DISTRICT OF COLUMBIA
Office of Administrative Hearings

GABRIEL FINEMAN, Tenant/Petitioner, V. SMITH PROPERTY HOLDINGS VAN NESS L.P., Housing Provider/Respondent	Case No.: 2016 DHCD TP 30,842 3003 Van Ness Street, N.W., Apt. W-1131 Administrative Law Judge: Ann C. Yahner REMAND

TENANT'S MOTION OPPOSING STAY

Tenant/Petitioner Gabriel Fineman (the "**Tenant**"), submits this Motion in Opposition to the Housing Provider's (the "**Landlord**") motion to stay the proceedings. Tenant hereby states:

I. Background

The Tenant filed a Tenant Petition (the "**Petition**") asking for the Landlord to be required to correct its "Housing Provider's Notice to Tenant of Adjustment in Rent Charged" notice ("Form 8") and its "Certificate of Notice to RAD of Adjustment in Rent Charged" ("Form 9") filings with the RAD. The Tenant then filed a Request for Summary Judgment on the Tenant Petition. The Petition required a determination of what was meant by the term "Current Rent" as used in the Rental Housing Act (the "**Act**") as amended by the Rent Control Reform Amendment Act of 2006 and, in particular, in the Form 8 and Form 9 where the Housing Provider is required to disclose the "Current Rent". That determination was made by the Rental Housing Commission (the "**RHC**") in its decision dated February 18, 2018 (the "**Decision**"). The Landlord moved for reconsideration and the RHC issued a

second decision dated March 13, 2018 captioned "Order Denying Reconsideration" upholding the Decision and clarifying it in some detail. The case was remanded to the Office of Administrative Hearings (the "**OAH**") for further proceedings consistent with those two decisions (together, the "**RHC Decisions**") and their accompanying orders. The Landlord filed a notice of Appeal with the District of Columbia Court of Appeals ("**DCCA**"). At about the same time, the Landlord filed a motion with the OAH to stay (the "**Motion to Stay**") the proceedings in the OAH pending the final outcome of its appeal to the DCCA.

II. Argument

The motion to stay the proceedings should not be granted for a multitude of reasons:

A. Remands are supposed to be handled by the OAH expeditiously. A stay of a case is the opposite of expediting the case. It violates the basic policy that the administrative process is supposed to expedite solutions to problems.

B. The OAH is not empowered to reverse or stay an order from the RHC. Although it is able to stay any of its own final orders, there is no authority for it to stay a remand order of the RHC, either pending a review (and possible reconsideration) by the DCCA (that might take years) or pending the resolution of proposed legislation in the City Council. In this case, the RHC, as part of its determination of the Tenant's appeal, ordered and directed the OAH to reconsider and modify its decision in light of the RHC Decisions. It did not say the RHC Decisions as they may later be amended by the DCCA or the US Supreme Court or as modified or superseded by a new law from City Council. It is unheard of for a lower judicial body to ignore or stay the orders of its appellate body. This would do away with the very concept of judicial review.

C. The proper procedure in this case would have been for the Landlord to have sought a stay from the RHC, and if that failed, to appeal the denial of the stay to the DCCA.

1. The rules of the DCCA

The Decisions and orders of the RHC are on appeal by the Landlord to the DCCA as case number 18-AA-0364. The Respondent is the RHC. The OAH is not named as a respondent. Rule 18 of the DCCA deals with stays and provides:

a. "**Initial Motion Before the Agency**. A petitioner must ordinarily move first before the agency for a stay pending review of its decision or order."[1]

The rule states that the Landlord should first move for a stay before "the agency". The agency is defined in rule 15(a)(3)(B)[2] that requires the Landlord to name the agency as a respondent in its petition submitted to the DCCA. The Landlord named the RHC as the only respondent and did not name the OAH.

Because no motion has been made to the RHC for a stay:

b. **The petitioner must "show that moving first before the agency would be impracticable**; or state that the agency has denied a motion for stay and state any reasons given by the agency for its action."[3]

There is no claim that moving for a stay from the RHC would be im-

[1] DCCA Rule 18 (a) (1)

[2] DCCA Rule 15 states (in part)
TITLE III. REVIEW OF ORDERS OF ADMINISTRATIVE AGENCIES
Rule 15. Review of Agency Orders. …
(3) The petition must:
(A) name each party seeking review either in the caption or the body of the …;
(B) name the agency as a respondent; and
(C) specify the order or decision or part thereof to be reviewed.

[3] DCCA Rule 18 (a) (2) (A)

practical and the rules of the RHC provide a practical procedure for doing so. Although it is not impractical to move for a stay in this case from the RHC, it might be difficult to obtain (see section 2, below). However, even that is far from clear. In the concurring opinion one Commissioner thought that the holding, while correct, did not give the City Council a chance to provide a legislative solution to the issues decided. Perhaps, the RHC would follow that lead and grant a stay.

Because no motion for a stay was filed with the RHC, there was no motion to deny and thus no basis to even seek a stay under the rules of the DCCA.

2. The rules of the RHC provide that the following factors be considered in determining if the stay should be granted.[4]

(a) *The likelihood of eventual success of the moving party*;

Because the DCCA uses a standard of review that is similar to the Chevron standard, with great deference to the agency, the likelihood of the appeal being successful is remote.[5]

(b) *The likelihood of irreparable injury to either party*;

Because there were no monetary damages involved in the Decisions, the damages to the Landlord are slight: it must only issue corrected filings.

[4] DCMR Section 14-3805.3

[5] The most recent statement of the standard used was in Wilson, 159 A.3d 1211 (2017) where the court said [quoting Sawyer, 877 A.2d 96, 102 (D.C. 2005)] "We are obliged to sustain the RHC's interpretation of those statutes and regulations unless it is unreasonable or embodies `a material misconception of the law,' even if a different interpretation also may be supportable." 159 A.3d 1211 (2017).

Because of the advanced age (75) of the Tenant, there exists a significant likelihood that he would die before all appeals are final thereby precluding any relief from the OAH.[6]

(c) *The balancing of injury as between the moving party and the other party(ies)*;

Although OAH decisions are not supposed to be precedent, often a later decision will adopt the reasoning of a prior decision.[7] Thus granting a stay in this case could result in the granting of stays in many future cases where tenants may seek refunds of improper rent increases based on the Decisions. This would impose a substantial hardship on the tenants in such cases. On the other hand, Equity[8] is a $20,000,000,000 company with a net income (profit) of over $600,000,000 a year. Any losses because of this case would be insignificant.

(d) *The effect of a stay on the public interest*.

It is in the public interest for tenants to have adequate notice of rent increases so that they can plan for either increased payments or move. A stay will allow the Landlord to continue to issue notices that do not meet this objective because the current notices only show the ceiling rent and invite the tenant to bargain for a new rent. This is not rent stabilizing or making rent predictable as anticipated by the Rent Stabilization Act.

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[6] This calculation is based on the probability of death in the latest tables issued by the Social Security Administration [https://www.ssa.gov/oact/STATS/table4c6.html], showing that the probability of death for a male at the ages 75, 76 and 77 totals over 14%. It is also possible that he would suffer a stroke or neurological disease (both more common in older people) that would prevent him from proceeding pro se.

[7] An example of this appears in Maxwell v Equity Residential Management [2015-DHCD-TP 30,704] that adopted the reasoning in Pope v. Equity Residential Mgmt., 2014-DHCD-TP 30, 612 (OAH July 8, 2015)

[8] Equity Residential Services is the owner of 3003 Van Ness through various wholly owned subsidiaries, having purchased the corporation that owns the building in 2013 from Lehman Brothers as part of a $9,000,000,000 transaction. https://en.wikipedia.org/wiki/Equity_Residential

3. Rules of the OAH

In those cases where the OAH stays its own decisions, the rules specified in Chapter 28 must be followed.

a. Section 2830.3 says that the petition requesting a stay must state the reasons for granting the stay.

No reasons were stated in the Landlords petition other that there was a possibility of the holdings in the Decisions could be reversed by the DCCA. This is a reason for an appeal, but not a reason to stay the OAH proceedings for possibly years. The OAH should proceed with the remand as ordered by the RHC using the law as it existed at the time that the Petition was filed (as interpreted by the Decisions).

b. Section 2830.4 lists the factors to be considered[9]. They are essentially the same as the factors listed by the RHC, above.

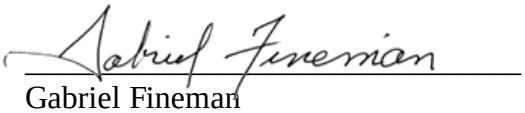
For the reasons stated above in C (1) (a)-(d), a petition to stay the original final order of the OAH would be denied. Likewise, the actual petition to stay the order of the RHC (to reconsider the case in light of the RHC Decisions) should also be denied.

[9] In determining whether to grant a stay, the Administrative Law Judge may consider the following factors: whether the party filing the motion is likely to succeed on the merits, whether denial of the stay will cause irreparable injury, whether and to what degree granting the stay will harm other parties, and whether the public interest favors granting a stay. Section 2830.4.

III. Summary

For the reasons stated above, the OAH should reject the motion of the Landlord for a stay and proceed expeditiously with the remand hearings.

Respectfully submitted,
Tenant



Dated: April 19, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion in Opposition to the Housing Provider's Motion to Stay the Proceedings was served on April 19, 2018, by first class mail, postage pre-paid upon the attorney for the Housing Provider:

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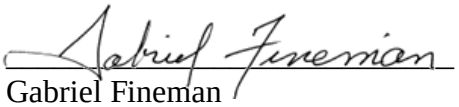

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