

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

RH-TP-08-29,489

*In re:* 3133 Connecticut Ave., N.W.

Ward Three (3)

**CHRISTINE BURKHARDT and  
DONALD WASSEM**  
Tenants/Appellants

v.

**KLINGLE CORPORATION,  
B.F. SAUL COMPANY, and  
B.F. SAUL PROPERTY COMPANY**  
Housing Providers/Appellees

**ORDER ON APPEARANCE AND REPRESENTATION, WITHDRAWAL OF APPEAL,  
AND  
SUA SPONTE CONTINUANCE OF SCHEDULED HEARING**

June 3, 2016

**SZEGEDY-MASZAK, CHAIRMAN.** This case is on appeal to the Rental Housing Commission (“Commission”) from a final order issued by 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”).<sup>1</sup> 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

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<sup>1</sup> OAH assumed jurisdiction over tenant 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, 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 Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

("DCMR"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

**I. PENDING MOTIONS**

On August 4, 2015, Tenants/Appellants Christine Burkhardt and Donald Wassem (collectively, "Tenants") filed a notice of appeal with the Commission ("Notice of Appeal"). On May 10, 2016, the Commission issued a Notice of Scheduled Hearing and Notice of Certification of Record ("Notice of Scheduled Hearing"), setting a hearing on this appeal for June 9, 2016. Two motions are currently pending before the Commission in this case.

The first is a motion filed by Tenant Wassem on May 20, 2016, titled "Request to Participate in Hearing(s) by Telephone, Or to Be Deemed Present via One or More of Three Alternatives" ("Motion on Appearance"). The Motion on Appearance states that Tenant Wassem now resides three time zones away from the District of Columbia, providing care to an elderly family member, and that travel for the purpose of the hearing in this matter is not feasible. Motion on Appearance at 1. Because the Commission's Notice of Scheduled Hearing warns that the Commission may dismiss an appeal based on an appellant's failure to appear, *see, e.g., Stancil v. D.C. Rental Hous. Comm'n*, 806 A.2d 622, 622-25 (D.C. 2002), Tenant Wassem seeks leave to prosecute his appeal either by telephone, on the briefs alone, or through another Tenant as his representative. *See* Motion on Appearance at 1-2.<sup>2</sup>

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<sup>2</sup>The Commission's rules on motions provide that, "Any party may file a response in opposition to a motion within five (5) days after service of the motion." 14 DCMR § 3814.3. Under the Commission's rules for computation of time, only business days are counted for time periods less than ten (10) days, and an additional three (3) business days are permitted when service is by mail. *See* 14 DCMR § 3816. Because Mr. Wassem served the Housing Provider with the Motion on Appearance by mail on May 20, 2016, and because of the intervening weekends and Memorial Day holiday, the Commission determines that the Housing Provider was allowed to file a response in opposition by June 2, 2015. *Id.* As of the date of this Order, the Commission has received no response in opposition to the Motion on Appearance. The Commission notes that Mr. Wassem, in the Motion on Appearance, represents that counsel for the Housing Provider "do[es] not consent" to the motion. Motion on Appearance at 1 n.2.

The Second is a motion filed by Ms. Burkhardt on June 2, 2016, to withdraw her appeal (“Motion to Withdraw”). The Motion to Withdraw states that she will be unable to attend the Commission’s scheduled hearing on June 9, 2016. Motion to Withdraw at 1.

## II. DISCUSSION

The Commission’s rules at 14 DCMR § 3824 provide the following regarding the withdrawal of an appeal pending before the Commission:

3824.1 An appellant may file a motion to withdraw an appeal pending before the Commission.

3824.2 The Commission shall review all motions to withdraw to ensure that the interests of all parties are protected.

*See, e.g., Siegel v. B.F. Saul Co.*, RH-TP-06-28,524 (RHC Apr. 15, 2015). Because the Housing Provider prevailed before OAH, the Commission is satisfied that its interests are protected by the withdrawal of Tenant Burkhardt from this appeal. *See Siegel*, RH-TP-06-28,524.

With respect to Tenant Burkhardt’s interests, the Commission is satisfied that, because she filed the Motion to Withdraw, she is no longer interested in pursuing the appeal of the Final Order.<sup>3</sup> The Commission’s conclusion is bolstered by Tenant Burkhardt’s failure to file a motion for a continuance based on her inability to appear for the June 9, 2016 hearing. *Cf.* 14 DCMR § 3815 (“Any party may move to request a continuance of any scheduled hearing . . . at least five (5) days before the hearing or the due date; however, in the event of extraordinary circumstances, the time limit may be shortened by the Commission.”).

With respect to the protection of Tenant Wassem’s interests, the Commission observes that he has previously filed a motion similar to the Motion on Appearance in another proceeding. *See Burkhardt v. Klingle Corp.*, RH-TP-10-29,875 (RHC May 14, 2015) (Order on Appearance).

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<sup>3</sup> The Commission also observes that Tenant Wassem filed a brief in this case on May 19, 2016, which contained a signature block for Tenant Burkhardt but was not, in fact, signed by her.

In that case, the Commission permitted Tenant Wassem to be represented by Tenant Burkhardt, as the only other Tenant party to the appeal, to represent Tenant Wassem as a “member selected by the members of . . . a group of tenants,” following her submission of a notice of appearance on his behalf. *Id.*; see 14 DCMR § 3812.1(d).

The Commission observes that, although the instant Motion on Appearance does not identify another Tenant by name, Tenant Burkhardt is the only other Tenant who is a party in this appeal. See Notice of Appeal at 1, 7. Accordingly, the Commission was prepared to provide Tenant Burkhardt and Tenant Wassem, respectively, with the same opportunity for representation. However, since Tenant Burkhardt has now requested to withdraw from this appeal, the Commission determines that there is no other “member of a group of tenants” in this case who would be able to represent Tenant Wassem. See 14 DCMR § 3812.1(d).

With respect to Tenant Wassem’s request to appear by telephone, the Commission in its reasonable discretion<sup>4</sup> determines that it cannot currently assure that Tenant Wassem’s appearance in this manner would be adequately recorded by the Commission’s recording devices or that Tenant Wassem’s due process right to fully and fairly prosecute his appeal would be sufficiently secured and protected in light of any inadequacy or impairment in the Commission’s telephone transmission network and facilities (e.g., Tenant Wassem’s or the Housing Provider’s inability to reasonably hear the Commissioners or opposing party).<sup>5</sup> See 14 DCMR § 3820.1 (“The entire proceedings of hearings on motions and appeals shall be recorded on tape, which

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<sup>4</sup> It is well established that administrative tribunals, like the Commission, “‘must be, and are, given discretion in the procedural decisions made in carrying out their statutory mandate.’” Prime v. D.C. Dep’t of Pub. Works, 955 A.2d 178, 182 (D.C. 2008) (quoting Ammerman v. D.C. Rental Accommodations Comm’n, 375 A.2d 1060, 1063 (D.C. 1977)). See also Smith Prop. Holdings Five (D.C) L.P. v. Morris, RH-TP-06-28,794 (RHC May 22, 2014); KMG Mgmt., LLC v. Richardson, RH-TP-12-30,230 (RHC Jan. 28, 2014).

<sup>5</sup> “[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances, but rather it is flexible and calls for such procedural protections as the particular situation demands.” Matthews v. Eldridge, 424 U.S. 319, 334 (1976) (quoted in Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 542 (D.C. 2002); Borger Mgmt., Inc. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009).

shall remain in the custody of the Commission at all times.”).<sup>6</sup> Moreover, unlike the OAH rules, nothing in the Commission’s rules authorizes participation in a hearing by telephone. *Cf.* 1 DCMR § 2821.8.<sup>7</sup> Finally, although the Commission may, when its rules are silent, be guided by the rules of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals, *see* 14 DCMR § 3828.1, the Commission observes that neither Courts’ rules address appearances for hearings by telephone or other electronic means. *See generally* Super. Ct. Civ. R.; D.C. App. R.

With respect to Tenant Wassem’s request to be excused from appearing to prosecute his appeal and rather, in effect, rely upon his written brief to present his appeal (instead of supplementing his written brief with oral argument), the Commission is not satisfied that Tenant Wassem’s mere reliance on a written brief would meet the Tenant’s burden to prosecute his appeal. *See* D.C. OFFICIAL CODE § 2-509(b) (“In contested cases, the proponent of a rule or order shall have the burden of proof.”); Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014); Wilson v. KMG Mgmt., LLC, RH-TP-11-30,087 (RHC May 24, 2013). Furthermore, in the absence of the Housing Provider’s consent to either Tenant Wassem’s appearance at the Commission hearing by phone transmission, or to simply submit a written brief without opportunity for oral argument, the Commission is not persuaded that the Housing Provider’s due process right to a full and fair appellate hearing are adequately secured and protected. *See*

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<sup>6</sup> The Commission notes that, notwithstanding this rule, it no longer uses analog tape and has switched to a digital audio recording system.

<sup>7</sup> OAH’s rule at 1 DCMR § 2821.8 provides:

For good cause shown, and subject to appropriate safeguards, an Administrative Law Judge may permit witness testimony from a remote location by telephone, videoconferencing, or similar means. Requests for such testimony will ordinarily be granted where the witness does not reside or work in the greater District of Columbia Metropolitan area.

Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d at 541-43; Borger Mgmt., Inc. v. Lee, RH-TP-06-28,854. *See generally* Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

### III. CONCLUSION

The Commission, *sua sponte*, determines that, in order to protect Tenant Wassem's interests, **the scheduled hearing on June 9, 2016, in this case shall be continued** in order to allow the Tenant time to obtain representation<sup>8</sup> or make other arrangements to appear. *See* 14 DCMR §§ 3812, 3824.2; *see also* Jerome Mgmt. v. D.C. Rental Hous. Comm'n, 682 A.2d 178, 183 (D.C. 1996) ("Notice and an opportunity to be heard at a meaningful time are fundamental elements of due process."). The Commission reaches this determination in consideration of the short time remaining before the Commission's scheduled hearing and of Tenant Burkhardt's desire to withdraw from this appeal.

The Commission will direct the Clerk to issue a new notice of scheduled hearing after June 20, 2016. The parties are instructed that this order shall not affect the times for filing of any briefing as set forth in the original Notice of Scheduled Hearing. The Commission accordingly denies Tenant Wassem's Motion on Appearance, with prejudice with respect to appearance by telephone and to excuse from appearance, and otherwise without prejudice.

Because the Commission is satisfied that the continuance of the hearing in this case protects the interests of all other parties, *see* 14 DCMR § 3824.2, the Commission grants Tenant Burkhardt's Motion to Withdraw.

**SO ORDERED**

  
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PETER B. SZEGEDY-MASZAK, CHAIRMAN

<sup>8</sup> Tenant Wassem has not indicated any hardship, impairment or other obstacle in securing a representative of his interests for appearance before the Commission.

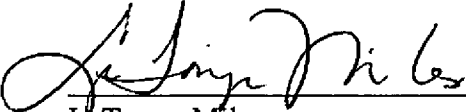
**CERTIFICATE OF SERVICE**

I certify that a copy of the **ORDER** in RH-TP-08-29,489 was served by first-class mail, postage prepaid, this **3rd day of June, 2016**, to:

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Washington, DC 20008

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c/o Ken Mazzer  
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