DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 28,270

In re: 3133 Connecticut Ave., N.W.
Unit 829

Ward Three (3)

KLINGLE CORPORATION and
B.F. SAUL COMPANY
Housing Providers/Appellants/Cross-appellees

v.

CHRISTINE BURKHARDT
Tenant/Appellee/Cross-appellant

ORDER ON RECONSIDERATION

May 31, 2016

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission ("Commission") from a final order issued by the Rental Accommodation and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA").[1] These proceedings are governed by the applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE § 42-3501.01 *et seq.* (2001), the District of Columbia Administrative Procedures Act ("DCAPA"), D.C. OFFICIAL CODE § 2-501 *et seq.* (2001), and the District of Columbia Municipal Regulations ("DCMR"), 14 DCMR §§ 3800-4399 (2004).

[1] The functions and duties of the former RACD were transferred to Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD") pursuant to § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2008 Supp.). An evidentiary hearing on the petition was held by the RACD before the Office of Administrative Hearings ("OAH") assumed jurisdiction over rental housing cases pursuant to § 6(b-1)(1) of the OAH Establishment Act of 2001, D.C. Law 14-76, D.C. Official Code § 2-1831.03(b-1)(1) (2007 Repl.).

I. PROCEDURAL HISTORY

The full procedural history of this case is set forth in the Commission's decision and order, Klingle Corp. v. Burkhardt, TP 28,270 (RHC April 29, 2016) ("Decision and Order"). On January 31, 2005, Christine Burkhardt ("Tenant"), residing in unit 829 of the housing accommodation located at 3133 Connecticut Avenue, N.W. ("Housing Accommodation"), filed tenant petition TP 28,270 ("Tenant Petition") with RACD. In the petition, the Tenant alleged that Klingle Corporation and B.F. Saul Company (collectively, "Housing Provider") violated the Act as follows: 1) the rent being charged for her unit exceeded the legally calculated rent ceiling; and 2) the rent ceiling filed with RACD for her unit was improper.

On September 2, 2005, Hearing Examiner Saundra M. McNair ("Hearing Examiner") issued a final order: Burkhardt v. Kingle Corp., TP 28,270 (RACD Sept. 2, 2005) ("Final Order"); R. at 174. In the Final Order, the Hearing Examiner found that several rent ceiling adjustments for the Tenant's rental unit were invalid, and awarded a rent refund based on the amount by which the rent charged to the Tenant exceeded the lawful rent ceiling. *See* Final Order at 20; R. at 155.

In relevant part, the Commission's Decision and Order reversed the Hearing Examiner's conclusion that the rent ceiling adjustments at issue were untimely filed. Decision and Order at 15-16. The Commission affirmed that a rent charged increase implemented on November 1, 2004, was unlawful. *Id.* at 6-11. On May 13, 2016, the Tenant filed a timely motion for reconsideration ("Motion for Reconsideration") pursuant to 14 DCMR § 3823.[2]

[2] The Commission notes that the Motion for Reconsideration is captioned with case number RH-TP-06-28,708, a separate case on appeal to the Commission between the Tenant and the Housing Provider, regarding unit 901 at the Housing Accommodation, which is the current address of the Tenant. However, the Motion for Reconsideration specifically refers to the "April 29, 2016 Decision and Final Order," and the only decision issued by the Commission on April 29, 2016, was the Decision and Order in this case.

II. DISCUSSION

A. Effective Dates of Rent Ceiling Adjustments and the Lawful Rent Ceiling

The Tenant asserts in the Motion for Reconsideration that the Commission erred in its Decision and Order by concluding that the rent ceiling adjustments filed by the Housing Provider, based on the annual adjustment of general applicability ("CPI-W adjustments"), in 2002 through 2005 were timely filed. Motion for Reconsideration at 2-5. Accordingly, the Tenant argues that her rent charged exceeded the lawful rent ceiling for her unit and she is entitled to the refund ordered by the Hearing Examiner. *Id.* at 5.

1. When a Housing Provider is "First Eligible" to Take and Perfect a CPI-W Adjustment

The amount of each annual CPI-W adjustment is determined based on rate of inflation over the prior calendar year and published by the Commission with an effective date of May 1. D.C. OFFICIAL CODE §§ 42-3502.02(a)(3), 42-3502.06(b) (2001); *see, e.g.,* 48 DCR 1856 (Feb. 23, 2001) (allowable adjustment of 3.3%). The Commission's regulations require that a CPI-W adjustment must be taken and perfected "by filing with the Rent Administrator . . . a [Certificate of Election] which shall . . . [b]e filed . . . within thirty (30) days following the date when the housing provider is first eligible to take the adjustment." 14 DCMR § 4204.10(c).

As the Commission determined in its Decision and Order, a housing provider will not necessarily be "first eligible" to take and perfect a CPI-W adjustment on May 1 of a particular year because the Act prohibits a housing provider from taking and perfecting a CPI-W adjustment within twelve months of a prior CPI-W adjustment. Decision and Order at 13-15

Accordingly, it is readily apparent that this is a typographical error and that the Motion for Reconsideration actually regards TP 28,270. The Commission has directed the Clerk to enter the Motion for Reconsideration in to the record of this case. The Commission additionally observes that the Housing Provider is represented by the same law firm in both cases, which was served with the Motion for Reconsideration, and it is therefore satisfied that there is no actual prejudice to the Housing Provider due to this error.

(citing Sawyer Prop. Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 104 n.5 (D.C. 2005); American Rental Management Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014)); *see* D.C. OFFICIAL CODE § 42-3502.06(b) (2001); 14 DCMR § 4206.3. The Commission's review of the record, in its Decision and Order, revealed Certificates of Election, which were filed or effective within the statute of limitations period for this case, on the following dates: (1) on January 2, 2002, effective February 1, 2002, RX 4 at 1; R. at 80, ("2002 Certificate"); (2) on January 5, 2003, effective February 1, 2003, RX 5 at 4; R. at 68, ("2003 Certificate"); and (3) on January 3, 2005, effective February 1, 2005, RX 6 at 3; R. at 60, ("2005 Certificate"). *See* Decision and Order at 15.

As the Commission also noted in its Decision and Order, the record does not contain a Certificate of Election that became effective in 2004. *Id.* The Commission also stated that the record does not contain "other evidence of a CPI-W adjustment for 2004." *Id.* However, as the Tenant points out in the Motion for Reconsideration, the record does contain a Tenant Notice of Rent Ceiling Adjustment of General Applicability, dated December 16, 2003, with a stated effective date of February 1, 2004. Motion for Reconsideration at 4; *see* R. at 114 ("2004 Tenant Notice").[3] In opposing the Motion for Reconsideration, the Housing Provider disputes whether the 2004 Tenant Notice satisfies the Tenant's burden of proving the rent ceiling adjustment was illegal. Housing Provider's Opposition at 3.

---

[3] The Commission notes that the Motion for Reconsideration, at the break of pages 4 and 5, reads as follows: "Since that notice is dated December 16, 2003 and is associated with [page break] appropriate Certificate of Election or did so out of time." Because the Commission's regulations require a CPI-W adjustment to be "filed *and served* within thirty (30) days following the date when the housing provider is first eligible to take the adjustment," 14 DCMR § 4204.10(c) (emphasis added), the Commission interprets the Tenants argument to be that the 2004 Tenant Notice constitutes substantial evidence of the date on which the Housing Provider sought to take and perfect the rent ceiling adjustment of general applicability that became effective the immediately preceding May, and that the date it did so was untimely.

The Commission, upon reconsideration, acknowledges that its previous statement that there was no "other evidence of a CPI-W adjustment for 2004" was incorrect. *Compare* Decision and Order at 15 *with* R. at 114. The Commission nonetheless remains satisfied, for the reasons set forth herein, that the Tenant has not demonstrated that any of the CPI-W adjustments at issue were untimely filed.

In its Decision and Order, the Commission noted that, in the proceedings before the Hearing Examiner, "the sole basis argued by the Tenant for finding the 2002 [through] 2005 CPI-W adjustments invalid was that they were not filed [or served on the Tenant] during May of each year." Decision and Order at 13 n.12 (citing Hearing Tape 2 (RACD Apr. 18, 2005) at 59:00-63:00). As noted, a housing provider is not "first eligible" under the Act to take and perfect a CPI-W adjustment until twelve months have elapsed since any prior CPI-W adjustment. D.C. OFFICIAL CODE § 42-3502.06(b); 14 DCMR § 4206.3; Chaney, RH-TP-06-28,366 & RH-TP-06-28,577.

The Commission's review of the record in this case reveals that, prior to filing the 2002 Certificate, the Housing Provider filed a Certificate of Election with an effective date of January 1, 2001. *See* Respondent's Exhibit ("RX") 3 at 2; R. at 90 ("2001 Certificate"). The Commission, in its Decision and Order, was satisfied that the Housing Provider was not, thereafter, "first eligible" to take and perfect another CPI-W adjustment until January 1, 2002, and that the 2002 Certificate was timely filed on January 2, 2002, less than thirty days after the Housing Provider became eligible to do so. Decision and Order at 14-15. The Tenant does not ask the Commission to reconsider this legal conclusion, but rather disputes its applicability to the facts of this case. *See* Motion for Reconsideration at 1-2.

2. The Housing Provider's First Eligibility to Take and Perfect and the Statute of Limitations

In the Motion for Reconsideration, the Tenant maintains that the Commission erred by allowing the 2001 Certificate to establish the "anniversary date for future filings." Motion for Reconsideration at 2. The Tenant asserts that the 2001 Certificate is, in essence, a "nullity" and was "never made effective at all by the Housing Provider" for the following reasons: (1) both the 2001 Certificate and the 2002 Certificate indicate that the "prior rent" charged to the Tenant was $875, even though the 2001 Certificate indicates an increase in rent charged to $965; (2) the 2001 Certificate and the Certificate of Election filed by the Housing Provider effective January 1, 2000 ("2000 Certificate") both indicate that they implement the 1999 CPI-W adjustment;[4] and (3) both the 2001 Certificate and the 2002 Certificate indicate that the "prior rent ceiling" for the Tenant's unit was $1,011, even though the 2001 Certificate indicates an increase in the rent ceiling to $1,032.

However, the Tenant's assertions regarding the validity of the 2001 Certificate fails to address a critical issue considered by the Commission in its Decision and Order and in Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 at 35-36 & n.20: that is, whether, in establishing an anniversary date for subsequent CPI-W adjustments, the statute of limitations bars challenges to the validity of rent ceiling adjustments effective more than three years prior to the filing of a tenant petition. *See also* Kennedy v. D.C. Rental Hous. Comm'n, 709 A.2d 94, 99-100 (D.C. 1998); Nelson, TP 28,519.

---

[4] The Commission notes that Tenant has provided the 2000 Certificate as an attachment to the Motion for Reconsideration. However, the Commission is unable to locate the 2000 Certificate in the record. The Commission's review on appeal is limited to the record from the hearing, and it may not consider new evidence on appeal. 14 DCMR § 3807.5; *see, e.g.*, Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013). Nonetheless, the Commission, for the reasons discussed *infra*, is satisfied that the 2000 Certificate is not relevant to the legal issues in this case, because, in the Commission's reasonable understanding, the 2001 Certificate establishes the date on which the Housing Provider was first eligible to take and perfect the subsequent CPI-W adjustment.

The Act's statute of limitations provides, in relevant part:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment[.]

D.C. OFFICIAL CODE § 42-3502.06(e) (2001). As the Commission explained in addressing the Tenant's sole issue raised in her notice of appeal, a tenant cannot directly challenge the validity of a rent ceiling adjustment more than three years after it becomes effective. *See* Decision and Order at 22-24; *see also* Nelson, TP 28,519.

The Commission recognizes that it has determined in other circumstances that the "effective date" of a rent ceiling adjustment, for the purposes of D.C. OFFICIAL CODE § 42-3502.06(e), is the date that it is implemented as an adjustment to the rent charged. *See* United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013) *aff'd sub nom* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426 (D.C. 2014); Gelman Mgmt. Co. v. Grant, TPs 27,995, 27,997, 27,998, 28,002, & 28,004 (RHC Dec. 31, 2002).[5] However, as relevant to the Motion for Reconsideration, the Tenant only challenges a series of rent ceiling adjustments, but not a corresponding adjustment in rent charged. Motion for Reconsideration at 2-4; *see* Decision and Order at 22-24; *see also* Nelson, TP 28,519.[6]

With regard to the Tenant's first assertion, that the "prior rent" was unchanged, the Commission's review of the record does not reveal any substantial evidence that the CPI-W adjustment reflected in the 2001 Certificate was implemented as an adjustment in rent charged

[5] The Commission notes that the Motion for Reconsideration does not directly cite or discuss Hinman, RH-TP-06-28,728, or Grant, TPs 27,995 27,997, 27,998, 28,002, & 28,004. Nonetheless, the Commission discusses them because of the similarities between the Tenant's assertions in this case and the issues addressed in those cases.

[6] As described *infra* at 9, the Commission, in its Decision and Order, applied this interpretation of "effective date" to an adjustment to the Tenant's rent charged that was implemented in November, 2004, based on a 1994 vacancy rent ceiling adjustment.

within the statute of limitations period. To the contrary, the Commission's review of the 2001 Certificate indicates that a corresponding adjustment in rent charged was implemented at the same time the rent ceiling adjustment became effective. *See* RX 3 at 2; R. at 90.

Moreover, the Tenant notes in the Motion for Reconsideration that the adjustment in rent charged reflected on the 2001 Certificate was never actually demanded or received from the Tenant, and that the 2002 Certificate reflects an identical "prior rent" amount to the 2001 Certificate. *See* Motion for Reconsideration at 2-3. The Commission is satisfied that this set of facts is distinguishable from the circumstances of Hinman and Grant, in which the challenged CPI-W adjustments were actually implemented, and the implementations occurred within the statute of limitations periods. *See* Hinman, RH-TP-06-28,728; Grant, TPs 27,995 27,997, 27,998, 28,002, & 28,004.

With regard to the Tenant's second and third arguments – namely, that the rent ceiling adjustment was erroneous and never relied upon, the Commission's review of the record does not reveal any substantial evidence on the record to support and explain these apparent discrepancies or any legal arguments advanced by either party that support the conclusion that the 2001 Certificate is invalid because of the later filing of the 2002 Certificate. See D.C. OFFICIAL CODE § 2-509(b) ("In contested cases, . . . the proponent of a rule or order shall have the burden of proof."). The Tenant asserts that the 2001 Certificate is invalid because it implemented the same CPI-W adjustment that was previously implemented by the 2000 Certificate, the adjustment authorized for 1999, *i.e.*, the 1999 adjustment of general applicability. Motion for Reconsideration at 3.[7] The Tenant also maintains that the 2001 Certificate is a

[7] The Commission again notes that the 2000 Certificate does not appear in the record. *See supra* at n.4. Without deciding any issue based on evidence outside the record, the Commission nonetheless simply observes that the attached documents do not appear to support the Tenant's contentions in the Motion for Reconsideration. Specifically, and again without serving as the basis of any Commission decision in this appeal, the Commission

"nullity" because the "Housing Provider did not rely on it in future filings (although the Housing Provider also never withdrew or corrected the erroneous filing it knowingly made)." Motion for Reconsideration at 3. In support, the Tenant points to the 2002 Certificate, which contains the same "prior rent ceiling" of $1,011 as stated in the 2001 Certificate. *Compare* RX 4 at 1; R. at 80 *with* RX 3 at 2; R. at 90.

The Commission is satisfied that Tenant's assertions both relate to the permissible amount of the CPI-W adjustment, but do not affect the "effective date" of the rent ceiling adjustments being challenged. *See* Nelson, TP 28,519; *cf.* Hinman, RH-TP-06-28,728. Therefore, the Commission is also satisfied that the 2002 Certificate, and thus the subsequent Certificates as well, were timely filed based on the effective date of the immediately preceding CPI-W adjustment in January 2001. 14 DCMR §§ 4204.10(c), 4206.3; *see* Nelson, TP 28,519; Chaney, RH-TP-06-28,366 & RH-TP-06-28,577.

Accordingly, the Tenant's Motion for Reconsideration is denied on these issues.

B. Implementation of the 1994 Vacancy Increase and Entitlement to a Rent Refund

The Tenant asserts in the Motion for Reconsideration that the $96 increase in rent charged that was implemented on November 1, 2004, is invalid. Motion for Reconsideration at 5. As the Tenant notes, the Commission's Decision and Order affirmed the Final Order on this issue in the Tenant's favor, where the Housing Provider's appeal asserted that the November 2004 increase, which implemented a 1994 vacancy rent ceiling adjustment, could not be challenged because of the statute of limitations. *See* Decision and Order at 6-11. The Tenant

---

notes that the 2000 Certificate and 2001 Certificate, as attached, both state different percentages for the CPI-W adjustment, and those percentages correspond to the authorized CPI-W adjustment for 1999 and 2000, respectively. *See* 46 DCR 2263 (Feb. 26, 1999); 47 DCR 1303 (Feb. 25, 2000). Consequently, the Commission merely observes that the identification of the "1999 CPI-W" in the 2001 Certificate therefore does not appear to have substantively affected the amount of the rent ceiling adjustment claimed by the Housing Provider or support the Tenant's contention that it is a "nullity."

next argues that the Commission erred by vacating the Hearing Examiner's award of a rent refund. *See* Motion for Reconsideration at 5.[8]

Where the rent charged to a tenant does not exceed the lawful rent ceiling for that unit, the tenant is not entitled to a rent refund under the Act. D.C. OFFICIAL CODE § 42-3509.01(a) (2001);[9] *see, e.g.,* Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000) ("The housing provider is liable for a rent refund only if the rent charged is higher than the reduced rent ceiling. Where the rent actually charged is equal to or lower than the reduced rent ceiling, there was no excess rent collected and no refund is required."); Hiatt Place P'ship v. Hiatt Place Tenants Ass'n, TP 21,149 (RHC May 10, 1991) ("If the rent actually charged is equal to or lower than the reduced rent ceiling then there has been no excess rent collected and no refund need be made."). Nonetheless, a tenant may be entitled to a rent rollback, going forward, although no rent refund is owed. *See* Afshar v. D.C. Rental Hous. Comm'n., 504 A.2d 1105, 1108-09 (D.C. 1986) (explaining distinction between prospective rent rollback and rent refund due to retroactive reduction in rent ceiling); Pinnacle Realty Mgmt. Co. v. Voltz, RP 25,092 (RHC Mar. 4, 2004).

As the Commission determined in its Decision and Order, the Tenant's rent charged, including the rent charged after the November 2004 increase, never exceeded the lawful rent ceiling for the Tenant's rental unit. Decision and Order at 15-17. The determination of the

---

[8] Although the Motion for Reconsideration is not entirely clear on what change is requested to the Decision and Order because the $96 rent increase was unlawful, the Commission, in its discretion, discusses both issues together, as relating to the proper remedy. *See, e.g.,* Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8 (Commission has discretion to restate legal issues raised on appeal).

[9] At all relevant times to this case, D.C. OFFICIAL CODE § 42-3509.01(a) read as follows:

> [A]ny person who knowingly 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 [§ 42-3502.01 *et seq.*] . . . shall be held liable by the Rent Administrator or the 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 the Rental Housing Commission determines.

lawful rent ceiling was based on the Commission's disposition of the "anniversary date" issue, as is discussed *supra* at 3-8. Therefore, the Commission remains satisfied that the Tenant is not entitled to a rent refund under the Act, as it existed at all relevant times to this case. *See* D.C. OFFICIAL CODE § 42-3509.01; Kemp, TP 24,786.

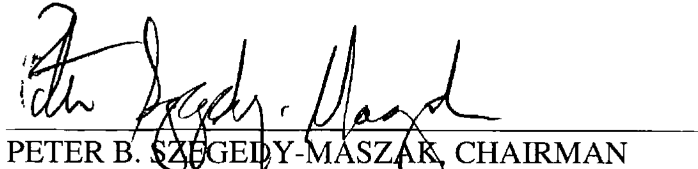
Finally, the Commission's review of the record reveals that the Tenant no longer resides in unit 829 of the Housing Accommodation. *See* Praecipe re: Change of Address (stating that Tenant moved to a different unit on March 31, 2006). Therefore, the Commission can grant no prospective relief in the form of a rent rollback when the Tenant is no longer paying rent that is based on the unlawful November 2004 increase. *See* Afshar, 504 A.2d at 1108-09.[10]

Accordingly, the Tenant's Motion for Reconsideration is denied on these issues.

III. CONCLUSION

For the foregoing reasons, the Commission denies the Tenant's Motion for Reconsideration.

SO ORDERED.



PETER B. SZEGEDY-MASZAK, CHAIRMAN

CLAUDIA L. McKOIN, COMMISSIONER

[10] The Commission further notes that the Tenant moved out of unit 829 prior to the abolition of rent ceilings on August 5, 2006, after which time she may have been entitled to a different remedy. *See* Rent Control Reform Amendment Act of 2006, D.C. Law 16-145; *cf.* Bratcher v. Johnson, RH-TP-08-29,478 (RHC Mar. 27, 2014) (remanding for plain error in calculation of damages for reduction in services that spanned date on which rent ceilings were abolished).

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
430 E Street, N.W.
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **ORDER ON RECONSIDERATION** in TP 28,270 was mailed, postage prepaid, by first class U.S. mail on this **31st day** of **May, 2016,** to:

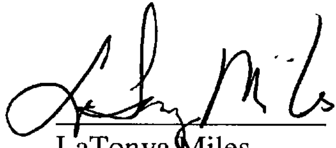
Richard W. Luchs, Esq.
Debra F. Leege
Greenstien, DeLorme and Luchs, PC
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036

Carol S. Blumenthal, Esq.
Blumenthal & Cordone, PLLC
7325 Georgia Ave., N.W.
Washington, DC 20012

Intervenors:

Blake and Wendy Nelson
509 Raebrn Ln.
Farragut, TN 37934

Michael W. Dolan
3133 Connecticut Avenue, N.W.
Unit 819
Washington, D.C. 20008



LaTonya Miles
Clerk of the Court
(202) 442-8949