

Tentative Appeal Decision
Petition C22230037

Rental Housing Committee
Tentative Appeal Decision

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The Rental Housing Committee of the City of Mountain View (the "**RHC**") finds and concludes the following:

I. Summary of Proceedings

On March 2, 2023, Tenant Eric Allen Walker ("**Petitioner**") filed a petition for a downward adjustment of rent based on unlawful rent (the "**Petition**") (Petitioner's Exhibit #1) related to the property located at 1725 Wright Avenue, Unit [REDACTED], Mountain View ("**Property**"). The Property is owned by Timpson Enterprises, Inc, which has been represented in the petition proceedings by Shirley Ankenbauer, the property manager ("**Respondent**"). Petitioner and Respondent are collectively referred to herein as the "**Parties**." On April 12, 2023, a revised notice of hearing was issued with a hearing date scheduled for May 9, 2023 at 1:00 p.m.

The Petition requested a downward adjustment of rent and rent refund on the basis that the Respondent had failed to maintain a habitable premises due to a lack of hot water at the Property, in violation of the Community Stabilization and Fair Rent Act ("**CSFRA**"). Specifically, the Petition alleged that beginning in November 2022, the temperature of the hot water at the Property was regularly below that required by California health and safety codes.

On May 2, 2023, a pre-hearing conference was conducted by the Hearing Officer via telephone. Petitioner and Respondent (through its authorized representative Ms. Ankenbauer) were present on the call. Hearing Officer and the Parties discussed the administrative procedure that would be followed at the hearing. In addition, the Parties were instructed to submit any additional documentation by close of business on Friday, May 5, 2023. A Notice of Hearing Officer's Written Order and Summary of Pre-Hearing Conference and Notice of the Hearing were served on the Parties on May 3, 2023. (Hearing Officer's Exhibit #4).

The hearing was held on May 9, 2023. The hearing record was closed on May 9, 2023. The Hearing Officer issued a decision on June 9, 2023 ("**HO Decision**"). The Hearing Officer's Decision was served on the parties on June 12, 2023.

A timely appeal of the Decision was received from the Respondent on June 22, 2023 ("**Appeal**").

Procedural Posture

CSFRA section 1711(j) states in part that "[a]ny person aggrieved by the decision of the Hearing Officer may appeal to the full Committee for review." Regulation Chapter 5 section H(5)(a)

provides that the RHC "shall affirm, reverse, or modify the Decision of the Hearing Officer, or remand the matters raised in the Appeal to a Hearing Officer for further findings of fact and a revised Decision" as applicable to each appealed element of the decision.

II. Summary of Hearing Officer Decision.

The Hearing Officer issued a detailed decision on the Petition summarizing the evidence and making findings of fact and conclusions of law. The Hearing Officer found the following:

1. The maximum water temperature at the Property has failed to reach the 120-degree minimum requirement in California Health & Safety Code Section 114192 on a consistent basis since November 23, 2022 through the date of the hearing.

2. The minimum water temperature requirement is necessary to provide sufficient heat to shower, wash hands and clean dishes, to prevent bacteria from forming in the areas where water is stored, and other health and practical reasons. Witness testimony and other evidence showed that the failure to meet the minimum water temperature requirement had a significant impact on the Tenant's use of the shower and the ability to properly use the sinks.

3. Respondent's failure to provide the minimum water temperature required constitutes a failure to maintain a habitable premises. Petitioner provided Respondent with notice of the issue on November 23, 2022, and giving Respondent seven (7) days to fix the issue, Respondent failed to meet its obligations to provide a habitable premises since December 1, 2022.

4. Based on the foregoing, Petitioner was entitled to a ten percent (10%) downward adjustment of rent due and a rent refund. Petitioner's Rent is \$2,200.00 per month, and assessing the ten percent (10%) reduction, Petitioner is entitled to a rent credit of \$7.33 per day or \$220.00 per month since December 1, 2022, for each day the minimum water temperature requirement is not met. As of April 30, 2023, the aggregate figure is \$1,100.00.

5. Petitioner is required to keep track of the maximum water temperature at the Property and inform Respondent of his findings on a weekly basis. The petition (and consequently, the \$7.33 daily reduction in rent) shall be deemed terminated once the minimum water temperature requirement has been met for fifteen (15) consecutive days.

III. Appealed Elements of Hearing Officer Decision

Regulation Chapter 5 section H(1)(a) states that "[t]he appealing party must state each claim that he or she is appealing, and the legal basis for such claim, on the Appeal request form." Section III of this Appeal Decision identifies the elements of the Decision that are subject to appeal by the Respondent. The Appeal Decision regarding each appealed element is provided in Section IV of this Appeal Decision.

The Respondent raises the following issues on appeal:

A. **Respondent was not permitted into the pre-hearing conference until 1:30 p.m.** Although the pre-hearing conference was scheduled to begin at 1:00 p.m., only the Hearing Officer and Petitioner were on the Zoom beginning at that time; Respondent was not able to join until 1:30 p.m.

B. **Hearing Officer relied on an inapplicable section of the California Health & Safety Code in reaching his decision.** Health & Safety Code Section 114192, which was cited by Petitioner and relied upon on the Hearing Officer for the 120-degree minimum water temperature requirement, applies to restaurants and other food service facilities. A Memorandum from a Board of Supervisors indicates that 105 degrees to 120 degrees from the faucet is acceptable for the Health & Safety Codes applicable to residential properties.

C. **Petitioner’s method of testing the water temperature by plastic container is inaccurate.** Respondent’s maintenance readings directly from the faucet are more accurate.

D. **Respondent never reimbursed Tenant \$100.00 for the cost of a portable heater.** This finding in Section IV.1.d of the HO Decision is incorrect.

E. **The temperature for the water heater at the Property is set at 120 to 140 degrees and usually reads at 138 degrees.** This temperature is sufficient to kill pathogens and bacteria growth and make the water safe for use by tenants at the Property.

IV. Decision Regarding Appealed Elements

A. **HO Decision Correctly Stated that Petitioner and Respondent Participated in Pre-Hearing Conference.**

Respondent states that although the Pre-Hearing Conference was scheduled to begin at 1:00 p.m., only the Hearing Officer and Petitioner were on the Zoom beginning at that time; Respondent was not able to join until 1:30 p.m. Respondent provides no documentation to support the claim that Hearing Officer and Petitioner began the Pre-Hearing Conference without Respondent’s participation. In fact, the Hearing Officer Pre-Hearing Meeting Summary and Order provides that Pre-Hearing Conference “was held on May 2, 2023, at 1:20 p.m.” (Hearing Officer’s Exhibit #4.) Further, Respondent does not allege that this finding in the HO Decision, or the alleged exclusion of Respondent from any portion of the Pre-Hearing Conference prejudiced Respondent and/or would have resulted in a different outcome in the HO Decision.

B. **Hearing Officer Erred in Applying the Requirements of Health & Safety Code Section 114912.**

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Next, Respondent argues that the Hearing Officer erred in applying the requirements of Health & Safety Code Section 114192. Respondent's Appeal provides support for the argument that the provisions of Health & Safety Code Section 114192, including the requirement to provide water that is at least 120-degrees Fahrenheit as measured from the faucet, are applicable to restaurants and other food service facilities. Based on this, Respondent argues that the Hearing Officer erroneously concluded that that Respondent had failed to maintain a habitable premises because temperatures between 105-degrees and 120-degrees Fahrenheit are appropriate for residential properties.

The CSFRA authorizes a Tenant to file a petition for downward adjustment based on a Landlord's failure to maintain a habitable premises. Specifically, Section 1710(b) of the CSFRA provides as follows:

"Failure to maintain a Rental Unit in compliance with governing health and safety and building codes, including but not limited to Civil Code Sections 1941.1 et seq. and Health and Safety Code Sections 17920.3 and 17920.10, constitutes an increase in Rent. A Tenant may file a Petition with the Committee to adjust the Rent downward based on a loss in rental value attributable to the Landlord's failure to maintain the Rental Unit in habitable condition."

The Hearing Officer, in reaching his decision, relied on Health & Safety Code Section 114192. (HO Decision, Section III.2.) In doing so, the Hearing Officer erred in the application of the law. As Respondent outlines in the Appeal, the requirements of Health & Safety Code Section 114192 apply to restaurants and other food service facilities; they do not apply to residential dwelling units. Rather, the Hearing Officer should have relied on Civil Code Sections 1941.1, et seq. and Health & Safety Code Sections 17920.3 and 17920.10, which are specifically called out by the CSFRA as the standards for habitability for a residential unit.

In relevant part, Civil Code Section 1941.1 provides:

"(a) A dwelling shall be deemed untenable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in Section 17920.3 or 17920.10 of the Health and Safety Code:

...

(3) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law."

Similarly, Health & Safety Code Section 17920.3 states:

“Any building or portion thereof including any dwelling unit, guestroom or suite of rooms, or the premises on which the same is located, in which there exists any of the following listed conditions to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants thereof shall be deemed and hereby is declared to be a substandard building:

(a) Inadequate sanitation shall include, but not be limited to, the following:

...

(5) Lack of hot and cold running water to plumbing fixtures in a dwelling unit.”

Neither of these standards provide a specific temperature requirement, unlike Health & Safety Code Section 114192. Therefore, while Respondent is correct that the Hearing Officer made an error in applying the incorrect code section, there is insufficient evidence in the record for the Rental Housing Committee to reach a conclusion on whether the water temperatures at the Property constitute a violation of either or both Civil Code Section 1941.1(a)(3) or Health & Safety Code Section 17920.3(a)(5). As such, the Rental Housing Committee remands the decision to the Hearing Officer for gathering of further evidence, including expert testimony from the City of Mountain View code enforcement or other professionals, regarding the proper standard for hot water in a residential dwelling unit.

C. Hearing Officer Did Not Abuse His Discretion in Finding Petitioner’s Testing Method Reliable.

Respondent 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. Respondent alleges that their maintenance readings from the faucet are more accurate. In support of their argument, Respondent submits a number of new digital thermometer readings from both the kitchen and bathroom in the Property taken after the date of the HO Decision; these readings show water temperatures ranging from 106.3 degrees Fahrenheit to 111.0 degrees Fahrenheit.

First, Respondent’s argument is conclusory. Respondent provides no support, such as expert testimony, for their argument that readings taken direct from the faucet are more accurate than Petitioner’s readings measured from a plastic container. At the hearing, Respondent called into question Petitioner’s method of measuring water temperature, stating that she was informed that water temperature should be measure directly from the faucet rather than from a plastic container that could have been sitting to the side for any amount of time. (Hearing Recording, 00:05:24-00:07:03.) Petitioner testified in response that before measuring the water temperature, he held the plastic container under the hot water to ensure that it was heated up to the temperature of the water. (*Id.*) Petitioner further testified that he got higher readings when measuring the water temperature from a plastic container versus measuring directly

from the faucet. (*Id.*) Finally, the readings submitted by Respondent showed similar temperatures to those submitted by Petitioner. (*See Res. Exhibit #4.*) Based on the foregoing, it was reasonable for Hearing Officer to conclude that Petitioner's testimony and his methodology for measuring water temperature were reliable.

Further, the evidence of the post-hearing readings provided by Respondent are not admissible on appeal. The Rental Housing Committee must determine whether the Hearing Officer erred or abused his discretion based on the record for the petition hearing. The photos of the readings submitted by Respondent constitute new evidence being submitted after the record for the hearing was closed on May 9, 2023, and therefore cannot be considered by the Committee in determining whether the Hearing Officer erred or abused his discretion.

D. Hearing Officer Did Not Err in Concluding Respondent Reimbursed Petitioner for Portable Heater.

Respondent argues that Hearing Officer incorrectly found that Respondent reimbursed Petitioner \$100 for the cost of a portable heater. Respondent testified at the hearing that they provided Petitioner with a \$100 rent credit in March 2023 to accommodate Petitioner for three to four months of cold weather and Petitioner having to bring a portable heater into the bathroom to warm up the temperature in the bathroom. (Hearing Recording, 00:11:00-00:11:40.) Later in the hearing, Respondent again clarified that the \$100 rent credit in March 2023 was not for the water temperature issues, but rather because Petitioner had to bring in a portable heater to warm up the bathroom during the winter months. (Hearing Recording, 00:15:22-00:16:52.) Based on this testimony, it was reasonable for the Hearing Officer to conclude that Respondent was being reimbursed for having to use a portable heater. More importantly, Respondent does not allege that the Hearing Officer's finding regarding the March 2023 rent credit affected the Hearing Officer's ultimate decision on the petition.

E. Hearing Officer's Decision Does Not Contradict Respondent's Argument Regarding Bacteria and Pathogens.

Finally, Respondent 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 HO Decision reaches the same conclusion, stating that "[t]here was no evidence of any bacteria in the water or related health issues." (HO Decision at pg. 4.)

V. Conclusion

As detailed above, the RHC denies issues A, C, D and E of the Appeal. As to issue B, the Rental Housing Committee remands the decision to the Hearing Officer with instruction to gather further evidence and testimony regarding the standard applicable to residential dwelling units with regard to the provision of hot water.