DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

CI 20,768

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

Ward One (1)

TENANTS OF 2480 16th STREET, N.W.
Tenants/Appellants

v.

DORCHESTER HOUSE ASSOCIATES LIMITED PARTNERSHIP
Housing Provider/Appellee

DECISION AND ORDER ON REMAND

November 18, 2014

SZEGEDY-MASZAK, CHAIRMAN, and YOUNG, COMMISSIONER. This appeal is from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission based on a petition filed in the Rental Accommodations and Conversion Division (RACD).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, 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 December 20, 2007, the District of Columbia Court of Appeals (DCCA) issued its decision in Dorchester House Assocs. Ltd. P'ship v. D. C. Rental Hous. Comm'n, 938 A.2d 696

[1] The Office of Administrative Hearings (OAH) assumed jurisdiction over tenant petitions from RACD pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to the Department of Housing and Community Development (DHCD), Rental Accommodations Division (RAD), by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.)).

(D.C. 2007). The DCCA reversed and remanded the Commission's decision in Tenants of 2480 16th Street, N.W. v. Dorchester House Assocs. Ltd. P'ship, CI 20,768 (RHC Aug. 31, 2004) (Commission Decision). The full procedural history of this case is in the August 31, 2004 Commission Decision.

A summary of the relevant procedural history prior to the DCCA's remand follows: on November 2, 2001, Housing Provider/Appellee Dorchester House Associates Limited Partnership (herein "Dorchester" or "Housing Provider"), of the housing accommodation located at 2480 16th Street, N.W. (Housing Accommodation), filed Capital Improvement (CI) Petition 20,768 in RACD, pursuant to D.C. OFFICIAL CODE § 42-3502.10(g) (2001).[2] The CI proposed replacing boiler number two (2), at the Housing Accommodation. Record for CI 20,768 (R.) at 82. On October 4, 2002, Administrative Law Judge (ALJ) Henry McCoy issued a decision and order approving the CI.[3] On November 21, 2002 the Tenants filed an appeal with the Commission.

A. The Commission Decision

The Tenant's Notice of Appeal asserted that the ALJ erred in his analysis that the Housing Provider met its burden of proof regarding the inspection of each rental unit required by D.C. OFFICIAL CODE § 42-3502.08(b) (2001),[4] as interpreted by the DCCA in Tenants of 500 23rd St., N.W. v. D.C. Rental Hous. Comm'n, 585 A.2d 1330 (D.C. 1991). The Commission stated, in relevant part:

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[2] D.C. OFFICIAL CODE § 42-3502.10(g) provides the following: "The housing provider may make capital improvements to the property before the approval of the rent adjustment by the Rent Administrator for the capital improvements where the capital improvements are immediately necessary to maintain the health or safety of the tenants."

[3] The decision and order was vacated and reissued on November 6, 2002.

[4] The text of D.C. OFFICIAL CODE § 42-3502.08(b) is recited *infra* at 7.

[The evidence of record] does not certify the number of rental units inspected. Moreover, it was written by the Housing Provider, not the Department of Consumer and Regulatory Affairs, which has the statutory authority to conduct the inspections of the rental units. The document attached to [Petitioner's Exhibit] 6 lists the four (4) rental units that were inspected on October 3, 2001, and had housing code violations. R. at 1401.

Petitioner's [Exhibit] 7, referenced under Evidence and Pleadings Considered, is listed as, "Housing Deficiency Notices for [the] October 3, 2001 inspection of all rental units." The Commission reviewed those Housing Deficiency Notices in the official certified record. The Commission counted the units in the Housing Deficiency Notices which had inspection dates within the 30 days immediately preceding the filing of the capital improvement petition on November 2, 2001. There were 135 units in the Housing Deficiency Notices, plus the four (4) additional rental units attached to [Petitioner's Exhibit] 6, for a total of 139 units. The [H]ousing [A]ccommodation contains 394 units, with proof that at a maximum only 139 units were inspected. That leaves (394-139=) 255 units, which were either not inspected or there was no proof of inspection 30 days prior to the filing of the capital improvement petition. Accordingly, the exhibits and testimony show that the Housing Provider did not meet the inspection requirement of D.C. OFFICIAL CODE § 42-3502.08(b)(2) (2001), which states:

> For purposes of the filing of petitions for adjustments in the rent ceiling as prescribed in § 42-3502.16, the housing accommodation and each of the rental units in the housing accommodation shall have been inspected at the request of each housing provider by the Department of Consumer and Regulatory Affairs within the 30 days immediately preceding the filing of a petition for adjustment. (emphasis added).

The [DCCA] in Tenants of 500 23rd Street, N.W. v. D. C. Rental Housing. Commission, 585 A.2d 1330 (D.C. 1991), affirmed the Commission's application of D.C. OFFICIAL CODE § 42-3502.08(b)(2) (2001) to capital improvement petitions that are filed as immediately necessary, pursuant to § 42-3502.10(g) (2001), as in this appeal. Accordingly, the record does not support the ALJ's finding of fact numbered 12, which stated, "[t]he Petitioner had the housing accommodation inspected for housing code violations within 30 days of filing the petition." A partial inspection, such as 139 of 394 units, does not satisfy the Act's requirement that each rental unit be inspected within the 30 days preceding the filing of the petition.

In addition, the capital improvement petition was filed on November 2, 2001. The four (4) inspections on the attachment to [Petitioner's Exhibit] 6 occurred on October 3, 2001, and therefore meet the requirements of the Act. Some of the inspections in [Petitioner's Exhibit] 7 occurred on September 13 and 18, 2001, which is more than 30 days before the November 2, 2001 filing date of the capital

> improvement petition, and therefore, do not meet the requirement of the Act that the inspection occur "within 30 days immediately preceding the filing of a petition for adjustment." Therefore, the Commission reverses the ALJ on this issue related to the 30 day maximum time period for the inspections to occur before the capital improvement petition was filed, and the failure of the Housing Provider to prove each rental unit was inspected in compliance with the Act. The capital improvement surcharge is denied.

Commission Decision at 7-9 (emphasis original) (footnotes and citations omitted).

B. The DCCA Decision

Dorchester filed a petition for review of the Commission's decision in the DCCA. The Housing Provider appealed that part of the Commission Decision that denied the capital improvement surcharge on the basis of the Commission's interpretation of D. C. OFFICIAL CODE § 42-3502.08(b).

On December 20, 2007, the DCCA issued its decision. The DCCA summarized its opinion as follows, in relevant part:

> We reject Dorchester's argument that the RHC was without authority to require a showing of Dorchester House's presumptive or actual substantial compliance with the housing code as a condition of approval of Dorchester's capital improvement petition. However, we agree with Dorchester that the RHC too narrowly applied the applicable statute and regulation (*i.e.,* by requiring an inspection of the housing accommodation within the 30-day pre-petition period as a condition of petition approval, rather than recognizing that such a pre-petition inspection was an option available to the housing provider, to take advantage of a statutory presumption of housing code compliance in connection with the filing of a petition for a rent ceiling adjustment). We also are persuaded that the RHC's decision upset Dorchester's reasonable expectations based on the Rent Administrator's past practice with respect to what documentation is required in connection with capital improvement petitions. We conclude that this matter must be remanded so that Dorchester will have an opportunity to present evidence bearing on whether Dorchester House is, presumptively or actually, in substantial compliance with the housing code.

Dorchester House, 938 A.2d at 698 (footnote omitted). The DCCA upheld the Commission's regulation at 14 DCMR § 4216.1 (2004),[5] requiring the Rent Administrator to find that the Housing Accommodation was "presumptively or actually in substantial compliance" with the housing code prior to approval of the CI, and elaborated on the requirement as follows:

> The Rent Administrator could make this finding on the basis of a pre-petition inspection, or (subject to tenant objections) upon a certification that all violations identified during an earlier inspection were timely abated, or – because neither D.C. Code § 42-3502.08 (b) (2001) nor 14 DCMR § 4216.3 declared that the foregoing were the exclusive means by which the housing code compliance could be demonstrated – on the basis of other evidence satisfactory to the RHC.

Id. at 707. The DCCA also upheld the Commission's previous interpretation of D.C. OFFICIAL CODE § 42-3502.08(b)[6] as requiring that a pre-petition inspection "'must cover substantially all rental units in the housing accommodation,'" except those for which the tenant has denied access for the purpose of an inspection. *Id.* at 708 (quoting Tenants of 1709 Capitol Ave., N.E. v. 17th & L St. Prop., HP 20,328 (RHC Dec. 15, 1987)).

Nevertheless, upon consideration of the Housing Provider's assertion that it was the practice of the Rent Administrator to accept a housing provider's self-certification of a pre-petition inspection, the DCCA determined that a remand to the Commission was necessary in this case, for the following reasons:

> We are unable to reconcile the various approaches that the Rent Administrator and the RHC have taken with respect to what documentation was required in connection with a rent ceiling adjustment petition . . . . Because it appears that Dorchester was not on notice that more than its self-certification of a pre-petition inspection would be required, or that it might need to demonstrate Dorchester House's substantial compliance with the housing code in some other way, we conclude that this matter must be remanded so that Dorchester may have an

[5] 14 DCMR § 4216.1 is recited *infra* at n.7.

[6] D.C. OFFICIAL CODE § 42-3502.08(b) is recited *infra* at 7.

> opportunity to present evidence as to Dorchester House's (presumptive or actual) substantial compliance with the housing code . . .

Id. at 709-710.

III. DISCUSSION

First, in its decision, the DCCA affirmed that the Commission is authorized by the Act to require a showing of the Housing Accommodation's presumptive or actual substantial compliance with the housing regulations as a condition of approval of the CI. Dorchester House, 938 A.2d at 704-707. Second, the DCCA determined that the decision "upset Dorchester's reasonable expectations based on the Rent Administrator's past practice with respect to what documentation is required in connection with capital improvement petitions." *Id.* at 698. Thus, the DCCA provided the following instruction to the Commission to clarify what evidence of a housing inspection is required to support a rent ceiling adjustment for capital improvement petitions pursuant to D.C. OFFICIAL CODE § 42-3502.08(b):

> Because it appears that Dorchester was not on notice that more than its self-certification of a pre-petition inspection would be required, or that it might need to demonstrate Dorchester House's substantial compliance with the housing code in some other way, we conclude that this matter must be remanded so that Dorchester may have an opportunity to present evidence as to Dorchester House's (presumptive or actual) substantial compliance with the housing code.

Id. at 710.

In order for a housing provider to petition for a rent increase, the housing accommodation must be in substantial compliance with the housing regulations. 14 DCMR § 4216.1.[7] The Act allows a housing provider to show substantial compliance in two ways:

[7] 14 DCMR § 4216.1, provides that: "[e]ach petition for a rent ceiling adjustment . . . shall be considered a petition to increase rent, and the Rent Administrator may consider whether the rental unit and common elements of the housing accommodation are in substantial compliance with the housing code." *See* Dorchester House, 938 A.2d at 704-707 (affirming the Commission's promulgation of 14 DCMR § 4216.1 as a rational exercise of the Commission's authority under the Act).

(b) A housing accommodation and each of the rental units in the housing accommodation shall be considered to be in substantial compliance with the housing regulations if:

> (1) For purposes of the adjustments made in the rent ceiling in §§ 42-3502.06 and 42-3502.07, all substantial violations cited at the time of the last inspection of the housing accommodation by the Department of Consumer and Regulatory Affairs before the effective date of the increase were abated within a 45-day period following the issuance of the citations or that time granted by the Department of Consumer and Regulatory Affairs, and the Department of Consumer and Regulatory Affairs has certified the abatement, or the housing provider or the tenant has certified the abatement and has presented evidence to substantiate the certification. No certification of abatement shall establish compliance with the housing regulations unless the tenants have been given a 10-day notice and an opportunity to contest the certification; and
>
> (2) For purposes of the filing of petitions for adjustments in the rent ceiling as prescribed in § 42-3502.16, the housing accommodation and each of the rental units in the housing accommodation shall have been inspected at the request of each housing provider by the Department of Consumer and Regulatory Affairs within the 30 days immediately preceding the filing of a petition for adjustment.

D.C. OFFICIAL CODE § 42-3502.08(b). The relevant regulations, upheld by the DCCA in its opinion, Dorchester House Assocs., 938 A.2d at 704-707, mirror the conditions contained in D.C. OFFICIAL CODE § 42-3502.08(b) for raising a presumption of substantial compliance with the housing regulations, as follows:

> 4216.3 In a hearing on a housing provider's petition for a rent ceiling adjustment, there shall be a rebuttable presumption of substantial compliance with the housing regulations for each rental unit and the common elements of a housing accommodation, if the following applies:
>
> > (a) The housing accommodation was last inspected for housing code violations more than thirty (30) days prior to the date of filing of the petition for adjustment, and all substantial violations then cited have been abated within the time set forth in the notice of violations; or
> >
> > (b) The housing accommodation shall have been inspected at the housing provider's request within thirty (30) days immediately preceding the date of filing of the petition for adjustment.

14 DCMR § 4216.3 (emphasis added).

Accordingly, based on the D.C. OFFICIAL CODE § 42-3502.08(b) and 14 DCMR § 4216.3, the Commission determines that prior to the approval of a capital improvement petition, a housing provider must show that each unit in the housing accommodation is in substantial compliance with the housing regulations, by demonstrating either that each unit in the housing accommodation is entitled to a presumption of substantial compliance under D.C. OFFICIAL CODE § 42-3502.08(b) and 14 DCMR § 4216.3, or by showing that each unit in the housing accommodation is actually in substantial compliance with the housing regulations. D.C. OFFICIAL CODE § 42-3502.08(b); 14 DCMR § 4216.1, -.3.

Evidence of presumptive or actual compliance may be shown, for example, by introducing DCRA housing inspection notices, DCRA notices of abatement, testimony, or other documentary evidence, relevant to whether the housing accommodation is presumptively or actually in substantial compliance with the housing regulations.[8] *See, e.g.,* Tenants of 1460 Irving St., N.W. v. 1460 Irving St., L.P., CIs 20,760-20,763 (RHC Apr. 5, 2005) (evidence relevant to compliance with the housing regulations included housing inspection reports and testimony from housing inspector); Tenants of 2480 16th St., N.W. v. Dorchester House Assocs., CIs 20,739 & 20,741 (RHC Jan. 14, 2000) (affirming that property manager's testimony that housing inspections occurred was sufficient evidence for hearing examiner to conclude that the housing accommodation had been inspected). The Commission will not preclude a housing provider from self-certifying that each unit in the housing accommodation is entitled to a

[8] The Commission notes that these examples are not meant to be an exhaustive list of evidence that may show whether a housing accommodation is in presumptive or actual compliance with the housing regulations.

presumption of compliance with the housing regulations, in accordance with D.C. OFFICIAL CODE § 42-3502.08(b) and 14 DCMR § 4216.3.[9] However, the Commission cautions that such self-certification must certify all of the facts necessary to establish the particular presumption being claimed. D.C. OFFICIAL CODE § 42-3502.08(b); 14 DCMR § 4216.3.

Nevertheless, the Commission notes that actual compliance with the housing regulations remains a requirement prior to the taking of any rent increase under the Act, including a rent increase implementing a capital improvement surchage. D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A); 14 DCMR § 4205.5(a).[10] As the DCCA explained in its decision, the housing provider's certification of actual or presumptive compliance with the housing regulations does not prevent a tenant from filing a tenant petition if housing code violations exist at the time that the capital improvement surcharge is implemented through a rent increase. Dorchester House, 938 A.2d at 703 n.8; *see* 14 DCMR § 4214.3(e) ("The tenant of a rental unit . . . may . . . challenge or contest any rent or rent increase that is: . . . (e) Implemented when the rental unit of the common elements of the housing accommodation are not in substantial compliance with the housing regulations . . .").

Finally, the Commission notes that no part of this Decision and Order is meant to undo or otherwise undermine the following well-established principles under the Act: first, that the

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[9] The Commission notes that any self-certification that the housing accommodation is entitled to a presumption of compliance with the housing regulations may be challenged by any tenant within ten (10) days of notice of such self-certification. *See* Modern Prop. Mgmt., Inc. v. Dorchester House Tenants Ass'n., TP 21,425 (RHC Mar. 26, 1992) (applying the doctrine of self-certification for capital improvement petitions).

[10] D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A) provides as follows, in relevant part: "(a)(1) Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless: (A) The rental unit and the common elements are in substantial compliance with the housing regulations . . . ."

14 DCMR § 4205.5(a) provides in relevant part the following: "Notwithstanding § 4205.4, a housing provider shall not implement a rent adjustment for a rental unit unless all of the following conditions are met: (a) The rental unit and the common elements of the housing accommodation are in substantial compliance with the D.C. housing regulations . . . ."

proponent of a rule or order has the burden of proving each fact essential to their claim by a preponderance of evidence, D.C. OFFICIAL CODE § 2-509(b); 14 DCMR § 4003.1;[11] *e.g.*, Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-14-28,794 (RHC Aug. 19, 2014); and second, that it is the duty of the hearing examiner or administrative law judge, not the Commission, to evaluate and weigh the evidence, and determine the credibility of witnesses, *see* Borger Mgmt., Inc .v. Miller, TP 27,445 (RHC Mar. 4, 2004) (quoting Harris v. D.C. Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C.1986)) ("The ALJ has a responsibility to weigh the evidence . . . . '[I]n rendering a decision, the [e]xaminer is entrusted with a degree of latitude in deciding how he shall evaluate and credit the evidence presented.'"); McDonald v. Nuyen, TP 26,124 (RHC Aug. 29, 2003).

In compliance with the DCCA's decision, the Commission thus remands this case to the Rent Administrator for further evidentiary proceedings limited to the issue of whether each unit in the Housing Accommodation was in presumptive or actual compliance with the housing regulations, as those terms are defined by D.C. OFFICIAL CODE § 42-3502.08(b) and 14 DCMR § 4216.3, at the time that the CI was filed. The Commission instructs the Rent Administrator to ensure that the evidentiary hearings on remand are conducted in full compliance with the contested case procedures contained in the DCAPA, including providing the Tenants in this case with an opportunity to appear and present evidence and witnesses, and to cross-examine the Housing Provider's witnesses. D.C. OFFICIAL CODE § 2-509(b).[12]

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[11] D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, the following: "In contested cases . . . the proponent of a rule or oder shall have the burden of proof . . . ." 14 DCMR § 4003.1 provides the following: "The proponent of a rule or order shall have the burden of establishing each finding of fact essential to the rule or order by a preponderance of evidence."

[12] D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, as follows:

IV. CONCLUSION

Based on the foregoing, the Commission remands this case to RAD for additional evidentiary proceedings limited to the issue of whether each unit in the Housing Accommodation was in actual or presumptive compliance with the housing regulations at the time that the CI was filed.

SO ORDERED.[13]

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CLAUDIA L. McKOIN, 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."

> Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts[.]

[13] Under the Act, a majority of the Commission - namely, two (2) Commissioners - constitutes a quorum, and all decisions of the Commission shall be signed by at least two (2) members of the Commission. D.C. OFFICIAL CODE § 42-3502.02(b)(2) (2001); 14 DCMR § 3821.1 (2004).

JUDICIAL REVIEW

Pursuant to DC 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
430 E. Street, N.W.
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in CI 20,768 was mailed, postage prepaid, by first class U.S. mail on this **18th day of November, 2014** to:

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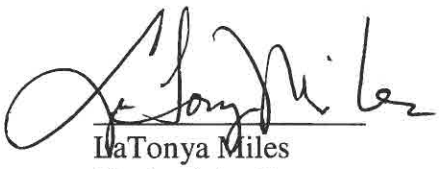

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