**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

TP 26,129

In re: 5716 16th Street, N.W.

Ward Four (4)

THEO G. MYERS
Housing Provider/Appellant

v.

CURTIS L. SMITH
Tenant/Appellee

**DECISION AND ORDER**

**February 28, 2013**

**YOUNG, COMMISSIONER.** This case is on appeal from the District of Columbia Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudication (OAD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), 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), 14 DCMR §§ 3800-4399 (2004) govern the proceedings.

## I. THE PROCEDURES

On October 27, 2000, Curtis L. Smith, the tenant (Tenant) of the housing accommodation (Housing Accommodation) located at 5716 16th Street, N.W., filed tenant petition (TP) 26,129. The Tenant alleged that Theo G. Myers, his housing provider (Housing Provider): 1) took a rent increase larger than the amount of increase permitted by the Act; 2) charged rent which exceeded the legally calculated rent ceiling for his unit; 3) filed a rent ceiling with the Rental Accommodations and Conversion

Division for his unit which was improper; 4) failed to properly register the building in which his rental unit was located with the RACD; 5) substantially reduced services or facilities provided in connection with his rental unit; and 6) took retaliatory action against him for exercising his rights in violation of section 502 of the Act.

Administrative Law Judge (ALJ) Henry McCoy held the OAD hearing on July 16, 2001, with both parties present. He issued the OAD decision and order on July 5, 2002. The ALJ made the following relevant conclusion of law: "Petitioner has proved, by substantial record evidence, that Respondent has substantially reduced related services and/or facilities in his rental unit, in violation of D.C. [sic] Code 42-3502.11." Smith v. Myers, TP 26,129 (OAD July 5, 2002) (OAD Decision I) at 11. The ALJ ordered, in part: "Respondent shall pay a fine pursuant to D.C. [sic] Code § 42-35__ [sic] in the amount of ONE THOUSAND DOLLARS ($1,000.00) for substantially reducing Petitioner's services and/or facilities in violation of D.C. [sic] Code § 42-3502.11." Id.

The Housing Provider filed a Notice of Appeal in the Commission on July 24, 2002, and the Commission held its appellate hearing on December 19, 2002.

## II. ISSUE ON APPEAL

The notice of appeal contained one issue raised by the Housing Provider. The Housing Provider argued: "The Examiner [sic] exceeded his authority when he fined the Housing Provider for substantially reducing Petitioner's service[s] and/or facilities." Notice of Appeal at 1.

## III. THE COMMISSION DECISION

The Commission determined, after reviewing the ALJ's decision, that, "[t]he ALJ did not make findings of fact, and conclusions of law, on the imposition of a fine."

Myers v. Smith, TP 26,129 (RHC Mar. 17, 2003) at 4 (citing Lee v. D. C. Zoning Comm'n, 411 A.2d 635 (D.C. 1980) (where the court stated whenever an administrative agency fails to make a finding on a material contested issue, the reviewing court cannot properly fill the gap itself by inferring findings)). The Commission determined that it "cannot infer findings on whether the Housing Provider's acted 'knowingly' under D.C. OFFICIAL CODE § 42-3509.01(a) (2001) or 'willfully' under D.C. OFFICIAL CODE § 42-3509.01(b) (2001)." Id. (footnote omitted). The Commission concluded:

> The lack of findings of fact and conclusions of law that the Housing Provider's conduct showed "wilfullness" was fatal in Ratner Mgmt. Co. v. Tenants of Shipley Park, TP 11,613 (RHC Nov. 4, 1988), and RECAP-Gillian v. Powell, TP 27,042 (RHC Dec. 19, 2002). ... Likewise, in the instant appeal, the Commission reverses the imposition of the $1,000.00 fine by the ALJ, because there was no finding of fact and conclusions of law based on record evidence showing there was willful conduct by the Housing Provider. ... Accordingly, he is reversed on the fine issue, and that issue is remanded to the ALJ for findings of fact and conclusion of law on the fine.

Myers v. Smith, TP 26,129 at 5-6. Accordingly, the Commission remanded the case to the ALJ for findings of facts and conclusions of law on the issue of whether the evidence of record showed that the Housing Provider's actions were willfull.

## IV. PROCEDURES ON REMAND OF OAD DECISION

On March 24, 2004, the ALJ issued his remand decision and order. Smith v. Myers, TP 26,129 (OAD Mar. 24, 2004) (OAD Decision II). The decision contained the following additional findings of fact:

1. By letter dated November 17, 1997, the Petitioner informed the Respondent that the front porch was in serious need of repair and asked that it be repaired.

2. The Respondent did not respond to the Petitioner's request for maintenance and repair of the front porch.

3. In Housing Deficiency Notice #577819 dated October 5, 2000, a DCRA housing inspector cited the porch floor as being rotten, the downspouts were improperly connected to the gutter, had rotten parts, and had mission [sic] parts, and the gutters were improperly connected to the building and had missing parts.

4. On December 28, 1997, the Petitioner first notified the Respondent that there was no heat in the house.

5. On January 2, 1998, the Petitioner submitted a proposal to the Respondent to replace the heating system in the house that was rejected by the Respondent.

6. On January 6, 1998, the Petitioner memorialized a January 4, 1998 telephone conversation with the Respondent in which he officially notified the Respondent that there was no heat in the house.

7. The Respondent provided no proof that he repaired the heating system in the house by the time of the hearing in this matter.

8. The Respondent had knowledge of the problem with the front porch and the nonworking heating system for an extended period of time and intentionally made no effort to make repairs.

9. The Respondent made a conscious decision not to repair the front porch and the heating system.

OAD Decision II at 2-3. The ALJ made the following conclusion of law:

1. The Respondent willfully violated the Act by consciously failing to repair the front porch and failing to fix the heating system and is subject to a civil fine pursuant to D.C. Official Code § 42-3509.01(b) (2001).

Id. at 4.

On April 8, 2004, the Housing Provider filed a notice of appeal in the Commission of the March 24, 2004, OAD decision and order. The Commission held its appellate hearing on March 20, 2008, after receiving the certified record from the Office of the Rent Administrator.

## V. ISSUES ON APPEAL OF THE OAD REMAND DECISION

In his notice of appeal, the Housing Provider raised two (2) issues. The notice stated:

1. The Examiner [sic] exceeded his authority when he fined the Housing Provider for substantially reducing Petitioner's service[s] and/or facilities.

2. The evidence does not support the fine.

Notice of Appeal at 1.

## VI. DISCUSSION OF THE ISSUES

### A. Whether the Administrative Law Judge exceeded his authority when he fined the Housing Provider for substantially reducing the Tenant's services and facilities.

Counsel for the Housing Provider failed to submit a brief on appeal to further elucidate the assertion that the ALJ exceeded his authority. The Commission's regulation governing the initiation of appeals, 14 DCMR § 3802.5(b)(2004), provides that the notice of appeal shall contain the following: "The Rental Housing Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from and a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator." (emphasis added).

On appeal to the Commission, the Housing Provider asserts that the ALJ "exceeded his authority when he fined the Housing Provider for substantially reducing the Tenant's services and facilities." However, counsel for the Housing Provider failed to provide the Commission with the specific nature of the ALJ's error, and how he exceeded his authority. The Commission has repeatedly held that an appeal, which fails to provide the Commission with a clear and concise statement of the alleged errors in the decision below, as required by 14 DCMR § 3802.5(b)(2004), will be dismissed. Canales

v. Martinez, TP 27,535 (RHC June 29, 2005); Kenilworth Parkside RMC v. Johnson, TP 27,782 (RHC June 22, 2005); Vicente v. Anderson, TP 27,201 (RHC Aug. 20, 2004); Stancil v. Davis, TP 24,709 (RHC Mar. 24, 2000). In Battle v. McElvene, TP 24,752 (RHC May 18, 2000) at 4, the Commission dismissed an appeal issue because the housing provider alleged "analysis errors," but failed to provide a clear and concise statement of the "specific instances of the errors." Similarly in this case, the Housing Provider has failed to provide the Commission the specific instances of error alleged in this issue and has failed to provide citations to the Act in support of his contention. See, e.g., Vicente, TP 27,201; Stancil, TP 24,709; and Battle, TP 24,752. Accordingly, the Commission dismisses this issue as violative of 14 DCMR § 3802.5 (b) (2004).

B. **Whether the evidence of record supports the imposition of a fine.**

On appeal to the Commission, the Housing Provider argues that the evidence of record did not support the ALJ's imposition of a fine.

The ALJ held that the Housing Provider knowingly and willfully violated the Act and imposed a $1000.00 civil fine. OAD Decision II at 4; R. at 166. The penalty provisions of the Act state, in part, that:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, or (2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.
>
> Any person who willfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under

> this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation.

D.C. OFFICIAL CODE § 42-3509.01 (a)-(b) (2001) (emphasis added).

The Commission's standard of review is contained in 14 DCMR § 3807.1(2004),[1] and requires the Commission to review an ALJ's determination as follows: "[whether the ALJ] (1) made findings of fact on each material, contested factual issue, (2) based those findings on substantial evidence,[2] and (3) drew conclusions of law which followed rationally from the findings." Britton v. D.C. Police & Firefighters' Ret. & Relief Bd., 681 A.2d 1152, 1155 (D.C. 1996). The Commission is required to give deference to the ALJ's findings, and will not disturb a decision if it rationally flows from the facts relied upon and those facts or findings are substantially supported by the evidence of record. See Selk v. D.C. Dep't. of Emp't. Servs., 497 A.2d 1056, 1058 (D.C. 1985) (citing Washington Post v. District Unemp't. Comp. Bd., 377 A.2d 436, 439 (D.C. 1977); 424 Q Street Ltd. P'ship. v. Evans, TP 24,597 (RHC July 31, 2000)).

The ALJ made the following findings regarding the Housing Provider's willfulness:

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[1] The regulation, 14 DCMR § 3807.1(2004), provides:

> The Commission shall reverse final decisions of the Rent Administrator 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.

[2] Substantial evidence is defined as "more than a mere scintilla;" evidence that "a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938) (cited in Pierce v. D.C. Firefighters' Ret. & Relief Bd., 681 A.2d 1152, 1155 (D.C. 1996)).

6. On January 6, 1998, the Petitioner memorialized a January 4, 1998 telephone conversation with the Respondent in which he officially notified the Respondent that there was no heat in the house.

7. The Respondent provided no proof that he repaired the heating system in the house by the time of the hearing in this matter.

8. The Respondent had knowledge of the problem with the front porch and the nonworking heating system for an extended period of time and intentionally made no effort to make repairs.

9. The Respondent made a conscious decision not to repair the front porch and the heating system.

OAD Decision II at 2-3; R. at 165. The ALJ made the following conclusion regarding the Housing Provider's inaction:

1. The Respondent willfully violated the Act by consciously failing to repair the front porch and failing to fix the heating system and is subject to a civil fine pursuant to D.C. Official Code § 42-3509.01(b) (2001).

Id. at 4; R. at 166.

The District of Columbia Court of Appeals (DCCA) affirmed the Commission's interpretation of the term "willfully" as a more culpable mental state than the term "knowingly." Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 505 A.2d 73, 75 n. 6 (D.C. 1986) (cited in Willoughby Real Estate Co, Inc. v. Shuler, TP 28,266 (RHC Nov. 7, 2008)).

In RECAP-Gillian v. Powell, TP 27,042 (RHC Dec. 19, 2002), the Commission stated:

> [I]n Quality Mgmt. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73, 75-76 (D.C. 1986) the court quoted the legislative history of the penalty section of the Act to explain the distinction between a 'knowing' violation of the Act under [D.C. OFFICIAL CODE] § 42-3509.01(a) as distinct from § 42-3509.01(b), which requires a housing provider to act 'willfully' in violation of the Act. The court stated the distinction, 'is further supported by the necessity to draw some independent meaning

from the word 'willfully,' as used in ... [D.C. OFFICIAL CODE § 42-3509.01(b)].' Id. The Council created legislative history during debates on the distinctions, which states:

> From the context it is clear that the word 'willfully' as it is used in [D.C. OFFICIAL CODE § 42-3509.01(b)] demands a more culpable mental state than the word 'knowingly' as used in [D.C. OFFICIAL CODE § 42-3509.01(a)]....There is a difference. 'Willfully' goes to intent to violate the law. 'Knowingly' is simply that you know what you are doing. A different standard. If you know that you are increasing the rent, the fact that you don't intend to violate the law would be 'knowingly.' If you also intended to violate the law, that would be 'willfully.' Knowingly [is a] lower ... standard.

RECAP-Gillian v. Powell, TP 27,042 at 5. See also Webb v. D.C. Rental Hous. Comm'n, 505 A.2d 467 (D.C. 1986) (for a discussion of the meaning of the term "knowingly.")

In the instant case, the ALJ has listed a set of facts that establish that the Housing Provider, as a result of the notice provided by the Tenant, and the Notice of Violation issued by DCRA, "knowingly" violated D.C. OFFICIAL CODE § 42-3509.01 (a) (2001). However, the ALJ recites no testimony or other evidence in the record to support a finding of "willfulness" as required by D.C. OFFICIAL CODE § 42-3509.01 (b) (2001), which would warrant the $1000.00 fine. The Commission determines that the ALJ erred when he concluded that the Housing Provider "willfully" reduced the Tenant's services and facilities, without sufficient supporting evidence from the record, as required by D.C. OFFICIAL CODE § 42-3509.01 (b)(2001). The lack of substantial evidence in the record to support findings of fact is contrary to the DCAPA. See D.C. OFFICIAL CODE § 2-509(e) (2001);[3] see also King v. D.C. Dep't of Emp't Servs., 742 A.2d 460 (1999);

[3] The DCAPA, D.C. OFFICIAL CODE § 2-509(e) (2001), provides in part:

Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 402 (D.C. 1981); RECAP-Gillian v. Powell, TP 27,042 at 9.

In Ratner Mgmt. Co. v. Tenants of Shipley Park, TP 11,613 (RHC Nov. 4, 1988), the Commission stated, in part:

> [W]e do not find present the element of intent and conscious choice necessary to sustain a finding of wilfullness. There is no doubt that the proof sustains the finding that the violations were "knowing" as that word is used in [D.C. OFFICIAL CODE § 42-3509.01(a)] of the Act, but no testimony was presented to meet the heavier burden imposed by [D.C. OFFICIAL CODE § 42-3509.01(b)] of showing that the landlord's conduct was intentional, or deliberate or the product of a conscious choice. Accordingly, the fine will be vacated.

Ratner Mgmt. Co., at 4-5 (quoted in RECAP-Gillian at 9 (emphasis added)). Similarly in this case, as was the case in Ratner, "there was no testimony presented to meet the heavier burden imposed by the Act showing that the Housing Provider's conduct was intentional, deliberate, or the product of a conscious choice," as required by D.C. OFFICIAL CODE § 42-3509.01(b) (2001). Id. at 4-5. Because the record lacked substantial evidence to support the imposition of the $1000.00 civil fine for willful reduction of services and facilities, the Housing Provider's appeal of this issue is granted, the ALJ's decision on this issue is reversed and the civil fine of $1000.00, imposed by the ALJ is vacated.

## VII. CONCLUSION

Issue A is dismissed, because the Housing Provider did not state a "clear and

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Every decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence.

concise statement of the error in the decision of the Rent Administrator," as required by 14 DCMR § 3802.5(b) (2004). Regarding issue B, the Housing Provider's appeal is granted, the ALJ's decision on this issue is reversed and the civil fine of $1000.00 is vacated for the reasons stated herein.

**SO ORDERED**

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

MARTA W. BERKLEY, COMMISSIONER

## 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, D.C. 20001
(202) 879-270

## CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in TP 26,129 was served by first-class mail, postage prepaid, this **28th day of February, 2012**, to:

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