

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-15-30,653

In re: 2727 M Street, NW

Ward Two (2)

PATRICK C. NOVAK
Tenant/Appellant

v.

NATALIA G. SEDOVA
Housing Provider/Appellee

ORDER DISMISSING APPEAL

November 20, 2015

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 District of Columbia 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 Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD) 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 DHCD by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.).

I. PROCEDURAL HISTORY

Tenant/Appellant Patrick Novak (Tenant), former resident of the housing accommodation located at 2727 M Street, NW, (Housing Accommodation), filed Tenant Petition RH-TP-15-30,653 (Tenant Petition) with RAD on April 1, 2015, against Housing Provider/Appellee Natalia Sedova (Housing Provider). Tenant Petition at 1-2; Record for RH-TP-15-30,653 (R.) at 37-38.

A hearing was held before Administrative Law Judge Erika Pierson (ALJ) on July 21, 2015, and a final order was issued on August 13, 2015: Novak v. Sedova, RH-TP-15-30,653 (OAH Aug. 13, 2015) (Final Order). R. at 122-34. In the Final Order, the ALJ determined that the Tenant had not met his burden of proving that the Housing Provider had unlawfully withheld his security deposit, and dismissed the Tenant Petition. Final Order at 10; R. at 125.

Under the OAH rules at 1 DCMR § 2841.1 (2011), OAH is permitted to serve orders on parties by e-mail. The Tenant specifically requested in the Tenant Petition that he be served with documents solely and exclusively by e-mail rather than by the customary United State (U.S.) mail. *See* Attachment to Tenant Petition at 1; R. at 34. OAH served the Final Order on the Tenant solely and exclusively by e-mail on August 13, 2015, the date of issuance of the Final Order by the ALJ. The e-mail address provided by the Tenant was: grand88@yahoo.com. Tenant Petition at 1; R. at 38.

On September 1, 2015, the Tenant filed an appeal with the Commission (Notice of Appeal).

II. PRELIMINARY ISSUE: TIMELINESS OF APPEAL

In accordance with the Commission's regulations at 14 DCMR § 3802.2 (2004), a notice of appeal must be filed within ten days after a final decision is issued, plus three days if the ALJ

had “mailed” the final decision to the parties.² The ten days do not include intermediate weekends or holidays. 14 DCMR § 3816.3.³

In accordance with 14 DCMR §§ 3802.2 & 3816.3, the Tenant’s ten-day time period for filing a notice of appeal expired on August 27, 2015, five days before the Tenant’s actual and otherwise untimely filing of the notice of appeal with the Commission on September 1, 2015. *See* Final Order at 1, 13; R. at 122, 134. However, if three additional days were added in accordance with 14 DCMR § 3802.2 in the event that the ALJ were deemed to have “mailed” the final decision to the parties, the expiration date of the 10-day filing period for the Tenant’s notice of appeal would be September 1, 2015, thereby rendering the Tenant’s September 1, 2015 notice of appeal timely under 14 DCMR §§ 3802.2 & 3816.3.

The Commission’s review of the record reveals that the Certificate of Service attached to the Final Order indicates that the Final Order was e-mailed to the Tenant at his correct e-mail address of record: grand88@yahoo.com. Final Order at 13; R. at 122. Additionally, the record contains a printout of the e-mail from the OAH Clerk addressed to the Tenant at grand88@yahoo.com, and containing the Final Order as an attachment. *See* August 13, 2015 e-mail; R. at 121. The Tenant does not contend, nor does the record reveal evidentiary support for a determination, that the Tenant did not receive a copy of the Final Order on the date that it was e-mailed.

Initially, the Commission notes that, upon the specific request of the Tenant, OAH used email solely and exclusively to deliver the Final Order to the Tenant. Tenant Petition at 1; R. at

² 14 DCMR § 3802.2 provides the following: “A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator [or ALJ] is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.”

³ 14 DCMR § 3816.3 provides the following: “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.”

38. OAH regulations allow service by email, as follows: “[t]his Section permits . . . OAH to serve orders and notices by email.” 1 DCMR § 2841.1 (2011).

OAH regulations do not allow any additional time for required actions by a party, such as filing a notice of appeal with the Commission, when email is used as the form of service on such party: “[t]he five (5) additional days added to the response times by Subsection 2812.5 [when service is made by United States mail,] does not apply to orders, notices, or papers served by e-mail, even if they are also served by other means.” 1 DCMR § 2841.11.

The Commission’s regulations do not specifically address service of Commission or other orders and decisions by e-mail. *See, e.g.*, 14 DCMR §§ 3800 & 4000 (2004).⁴ When the Commission’s regulations do not address a procedural matter before the Commission, the Commission may seek guidance from the rules of civil procedure of the D.C. Superior Court and the rules of the District of Columbia Court of Appeals (DCCA). *See* 14 DCMR § 3828.1 (“When these rules are silent on a procedural issue before the Commission, the 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.”). The Commission’s review of the rules of both the D.C. Superior Court and the DCCA does not reveal any provisions related to e-mail service of final orders and decisions relevant to the determination of timeliness of the notice of appeal in this case.⁵

In the absence of any specific guidance from the D.C. Superior Court and the DCCA, the Commission begins with the specific language of 14 DCMR § 3802.2 (emphasis added): “[a]

⁴ The Commission is currently in the process of amending its procedural provisions in 14 DCMR §§ 3800 & 4000 and will address the enactment of provisions governing service by email, as OAH has done in 1 DCMR § 2841.

⁵ For example, D.C. Sup. Ct. R. Civ. Pro. 5(e)(2) provides guidelines for electronic filing of documents, but not service of decisions and orders by the court.

notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator [or ALJ] is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.” The DCCA has explained that a court must look at the “plain meaning” of the words of a statute or regulation when the words are clear and unambiguous, and construe the words according to their ordinary sense and with the meaning commonly attributed to them. *See* District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006); *see also* Dorchester House Assocs. Ltd. P’ship v. D.C. Rental Hous. Comm’n, 938 A.2d 696, 702 (D.C. 2007); Tenants of 4021 9th St., N.W. v. E&J Props., LLC, HP 20,812 (RHC June 11, 2014); Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014); Carpenter v. Markswright Co., RH-TP-10-29,840 (RHC June 5, 2013). Based on the plain meaning of the language of 14 DCMR § 3802.2, and substantial case precedent of the Commission in construing the application of 14 DCMR § 3802.2 to U.S. mail, the Commission, in its discretion, interprets the term “mail” to mean U.S. mail. *See* D.C. OFFICIAL CODE §§ 42-3502.16(c),⁶ 42-3509.04(a)(3) (2007 Supp.);⁷ *see also* 1 DCMR § 2841.10 (2011). *See, e.g.*, Presley v. Admasu, RH-TP-08-29,147 (RHC June 18, 2015); Salazar v. Varner, RH-TP-09-29,645 (RHC June 16, 2015); Ahmed v. Torres, RH-TP-07-29,064 (RHC Apr. 15, 2014); Shipe v. Carter, RH-TP-08-29,411 (RHC Sept. 18, 2012); Smith Property Hldngs Five L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013); Dawson v. A.J. Edwards Realty, RH-TP-08-29,153 (RHC Mar. 24, 2009); Haendel v. Budd, TP 27,598 (RHC May 21, 2007). Thus, if a final order is served by email, the Commission in its discretion determines that the time for filing an appeal is ten days,

⁶ D.C. OFFICIAL CODE § 42-3502.16(c) provides the following: “If a hearing is requested . . . notice of the time and place of the hearing shall be furnished the parties by first-class mail[.]”

⁷ D.C. OFFICIAL CODE § 42-3509.04(a)(3) provides the following: “[A]ny information or document required to be served upon any person shall be served upon that person Service may be completed by any of the following ways . . . (3) By mail or deposit with the United States Postal Service[.]”

without the three extra days provided for mailing under 14 DCMR § 3802.2. The Commission's determination is consistent with current, applicable OAH rules. *See* 1 DCMR § 2841.11.

Furthermore, the Commission observes that the three additional days for filing a notice of appeal allowed by 14 DCMR § 3802.2 when a final order is posted by U.S. mail to a party are seemingly intended to account for the customary administrative and processing time attendant to the mailing and delivery of U.S. mail or, as has been otherwise characterized by the DCCA, "our expectations of the [U.S.] postal service". Town Ctr. Mgmt. v. D.C. Rental Hous. Comm'n, 496 A.2d 264, 266 (D.C. 1985) (citing Poyner v. Police and Firemen's Retirement and Relief Bd., 456 A.2d 1249, 1251 (D.C. 1983)). When a final order is served by email, which has been deemed by courts with apparent uniformity to be an "instantaneous" or "virtually instantaneous" communication, the Commission is not persuaded that it is reasonable to apply to such notice of appeal the same rationale which supports the addition of three days for filing a notice of appeal resulting from the service of a final order by U.S. mail. *See, e.g.,* Syngenta Crop Prot., LLC v. Willowood, LLC, 2015 U.S. Dist. LEXIS 139627, at *21 (M.D.N.C. Oct. 14, 2015) (describing email and texts as "virtually instantaneous" communications); Aguilar v. Recktenwald, 2015 U.S. Dist. LEXIS 137031, at *18 (M.D. Pa. July 28, 2015) (characterizing telephones, videoconferencing, and email as methods of instantaneous communication); In re M.C., 8 A.3d 1215, 1217 (D.C. 2010) (discussing whether recusal was required when a judge receives "instantaneous . . . electronic communications [such as e-mails] related to a pending judicial proceeding"). Because of the "instantaneous" nature of OAH's service of the Final Order on the date of its issuance by e-mail to the Tenant, the Commission's determination that the Tenant was not entitled to an additional three days for filing his notice of appeal under 14 DCMR § 3802.2 continues to recognize that the form of mailing is "critical to the right of

appeal” and that the “stringent” ten-day period for appeal to the Commission is not shortened or impaired in any way. See Joyce v. D.C. Rental Hous. Comm’n, 741 A.2d 24, 26-27 (D.C. 1999); Town Center Mgmt., 496 A.2d at 266; Poyner, 456 A.2d at 1251.

Under the Act and its regulations, the time limit for filing an appeal with the Commission is mandatory and jurisdictional. See, e.g., Salazar v. Varner, RH-TP-09-29,645 (RHC Jun 16, 2015); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Mar. 11, 2015); Allen v. L.C. City Vista LP, RH-TP-12-30,181 (RHC Apr. 29, 2014); Kuratu v. Ahmed. Inc., RH-TP-07-28,985 (RHC Feb. 28, 2014); Shipe v. Carter, RH-TP-08-29,411 (RHC Sept. 18, 2012). The Commission determines, based on the plain meaning of the regulation, that the Tenant was not entitled to an additional three days provided in 14 DCMR § 3802.2 to file his Notice of Appeal when he specifically requested and received the Final Order by e-mail from OAH on the date of its issuance by OAH. See 14 DCMR §§ 3802.2 & 3816.3.

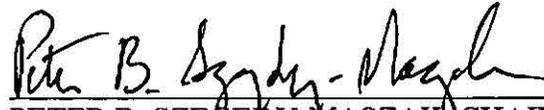
Accordingly, the Commission determines that the Notice of Appeal was untimely, and thus the Commission lacks jurisdiction over the issues raised therein. 14 DCMR §§ 3802.2 & 3816.3; Salazar, RH-TP-09-29,645; Campbell, RH-TP-09-29,715; Allen, RH-TP-12-30,181; Kuratu, RH-TP-07-28,985; Shipe, RH-TP-08-29,411. The Commission dismisses the Notice of Appeal for lack of jurisdiction. 14 DCMR §§ 3802.2 & 3816.3; Salazar, RH-TP-09-29,645; Campbell, RH-TP-09-29,715; Allen, RH-TP-12-30,181; Kuratu, RH-TP-07-28,985; Shipe, RH-TP-08-29,411.

III. CONCLUSION

For the foregoing reasons, the Commission determines that the Notice of Appeal was

untimely, and dismisses the Notice of Appeal for lack of jurisdiction.⁸ 14 DCMR §§ 3802.2 & 3816.3; Salazar, RH-TP-09-29,645; Campbell, RH-TP-09-29,715; Allen, RH-TP-12-30,181; Kuratu, RH-TP-07-28,985; Shipe, RH-TP-08-29,411.

SO ORDERED


PETER B. SZEGEDY-MASZAK, CHAIRMAN

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 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
Historic Courthouse
430 E Street, N.W.
Washington, DC 20001
(202) 879-2700

⁸ The Commission notes that any changes to the Commission’s regulation that only provides an additional three days for filing a notice of appeal when the final order is served on a party by U.S. mail can only be made through the issuance of new, amended regulations, approved by the D.C. City Council.

CERTIFICATE OF SERVICE

I certify that a copy of the **ORDER DISMISSING APPEAL** in RH-TP-15-30,653 was served this 20th day of November, 2015:

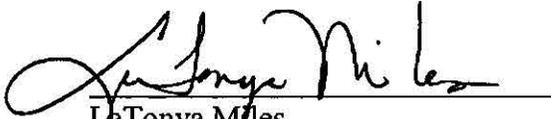
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