

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-08-29,489

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

Ward Three (3)

DONALD WASSEM
Tenant/Appellant

v.

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

RECONSIDERATION OF ORDER ON APPEARANCE AT HEARING

November 17, 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”).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”), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

¹ 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 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 August 4, 2015, Tenant/Appellant Donald Wassem (“Tenant”) filed a notice of appeal with the Commission (“Notice of Appeal”).² 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. The scheduled hearing was continued by the Commission in light of the withdrawal of another party from the appeal. *See* Burkhardt v. Klingle Corp., RH-TP-08-29,489 (RHC June 3, 2016) (“Order on Continuance”).

Since the Notice of Scheduled Hearing was issued, the Tenant has filed numerous motions requesting that he not be required to appear in person at a hearing to present oral arguments. First, on May 20, 2016, the Tenant filed a “Request to Participate in Hearing(s) by Telephone, Or to Be Deemed Present via One or More of Three Alternatives” (“Motion on Appearance”). The Commission denied, with prejudice, the Tenant’s request to be excused from appearing and to rely entirely on the written submissions. *Order on Continuance* at 5-6.³

Second, on June 6, 2016, the Commission received a filing from the Tenant captioned “Request for No One to Be Dismissed for Failing to Appear at Hearing(s)” (“Motion on Dismissal”). The Motion on Dismissal requested that the Tenant be allowed to supplement the original Motion on Appearance with additional legal argument, specifically, that the Commission should follow D.C. App. R. 34(e) if any party fails to appear at the Commission’s scheduled hearing. *See* *Motion on Dismissal* at 1-2 (including text of D.C. App. R. 34(e)).

² The Notice of Appeal was joined by Christine Burkhardt, who, on June 2, 2016, filed a motion to withdraw her appeal, which was granted. *See* Burkhardt v. Klingle Corp., RH-TP-08-29,489 (RHC June 3, 2016).

³ The Commission notes that the Motion on Appearance was denied without prejudice with respect to the Tenant’s request to appear through a designated representative. *Order on Continuance* at 6.

Third, on June 22, 2016, the Tenant filed a motion for reconsideration of the Commission's Order on Continuance ("First Motion for Reconsideration"). The Motion for Reconsideration both reiterated and expanded upon the legal grounds underlying the Tenant's previous arguments in the Motion on Dismissal that the Commission should decide this appeal without oral argument. *See generally* First Motion for Reconsideration. The Commission denied the Motion on Dismissal as moot and denied the First Motion on Reconsideration because reconsideration is only available under the Commission's rules for decisions "issued to dispose of the appeal" on the merits, and is therefore inapplicable to non-dispositive motions like the First Motion on Reconsideration. Wassem v. Klingle Corp., RH-TP-08-29,489 (RHC July 8, 2016) ("Order on Appearance at Hearing");⁴ *see* 14 DCMR § 3823.1 (2004).

Fourth, on July 25, 2016, the Tenant filed another request for the Commission to reconsider its orders and to thereby waive the Tenant's appearance at an oral hearing on the appeal ("Second Motion for Reconsideration"). The Second Motion for Reconsideration adds new legal arguments to the Tenant's previous filings. Specifically, the Tenant maintains that his appeal should not be dismissed if he fails to appear at a scheduled hearing because the cases of Stancil v. D.C. Rental Hous. Comm'n, 806 A.2d 622 (D.C. 2002), and Mullin v. N Street Follies, L.P., 712 A.2d 487 (D.C. 1998), (both affirming that the Commission may dismiss a case for a party's failure to appear at a Commission hearing or comply with procedural orders) are distinguishable from the procedural history of this case on appeal. *See* Second Motion for Reconsideration. The Commission denied the Second Motion for Reconsideration because it sought the same relief previously requested, and a motion for reconsideration is not permitted for

⁴ The Commission also noted that the Tenant's request was not yet "ripe," because no hearing has been held at which he has failed to appear and a determination of the consequences from such a failure would be "hypothetical and contingent." *See* Order on Appearance at Hearing at n.6 (citing Young v. Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012)).

a non-final order. Wassem v. Klingle Corp., RH-TP-08-29,489 (RHC Aug. 10, 2016) (“Second Order Denying Reconsideration”).

Finally, on August 30, 2016, the Tenant filed a document titled:

Request for Modification of the Commission “Notice of Scheduled Hearing” to Reflect Commission Policy that Parties Can Be Represented by Appropriately Filed Documents Including Briefs, and Request for Confirmation that Parties Have the Option of Being Represented at Commission Hearing(s) by Appropriately Filed Documents.

(“Request for Modification”). The Request for Modification again asks that the Tenant’s appeal not be dismissed if he fails to appear at a hearing, citing Klingle Corp. v. Tenants of 3131/3133 Connecticut Ave., N.W., NV 09-001 (RHC June 8, 2013) (Order), in which the Commission ordered that the Tenant would not be dismissed from an appeal where his interests were represented by other tenants, a brief had been filed, and the Tenant made the request well in advance of the hearing.

The Housing Provider has not filed any opposition to any of the Tenant’s foregoing motions.

II. DISCUSSION

Notwithstanding the Tenant’s repeated motions relating to the same issue, the Commission has the authority to vacate and modify its own orders and judgment *sua sponte*. See Bookman v. United States, 453 F.2d 1263, 1265 (Ct. Cl. 1972) (stating that every tribunal, judicial or administrative, on its own initiative, has power to correct its own errors and to modify its judgment, order, or decree with proper notice and within a reasonable time period); Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012); Pettaway v. Town Ctr. Mgmt. Corp., TP 23,538 (RHC Aug. 10, 1995). For the reasons that follow, the Commission reconsiders the Tenant’s request to waive the right to present his case in person, which supersedes its previous orders.

The Commission has consistently followed the precedent established in Stancil v. D.C. Rental Hous. Comm'n, 806 A.2d 622, 622-25 (D.C. 2002), that failure to appear at a scheduled Commission hearing is grounds for dismissal of an appeal. *See, e.g.*, Tenants of 2480 16th St., N.W. v. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Sept. 25, 2015) (noting authority that dismissal is permitted for failure to appear); Siegel v. B.F. Saul Co., RH-TP-06-28,524 (RHC Sept. 9, 2015) (dismissal permitted against several members of a group of appellants did not appear); Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014) (exercising discretion to dismiss tenant's cross-appeal where tenant failed to appear at the Commission's hearing); Carter v. Paget, RH-TP-09-29,517 (RHC Dec. 11, 2013) (dismissing tenant's appeal where neither party appeared at the Commission's hearing); Wilson v. KMG Mgmt., LLC, RH-TP-11-30,087 (RHC May 24, 2013) (exercising "broad discretion" to dismiss tenant's notice of appeal where tenant failed to appear at the Commission's hearing).⁵ In Stancil, the Commission dismissed an appeal for failure to appear, which the District of Columbia Court of Appeals ("DCCA") affirmed on two independent grounds: first, the Commission had followed D.C. App. R. 14,⁶ providing that the DCCA "may" dismiss a case for failure to comply with its rules; and second, the Commission determined that it has "inherent power to dismiss an appeal as part of its

⁵ Additionally, the District of Columbia Court of Appeals ("DCCA") noted that, prior to its decision upholding the practice, the Commission "had a long line of apparently unchallenged decisions" dismissing appeals for failure to appear. Stancil, 806 A.2d at 624 n.1 (citing cases from 1983-1987).

⁶ The Commission's rule at 14 DCMR § 3828.1 provides 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.

D.C. App. R. 14, in effect at the time, "permits dismissal of an appeal 'for failure to comply with these rules or for any other lawful reason.'" Stancil, 806 A.2d at 625 (emphasis added). The Commission observes that current D.C. App. R. 13 (Dec. 1, 2014) contains substantially similar language, provides that the DCCA "may dismiss an appeal for failure to comply with a rule of this court or where otherwise warranted." (emphasis added). As specifically noted, the above texts of the respective applicable rules contain precatory, not mandatory, language.

general power to hear and dispose of motions.” Stancil, 806 A.2d at 624-25. For both reasons, the DCCA was satisfied that the Commission had authority to dismiss an appeal and did not abuse its discretion by imposing dismissal as a sanction. *Id.* at 625-26. The DCCA’s rules, which the Commission follows, also state that the Court “may” dismiss an appeal. *See* D.C. App. R. 13, *supra* n.6. The DCCA’s decision in Stancil asserts only that the Commission has the authority and discretion to dismiss an appeal, but does not mandate that the Commission shall impose such sanction if a party fails to appear. *See* Stancil, 806 A.2d at 622-25.

Further, the Commission notes that the Act and its own rules do not expressly require a hearing to be held on each appeal. *See* Stancil, 806 A.2d at 624-25 (noting no specific provision of Commission’s rules authorizes dismissal for failure to comply with rules); JBG Props., Inc. v. Van Ness South Tenants Ass’n, Inc., TP 20,773 (RHC Mar. 17, 1987).⁷ The Act provides that the “Commission may hold hearings, sit and act at times and places within the District . . . as the Rental Housing Commission may consider advisable in carrying out its functions under this chapter.” D.C. OFFICIAL CODE § 42-3502.02(b)(1) (emphasis added). The Commission’s rules on hearings provide that at least two Commissioners must be present and the meeting must be open to the public, but no provision mandates that a hearing shall be held. *See* 14 DCMR § 3819 (Hearings); *see also* 14 DCMR §§ 3802 (Initiation of Appeals) & 3807 (Review of Appeals); Van Ness South Tenants Ass’n, TP 20,773.⁸

⁷ The Commission notes that in Van Ness South Tenants Ass’n, TP 20,773, and later cases following its reasoning, the Commission determined that appeals presenting a single, purely legal issue are appropriate for summary disposition without an oral argument. *See, e.g.,* Borger Mgmt., Inc. v. Sindram, TP 28,028 (RHC Oct. 27, 2004). The Commission observes that the Tenant’s Notice of Appeal in this case enumerates 44 distinct issues. Accordingly, the Commission’s determination in this case to depart from its standard practice of requiring appearance a hearing is based on the separate grounds enumerated *infra*.

⁸ In Van Ness South Tenants Ass’n, TP 20,773, the Commission observed that:

[U]nder the 1980 Act, the Commission was required by its own regulations to conduct an oral hearing on each appeal properly taken from a decision of the Rent Administrator. 14 DCMR

The Commission is therefore satisfied that it has discretion in carrying out its duties as to whether or not an appeal will be dismissed for failure of a party to appear. *See Stancil*, 806 A.2d at 624-25; Dorchester House Assocs., LLC, RH-SF-09-20,098; Siegel, RH-TP-06-28,524; Hardy, RH-TP-09-29,503; Carter, RH-TP-09-29,517; Wilson, RH-TP-11-30,087; *see also Prime v. D.C. Dep't of Pub. Works*, 955 A.2d 178, 182 (D.C. 2008) (administrative tribunals like the Commission “must be, and are, given discretion in the procedural decisions made in carrying out their statutory mandate”) (quoting Ammerman v. D.C. Rental Accommodations Comm'n, 375 A.2d 1060, 1063 (D.C. 1977)); *see also Smith Prop. Holdings Five (DC), 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).

The Commission, in reasonable exercise of its discretion, is satisfied that, on the specific procedural posture of this case and the cumulative weight of the facts averred by the Tenant to which the Housing Provider has filed no opposition, it is appropriate to determine, in advance of a hearing, that the Tenant’s appeal will not be dismissed as a sanction for failure to appear at the hearing. In its discretion, the Commission notes the following seven reasons in support of its determination:

First, the Tenant has already submitted a brief of his position on appeal. *See* Tenant’s Initial Brief of Appeal Issues (“Tenant’s Brief”). This is unlike Stancil, in which the appellant before the Commission did not submit a brief. Stancil, 806 A.2d at 625. Moreover, by submitting a brief, the Tenant has made a clear effort to carry his burden as the proponent of the appeal. *See* D.C. OFFICIAL CODE § 2-509(b) (“In contested cases, . . . the proponent of a rule or

[§] 3303 *et seq.* (1981). In promulgating regulations under the 1985 Act, the Commission deleted the provisions which mandated a hearing on each appeal. This reflected the discretionary character of Commission hearings under the Act and the administrative necessity of managing a rapidly increasing case load.

order shall have the burden of proof.”); Tenants of 3133 Conn. Ave., N.W. v. Klingle Corp., NV 09-001 (RHC Oct. 16, 2015) (Order on Reconsideration) (appellants dismissed who requested to “stand on their pleadings” but filed no brief); Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014) (dismissing issues raised in notice of appeal but not briefed or orally argued by party represented by counsel for failure to carry burden as proponent).⁹

Second, the Tenant has notified the Commission, well in advance of any scheduled hearing on this appeal, of his difficulty in appearing in person. *See* Motion on Appearance. The Commission determines that the timeliness of the Tenant’s filing demonstrates the Tenant’s good faith intent to prosecute his appeal. *Cf. Radwan v. D.C. Rental Hous. Comm’n*, 683 A.2d 478, 481 (D.C. 1996) (failure to appear at hearing may be excused in consideration of whether a party acted in good faith and acted promptly); Klingle Corp., NV 09-001 (although “good faith” or “bad faith” not a requisite ground to support the exercise of the Commission’s discretion, appellants dismissed who filed last-minute notice of inability to attend hearing).

Third, the Commission observes that the Tenant’s primary, stated reason for not attending the hearing is that he now resides an extraordinary distance from the District of Columbia. *See* Motion on Appearance at 1 (stating he resides “3 time zones away”); First Motion for Reconsideration at 2 n.3 (stating he is “2400 (air) miles from Washington DC”). The Commission is persuaded that the distance of the Tenant’s current residence presents an unreasonable burden in proportion to the benefit of presenting oral argument on this appeal.

⁹ The Commission notes that, unlike the District of Columbia Court of Appeals, its rules do not provide for the docketing of cases on a summary calendar without oral argument. *See* D.C. App. R. 33.

Fourth, the Commission observes that the reason stated by the Tenant for being unable to take the time to travel to the District of Columbia for oral argument is that he is providing care for an elderly, medically dependent family member. *See* Motion on Appearance at 1; First Motion for Reconsideration at 2 n.3. The Commission is satisfied that the Tenant's obligations away from the District of Columbia present an unreasonable burden in proportion to the time that would be required for travel to present oral argument on this appeal.

Fifth, the Commission notes that the Tenant is not represented by counsel in this proceeding and there are no other tenant-parties to this case who could appear on his behalf, as the Commission has allowed in other cases. *See* Burkhardt v. Klingle Corp., RH-TP-10-29,875 (RHC May 14, 2015). The Commission has consistently determined that it must be mindful of the important role that *pro se* litigants play in the enforcement of the Act. 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); Philip v. Willoughby Real Estate Co., RH-TP-16-30,800 (RHC Aug. 30, 2016); Chen v. Moy, RH-TP-08-29,340 (RHC Mar. 27, 2012). As the Commission noted in its Order on Appearance at Hearing, the Tenant could have been represented by his fellow tenant Christine Burkhardt, who joined the Notice of Appeal but has since withdrawn. Order on Appearance at Hearing at 4. In light of the change in circumstances that now appears to prevent the Tenant from being represented by anyone other than an attorney, the Commission determines that it is appropriate to afford the Tenant greater flexibility in the *pro se* prosecution of his appeal.

Sixth, the Commission is satisfied that the Housing Provider is not subject to any prejudice by not requiring the Tenant to appear for an oral argument. The Housing Provider has already filed a responsive brief to the Tenant's Brief. *See* Appellees' Brief in Opposition to

Appeal. Further, the Housing Provider is represented by counsel and therefore is fully able to respond in writing to the Tenant's written contentions.¹⁰ Moreover, although the Tenant has elected to waive his opportunity to present oral arguments, the Commission will nonetheless afford the Housing Provider the same opportunity by scheduling a hearing on this appeal.

Seventh, the Commission notes that, unlike OAH, it is not presently able to assure that its telephone and electronic recording equipment would properly carry, transmit and record an appearance by telephone or by other means of telecommunications. The Commission notes that its exercise of its discretion in this case is undertaken in consideration only of its present telecommunications limitations, which may improve with appropriate resources in the future.

III. CONCLUSION

In the exercise of its discretion, and based upon a thorough review of the record, the Commission is satisfied that the factual grounds underlying the Tenant's request not to attend the Commission hearing in this case are sufficiently unique, and distinct from the factual circumstances in Stancil, 806 A.2d 622-25, and other cases supporting dismissal of an appeal where a party fails to appear for a Commission hearing, *see, e.g.*, Dorchester House Assocs., LLC, RH-SF-09-20,098; Siegel, RH-TP-06-28,524; Hardy, RH-TP-09-29,503; Carter, RH-TP-09-29,517; Wilson, RH-TP-11-30,087, that the Tenant's appeal in this case will not be dismissed on the grounds of the Tenant's absence from a Commission hearing. As its precedent indicates, the Commission will not hesitate to rely on the reasoning and holding of Stancil, 806 A.2d

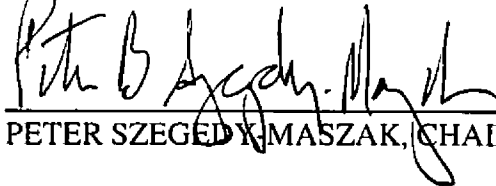
¹⁰ The Commission, mindful of the difficulties faced by *pro se* litigants, notes that there may be circumstances, particularly in administrative cases where parties are frequently unrepresented, where the opportunity to present and respond to arguments orally and in person could be critical to any party. *See Goodman v. D.C. Rental Hous. Comm'n*, 573 A.2d 1293, 1298-99 (D.C. 1990); Burkhardt v. Klingle Corp., RH-TP-10-29,875 (RHC May 14, 2015); Watkis v. Farmer, RH-TP-07-2,045 (RHC Aug. 15, 2013) at n.14. By not appearing at the Commission's hearing in this appeal, the Tenant forfeits his ability to respond to the Housing Provider's oral arguments at a hearing.

622-25, in dismissing an appeal when a party fails to attend a Commission hearing. The Commission's decision in this case is based primarily and exclusively on the unique factual circumstances proffered by the Tenant for his absence from the hearing and the cumulative weight of the seven factors described in this order.

The Commission's prior orders in this case are hereby reconsidered and superseded by this Order. Although, in its discretion, the Commission is persuaded to allow an exception herein to its hearing requirement for the foregoing reasons, the Tenant's Request for Modification is otherwise denied to the extent that it requests not only that the Commission's standard-form Notice of Scheduled Hearing be modified but also that the Commission ratify its "policy" on the same grounds as the Tenant proffers. *See* Request for Modification at 1-2.

As noted *supra* at 9-10, the Commission will nonetheless permit the Housing Provider the opportunity to present its response to the Tenant's appeal through oral argument. Unless the Housing Provider files a written notice of its intent to waive the opportunity to present oral argument within ten business days of this order, plus three business days to allow for delivery of this order by mail, the Clerk of the Court will schedule a hearing as soon as practicable.

SO ORDERED.



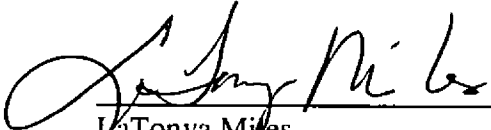
PETER SZEGEDY-MASZAK, CHAIRMAN

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **ORDER** in RH-TP-08-29,489 was served by first-class mail, postage prepaid, this **17th day of November, 2016**, to:

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