

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-SF-09-20,098

In re: 2480 16th Street, NW

Ward One (1)

DORCHESTER HOUSE, ASSOCIATES, L.L.C.
Housing Provider/Appellant

v.

TENANTS OF 2480 16TH STREET, NW
Tenants/Appellees

ORDER ON MOTIONS TO DISMISS APPEALS

September 6, 2013

BERKLEY, COMMISSIONER. This matter is on appeal to the Rental Housing Commission (Commission) from the Office of Administrative Hearings (OAH), based on a petition filed with the District of Columbia Department of Housing and Community Development (DHCD), Rental Accommodations Division (RAD).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 Supp. 2008), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004), govern these proceedings.

¹ The Office of Administrative Hearings assumed jurisdiction over tenant petitions from the Rental Accommodations Division (RAD) pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01 - 1831.-1831.03(b-1)(1)(2001 Supp.2005). The functions and duties of the Rental Accommodations Division (RAD) of DCRA were transferred to the Department of Housing and Community Development (DHCD) by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (September 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03(a) (2001 Supp. 2008).

I. PROCEDURAL HISTORY

On February 6, 2009, Dorchester House Associates, LLC (Housing Provider/Petitioner) filed Services and Facilities Petition (SF) 20,098, with the Rent Administrator seeking a change in services in the Dorchester House apartment building located at 2480 16th Street, N.W. (Housing Accommodation), which would affect all tenants.² On May 26, 2009, a status conference was held by Administrative Law Judge Erika L. Pierson (ALJ). An evidentiary hearing was held on the following dates: September 14 and 15, 2009; November 4, 5 and 17, 2009; March 16 and 17, 2010; April 27 and 28, 2010; and May 3, 2010. The Housing Provider was represented by Richard Luchs, Esquire. The following witnesses testified on behalf of the Housing Provider: Terry Busby, Construction Manager; John Hoskinson, Property Owner; Scott Kaufman, Engineer; Ernest Marcus, Appraiser; Aubrey Grant, Architect; John Barkanic, Certified Public Accountant; and Darlene Thomas, Property Manager.

The Dorchester Tenants Association (DTA or Dorchester Tenants) was represented by B. Marian Chou, Esquire.³ Three tenants represented themselves: Campbell Johnson III (Unit 234); Larry Hunter (Unit 227); and Mark Edwards (Unit 210). The following tenants testified: Richard Mancini (Unit 214); Bonnie Branner (Unit 821); David Castleberry (Unit 127); Mark

² The change in related services and facilities in the Dorchester House involved a major renovation to all apartments and common areas in the building. It involved a renovation of the building's electrical system and the heating, cooling and ventilation (mechanical) systems. R. at 59. Therefore, all of the tenants in the building were parties to this Services and Facilities Petition.

³ In an order dated July 14, 2009, the ALJ directed counsel for the Tenant Association to submit a list of the individual tenants she represents, sorted by apartment number, no later than July 31, 2009." R. at 536. On July 31, 2009, B. Marian Chou, Esquire, submitted a list of 123 tenants who have agreed to be represented by her. R. at 548-551. In the Scheduling Order dated September 3, 2009, the ALJ observed that "Counsel for the Tenants' Association stated that she represents 123 of approximately 395 tenants. Therefore, there are approximately 272 tenants representing themselves in this matter." R. at 569.

Fisher (Unit 407); Vernell Grissom (Unit 926); Ann Cook (Unit 442); Lorenzo Calendar II (Unit 246); and Rudolph Douglas (Unit 514). The following non-tenant witnesses testified on behalf of Tenants: Harold Ward, Electrician, and Dr. David V. Stallard, Electrical Engineer.

On May 23, 2011, the ALJ, issued her Final Order.⁴ Record (R.) at 830. On June 1, 2011, B. Marian Chou, Esquire, filed the Dorchester Tenants' motion for reconsideration of the Final Order. R. at 854. On June 3, 2011, the OAH notified Rudolph Douglas that his filing was rejected because he had failed to attach a certificate of service to the other parties in the case. R. at 859. Mr. Douglas filed a motion for reconsideration with the proper certificate of service on June 9, 2011, which was accepted by the ALJ. R. at 886. On June 9, 2011, Larry Hunter, a resident of the Dorchester House Apartments, filed a motion for reconsideration. R. at 890. On June 9, 2011, the Housing Provider filed an opposition to the Dorchester Tenants' motion for reconsideration. R. at 869. On June 16, 2011, counsel for the DTA filed the Dorchester Tenants' reply to the Landlord's opposition to the Tenants' motion for reconsideration. R. at 898. The Housing Provider filed an opposition to Mr. Douglas' motion for reconsideration on June 17, 2011. R. at 905. On June 29, 2011, the Housing Provider filed its opposition to the Dorchester Tenants' motion to submit a reply to its opposition to the Tenants' motion for reconsideration. R. at 908.

On August 1, 2011, B. Marian Chou, Esquire, filed the Dorchester Tenants' Notice of Appeal in the Commission. Tenant Larry Hunter filed a Jurisdictional Statement of Appeal Rights on August 1, 2011. On August 2, 2011, Rudolph Douglas, Vice President of the DTA,

⁴ The date stamp on the Final Order is May 20, 2011; however, the date typed on the signature page of the Final Order is May 23, 2011. Also, in the Order Denying Tenants' Motions for Reconsideration, the ALJ refers to the issuance date of the Final Order as May 23, 2011. R. at 931. Therefore, for the purpose of determining whether the notices of appeal were timely, we consider the date of the Final Order to be May 23, 2011.

filed a Supplemental Motion of Appeal. On August 4, 2011, Mr. Douglas filed, on behalf of the DTA, an Amendment to the Supplemental Motion of Appeal, adding a Certificate of Service. The ALJ issued an Order Denying the Tenants' Motions for Reconsideration on August 16, 2011.⁵ R. at 909-931. The Housing Provider filed a Motion to Dismiss the Appeal of Rudolph Douglas on August 24, 2011. On August 30, 2011, Eleanor Johnson, President of the DTA, filed the Dorchester Tenants' Notice of Appeal. The Housing Provider filed a Motion to Dismiss the Appeal of Eleanor Johnson on September 21, 2011. On October 5, 2011, Eleanor Johnson filed an Opposition to Motion to Dismiss the Appeal.⁶

II. ISSUES ON APPEAL

A. Issues raised by Tenants/Appellees in the August 1, 2011 notice of appeal filed by B. Marian Chou, and the August 30, 2011 notice of Appeal, filed by Eleanor Johnson, Dorchester Tenants Association President:

1. Whether the ALJ erred in holding that "air conditioning at the Dorchester is an optional service,"
2. Whether the ALJ erred in failing to calculate the aggregate rent ceiling for Loss of square footage in the apartment units,
3. Whether the ALJ erred in failing, in the order, to distinguish other charges of heating, cooking, and general purpose electricity.

Dorchester Tenants' Notice of Appeal at 1 and Johnson Notice of Appeal at 1.

⁵ The ALJ found that Tenant Hunter's motion was filed two days late and deemed it to be a motion for relief from final order as provided in OAH Rules 2828.7 and 2828.9 (2011). R. at 930, n. 2.

⁶ On September 13, 2011, B. Marian Chou, Esq., attorney for the DTA, filed a Motion for Attorney's Fees. The Housing Provider opposed the motion on September 28, 2011. On April 12, 2012, the ALJ issued an order awarding Tenants/Petitioners \$76,560.80 in attorney's fees. On April 24, 2012, the Housing Provider filed a notice of appeal in the Commission, challenging the Attorney's fee award. The notice of appeal was timely.

B. Issues raised by Tenant/Appellee/Cross-Appellant Larry Hunter in his August 1, 2011 notice of appeal:

1. Whether the Court order ruling regarding the rent reductions was in error.
2. Whether the Court exceeded its authority under the Rent Stabilization Act by ordering that tenants must now perform an act of signing up individually with PEPCO and are therefore responsible for paying for electrical service in perpetuity.
3. Whether the Court Order dated May 20, 2011 is discriminatory against those Dorchester residents who are not the average electrical users such as seniors and persons who work at home.
4. Whether the Court Order dated May 20, 2011 represents an illegal rent shift increase to the tenants.
5. Whether the Courts Order dated May 20, 2011 facilitated a future illegal rent increase.
6. Whether the court's refusal to recognize or discuss in the findings of the Court's Order dated May 20, 2011, Respondent's exhibits (RX-404, 405 &406) regarding the average cost of the electrical service for DC residents was a material error.

Hunter Notice of Appeal at 2-7.

C. Issues raised by Rudolph Douglas, Vice President of the Dorchester Tenants Association, in his August 2, 2012 notice of appeal:

1. Whether the ALJ erred when she rejected "loss of square footage" as a legitimate basis for reduction of tenants rents;
2. Whether the ALJ erred in rejecting the testimony of Dr. David Stallard on the grounds that his approach to calculation of the appropriate rent decreases had no foundation in precedence.
3. Whether the ALJ erred in failing to take judicial notice of the fact that general electric granted at the time of the ALJ's Order does not include electric stoves

4. Whether the ALJ erred in finding that the Tenants' attempts to make arguments during the hearings on the issues of air conditioning and rent overcharges arguments were irrelevant to the matter of Changes in Related Services.
5. Whether the ALJ erred when finding that the rent reduction adjustment for the two-bedroom apartment is \$68.00 and the reduction for the large one bedroom apartment is \$46.00, where the large one bedroom apartment is comparable in size to the two bedroom apartment and two HVAC's were installed in each apartment.

Douglas Notice of Appeal at 2.

III. DISCUSSION

The Rental Housing Act of 1985 provides that an appeal may be made to the Commission from a decision and order within ten (10) days of the issuance of a decision. D.C. OFFICIAL CODE § 42-3502.16 (h) (2001). The Commission is required by law to dismiss appeals that are untimely filed, because time limits are mandatory and jurisdictional. United States v. Robinson, 361 U.S. 209 (1960); Yu v. D.C. Rental Hous. Comm'n, 505 A.2d 1310 (D.C. 1986); Totz v. D.C. Rental Hous. Comm'n, 474 A.2d 827 (D.C. 1974); Pinnacle Realty Mgmt. v. Doyle, TP 27,067 (RHC Aug. 8, 2008); Haka v. Gelman Mgmt Co., TP 27,442 (RHC Feb. 9, 2006). The Commission determines the time period between the issuance of an OAH final order and the filing of a notice of appeal or motion for reconsideration by counting only business days, as required by its rules. See 14 DCMR § 3802.2 (2004); Town Ctr. v. D.C. Rental Hous. Comm'n, 496 A.2d (D.C. 1985).

The Commission's rules state:

14 DCMR § 3801.2 (2004)

No pleading or other documents shall be deemed filed until actually received at the Commission's office and compliance with time requirements shall be calculated from date of actual receipt.

14 DCMR § 3802.2 (2004)

A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.

14 DCMR § 3816.3

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

14 DCMR § 3816.5

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.

Most of the parties who filed notices of appeal in the Commission, had filed motions for reconsideration of the ALJ's Final Order issued on May 23, 2011. See pp. 7-9 *infra*. The relevant OAH Rules regarding motions for reconsideration provide:

1 DCMR § 2828.3

Within (10) calendar days after a final order has been served, any party may file a motion asking the Administrative Law Judge to change the final order. Such a motion is a 'motion for reconsideration or for a new hearing.'

1 DCMR § 2828.4

If any party files a motion for reconsideration or for a new hearing within the ten (10) calendar day deadline, the time for seeking judicial review of a final order does not start to run until the Administrative Law Judge rules on the motion, or the motion is denied as a matter of law under Subsection 2828.15.

1 DCMR § 2828.15

An Administrative Law Judge should rule on any motion filed under this Section within forty-five (45) calendar days of its filing. If an Administrative Law Judge has not done so, the motion is denied as a matter of law. An Administrative Law Judge may extend the period once for an additional thirty (30) calendar days by issuing an order before the first forty-five (45) day Period expires. After expiration of any applicable deadline, the Administrative Law Judge, in his or her discretion, may issue a statement of reasons for denying the motion, but any such statement has no effect on the time for seeking judicial review or filing any other appeal.

The DTA, represented by Marian Chou, Esquire, moved for reconsideration of the May 23, 2011 Final Order on June 1, 2011. On August 1, 2011, the DTA filed a notice of appeal in the Commission. The DTA's motion for reconsideration was denied by operation of law on July 18, 2011. 1 DCMR §§ 2828.4 and 2828.15. Excluding Saturdays, Sundays and holidays, the DTA had until August 4, 2011 to file the notice of appeal in the Commission. 14 DCMR §§ 3802.2, 3816.3 and 3816.5. Therefore, the appeal which was filed by B. Marion Chou, Esquire on August 1, 2011 was timely.

Rudolf Douglas, Vice President of the Dorchester Tenants' Association, filed a motion for reconsideration which was accepted on June 9, 2011.⁷ R. at 870-887. On August 2, 2011, Mr. Douglas filed his notice of appeal in the Commission.⁸ Mr. Douglas' motion for reconsideration was denied by operation of law on July 25, 2011. See 1 DCMR § § 2828.4 and 2828.15. According to the applicable regulations, Mr. Douglas had until August 11, 2011 to file a notice of appeal. 14 DCMR §§ 3802.2, 3816.3 and 3816.5. Therefore, Mr. Douglas' appeal on August 2, 2011 was timely. That appeal, however, only pertains to the claims he has brought in his individual capacity. See Lenkin Co. Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1288 (D.C. 1994); Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 548 n.6 (D.C. 1984); Borger Mgmt., Inc. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009) at 15.

On June 9, 2011, Larry Hunter pro se, a resident of 2480 16th Street, NW, filed a motion for reconsideration. R. at 888-890. On August 1, 2011, Mr. Hunter filed his notice of appeal in

⁷ Mr. Douglas initially filed his motion for reconsideration on June 3, 2011; however, it was rejected due to his failure to include a proper certificate of service. R. at 864. After corrections were made, Mr. Douglas' filing was accepted. R. at 884-887.

⁸ On August 4, 2011, Mr. Douglas filed an amended notice of appeal seeking permission to supplement his notice of appeal with a certificate of service.

the Commission. Since Mr. Hunter's motion for reconsideration was filed more than 15 (fifteen) days after the Final Order was issued on May 23, 2011, it was considered a motion for relief from final order. 1 DCMR §§ 2828.7, 2828.8 and 2828.9 (2011). A motion for relief from final order does not toll the time for filing an appeal to the Commission. Therefore, the Final Order of May 23, 2011 was deemed final for the purpose of seeking judicial review and Mr. Hunter should have filed his notice of appeal within ten business days of that order, plus three days for mailing. 14 DCMR §§ 3802.2, 3816.3 and 3816.5. Mr. Hunter's notice of appeal filed on August 1, 2011 was untimely and is dismissed.

Ms. Eleanor Johnson, President of the DTA, filed a notice of appeal in the Commission on August 24, 2011 on behalf of the DTA. Ms. Johnson did not file a motion for reconsideration of the OAH Final Order dated May 23, 2011. Her notice of appeal challenged the Order Denying Tenants' Motions for Reconsideration issued on August 16, 2011. R. at 931. The Commission has determined that a tenant cannot file an appeal from the denial of a motion for reconsideration, which is not "subject to appeal." 14 DCMR § 4013.3. See C.I.H. Props. v. Torain, TP 24, 817 (RHC July 17, 2000); Jordan v. Spellios, TP 24, 696 (RHC Sept. 8, 1999). Therefore, the appeal filed by Eleanor Johnson is dismissed.

The Commission has long determined that the ten-day (10) filing period for an appeal under 14 DCMR § 3802.2 is jurisdictional, depriving the Commission of jurisdiction to accept an appeal if filed beyond the period proscribed by the Act and regulations. Freeman v. Hamilton, TP 28,282 (RHC Jan. 17, 2006) at 2-3; C.I.H. Props., TP 24,817 at 6-7. Also, the Commission is unable to extend the filing deadline for a notice of appeal pursuant to 14 DCMR § 3816.6 ("The Commission, for good cause shown, may enlarge the time prescribed, either on motion by a party

or on its own initiative; provided, that the Commission does not enlarge the time for filing a notice of appeal.") See also, C.I.H. Props., TP 24,817 at 6-7 n 5.

In assessing the Notices of Appeal, the Commission is mindful of the important role that lay litigants play in the Act's enforcement. Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1298-1299 (D.C. 1990); Cohen v. D.C. Rental Hous. Comm'n, 496 A.2d 603, 605 (D.C. 1985). Courts have long recognized that pro se litigants can face considerable challenges in prosecuting their claims without legal assistance. Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). The DCCA has noted that "[i]n matters involving pleadings, service of process, and timeliness of filings, pro se litigants are not always held to the same standards as are applied to lawyers." Padou v. District of Columbia, 998 A.2d 286, 292 (D.C. 2010) (quoting Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d 977, 980 (D.C. 1999), cert. denied, 528 U.S. 1188 (2000)). Especially in cases involving remedial statutes like the Act, courts and administrative agencies have been more disposed "to grant leeway to" pro se litigants. Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d at 980. See, e.g., Rhea v. Designmark Serv. Inc., 942 A.2d 651, 655 (D.C. 2008) ("[T]he Unemployment Compensation Act, like the Rental Housing Act, 'relies largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings.'") (quoting Goodman v. D.C. Hous. Comm'n, 573 A.2d at 1299).

Nonetheless, "while it is true that a court must construe pro se pleadings liberally ... the court may not act as counsel for either litigant." Flax v. Schertler, 935 A.2d 1091, 1107 n. 14 (D.C. 2007) (quoting Bergman v. Webb (In re Webb), 212 B.R. 320, 321 (Bankr. Fed. App. 1997)). As the DCCA has stated, a pro se litigant "cannot generally be permitted to shift the

burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forego expert assistance." Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d at 979 (quoting Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1993)).

IV. CONCLUSION

Based upon its review of the entire record, the Commission determines that the notices of appeal filed by B. Marion Chou, Esquire and the Housing Provider were timely. The Commission also determines that the notice of appeal filed by Rudolph Douglas was timely insofar as it pertains to Mr. Douglas in his individual capacity. The notice of appeal filed by Larry Hunter, pro se, is dismissed as it was untimely filed. The Commission dismisses the appeal filed by Eleanor Johnson who appealed the OAH's denial of the motion for reconsideration which was not appealable.

SO ORDERED.


MARTA W. BERKLEY, 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 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 **ORDER ON MOTIONS TO DISMISS APPEALS** in RH-SF-09-20,098 was mailed, postage prepaid, by first class U.S. mail on this 6 **th** day of **September, 2013** to:

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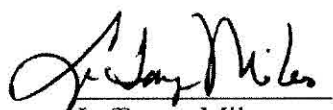
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