DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-SF-15-20,126

In re: 1754 Lanier Pl., N.W.

Ward One (1)

TENANTS OF 1754 LANIER PLACE, N.W.
Tenants/Appellants

v.

1754 LANIER, LLC
Housing Provider/Appellee

ORDER ON RECONSIDERATION

April 26, 2016

McKOIN, COMMISSIONER. This case is on appeal to the Rental Housing Commission ("Commission") from a final order of the Office of Administrative Hearings ("OAH"), based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD").[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 (2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE § 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899, 1 DCMR §§ 2920-2941, and 14 DCMR §§ 3800-4399, govern these proceedings.

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[1] OAH assumed jurisdiction over contested petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the Office of Administrative Hearings Establishment Act of 2001, 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 RAD in DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

I. PROCEDURAL HISTORY

On January 27, 2015, 1754 Lanier, LLC ("Housing Provider") filed related services or facilities petition RH-SF-15-20,126 ("SF Petition"), which requested authorization to convert the housing accommodation located at 1754 Lanier Place, N.W. ("Housing Accommodation") from a centrally metered electrical system to individual metering and payment and to implement a corresponding reduction in rents charged. R. at 3-147. The SF Petition was opposed by several tenants residing in the Housing Accommodation (collectively, "Tenants"). *See* Scheduling Order; R. at 174.

On October 29, 2015, the Administrative Law Judge Margaret A. Mangan ("ALJ") issued a final order approving the SF Petition. 1754 Lanier, LLC v. Tenants of 1754 Lanier Pl., N.W., 2015-DHCD-SF 20,126 (OAH Oct. 29, 2015) ("Final Order"); R. at 341-50.

The Tenants filed a timely Notice of Appeal on November 16, 2015, ("Notice of Appeal"). On March 25, 2016, the Commission issued a decision and order affirming the Final Order: Tenants of 1754 Lanier Pl., N.W. v. 1754 Lanier, LLC, RH-SF-15-20,126 (RHC Mar. 25, 2016) ("Decision and Order"). As relevant to the instant motion, the Commission determined that, although the ALJ erred in part by misstating the legal standard to approve the SF Petition and the evidentiary burden on the Tenants, as respondents to the petition, those errors were harmless. *See* Decision and Order at 7-19.

On April 12, 2016, the Tenants filed the instant motion requesting the Commission reconsider the Decision and Order ("Motion for Reconsideration"). The Motion for Reconsideration asserts that the errors found by the Commission were not harmless, and requests that the Commission either deny the SF Petition or issue an order requiring the Housing Provider to reduce rents by the amount of future electric utility bills. Motion for Reconsideration at 3.

The Housing Provider, on April 18, 2016, filed an opposition to the Motion for Reconsideration ("Housing Provider's Opposition").

II. DISCUSSION

A. Standard of Review

The Commission's rules require that a motion for reconsideration "shall set forth the specific grounds on which the applicant considers the decision and order to be erroneous or unlawful." 14 DCMR § 3823.2 (2004). The Commission's rules further provide that:

> When these rules are silent on a procedural issue before the Commission, that issue shall be decided by using as guidance the current rules of civil procedure published and followed by the Superior Court of the District of Columbia and the rules of the District of Columbia Court of Appeals.

14 DCMR § 3828.1 (2004). The Commission will deny a motion for reconsideration that does not "set forth such specific grounds of error or illegality in the Commission's decision." Dorchester House Assocs., LLC v. Tenants of 2480 16th Street, N.W., RH-SF-09-20,098 (RHC Jan. 3, 2014) (Order on Motion to Reconsider Denial of Motion) at 7. Nor may a party use a motion for reconsideration to "present[] theories or arguments that could have been advanced earlier." Dreyfuss Mgmt., LLC, v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) at 30 (quoting Long v. Howard Univ., 512 F.Supp. 2d 1, 26 (D.D.C. 2007) (applying F.R. Civ. P. 59(e)).

The Housing Provider urges the Commission, in deciding the Motion for Reconsideration, to adopt the standards applied by the Superior Court of the District of Columbia in D.C. Super. Ct. Civ. R. 59(e) and 60(b), under which reconsideration is justified only by "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." Housing Provider's Opposition at 2-3 (citing Dist. No. 1 – Pac. Coast Dist., Marine Eng'rs Beneficial Ass'n v. Travelers Cas. & Sur. Trust Co., 782

A.2d 269, 278-79 (D.C. 2001); Wallace v. Warehous Emps. Union No. 730, 482 A.2d 801, 804 (D.C. 1984)). The Commission has previously rejected a request to adopt those rules as governing motions for reconsideration under 14 DCMR § 3823.2. Carmel Partners, Inc., d/b/a Quarry II, LLC v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC Apr. 18, 2012) (Order on Reconsideration) at 24.

The Commission also observes that, by contrast, OAH has, by rulemaking, adopted a more particularized, albeit not exclusive, list of grounds for reconsideration that is similar to the standard used by the Superior Court. *See* 1 DCMR § 2828.5.[2] The Commission is satisfied that the generalized requirement provided by its own rules does not restrict the grounds on which a party may request reconsideration, so long as the grounds are specifically stated and are timely asserted. *See* 14 DCMR § 3823.2; Dorchester House, RH-SF-09-20,098 (Order on Motion to Reconsider Denial of Motion) at 7; Beckford, RH-TP-07-28,895 at 30; Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (Order on Reconsideration) at 24.

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[2] OAH's rule at 1 DCMR § 2828.5 provides:

> If any party files a motion for reconsideration or for a new hearing before a final order is issued or within the ten (10) calendar day deadline of Subsection 2828.3, and where substantial justice requires, the Administrative Law Judge may change the final order or schedule a new hearing for any reason including, but not limited to, the following:
>
> (a) The party filing the motion did not attend the hearing, has a good reason for not doing so, and states an adequate claim or defense;
>
> (b) The party filing the motion did not file a required answer to a Notice of Infraction or Notice of Violation or did not file some other required document, has a good reason for not doing so, and states an adequate claim or defense;
>
> (c) The final order contains an error of law;
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> (d) The final order's findings of fact are not supported by the evidence; or
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> (e) New evidence has been discovered that previously was not reasonably available to the party filing the motion.

B. Tenants' Grounds for Reconsideration

1. The ALJ's Erroneous Interpretation of 14 DCMR § 4211.2 Prevented the ALJ from Evaluating All Relevant Evidence and Was Not Harmless

In the Final Order, the ALJ stated that "[t]he housing regulations [sic] provide that I shall approve a related services or related facilities petition if I find" that the four enumerated criteria of 14 DCMR § 4211.2 are met. Final Order at 4 (emphasis added); R. at 344. Because the ALJ found that the four criteria were met, she determined that the SF Petition "should be granted." Final Order at 5; R. at 345.

The Commission determined that the ALJ erred because the applicable regulation provides that an ALJ "shall approve a related services or related facilities petition only if the [OAH] finds" that the four enumerated criteria are met. Decision and Order at 9-10; *see* 14 DCMR § 4211.2 (emphasis added). Based on the plain language of the regulations, the four criteria are necessary but not sufficient for a related services or facilities petition to be approved. Decision and Order at 10.

However, an error of law may be harmless where an agency articulates an erroneous legal standard but its order reflects the application of the correct legal standard. *See* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014) (citing LCP, Inc. v. D.C. Alcoholic Beverage Control Bd., 499 A.2d 897, 903 (D.C. 1985); Arthur v. D.C. Nurses' Examining Bd., 459 A.2d 141,146 (D.C. 1983)); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.15 (defining "harmless error" as "[a]n error which is trivial... and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case . . . .") (quoting BLACK'S LAW DICTIONARY 646 (5th ed. 1975)). For example, in United Dominion Mgmt., the District of Columbia Court of Appeals

("DCCA") found that the Commission erred in stating that its review of decisions by an ALJ should be deferential to reasonable conclusions of law. 101 A.3d at 430. The Commission's "error was ultimately immaterial," the DCCA found, because the Commission's thorough analysis "amounted to a *de novo* review of the legal issues posed by [the] case . . . even though the [Commission] did not acknowledge it as such." *Id.* at 431.

The Tenants argue that the ALJ's error in this case was not harmless because the ALJ "did not consider *any* additional factors in determining whether to grant the petition" and therefore "'substantial doubt exists whether the agency would have made the same ultimate finding with the error removed.'" Motion for Reconsideration at 2 (quoting LCP, Inc., 499 A.2d at 903). They request that the Commission "identify what other factors must be met" and that one factor should be "for the Housing Provider to show some compelling need for the modification" to the services provided in connection with the Tenants' rental units. *Id.* at 1.[3]

The Commission determined that the ALJ's error was harmless because the ALJ made further findings of fact and conclusions of law on all remaining issues necessary to the approval of a related services or facilities petition, specifically, the "monthly value of the change in related services or facilities" in accordance with 14 DCMR § 4211.8 and .9. *See* Decision and Order at

[3] The Commission notes that the Tenants argument describes the provision of electric utility service as a contractual matter between them and the Housing Provider, and that the SF Petition amounts to a "unilateral revision of terms." Motion for Reconsideration at 1. The Commission's review of the record, however, does not reveal evidence that any of the Tenants are currently subject to leases of a fixed duration, rather than tenants at will. *See* D.C. OFFICIAL CODE § 42-3505.01; Double H Hous. Corp. v. David, 947 A.2d 38, 41 (D.C. 2008) (noting that, at the expiration of a lease, holdover tenancies under the Act become month-to-month). "In tenancies from month-to-month each month is regarded as a new 'periodic tenancy,' – a tenancy for a month certain plus an expectancy or possibility of continuation for one or more similar periods." Keuroglian v. Wilkins, 88 A.2d 581, 582 (D.C. 1952). Because the terms of the Tenants occupancy are periodically renewed, rather than ongoing, the Commission is satisfied that it does not need to address at this time whether the Housing Provider would be in breach of a contract with any specific Tenant by implementing the reduction in services requested in the SF Petition. *Cf.* D.C. OFFICIAL CODE § 42-3502.08(e) ("Notwithstanding any other provision of this chapter, no rent shall be adjusted under this chapter for any rental unit with respect to which there is a valid written lease or rental agreement establishing the rent for the rental unit for the term of the written lease or rental agreement.").

10-11. Although the Tenants dispute the process by which the ALJ reached the determination of the monthly value, *see infra* at 8, it is apparent from the Final Order that the ALJ did actually reach the issue. *See* Final Order at 5; R. at 345; United Dominion Mgmt., 101 A.3d at 431. Moreover, the Tenants do not identify any further issues made necessary by the Act or regulations that the ALJ failed to address. *See* Motion for Reconsideration at 1-2; *cf.* 14 DCMR § 4211.

With regard to the Tenants' assertion that the Commission should require the Housing Provider to show a "compelling need" before the SF Petition may be granted, the Commission can find no basis under the Act, the regulations, or its or the DCCA's cases for such a standard. Moreover, the Commission's review of the record does not reveal any prior assertion of this novel legal theory by the Tenants prior to the Motion for Reconsideration. *See* Beckford, RH-TP-07-28,895 at 30.

For these reasons, the Commission is satisfied that no "substantial doubt exists whether the [ALJ] would have made the same ultimate finding with the error removed." LCP, Inc., 499 A.2d at 903; *see* United Dominion Mgmt., 101 A.3d at 431; Tenants of 809 Kennedy St., VA 02-107 at n.15. Despite the ALJ's misstatement indicating that the four criteria enumerated in 14 DCMR § 4211.2 are sufficient to the approval of related services or facilities petition, it is apparent from the Final Order that the ALJ's actual consideration of the SF Petition included all elements required by the Act and regulations. United Dominion Mgmt., 101 A.3d at 431; *see* 14 DCMR § 4211.8, .9.

Accordingly, the Commission denies the Motion for Reconsideration on this ground.

2. The ALJ's Requirement that Tenants Put on Expert Testimony Prevented Consideration of Tenants' Other Evidence and Was Not Harmless

The Tenants maintained before OAH and on appeal to the Commission that the Housing Provider's expert witness' report and testimony were insufficient to determine the monthly value of the elimination of electric utility service, because future utility bills will be a more accurate measure of the lost value. *See* Motion for Reconsideration at 2-3; Decision and Order at 19-20. In the Final Order, the ALJ credited the testimony of the Housing Provider's expert witness, Mr. Kaufman, as to the monthly cost of electricity at current rates and rejected the Tenants' contentions because "[l]ay opinions based on preferences are not sufficient to refute the expert opinion presented." *See* Final Order at 5 (citing DCCA cases requiring expert testimony to establish standard of care in wrongful death claims); R. at 345.

In its Decision and Order, the Commission determined that the ALJ erred by stating that the Tenants bore a burden to produce expert testimony. Decision and Order at 17. Nonetheless, the Commission found, based on its review of the record, that the ALJ's error was harmless. *Id.* at 17-19.

As noted, an error may be found harmless where no "substantial doubt exists whether the [ALJ] would have made the same ultimate finding with the error removed." LCP, Inc., 499 A.2d at 903, 905 (where "ample evidence" supported finding that location of alcohol licensee was "inappropriate," defects in certain "subsidiary" findings not grounds for remand). In its Decision and Order, the Commission was satisfied that Mr. Kaufman's testimony constituted substantial evidence to support the valuation of the elimination of electric utility service, and that the Tenants neither put on any contrary evidence that the ALJ failed to consider because of her error nor were denied the opportunity to put forth such evidence on the record. Decision and Order at

17-19; *see* 14 DCMR § 3807.1;[4] 14 DCMR § 4211.9;[5] LCP, Inc., 499 A.2d at 903; Palmer v. Clay, RH-TP-13-30,431 (RHC Oct. 5, 2015) at 13-14 ("Where substantial evidence exists to support the [ALJ's] findings, even the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ]." (internal quotations omitted)).

The Tenants argue that the ALJ's error was not harmless because "it is unclear how the ALJ would have weighed the evidence the Tenants did present, including uncontradicted evidence (and Housing Provider's admissions) that there will be future Pepco bills for current tenants, and that these bills establish the monthly value to Tenants." Motion for Reconsideration at 2. As the Commission noted in its Decision and Order, the Tenants' counsel elicited testimony from Mr. Kaufman on cross-examination that actual, future Pepco bills may not be the exact amounts that his report estimates to be the monthly cost of electric utility service to each rental unit. Decision and Order at 22 (citing Transcript of May 28, 2015 Evidentiary Hearing at 25-26; R. at 344).

However, the Tenants do not identify any other evidence they presented that is relevant to the accuracy of Mr. Kaufman's report or that might otherwise support a finding as to the monthly value of the service. *See* Motion for Reconsideration at 2-3. Rather, they argue that "the actual electrical bills during the remaining terms of the leases was a far better measure to use[.]" *Id.* at 3.

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[4] 14 DCMR § 3807.1 provides as follows:

> The Commission shall reverse final decisions of the Rent Administrator [or OAH] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the Rent Administrator [or OAH].

[5] The Commission sets forth the text of 14 DCMR § 4211.9 *infra* at 10.

The Commission is satisfied that what the Tenants frame as an evidentiary issue is in fact a question of law that was resolved in the Decision and Order. The Commission noted that the regulations provides three factors that an ALJ may consider in determining the monthly value of a reduction in related services or facilities:

(a) The cost to the tenant of obtaining alternate related services or facilities comparable to those reduced by the housing provider;

(b) The operating cost to the housing provider of the related services or facilities which are changed; or

(c) The fair market value of comparable related services or facilities.

14 DCMR § 4211.9 (emphasis added). The Commission determined that an ALJ is not limited by the regulations to using the "cost to the tenant," 14 DCMR § 4211.9(a), and that actual, future costs are not necessary when a housing provider seeks to obtain prior approval for the prospective elimination of a related service. *See* Decision and Order at 23 (citing Johnson v. Hughes, SF 20,040 (RHC Apr. 11, 1996) at 5; Shipley Gardens v. Tenants of Shipley Park Apartments, CIs 20,130-20,151 (RHC Dec. 18, 1987) at 6-7).

As noted, the ALJ was entitled to credit the testimony and report of Mr. Kaufman to determine the monthly value of the electric utility service. *See* 14 DCMR § 3807.1; 14 DCMR § 4211.9; Palmer, RH-TP-13-30,431 at 13-14. The Tenants have not identified any substantial evidence on the record that the ALJ failed to weigh because of her erroneous statement regarding their burden, and therefore the Commission remains satisfied that the ALJ "would have made the same ultimate finding with the error removed." LCP, Inc., 499 A.2d at 903.

Accordingly, the Motion for Reconsideration is denied on this ground.

IV. CONCLUSION

For the foregoing reasons, the Commission is satisfied that both errors by the ALJ that are identified in the Decision and Order are harmless, and denies the Tenants' Motion for Reconsideration.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CLAUDIA L. McKOIN, COMMISSIONER

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2012 Repl.), "[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 RH-TP-15-20,126 was mailed, postage prepaid, by first class U.S. mail on this **26th day** of **April, 2016,** to:

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