

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-10-29,875

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

Ward Three (3)

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

v.

KLINGLE CORPORATION, *et al.*
Housing Providers/Appellees

ORDER ON MOTION FOR RECONSIDERATION OF MAY 14, 2015 ORDER

June 16, 2015

McKOIN, COMMISSIONER. 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 District 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 Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

On December 23, 2104, Tenants/Appellants Christine Burkhardt and Donald Wassem (collectively, Tenants)² filed a notice of appeal with the Commission. On April 14, 2015,³ the Commission issued a Notice of Scheduled Hearing and Notice of Certification of Record (Notice of Scheduled Hearing), setting a hearing date for May 7, 2015. On April 21, 2015, the Tenants filed a joint “Requests for Extension of Time to File Appeal Brief(s) and for Postponement of Hearing Until After the Dates Briefs Are Then Due” (Motion for Continuance). The Motion for Continuance requested that the due date for briefing in this case be extended and that the May 7, 2015, hearing be rescheduled for some time after the week of June 29, 2015. Motion for Continuance at 2. Klingle Corporation, B.F. Saul Company, and B.F. Saul Property Company (collectively, Housing Providers) filed an “Opposition to the Motion for Continuance” on April 30, 2015, asserting that the Motion for Continuance does not provide a “valid, verifiable reason for asking for an extension, much less such a long one.” On May 1, 2015, the Commission issued its Order on Motion for Continuance (Order on Motion for Continuance, RH-TP-10-29,875 (RHC May 1, 2015)) granting the continuance and establishing a new date of June 9, 2015, for the hearing, and May 13, 2015, for the filing of Tenants’ brief and June 2, 2015, for the a Housing Providers’ brief.⁴

² The Commission observes that all filings with it in this matter have so far been captioned with “Kenneth Mazzer, *et al.*” as the appellants, consistent with the caption given by OAH. Because only Ms. Burkhardt and Mr. Wassem have appealed the final order issued by OAH, the Commission, in its discretion, amends the case caption of this appeal for all subsequent pleadings and orders. *See* 14 DCMR § 3808.1, .2.

³ The Commission’s notice on April 14, 2015, was a reissuance of a notice issued on April 3, 2015, which was addressed to Ms. Burkhardt and Mr. Wassem at the incorrect addresses.

⁴ In the Housing Providers’ Motion for Reconsideration of Commission Order Dated May 14, 2015, they state: “As the Commission is aware, it granted the Tenant/Appellants request to reschedule the hearing before the date on which Appellees were required to file an opposition to the Request.” Motion for Reconsideration of Commission Order Dated May 14, 2015, at 1. However, the Commission’s records indicate that the Housing Providers filed an “Opposition to Request for Extension of Time to File Appeal Brief(s) and for Postponement of Hearing until after the Dates Briefs are then Due” on April 30, 2015, one day before the Commission issued its Order on Motion for

On April 29, 2015, Tenant Petitioner Donald Wassem filed a “Request to Participate by Telephone, or to Appear Via Fellow Member of Unincorporated Nonprofit Association, or to Rely on Written Pleadings” (Motion to Participate). In his Motion Tenant Petitioner Wassem asked to be allowed to participate in the hearing in RH-TP-10-29,875, by telephone, via representation by a fellow member of an unincorporated nonprofit association, or rely on written pleadings. On May 14, 2015, the Commission issued its Order on Appearance and Representation granting Tenant Petitioner Wassem’s Motion by allowing Ms. Burkhardt, his co-Petitioner in this case, to represent him if she filed a written notice of appearance. (Order on Appearance and Representation, RH-TP-10-29,875 (RHC May 14, 2015)). Ms. Burkhardt filed a “Notice of Appearance of Member of a Group for a Fellow Member (Co-Appellant) Who will be Absent from the Hearing” on May 29, 2015.

On May 20, 2015, the Housing Providers filed a “Motion for Reconsideration of Commission Order Dated May 14, 2015” (Motion for Reconsideration of May 14, 2015 Order). The Commission’s rules state that:

Any 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; provided that an order issued on reconsideration is not subject to reconsideration.

14 DCMR § 3823.1

The Commission’s May 14, 2015, Order was not a final dispositive decision on the merits of the appeal in this case, RH-TP-10-29,875. The May 14, 2015, Order was a procedural order addressing the appearance and representation of one of the Tenant Petitioners in this proceeding.

Continuance, RH-TP-10-29875 (RHC May 1, 2015). So, the Housing Providers did have the opportunity to object to the “Requests for Extension of Time to File Appeal Brief(s) and for Postponement of Hearing Until After the Dates Briefs Are Then Due” and to express their reasons for why the Motion should be denied.

Therefore, the Housing Providers use of a motion for reconsideration to object to the May 14, 2015, Order, was inappropriate. The Housing Providers should have objected to Tenant Petitioner Wassem's Motion to Participate by filing a motion opposing the request within five days as required by 14 DCMR § 3814.3, plus three days for mailing (i.e., by May 11, 2015).⁵ Having failed to file an opposition within the required time the Housing Providers have lost their opportunity to object.

In the Motion for Reconsideration of May 14, 2015, Order the Housing Providers state that Tenant Petitioner Wassem's Motion to Participate relates only to the previously scheduled May 7, 2015, hearing and not to the rescheduled date of June 9, 2015, and that Mr. Wassem did not file a separate Motion for the rescheduled hearing date. Reconsideration of May 14, 2015 Order, at 2. Tenant Petitioner Wassem's Motion states ". . . requests to participate in the hearing(s) in this matter – the first of which is currently scheduled for May 7, 2015 . . ." Motion to Participate, at 1. In Tenant Petitioner Wassem's statement he references more than one possible hearing and that the "first" hearing is scheduled for May 7, 2015. Mr. Wassem presumed the possibly of more than one hearing, especially in light of his request along with Ms.

⁵ 14 DCMR § 3814.3 provides as follows:

Any party may file a response in opposition to a motion within five (5) days after service of the motion.

14 DCMR § 3816.3 provides as follows:

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

14 DCMR § 3816.5 provides as follows:

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.

Burkhardt, to have the original hearing postponed until a later date. As noted above, a new hearing date was granted for June 9, 2015. Mr. Wassem states in his Motion to Participate that he no longer resides in the District and is located three (3) time zones away, and that it is not feasible for him to travel to Washington, DC. Motion to Participate, at 1. Based on the wording of Mr. Wassem's Motion and the fact that he currently resides three (3) time zones away the Commission determines that Tenant Petitioner Wassem's Motion was intended to apply to any and all hearings in this case and not just to the previously scheduled May 7, 2015, hearing and therefore a separate motion for alternative appearance for the June 9, 2015, hearing was not necessary.

As to Mr. Wassem's request to appear by telephone the Housing Providers state that the OAH regulation 1DCMR § 2821.8⁶ allows witnesses to testify by telephone for good cause shown and that "Mr. Wassem, as a Petitioner in this case, does not satisfy these requirements as clearly his role is far beyond that of a witness. 1 DCMR § 2821.8 does not appear to allow for a party to appear by telephone; instead only a witness may be permitted to appear telephonically." Motion for Reconsideration of May 14, 2015 Order, at 2. Black's Law Dictionary (5th ed. 1979), defines witness as:

In general, one who, being present, personally sees or perceives a thing; a beholder, spectator or eyewitness. One who testifies to what he has seen, heard or otherwise observed.

⁶ 1 DCMR § 2821.8 provides as follows:

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.

A person whose declaration under oath (or affirmation) is received as evidence for any purpose, whether such declaration be made on oral examination or by deposition or affidavit.

Thus a witness is a person who provides evidence on what he or she has seen, heard or observed through testimony presented. The definition does not preclude parties from being witnesses. In fact, parties to cases before OAH and the Commission have provided testimony and therefore served as witnesses in their respective cases. (See Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 and RH-TP-06-28,577 (RHC December 15, 2014); (where 20 tenants who were parties to the case testified at the OAH hearing); Muneer Sheikh v. Smith Property Holdings Three, (DC) LP, 2012-DHCD-TP 30,279 (OAH January 29, 2014) (where the tenant/petitioner was a witness who provided testimony at the OAH hearing in the case). In addition, as noted in the Tenant Petitioners "Opposition to Motion for Reconsideration," the ALJ in her Final Order in Christine Burkhardt and Donald Wassem v. Klingle Corp., B.F. Saul Co., B.F. Saul Property Co., 2008-DHCD-TP 29, 489 (OAH April 14, 2015), states that Tenant Petitioner Donald Wassem testified at a hearing on December 16, 2014, by telephone and that the Housing Provider was represented at the hearing that day by counsel. Opposition to Motion for Reconsideration, at 3. Therefore, the use of the term witness in OAH's regulation 1 DCMR § 2821.8, is consistent with the definition in Black's Law Dictionary. Thus, a witness is any person providing evidence through testimony as to what he or she has seen, heard or observed and is not limited to non-parties. As a witness Mr. Wassem would be giving testimony to his knowledge of and observation of the issues in this case. However, as noted in our May 14, 2015, Order, the Commission declined Mr. Wassem's request to testify by telephone due to technical difficulties not because, as a party, he could not qualify as a witness under the OAH regulations. Order on Appearance and Representation, at 2, n. 2.

The Housing Providers challenge the Commission's decision to allow Mr. Wassem's representation at the June 9, 2015, hearing by the appearance of Ms. Burkhardt under 14 DCMR § 3812.1(d).⁷ They argue that Mr. Wassem filed the instant matter in an individual capacity and not as a member of a tenant association. Mr. Wassem and Ms. Burkhardt jointly filed this case, RH-TP-10-29,875, against the Housing Providers. As joint parties in this case they have jointly raised the issues on appeal and below. Thus, Ms. Burkhardt is in a unique position to represent the interests of Mr. Wassem at the hearing on this matter. Mr. Wassem in his "Motion to Participate" included as one of his alternatives to have a fellow member of the unincorporated nonprofit association represent him at the hearing. *See George I. Borgner, Inc., v. Rebecca Woodson, et al*, TP 11,848 (RHC June 10, 1987) ("From the above discussion, we believe it axiomatic that a party need not testify in person in order for testimony to be adduced on the party's behalf or in support of the party's petition. Here the evidence in support of the group petition consisted in large measure of the oral testimony of lead petitioner Woodson.). The Commission within its administrative authority is satisfied that 14 DCMR § 3812.1(d), allows a member of a group of tenants, selected by the other members of the group, including a group of only two (2) tenants, to appear on behalf of the other member(s) of the group. *See Prime v. D.C. Dept. of Public Works*, 955 A.2d 178, 182 (D.C. 2008) (citing *Ammerman v. D.C. Rental Accommodations Comm'n*, 375 A.2d 1060, 1063 (D.C. 1977) (administrative tribunals "must be, and are, given discretion in the procedural decisions made in carrying out their statutory

⁷ 14 DCMR § 3812.1(d) provides as follows:

In any proceeding, representation may be as follows:

(d) A member selected by the members of an association or an employee of the association, a group of tenants or non-profit corporation may represent the association, group or non-profit corporation;

mandate.”); Nader v. FCC, 520 F.2d 182, 195 (D.C. Cir. 1975) (“the [Federal Communications] Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940) (agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”).

The Housing Providers also state that because Mr. Wassem no longer resides at the Housing Accommodation that he cannot be a member of a tenant organization. Reconsideration of May 14, 2015 Order, at 2-3. As counsel for the Housing Providers is aware the original petition in this case was filed in April, 2010. The issues in the appeal in this case relate to matters dating back to 2010 and for some matters as far back as 2005. At the time of the filing of the petition Mr. Wassem was a tenant residing at the Housing Accommodation. (See Tenant Petition, R. at 33, which includes the signature of Mr. Wassem and notes his apartment number as 506). As a party to the ongoing proceedings in this case Mr. Wassem has the right to continue to pursue the resolution of the issues through the administrative process. See, e.g., Am. Rental Mgmt. Co. v. Arlene Chaney, et al, RH-TP-08-29,302 (RHC May 22, 2014, re-issued June 27, 2014), at 5 (“ . . . the Commission notes that the ALJ's s Reconsideration Order corrected errors identified in the Housing Provider's Motion for Reconsideration which included eliminating rent reductions for the incorrect period, changing reductions in rent to reductions in rent ceilings, prorating damages awarded for less than a full month and an award covering a period after a Tenant no longer resided at the Housing Accommodation, and limiting awards to Petitioners who participated in prior cases to the time period following the prior cases.”); Lisa Terry, v. Gaben Mgmt. LLC, RH-TP-12-30,206 (RHC December 8, 2014) (tenant failed to vacate unit after giving notice to quit, housing provider sued for rent for the months the tenant stayed beyond the

date in the notice, tenant filed petition alleging the housing provider charged double rent for the months tenant stayed beyond the date in the notice); Dudley and Singletary Property, Inc. v. Garden Towers Tenant Association, TP 21,318 (RHC September 26, 1990) (during the course of a hearing the parties agreed to participate in settlement proceedings. "Apparently all tenants who attended were permitted to vote. That included those who were original petitioners, those who had lived in the housing accommodation when the petition was filed but who had not been petitioners and those who moved in after the petition was filed."); Cf., Christian Dias and Marie Dias, v. Aaronita Perry, TP 24,379 (RHC July 30, 2004) ("The Commission held that the tenant failed to meet her burden, because she did not present reliable, probative, and substantial evidence that she occupied the rental unit and was entitled to a rent refund through March 2000. The Commission reversed the hearing examiner's award of a rent refund through March 2000, remanded the matter, and instructed the hearing examiner to review the record evidence and determine the dates that the tenant occupied unit 301.").

The Housing Providers state that to allow Ms. Burkhardt to appear on behalf of Mr. Wassem "... would countenance the unauthorized practice of law" Motion for Reconsideration of May 14, 2015 Order, at 3. The Housing Providers cite to Tenants of Dorchester House Apartments v. Dorchester House Assoc., CI 20,767 and CI 20,768 (RHC January 24, 2003). The Dorchester case cited is distinguishable in that it was addressing Mr. Benoit Brookens right to appear as an attorney or as a representative of the tenants in that case. Mr. Brookens had been barred by the Superior Court of the District of Columbia from the practice of law in the District of Columbia. The Commission ruled in that case that Mr. Brookens was permanently barred from appearing before the Commission as an attorney but could provide lay representation for the tenants if he met the requirements of 14 DCMR §§ 3812

and 4004 (*See Tenants of Dorchester House*, CI 20,767 and CI 20,768, at 7). Ms. Burkhardt is not representing Mr. Wassem as an attorney but in a lay capacity as a co-Tenant Petitioner in this case. As previously noted the Commission's rule 14 DCMR § 3812 allows for lay representation.

For the reasons stated above the Commission denies the Housing Providers' Motion for Reconsideration of Commission Order Dated May 14, 2015.

SO ORDERED


CLAUDIA L. MCKOIN, COMMISSIONER

JUDICIAL REVIEW

Pursuant to D.C. 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