

**DATE:** September 25, 2023

**TO:** Rental Housing Committee

**FROM:** Karen M. Tiedemann, Special Counsel to the Rental Housing Committee  
Nazanin Salehi, Special Counsel to the Rental Housing Committee  
Anky van Deursen, Program Manager

**SUBJECT:** Appeal of Hearing Officer’s Decision Regarding Petition No. C22230037

**RECOMMENDATION**

Consider the Tentative Appeal Decision and either accept the Tentative Appeal Decision or modify the Tentative Appeal Decision with instructions to staff citing appropriate evidence in the record.

**BACKGROUND**

The instant appeal arises out of a tenant petition for downward adjustment of rent (“Petition”) based on the landlord’s failure to maintain habitable premises. The hearing on the petition was held on May 9, 2023, and the Hearing Officer’s decision (“Hearing Decision”) was issued on June 9, 2023 and served on the parties on June 12, 2023. The landlord timely appealed the Hearing Decision on June 22, 2023. A relevant timeline is provided below for reference (Table 1).

**Table 1: Relevant Timeline**

| <u>Date</u>        | <u>Action</u>  |
|--------------------|--|
| March 2, 2023      | Rental Housing Committee accepted petition regarding 1725 Wright Avenue, Unit No. 53, Petition No. C22230037 |
| May 2, 2023        | Prehearing telephone conference held   |
| May 3, 2023        | Written Summary of Prehearing Conference and the Hearing Officer’s Request for Documents served on parties   |
| May 9, 2023        | Hearing held   |
| May 9, 2023        | Hearing closed and Hearing Record closed   |
| June 9, 2023       | Hearing Decision delivered   |
| June 12, 2023      | Hearing Decision served on the Landlord and Tenant   |
| June 22, 2023      | Appeal submitted by Appellant-Landlord   |
| September 15, 2023 | Tentative Appeal Decision issued   |
| September 25, 2023 | Appeal hearing before the Rental Housing Committee   |

The Petition requested a rent reduction and rent refund on the basis that the landlord had failed to maintain habitable premises due to inadequate hot water temperature.

The Hearing Decision determined that between November 12, 2022 and the date of the petition, the maximum water temperature as measured from the taps in Petitioner's unit had failed to reach the 120 degrees minimum required by California Health and Safety Code Section 114192. The Hearing Officer determined that the minimum water temperature requirement was necessary to provide sufficient heat for Petitioner to shower, wash their hands and clean their dishes, to prevent bacteria from forming in the areas where water is stored, and for other health and practical reasons. Therefore, the landlord's failure to provide the minimum water temperature after being provided reasonable notice by the tenant constituted a failure to maintain habitable premises. Thus, the Hearing Officer held that Petitioner was entitled to a 10% downward adjustment of rent due (i.e., a reduction of \$7.33 per day or \$220.00 per month since December 1, 2022, for each day the minimum water temperature requirement has not been met) and a rent refund of \$1,100 for amounts overpaid between December 1, 2022 and April 30, 2023. The Petitioner was required to keep track of the maximum water temperature at the property and inform the Respondent of their findings on a weekly basis; the Petition would be deemed terminated once the minimum water temperature requirement has been met for 15 consecutive days.

Appellant-Landlord raised the following five issues on the appeal:

- A. Respondent was not permitted into the prehearing conference until 1:30 p.m.
- B. Hearing Officer relied on an inapplicable section of the California Health and Safety Code in reaching their decision.
- C. Petitioner's method of testing the water temperature by plastic container is inaccurate, and the Hearing Officer erred or abused their discretion in finding Petitioner's measurements to be a reliable indicator of the water temperature at the property.
- D. The Hearing Officer erroneously held that Respondent reimbursed Petitioner \$100 for the cost of a portable heater.
- E. The temperature for the water heater at the property is set at 120 degrees to 140 degrees and usually reads at 138 degrees, which is sufficient to kill pathogens and bacteria growth and to make the water safe for use by the tenants.

The elements of the appeal are discussed in the Tentative Appeal Decision, as noted in Section C of this report below.

All parties to the appeal are entitled to respond to the Tentative Appeal Decision. Responses to the Tentative Appeal Decision were due on September 20, 2023. To the extent responses are received, staff may provide a supplement to this report addressing the responses.

## **ANALYSIS**

### **A. Role of the Rental Housing Committee**

The role of the Rental Housing Committee (RHC) is not to reweigh evidence submitted in support of or opposition to the Petition, unless the RHC chooses to hear the appeal *de novo* pursuant to Regulation Chapter 5, Section H.5.a. *De novo* review would require the RHC to open the hearing record and hold a new, formal hearing. Staff does not recommend *de novo* review for this appeal because there is sufficient evidence in the record on which the Committee may base its decision.

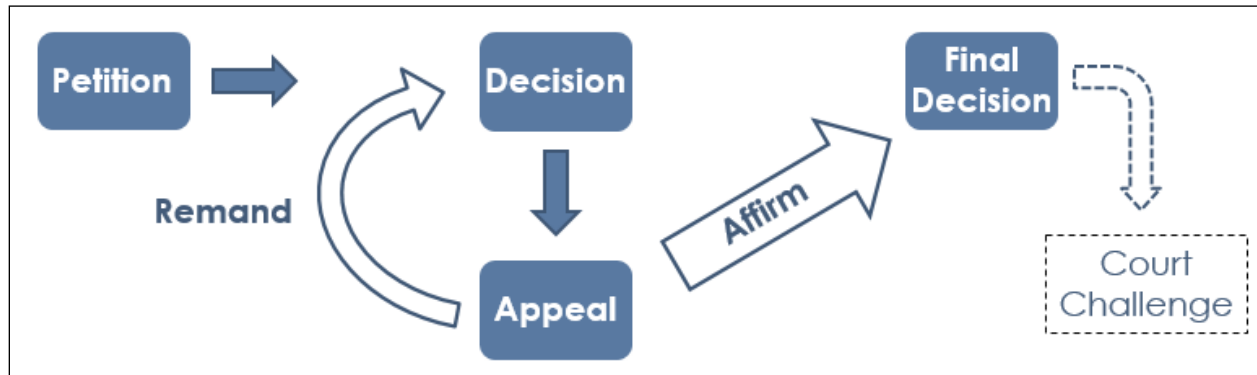
For questions of law, including statutory interpretation, the RHC must exercise its independent judgment without assuming that the Hearing Officer's ruling is correct or affording deference to the Hearing Officer's interpretation. Even though the RHC exercises its independent judgment, its review is still based on the evidence in the record for the petition hearing.

For questions of fact, the RHC's role will be to determine whether the appealed elements of the Hearing Decision are supported by substantial evidence. This process mimics a trial court and appeal court: the trial court drafts a decision after weighing all the evidence, and the appeal court reviews the decision to verify whether the decision was adequate. Legally, reviewing whether substantial evidence exists to support an appealed element of the decision simply means that there is adequate information in the record to support the decision. Stated differently, substantial evidence means that a reasonable person reviewing the evidence could have reached the same decision. Substantial evidence does not mean that RHC members (or RHC staff or special counsel) would have reached the same conclusion if they were present for every aspect of the hearing.

### **B. Review: Affirming, Reversing, and/or Remanding the Appealed Element of the Decision After Remand**

Petitions define the scope of the Hearing Officer's review. Appeals define the scope of the RHC's review of the Hearing Decision. The portions of the Hearing Decision that were not appealed by any party are considered final. The Tentative Appeal Decision reviews only those portions of the Hearing Decision that were appealed by the parties.

The process for an appeal can result in multiple appeal hearings before the RHC if a Hearing Decision is remanded to the Hearing Officer. A summary graphic visualizing the appeal procedure is provided below.



**Graphic 1—Visualization of Appeal Procedure**

### **C. Tentative Appeal Decision—Appeal Elements**

The Tentative Appeal Decision recommends denying issues A, C, D, and E of the Appeal and remanding the decision to the Hearing Officer for further consideration of Issue B. In summary:

- A. Appellant-Landlord alleges that although the Prehearing Conference was scheduled to begin at 1:00 p.m., only the Hearing Officer and Respondent-Tenant were on the Zoom beginning at that time; the Appellant was not able to join until 1:30 p.m. Appellant provides no documentation to support the claim that the Hearing Officer and Respondent began the Prehearing Conference without Appellant. More importantly, the Appellant does not state how this finding in the Hearing Decision or the alleged exclusion of Appellant from any portion of the Prehearing Conference prejudiced Appellant.
- B. Appellant-Landlord contends Hearing Officer erred in applying the minimum hot water requirements of Health and Safety Code Section 114192 to the instant petition because that code section is applicable to restaurants and other food service facilities. As a result, Appellant-Landlord asserts that Hearing Officer also erroneously concluded that Appellant failed to maintain habitable premises. While Appellant is correct that the code section relied upon by the Hearing Officer does not control here, there is insufficient evidence in the record for the Committee to reach a conclusion on whether the water temperatures at the property constituted a violation of the relevant code sections, Civil Code Section 1941.1(a)(3) or Health and Safety Code Section 17920.3(a)(5). As a result, the Committee remands this section of the Hearing Decision to the Hearing Officer for determination of the proper standard for hot water in a residential dwelling.
- C. Appellant-Landlord next argues that the Hearing Officer should not have found the Petitioner's method of measuring the water temperature in a plastic container to be

- reliable but instead should have determined that the readings taken by Appellant's agents are more accurate. The Appellant's argument is conclusory, providing no support for the argument that one method is a more reliable indicator than the other. Based on testimony provided by the Respondent at the hearing, and the fact that the readings submitted by the Appellant showed similar temperatures, it was reasonable for the Hearing Officer to conclude that Respondent's methodology for measuring water temperature was reliable and accurate.
- D. Fourth, Appellant-Landlord alleges that Hearing Officer incorrectly found that Appellant reimbursed Respondent \$100 for the cost of a portable heater. Testimony by both Appellant and Respondent at the hearing established that the \$100 rent credit provided by Appellant to Respondent in March 2023 was intended to accommodate Respondent for three to four months of cold weather and for the Respondent having to bring a portable heater into the bathroom to warm up the temperature in the bathroom. Based on this testimony, it was reasonable for the Hearing Officer to conclude the \$100 rent credit was intended to reimburse Respondent for the water heater; furthermore, the Appellant does not allege this finding in the Hearing Decision affected the ultimate decision on the petition.
- E. Finally, Appellant-Landlord argues that the temperature for the water heater that serves the property is always set between 120 and 140 degrees Fahrenheit, which means that the water is free from bacteria and other pathogens and safe for use by the tenants. The Hearing Officer's decision reaches the same conclusion; therefore, there is no issue at contest here.

#### **D. Appeal Hearing Procedure**

Each party to the appeal will have an opportunity to present their arguments to the RHC and respond to the other party's presentation. As noted above, the parties are not to present new evidence. Likewise, the public may provide comment to the RHC before it hears any appeals (Government Code Section 54954.3(a)). Finally, RHC members may have questions for staff and/or the parties. The following schedule for the appeal hearing is proposed to facilitate the orderly participation of all parties.

**Schedule of Appeal(s) of Hearing Decision(s)**

- Public Comment Period applicable for all Appeals on the agenda

| <b>Appeal Hearing (CSFRA Petition No. C22230037)</b> |                   |
|--|-------------------|
| Staff Report and Presentation                        |                   |
| Appellant-Landlord Presentation of Argument          | 10-minute maximum |
| Respondent-Tenant Presentation of Argument           | 10-minute maximum |
| Appellant-Landlord Presentation of Rebuttal          | 5-minute maximum  |
| Respondent-Tenant Presentation of Rebuttal           | 5-minute maximum  |
| RHC Question and Answer with Staff                   |                   |
| RHC Question and Answer with Appellant-Landlord      |                   |
| RHC Question and Answer with Respondent-Tenants      |                   |
| RHC Deliberations and Decision                       |                   |

- Conclude Agenda Item

**FISCAL IMPACT**

The Tentative Appeal Decision recommends remanding one part of the decision to the Hearing Officer for further consideration. This will increase the cost of Hearing Officer time associated with their petition. However, the RHC’s budget for the CSFRA sufficiently accounts for the cost of Hearing Officer time. Adoption of the Tentative Appeal Decision as drafted could potentially lead to litigation, which would have fiscal impacts. Notably, one purpose of appealing a Hearing Decision to the RHC (as opposed to directly appealing to the courts) is to ensure that hearing decisions are legally defensible, and so the appeal process to the RHC reduces the overall risk of legal liability and litigation expenses.

**PUBLIC NOTICING**—Agenda posting.

KMT-NS-AvD/KG/1/HSN/RHC  
895-09-25-23M-1

- Attachments:
1. Tentative Appeal Decision for Petition No. C22230037
  2. Decision of Hearing Officer (June 9, 2023)
  3. Appellant-Landlord Appeal of Decision (June 22, 2023)