's calculation of interest utilizing the flat six (6) percent interest rate.

The tenants have cited the Commission's decision in Sanders v. Keyes, TP 12,127 (Dec. 29, 2000), as support for their argument that the Commission has upheld the use of fluctuating interests rates despite the fact that the Rent Administrator's decision in that case was issued on August 11, 2000, two and one-half years after 14 DCMR § 3826.3 became law. The tenants assert:

> The Tenants filed their petition in this matter on September 29, 1979. The excessive delays in these proceedings that have frustrated the Tenants' ability to obtain redress for their injuries – through no fault of their own – warrant the Commission's exercise of its discretion to weigh the equitable considerations. As the Commission's decision in Sanders shows, Section 3826.3 of the Commission's Rules is no bar to the Commission's exercise of its equitable authority. Therefore, [the] Tenants urge the Commission to award the Tenants interest through the date of the final decision calculated using the variable interest rates provided for by statute of the D.C. Superior Court.

Tenants' Post-Hearing Memorandum on Interest Calculations at 3.

The standard of review applied by the Commission in a decision issued by the Rent Administrator is stated in D.C. OFFICIAL CODE § 42-3502.16(h), which 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.

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[6] D.C. CODE § 28-3302(c), has been recodified at D.C. OFFICIAL CODE § 28-3302(c) (2001).

The hearing examiner calculated the interest due the tenants using the new Commission regulation at 14 DCMR § 3826.3, which was in effect on the date his decision was made. The promulgation of this regulation was a valid exercise of the Commission's rule-making authority. See D.C. OFFICIAL CODE § 42-3502.02.[7] The Commission has previously determined that where its regulations change during the pendency of an action, the Rent Administrator properly decides that petition under the new regulation. See Florida Housing Ltd. Partnership v. Tenants of 1909 19th St., N.W., SR 20,001 (RHC Sept. 30, 1987).

Additionally, the Commission holds that the tenants reliance on its decision in Sanders is inappropriate in the instant case. The facts in Sanders reflect that TP 12,127 was filed on April 30, 1985, pursuant to the provisions of the Rental Housing Act of 1980. The tenant petition in this case was filed on September 29, 1979, under the provisions of the Rental Housing Act of 1977. The significance of the different filing dates is stated in the "supersedure" section of the 1985 Act, D.C. OFFICIAL CODE § 42-3509.03, which provides:

> [T]his chapter shall be considered to supersede the Rental Accommodations Act of 1975, the Rental Housing Act of 1977, and the Rental Housing Act of 1980, except that a petition filed with the Rent Administrator under the Rental Housing Act of 1980 shall be determined under the provisions of the Rental Housing Act of 1980 (emphasis added).

The rules promulgated pursuant to the Rental Housing Act of 1980 permitted the utilization of fluctuating judgment interest rates as used by the Superior Court of the District of Columbia pursuant to D.C. Code § 28-3302(c). Under the provisions of the Rental Housing Act of 1985, the applicable regulation, 14 DCMR § 3826.3, the interest

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[7] See D.C. OFFICIAL CODE § 42-3502.02, provides:

(a) The Rental Housing Commission shall:

(1) Issue, amend, and rescind rules and procedures for the administration of this chapter.

rate imposed on rent refunds is the judgment interest rate used by the Superior Court of the District of Columbia on the date of the decision. Based on the supercedure clause, the regulations under the 1985 Act apply to the calculation of interest. Accordingly, the decision of the hearing examiner to use a single interest rate for calculation of interest is affirmed on this issue.

2. **Whether the hearing examiner erred by failing to establish a rent ceiling for each affected apartment unit in the housing accommodation.**

In their Notice of Appeal the tenants argued: "The Decision is in error to the extent it fails to provide a rent ceiling for each affected apartment unit whether or not a refund was awarded for the tenant." However, in their Brief on Appeal filed on June 25, 2001, the representatives of the tenants state: "[T]he Hearing Examiner has set forth (in his February 14, 2001, decision and order) the rent ceiling for each apartment unit in the Dorchester housing complex. Therefore, Tenants withdraw their appeal to the Commission." Accordingly, this appeal issue is dismissed.

V. CONCLUSION

The housing provider's motion to dismiss the tenants' appeal, dated April 6, 2001, is dismissed as moot, and the Rent Administrator's decision appealed from is affirmed.

SO ORDERED.

Ruth R. Banks, Chairperson

Ronald A. Young, Commissioner

Jennifer M. Long, Commissioner
Concurring in the result.

CERTIFICATE OF SERVICE

I certify that a copy of the Decision and Order in TP 3788 was mailed certified mail postage prepaid this, **28th** day of September, 2001, to the following persons:

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