AGENDA ITEM REQUEST FORM

Department: Rent Program **Department Head:** Nicolas Traylor **Phone:** 620-6564

Meeting Date: August 16, 2023 **Final Decision Date Deadline:** August 16, 2023

STATEMENT OF THE ISSUE: The Richmond Rent Board is charged with holding hearings to adjudicate matters on appeal. Richmond Municipal Code Section 11.100.070(d) To ensure that the Rent Board can effectively execute its duties under Richmond Municipal Code Section 11.100.070(d), it is important that Board Members are exposed to the appeal process prior to hearing an appeals case. As such, General Counsel intends to review with the Rent Board a prior Board decision on appeal.

INDICATE APPROPRIATE BODY

☐ **City Council** ☐ **Redevelopment Agency** ☐ **Housing Authority** ☐ **Surplus Property Authority** ☐ **Joint Powers Financing Authority**

☐ **Finance Standing Committee** ☐ **Public Safety Public Services Standing Committee** ☐ **Local Reuse Authority** ☒ **Other: Rent Board**

ITEM

☐ **Presentation/Proclamation/Commendation (3-Minute Time Limit)**

☐ **Public Hearing** ☐ **Regulation** ☒ **Other: TRAINING**

☐ **Contract/Agreement** ☐ **Rent Board As Whole**

☐ **Grant Application/Acceptance** ☐ **Claims Filed Against City of Richmond**

☐ **Resolution** ☐ **Video/PowerPoint Presentation** (contact KCRT @ 620.6759)

RECOMMENDED ACTION: RECEIVE training on the Richmond Rent Board Appeals Process (Nicolas Traylor/Charles Oshinuga 620-6564). ***This item was continued from the July 19, 2023 Regular Rent Board Meeting.***

AGENDA ITEM NO:

I-1.

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AGENDA REPORT

DATE: August 16, 2023

TO: Chair Cantor and Members of the Rent Board

FROM: Charles Oshinuga, General Counsel

SUBJECT: RENT BOARD APPEALS TRAINING

STATEMENT OF THE ISSUE:

The Richmond Rent Board is charged with holding hearings to adjudicate matters on appeal. Richmond Municipal Code Section 11.100.070(d) To ensure that the Rent Board can effectively execute its duties under Richmond Municipal Code Section 11.100.070(d), it is important that Board Members are exposed to the appeal process prior to hearing an appeals case. As such, General Counsel intends to review with the Rent Board a prior Board decision on appeal.

RECOMMENDED ACTION:

RECEIVE training on the Richmond Rent Board Appeals Process (Nicolas Traylor/Charles Oshinuga 620-6564).

FISCAL IMPACT:

There is no fiscal impact related to this item.

DISCUSSION:

This training will consist of a discussion/review of a prior appeal case, General Counsel's corresponding recommendation, and regulation 842. There will be a PowerPoint and oral presentation.

ATTACHMENTS:

Attachment 1- General Counsel's prior recommendation on appeal

Attachment 2- Richmond Rent Board 842

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CITY OF RICHMOND RENT PROGRAM

MEMORANDUM

DATE: June 2, 2021

TO: Chair Finlay and Members of the Richmond Rent Board

FROM: Charles Oshinuga, Staff Attorney

SUBJECT: Legal Staff's Recommendation on Appeal in Petition No. RC20-T107

Petition Address: [redacted], Richmond, CA

Appellant: Lary Hanshaw

Respondents: [redacted]

Appeal Hearing: June 16, 2021

SUMMARY

Appellant appeals a Hearing Examiner's Decision that awarded Respondent Excess Rent in the amount of $3,532.22, based on the notion that the Appellant failed to maintain installed heating facilities in good working order, and caused a reduction in both refrigeration and ventilation services, impairing Respondent's use and/or benefit of the Rental Unit.

On appeal, Appellant contends the following:

1) During the period of time where the Respondent's heater needed to be fixed, Appellant offered Respondent a space heater, which should have provided adequate heat. Additionally, any delay in repair was attributable to Respondent as she failed to timely respond to scheduling request. Finally, Respondent failed to prove that an allege lack of heat caused her to leave the Rental Unit for no less than two weeks;
2) "For the period of 10/30/17-11/4/17, [Respondent] never proved the refrigerator was 'loud and obnoxious'." Also, any needed repairs were completed in a timely fashion; and

3) Respondent did not meet her burden of proof in demonstrating that the replaced skylight provided inadequate ventilation, as "the [Respondent] never proved that the former skylight opened 12"-18". Moreover, the Respondent "never complained about a lack of ventilation until the June 5, 2020 complaint was filed with the Rent Board, approximately 2 years after the skylight had been replaced." (*Attachment A)*

The summation of Appellant's assertions challenge whether the Record contained substantial evidence to warrant the Hearing Examiner's decision to grant an Excess Rent award based on a failure to maintain installed heating facilities in good working order, decrease in refrigeration services, and a decrease in ventilation services caused by a replaced skylight.

A full review of the Record demonstrates that substantial evidence does exist to substantiate the Hearing Examiner's finding that Appellant failed to maintain heating facilities in good working order and caused Respondent to experience a decrease in Housing Services due to a reduction in refrigeration services. However, the Record does not contain substantial evidence to support the Hearing Examiner's finding that Respondent experienced a decrease in Housing Services based on a decrease in ventilation, as Respondent failed to allege a claim of decrease of ventilation services in her petition and failed to provide adequate evidence establishing that she had provided notice to Appellant regarding the decrease in ventilation due to the replaced skylight. As it relates to heat and refrigeration, the Record not only contains sworn testimonial evidence demonstrating that the Appellant failed to maintain installed heating facilities in good working order and caused Respondent to experience a decrease in refrigeration services, it also contains documentary evidence in the form of emails and photographic evidence to corroborate Respondents' testimonial evidence.

Additionally, a review of the Record establishes that the Hearing Examiner carefully considered the relative weight of the evidence presented, and decisions regarding the credibility of certain evidence were reached through careful analysis of the entire body of the evidence. Consequently, the Hearing Examiner appropriately evaluated the demeanor of all witnesses and afforded less weight to contradictory testimony where appropriate.

PETITION HISTORY

Petitions Filed by Respondent:	June 1, 2020
Notice of Right to Object to Rent Adjustment Petition Sent:	June 5, 2020
Landlord Objection Form Received:	July 2, 2020
Notice of Combined Settlement Conference and Hearing sent:	July 21, 2020
Notice of Cont'd Settlement Conference and Hearing sent:	September 21, 2020
Combined Settlement Conference and Hearing held:	October 15, 2020
Hearing Record Held Open for Additional Evidence until:	October 30, 2020
Decision Issued:	December 18, 2020
Appeal filed by Landlord:	January 22, 2021
Respondent's response to Appeal filed:	February 2, 2021

STATEMENT OF FACTS

The following are facts are limited to the issues raised on appeal:

The Subject Property is a Studio dwelling unit located within a five-unit building. It is the uppermost Rental Unit, sitting on top of Santa Fe Avenue facing west, and located at [redacted] Richmond, CA. (*Attachment B)* It has two large windows facing the Bay, a bathroom window, a kitchen window, and a skylight that opens to add ventilation. (*Attachment B & Attachment C)* The Subject Property is subject to the full provisions of the Richmond Fair Rent, Just Cause, and Homeowner Protection Ordinance (hereinafter, "Rent Ordinance").

In April 2014, Lary Hanshaw (hereinafter, "Appellant") became the owner of the Subject Property. (*Attachment B)* Given his frequency of travel, Appellant thought it a good idea to have someone available onsite to quickly coordinate repairs when necessary. (*Attachment B)* Consequently, several months after becoming the Owner, the Appellant worked out an agreement with the Tenants located in Unit #1, Paula Helene and David Tatersall. (*Attachment B)* Paula was to be the point of contact between the Tenant experiencing the need for repair and the Appellant and his contractor. (*Attachment B)* Paula and David were given keys to each Renal

Unit and could, upon receiving permission from the occupying Tenant, enter various Rental Units. (*Attachment B)* However, at no time did the Paula and David collect rent. (*Attachment B)*

On October 22, 2017, The Hanshaw Revocable Trust, Lary Hanshaw Trustee entered into a written lease agreement with [redacted] (hereinafter, "Respondent") to occupy the Subject Property beginning October 28, 2017. (*Attachment D)* The lease established Respondent's rent at $1550. Soon after moving into the Rental Unit, Respondent began experiencing issues with the condition of the Rental Unit.

On October 30, 2017, Respondent emailed Appellant informing him that the prior night was a difficult one for her as, despite her many attempts, she was unable to get the heater to work and the refrigerator was producing such loud intermittent noises, it kept her awake. (*Attachment E & Attachment F)* Additionally, she informed Appellant, that the issue with the heat and refrigerator required urgent addressing. (*Attachment E & Attachment F)* Appellant acknowledged the issues, offering to replace the refrigerator and provide Respondent a space heater in the interim. (*Attachment E & Attachment F)* On October 31, 2017, Respondent emailed Appellant, thanking him for working on the various complained of issues, acknowledged Appellant's offered space heater, and granted him permission to enter her unit for repairs. (*Attachment E & Attachment F)* After some coordination with Paula and a California Contractor, Sean Esmaeili, Appellant opted to repair, rather than replace, the heater (*Attachment E)*; Appellant also chose to replace the refrigerator. (*Attachment F)* On November 4, 2017, Appellant replaced Respondent's refrigerator, and informed Respondent that Sean would repair her heater on November 10, 2017. ((*Attachment E & Attachment F)* Consistent with his statement, on November 10, 2017, Sean repaired Respondent's heater. (*Attachment E)*

In March 2018 and early April 2018, Respondent again began experiencing problems with the heat. On April 6, 2018, Respondent emailed Paula informing her that, among other things, the heater stopped working. (*Attachment E)* Having not received repairs to her heater, on April 17, 2018, Appellant sent another email to Appellant and Paula, requesting an update on the heater, and reminding Appellant that he would be required to give her notice prior to entry for repairs. (*Attachment E)* Paula called a contractor and offered Respondent a space heater in the interim; Respondent accepted the space heater. (*Attachment E)* A few days later, Appellant's contractor repaired the heater.

On May 12, 2018, Respondent wrote Appellant an email and letter informing him of the toll the prior month's habitability issues had on her. (*Attachment E)* Specifically, Respondent informed Appellant that lack of heat and plumbing caused her to vacate her Rental Unit for a few days, and that the delay in repair of the heater was unacceptable. (*Attachment E)* Within that same email, Respondent informed Appellant that the skylight window had broken glass parts and in need of urgent repairs as it was directly above her bed, imperiling her health and safety. (*Attachment G)* Appellant immediately responded and explained that he and Paula always tried to promptly address repair requests and that they would be willing to further discuss the various raised in Respondent's letter. (*Attachment E & G)* On May 22, 2018, Respondent acknowledged that the Appellant took steps to address the various issues raised the week prior, including fixing the skylight. (*Attachment E & G)*

On or about June 15, 2018, Appellant completely replaced the skylight. (*Attachment G)* Upon receiving the replaced skylight, Respondent expressed her dissatisfaction. (*Attachment G)* On June 15, 2018, she informed Appellant that her new skylight was a downgrade from the original as it blocked her view. (*Attachment G)* On several occasions, Respondent explained that one of her primary reasons for renting the Rental Unit was the view she experienced from the skylight. (*Attachment G)* For his part, Appellant and his agents explained that the skylight was not a downgrade as it was made of a material that would reduce heat. (*Attachment G)* Despite her many protest that the new skylight obscured her original view of the sky, Appellant did not replace the skylight with one that offered more transparency. (*Attachment G)*

On July 21, 2018, Respondent emailed Appellant, informing him that once again the heater was not working. (*Attachment E)* Respondent informed Appellant that she would reach out to a contractor, Butch, to schedule a repair of the heater. (*Attachment E)* Despite her efforts, Butch never arrived to repair her heater. (*Attachment E)* Paula also reached out to Butch multiple times but was unable to secure his attendance for the purposes of repairs. (*Attachment E)* After three weeks of endeavoring to secure Butch's presence, on August 11, 2018, Appellant requested Respondent reach out to PG&E to have them light the heater pilot. (*Attachment E)* Respondent reached out to PG&E and on August 21, 2018, a PG&E employee arrived at the property, but went to the incorrect Rental Unit. (*Attachment E)* As a result, Respondent had to schedule another PG&E visit. (*Attachment E)* In the interim, Appellant and Respondent had a conversation regarding Respondent obtaining a space heater. (*Attachment E)* After some back

and forth with PG&E, on September 26, 2018, PG&E fixed Respondent's heater. (*Attachment E)* That same day, Respondent informed Appellant that she would purchase a space heater just as they had discussed. (*Attachment E)*

On January 1 2019, Appellant relieved the Tenants in Unit#1 of their duties, and contracted with Ziprent to provide management services. (*Attachment B)* That same day, on January 1, 2019, Respondent informed Ziprent that her heater was not working. (*Attachment E)* It is unclear whether Ziprent repaired the heater at that time. From her testimony, Respondent explained that having been relegated to contacting PG&E for her heating complaints, she gave up and began utilizing a space heater. Later that year, on September 1, 2019, Respondent informed Ziprent, that her fridge was not working, as the fridge was no longer regulating temperature correctly, causing her food to spoil. (*Attachment F)* Respondent testified that the fridge was not fixed for four or five days.

On January 15, 2020, Respondent informed Appellant's agent, Ziprent, that her heater was not working. (*Attachment E)* After scheduling an appointment, on January 20, 2020, Appellant repaired the heater. (*Attachment E)* However, on February 18, 2020, the heater again became inoperable. (*Attachment E)* That same day, Ziprent acknowledged receipt of Respondent's notice and requested that Respondent send pictures of the heating unit and thermostat; Respondent complied. (*Attachment E)* On February 19, 2020, Ziprent responded that a repairperson would be in touch with Respondent that same day to look at the heater. (*Attachment E)* Responding to Ziprent, Respondent explained that she would need a required 24-hour notice prior to management entering her Rental Unit. (*Attachment E)* After some back and forth, Ziprent determined that the entire heating unit was in need of replacement. (*Attachment E)* On March 7, 2020, Ziprent replaced Respondent's entire heating unit. (*Attachment E)* During the repairs, it was discovered that the heating unit contained wooden planks that were serving as fuel for the heater. (*Attachment H)* Respondent testified that since the installation of the new heater, she had no issues related to the heat.

On April 23, 2020, Respondent informed Ziprent that her fridge was again not working, as it was failing to regulate temperature causing her food to go bad. (*Attachment F)* She also indicated that her freezer was much too cold, causing frost to accumulate to the point where she could no longer fit frozen foods into the freezer. On April 24, 2020, Ziprent placed a bid with their vendor network for purchase and installation of a replacement fridge and requested that

Respondent send the dimensions of the fridge to be replaced. (*Attachment F)* On April 25, 2020, Respondent sent Ziprent the requested dimensions and requested that the fridge be replaced with a stainless steel fridge. (*Attachment F)* Ziprent informed Respondent that there was no obligation replace the fridge with a stainless steel fridge but they would do their best to accommodate Respondent. (*Attachment F)* On April 28, 2020, Ziprent informed Respondent that they have ordered a new fridge, which was to be delivered to the store on May 8, 2020 at which time Ziprent would coordinate installation. (*Attachment F)* Respondent expressed concerns with the amount of time it would take to receive the fridge, and Ziprent explained that the delivery time was standard, especially considering the impact of Covid-19 on supply chains. (*Attachment F)* Respondent then requested compensation for the spoiled food and the fact that she was without a refrigerator. (*Attachment F)* On April 30, 2020, Ziprent asked Respondent whether she would be ok with a non stainless steel fridge that could be delivered earlier. (*Attachment F)* Respondent responded that refrigeration needed to be provided per the terms of the lease, Ziprent had failed to respond to her request for compensation, and that she would like a stainless steel fridge but "as always, [Ziprent would] make [their] decision." (*Attachment F)* After some back and forth, Ziprent informed Respondent that the fridge would actually be ready for pickup May 1, 2020. (*Attachment F)* They also informed Respondent that Appellant would not be providing her a credit for lack of refrigeration and spoiled food. (*Attachment F)* On May 2, 2020, Ziprent's contractor installed the fridge in Respondent's Rental Unit. (*Attachment F)*

On June 1, 2020, Respondent, while still in the Rental Unit, filed a petition based on multiple grounds for excess Rent due to the conditions of the Rental Unit. (*Attachment H)* In her petition, Respondent alleged seven grounds of habitability and services reduction: 1) No heat; 2) Raccoons overrun exterior; 3) No refrigeration; 4) Refrigeration downgrade; 5) Skylight removal; 6) Square footage Claims; and 7) Property Management. (*Attachment H)*

On July 2, 2020, Appellant filed his Objections to all of Respondent's claims. (*Attachment B)* There, Appellant raised essentially the same arguments as raised in this appeal, arguing that repairs were performed in a timely manner, Respondent had "consistently been difficult to schedule repairs with insisting that she be there during repairs and offering limited times of availability," and Respondent had exaggerated her level of impairment. (*Attachment B)*

On October 15, 2020, the Hearing Examiner held a hearing on the matters raised in all the aforementioned petitions and the objections. Appellant, Ziprent representative's Colin, Arvadn,

and Noah, and Respondent were present. At the Hearing, the Hearing Examiner narrowed the issues that could be considered, to issues of heat, raccoons, refrigeration, and skylight. The parties gave their testimony, conducted cross-examination, and entered evidence into the Record. During testimony, Respondent testified that in May 2020, Appellant's handyman informed her that her current skylight did not open very much. Respondent then testified that after she submitted the petition she learned that the skylight contributed to the lack of ventilation in the Rental Unit, which caused the temperature of the Rental Unit to rise and contributed to her feeling of suffocation. At cross-examination, Appellant elicited an admission from Respondent that she did not measure how many inches the current skylight opened compared to the prior skylight. For his part, Appellant testified, consistent with this Objections, that the new skylight opened at least eight inches and did not contribute to any lack of ventilation. At the conclusion of the hearing, the Hearing Examiner kept the Record open for two weeks for the parties to submit additional documents.

On December 18, 2020, the Hearing Examiner issued a decision awarding Respondent $1,125.63, for failure to maintain the installed heating facilities in good working order, $100.73 for decrease in services related to refrigeration, and $ 2,305.86, "for decrease in ventilation services [caused] by a replacement skylight that provided significantly less air circulation at the property for 880 days." (*Attachment I)* The Hearing Examiner rejected Respondent's claims based on Raccoons, skylight view obstruction, square footage, and management, awarding her 0$ on each claim. (*Attachment I)*

On January 22, 2020, Appellant timely filed this appeal. (*Attachment A)* On February 2, 2020, Respondent filed a response to Appellant's appeal. (*Attachment J)*

ISSUES

1. Does the Record contain Substantial Evidence to support the Hearing Examiner's award of Excess Rent in the total amount of $1,125.63 to Respondent, based on a failure to maintain heating facilities in good working order?
2. Does the Record contain Substantial Evidence to support the Hearing Examiner's award of Excess Rent to Respondents in the amount of $100, based on decrease in refrigeration services?

3. Does the Record contain Substantial Evidence to support the Hearing Examiner's finding of an Excess Rent Overcharge and award of $2,305.86, due to a decrease in ventilation services caused by the replacement skylight?

ANALYSIS

I. STANDARD OF REVIEW

This analysis is guided by the Standard of Review, which is Substantial Evidence. According to Richmond Rent Board Regulation 841.5, Substantial Evidence means the Board does not reweigh the evidence nor does it second guess the factual findings of the Hearing Examiner, even if there was contrary evidence. In fact, the law does not require the Hearing Examiner to believe uncontradicted evidence. *Ventura County Board of Supervisors* (2018) 20 Cal. App. 5th 572, 576 Rather, the Rent Board is to look to the evidence contained in the Record supporting the prevailing party (here the Respondent) and is to discard unfavorable evidence to the Respondents. *Richmond Rent Board Regulation 841.5(A)* Furthermore, the resolution of issues of credibility of witnesses and evidence belong to the trier of fact, and under the standard of Substantial Evidence, the reviewing body lacks the authority to substitute its judgment for that of the trier of fact. To be clear, the test is whether the Hearing Examiner has abused his discretion by exercising it in a manner that is unsupported by the Record.

It is important that all parties and the Board grasp the impact of the Substantial Evidence standard. Although one might disagree with the conclusions drawn by the Hearing Examiner and, if permitted to step in the Hearing Examiner's shoes, would rule otherwise, this is not the standard on appeal. Disagreements are not enough, and in fact, are irrelevant, when evaluating a Hearing Examiner's decision on appeal. Instead, the relevant inquiry is whether, based on all the evidence in the Record, the Hearing Examiner's determinations are supported by substantial evidence. If they are not, then the ruling cannot stand.

Finally, where the Hearing Examiner has made errors in the law or clearly erroneous conclusions are drawn from the evidence, the Board need not defer to the Hearing Examiner, and may substitute its judgement.

Insofar as either Appellant or Respondent has included evidence in their Appeal that was not admitted into the Record prior to the Hearing Examiner issuing his decision, that evidence must be barred from evaluation. This evidence includes, but is not limited to, Appellant's graphs,

charts, or other related depictions of the skylight and ventilation that were submitted with his appeal, as such documentation was not made part of the Record prior to the Hearing Examiner issuing his decision.

With the aforementioned legal principles, Appellants' appeal must be evaluated.

II. THERE IS SUBSTANTIAL EVIDENCE CONTAINED IN THE RECORD SUPPORTING THE HEARING EXAMINER'S FINDING THAT APPELLANT FAILED TO MAINTAIN HEATING FACILITIES IN GOOD WORKING ORDER.

Appellant's appeal fails to articulate a legal reason to modify or reverse the Hearing Examiner's findings on the issue of maintenance of heating facilities in good working order. Instead, the appeal alleges that the factual findings of the Hearing Examiner should have been made in his favor regarding the factual issue of whether the space heater provided enough heat in the interim, whether Respondent contributed to any delay in repairs, and whether heat was necessary during the summer months or periods of lack of ventilation. (*Attachment A)* Given the principles of Substantial Evidence, it is the privilege of the trier of fact to accept one version of facts over another or disregard, in whole or in part, testimony given on particular issues. Except for De Novo appeals, an appeal is not a re-litigation of facts, but rather, an evaluation of whether the facts in the Record, viewed in the light favorable to the Respondent, is enough to constitute substantial evidence supporting Respondent's claim. The review is limited to the issues on appeal. In addition to Appellant's failure to articulate a legal reason to reverse the Hearing Examiner's findings, his appeal fails to raise concerns related to the heating issues that occurred in the year 2020. As such, heating related issues occurring in the year 2020, are not properly before this Board and may not be considered. As it relates to the heating issues occurring prior to the year 2020, the Record contains substantial evidence supporting the Hearing Examiner's findings of a breach of habitability related to heating facilities.

Richmond Rent Board Regulation 904(B)(4)(b) states:

> A substantial lack of any of the affirmative standard characteristics for habitability set forth in Civil Code section 1941.1 shall be deemed a violation of the warranty of habitability and the Maximum Allowable Rent shall be decreased by no less than 10%, or, for a violation of subsection (b), (c), or (d) of Civil Code section 1941, no less than 20%, until the condition is corrected, notwithstanding seasonal variations in or an absence of impairment to a Tenant's use of or benefit from the unit.

In other words, if a Rental Unit lacks certain characteristics that are enumerated in Civil Code 1941.1, the Tenant, at a minimum, must receive a downward adjustment of 10%—the reduction is a minimum of 20%, if the issue relates to water, plumbing, or heating[1]—regardless of whether the Tenant's use is impaired or there are seasonal variations. Civil Code 1941.1(a)(4) requires that all dwelling units have an installed heating facility that conform to applicable law in effect at the time of installation, and is maintained in good working order. *Civil Code 1941.1(a)(4)* Taken together, an Excess Rent charge occurs when a Rental Unit either lacks an installed heating facility, contains an installed heating facility that is not installed in conformance with applicable law, or has an installed heating facility that is not in good working order. It is irrelevant that the lack of heating facility occurred in summer, or that the lack of the heating facility may not have impaired the Tenant's use or benefit from the Rental Unit. Thus, in so far as Appellant argues that Respondent failed to prove that she vacated the Rental Unit for two weeks due to the lack of heat, such argument is irrelevant as the inquiry is not concerned with Respondent's impaired use of the Rental Unit.

Here, the Record clearly demonstrates that Respondent's installed heating facility was not maintained in good working order. Upon moving into the Rental Unit, Respondent immediately experienced issues with the heat. (*Attachment E)* The following day Respondent informed Appellant that it was a very cold night because the heater did not work. (*Attachment E)* Appellant offered her a space heater and subsequently, took eleven (11) days to repair the heater. (*Attachment E)* Appellant now argues that eleven days was a reasonable amount of time to fix the heater given scheduling issues with the Respondent. (*Attachment A)* Rent Board Regulation 904(B)(4)(b) only requires the Respondent prove that the heating facility was either not installed, installed out of conformance with applicable law, or not in good working order. Thus, timeliness only goes to the amount of damages recovered by a prevailing Tenant, and not to whether a Tenant can prevail on a claim. Consequently, Appellant's contention of timeliness, with nothing more, is insufficient in addressing the legal issues necessary to overturn the Hearing Examiner's

[1] Rent Board Regulation 904(B)(4)(b), contains a typo referring to Civil Code 1941 (b), (c), (d), rather the Civil Code 1941.1 (b), (c), and (d). When adopted, Civil Code 1941.1 (b), (c), and (d), referred to instances of impaired plumbing and gas facilities, water, and heating facilities, respectively. Civil Code 1941.1 has since been amended and changed its alphabetical numbering system to a numerical system. Instances of impaired plumbing and gas facilities, water, and heating facilities are now codified under Civil Code 1941.1(a) (2), (3), and (4) respectively. An award of 20% reduction in the Maximum Allowable Rent based on a lack of plumbing and gas facilities, water, or heating facilities is consistent with the intent of the Regulation, as the Regulation was intended to provide greater relief for the aforementioned habitability issues.

findings on issues brought under Richmond Rent Board Regulation 904(B)(4)(b). Even if timeliness were probative on a claim concerning heating facilities, the Appellant's contention that he was timely is not supported by the Record. Respondent asserted her right to receive notice prior to entry and certainly cannot be punished for holding Appellant to his obligation. Any other delay seems to be caused by the Appellant's consideration of whether to repair or replace the heating facility, obtaining a contractor to perform the work, and Appellant being out of town and unavailable. (*Attachment E)*

Finally, Appellant asserts that the heater was working a few days prior to Respondent moving into the Rental Unit. (*Attachment A)* This is irrelevant as it does not go to the condition of the heating facility on the day Respondent moved into the Rental Unit. It is also circular, as its implicit premise assumes the very thing it is attempting to prove. It is similar to the logical fallacy that the sun will rise tomorrow because it rose yesterday.

Despite the Appellant's repair, the heating facility continued to break. Instead of exploring the possibility that the problem may have been systematic requiring replacement, Appellant continued to repair unidentified parts of the heating facility. On April 6, 2018, Respondent again informed the Appellant that her heater was inoperable. (*Attachment E)* Having not received repairs to her heater, Respondent again emailed Appellant inquiring into when the heater would be repaired. (*Attachment E)* Appellant fixed the heater on or around April 20, 2018. (*Attachment E)* Appellant argues that these circumstances evidence a timely response on his part to fix the heater and that any delay was attributable to Respondent as "she didn't respond to scheduling request in a timely fashion." The Record does not support Appellant's contention, as the Record shows that Appellant was nonresponsive, requiring Respondent to send a follow up email to remind Appellant of the broken heater. (*Attachment E)*

Three months after the heater was repaired, on July 21, 2018, Respondent informed Appellant that the heater was not working. (*Attachment E)* Instead of securing a contractor to determine whether the heating facility needed to be replaced altogether, Appellant permitted Respondent to contact the handyman, Butch, herself. (*Attachment E)* Butch proved to be an elusive character. (*Attachment E)* Respondent made various attempts to secure Butch's presence at her Rental Unit to no avail. (*Attachment E)* Even Paula, Appellant's agent, had difficulty securing Butch to perform the repair on the heater, as Butch would agree to show up to the Rental Unit but fail to actually arrive to perform repairs. (*Attachment E)* Butch became so elusive

that Paula concluded that a male would have better luck speaking with Butch and requested Appellant contact Butch. (*Attachment E)* Perhaps to no one's surprise, Appellant had difficulty getting a hold of Butch. (*Attachment E)* On August 11, 2018, instead of continuing to chase down Butch, Appellant, without actual inspection of the heater, requested Respondent contact PG&E to address to heater issue. (*Attachment E)* Respondent testified that she had difficulty securing PG&E's presence at the Rental Unit. When she was finally able to secure their presence, the PG&E employee went to the incorrect Rental Unit. (*Attachment E)* It took until September 20, 2018, for PG&E to make their way to Respondent's Rental Unit and repair the heater. (*Attachment E)* Appellant now argues that during this period he was responsive to Respondent's request for repairs and any delay was caused by difficulty scheduling repairs with Respondent. (*Attachment A)* The Record simply does not support that contention. However, the Record does support the contention that Respondent was without heat for sixty (60) days as she chased down Butch and PG&E.

The Record supports the Hearing Examiner's conclusion that the heating facilities were not maintained in good working order. In fact, the degree of impairment of the heating facility even raises the question as to whether the heating facility was ever in good working order and installed in conformance with applicable law, as in February 2020, it was discovered that wooden planks were placed behind the heating facility to serve as the heating source. (*Attachment H)* When the issue was properly remedied and the heating facility was replaced in accordance with applicable Mechanical Codes, it came as no surprise that Respondent experienced no additional issues with the heating facility.

After carefully weighing the documentary evidence, photographic evidence, and testimonial evidence, the Hearing Examiner found that the preponderance of evidence favored the Respondent, not the Appellant. For the aforementioned reasons, substantial evidence supports the Hearing Examiner's findings, and the Rent Board should uphold the decision of the Hearing Examiner as it relates to Appellant failing to maintain installed heating facilities in good working order.

III. THE RECORD CONTAINS SUBSTANTIAL EVIDENCE SUPPORTING THE HEARING EXAMINER'S FINDING THAT RESPONDENT EXPERIENCED A DECREASE IN REFRIGERATION SERVICES.

Richmond Rent Board Regulation 904(B)(1) states:

> The Maximum Allowable Rent shall be adjusted downward where a Landlord is aware of and causes a Tenant to suffer a decrease in…any services or space provided at the beginning of the tenancy…Decrease in the Maximum Allowable Rent shall not be granted due to a decrease in space or services that is a direct result of intentional actions on part of the Tenant to purposefully cause a decrease in space or services.

Here, the Record contains substantial evidence to support that Respondent's refrigeration services were decreased on three (3) separate occasions. It is undisputed that at the beginning of Respondent's tenancy, Appellant provided a refrigerator. However, upon moving into the Rental Unit, the refrigerator made "loud and obnoxious" noise. (*Attachment F)* So much so that on October 30, 2017, Respondent emailed Appellant informing him that the fridge was so loud that she could not sleep. (*Attachment F)* Soon after, Respondent sent Appellant an audio recording of the refrigerator, and the Appellant acknowledged that although the noise wouldn't bother him, the refrigerator was loud. (*Attachment F)* Appellant then began to pursue a replacement fridge and on November 4, 2017, Appellant replaced the fridge. (*Attachment F)* Appellant now contends that the Respondent failed to prove that the refrigerator was noisy. (*Attachment A)* In support of his contention, Appellant explains that prior to Respondent's tenancy he had been to the Rental Unit numerous times, even staying overnight, and he was never bothered by the refrigerator. (*Attachment A)* Additionally, Appellant asserts that Respondent visited the Rental Unit prior to her occupancy, and never complained of a noisy refrigerator. (*Attachment A)* Finally, Appellant contends that regardless of the alleged noise, he quickly replaced the refrigerator when Respondent complained. (*Attachment A)* Appellant contentions are either without merit or unsupported by the Record and Rent Board Regulations.

Given the facts in the Record, it is irrelevant that Appellant was not bothered by the refrigerator noise when he slept in the Rental Unit prior to Respondent's tenancy. The analysis of a decrease in services does not turn on the impact the services reduction may have on the Landlord. To the extent the Appellant is asserting his prior experiences as evidence of a future occurrence, it is irrelevant as such an argument is circular and does not explain conditions that

existed on the day the decrease in services occurred. Regardless of the fallacious logic employed, Appellant admitted to Respondent that the refrigerator was producing noise. (*Attachment F)* Even without such an admission, the Record still contains substantial evidence that the refrigerator was loud, as Respondent offered persuasive testimonial evidence and corroborating documentary evidence. Finally, the issue regarding the amount of time it took Appellant to repair the refrigerator, goes to the awarded amount of damages and not to whether Respondent is barred from succeeding on a claim of decrease in services. Claims brought under "Inadequate Services and Substantial Deterioration" require the consideration of timely maintenance when making a determination of success on that claim, separate and apart from damages. *Rent Board Regulation 904(B)(3)* On the other hand, Decrease in Services claims permit the Landlord to prevent success on said claim by demonstrating that the Tenant's intentional actions purposefully caused the decrease in services. Appellant does not offer such argument, and the Record does not support such an argument.

Regarding the other two instances of a decrease in refrigeration services occurring on September 1, 2019 and April 23, 2020, Appellant does not contend that the refrigerator was not broken. (*Attachment A)* Rather, Appellant contends that he timely fixed the refrigerator in both instances.[2] For the reasons stated above, notions of timely repairs do not go to whether the issue existed and whether the Respondent was impacted. In both instances, Respondent informed Appellant's agent the refrigerator was not working and in both instances she reported the spoliation of her food. (*Attachment F)* Despite her spoiled food and lack of refrigeration, Appellant refused her request for compensation. (*Attachment F)* The Record contains substantial evidence, in the form of testimonial, photographic, and documentary, supporting the notion that on September 1, 2019, and April 23, 2020, Respondent experienced a decrease in refrigeration services, causing her food to spoil, impacting her ability to store food in the freezer, and otherwise impacting her use of the Rental Unit.

Given all of the above, substantial evidence supports the Hearing Examiner's findings, and the Rent Board should uphold the decision of the Hearing Examiner as it relates to decrease in refrigeration services.

[2] When the refrigerator broke on September 1, 2019, Appellant fixed it on September 6, 2019. When the refrigerator broke on April 23, 2020, Appellant, after Respondent's prodding, fixed it on May 2, 2020

IV. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE SUPPORTING THE HEARING EXAMINERS FINDING OF DECREASE OF VENTILATION SERVICES AND THUS, THE HEARING EXAMINER'S AWARD OF $2,305.86 MUST BE REVERSED TO $0.

The Hearing Examiner Awarded Respondent $2,305.86, for 880 days of decrease in ventilation caused by the replacement skylight. (*Attachment I)* However, after searching the Record, there are to be two basis supporting reversal. First, the Respondent never alleged in her petition a decrease in ventilation caused by the replacement skylight. Second, Appellant articulates a persuasive legal basis supporting reversal; namely, Respondent failed to provide notice to Appellant regarding the lack of ventilation specifically caused by the replacement skylight.

As it relates to the first basis for reversal, Respondent brought a petition against Appellants under Richmond Rent Board Regulation 904(B). (*Attachment G & H)* Among other things, Respondent asserted a reduction in services claim related to the skylight. (*Attachment H)* Respondent explained that one of the basis for moving into the Rental Unit was the view from the original skylight. (*Attachment G & H)* The original skylight was transparent allowing her to see the stars and the full moon. (*Attachment G & H)* To drive home the point, Respondent attached pictures to her petition depicting the view from the original skylight. (*Attachment H)* Respondent went on to explain that she requested Appellant fix the skylight because there were broken glass parts, causing her to worry for her health and safety since she slept under the skylight. (*Attachment G & H)* After some back and forth, Appellant replaced the skylight with a new opaque skylight. (*Attachment G)* Respondent was impacted by the replacement, explaining to Appellant that she lost her view and it was affecting her. (*Attachment G)* Appellant explained that the new skylight was meant to reduce the heat in the Rental Unit. (*Attachment G)* Despite her protestations, the skylight was not replaced with a more transparent one. (*Attachment G)* The loss of the view effected Respondent so much so that two years later, in 2020, she brought the issue up with Ziprent. (*Attachment G)* The entirety of Respondent's skylight claim contained in her petition concerned the loss of view. (*Attachment H)* It did not concern, nor did it mention, decrease in ventilation. (*Attachment H)* Indeed, Respondent herself testified that she only learned of the possibility of a decrease in ventilation claim after she filed the petition.

As a matter of law, where a party does not raise a claim against another party, the adjudicative body has no jurisdiction to hear that particular claim. Indeed, according to Richmond Rent Board Regulation 821:

> It is the policy of the Rent Board that all petitions and objections be decided on their merits, consistent with due process of law and orderly administrative procedure. The regulations of this Chapter are intended to ensure that each party is given notice of the grounds for a petition and all objections thereto in advance of the hearing so that all parties will be prepared to present their case at the hearing. Accordingly, the hearing shall be limited to the issues raised by the petition and the objections filed thereto, unless the hearing examiner determines that, in the interest of fairness, additional issues or objections should be considered and thereafter takes all necessary steps to ensure that all parties have a full and fair opportunity to respond to new issues objections or evidence. *(Emphasis added)*

The Hearing Examiner had the discretion to allow additional issues/claims to be raised during the Hearing, but such allowance required the Hearing Examiner to: 1) find that in the interest of fairness additional issues should be considered, and 2) take all necessary steps to ensure that all parties had a full and fair opportunity to respond to the new issues. The Record does not support the notion that the Hearing Examiner took the aforementioned steps prior to considering the new claim of Excess Rent. Respondents cannot prevail on claims/issues that were never raised. Given these notions, the Board should reverse the Hearing Examiner's decision related to decrease in ventilation in its entirety. However, even if the Rent Board finds that Respondent properly raised the claim of decrease in ventilation or that the Hearing Examiner properly exercised his discretion to allow the claim, the Hearing Examiner's decision related to decrease in ventilation must be reversed as Respondent did not provide Appellant notice of the decrease in ventilation.

Richmond Rent Board Regulation 904(B)(6), states:

> A Tenant who files a petition pursuant to this regulation must be able to establish the basis for the reduction and when the Landlord first received notice of the decreased service, deterioration, code violation or habitability violation. Notice may be actual or constructive.

On Appeal, Appellant asserts a persuasive legal basis for reversal as it relates to decrease in ventilation. Appellant argues that in the two years since replacing the skylight, Respondent never notified him of the decrease in ventilation due to the replaced skylight. (*Attachment A)* In other words, Appellant argues that the Record does not contain substantial evidence supporting a finding of notice of the decrease in ventilation caused by the replaced skylight. Appellant is correct. Nowhere in the numerous documents or petition does Respondent provide notice of the specific instance of decrease in ventilation due to the replacement skylight. Indeed, the Hearing Examiner's decision is silent on the issue of notice. Respondent's failure to provide Appellant with notice of the decrease is consistent with her testimony of only learning about the possibility of a decrease in ventilation after filing her petition. Because the Record does not contain substantial evidence supporting the notion that Appellant had actual or constructive notice of the decrease in ventilation, the Hearing Examiner's findings on the issue of decrease in ventilation should be reversed. Consequently, the Hearing Examiner's award of $2,305.86, should be reversed down to $0, and his findings on the issue of decrease in ventilation vacated.

CONCLUSION

Under the Substantial Evidence Standard, the Rent Board does not act as a fact-finder. Rather, the Rent Board defers to the Hearing Examiner's factual findings and resulting legal findings to determine whether the Record contains substantial evidence to support the Hearing Examiner's legal and underlying factual findings. Based on the aforementioned reasons, the Board is advised to find that substantial evidence in the Record supports the decision of the Hearing Examiner concerning lack of proper heating facilities and decrease in refrigeration services. However, the Rent Board is advised to reverse the portion of the Hearing Examiner's decision that awarded Respondent Excess Rent damages due to a decrease in ventilation caused by the replaced skylight, as the Respondent did not raise the claim in her petition, nor does the Record contain substantial evidence that Respondent informed Appellant of the decrease in ventilation due to the replaced skylight.

RECOMMENDATION

The Staff Attorney recommends that the Rent Board affirm the Hearing Examiner's decision in part and reverse in part. Specifically, the Staff Attorney recommends the Rent Board do the following:

1. AFFIRM the Hearing Examiner's findings that Appellant failed to maintain heating facilities in good working order in conformance with applicable law, and the consequent award of $1,125.63.
2. AFFIRM the Hearing Examiner's findings that Appellant decreased Respondent's refrigeration services and the consequent award of $100.73.
3. REVERSE the Hearing Examiner's finding of decrease in ventilation services due to a replaced skylight and subsequent award of $2,305.86 to 0$, as Respondent did not raise the claim in her petition nor does the Record contain substantial evidence that Respondent informed Appellant of the decrease in ventilation due to the replaced skylight.

ATTACHMENT LIST

Attachment A – Appellant's Filed Appeal

Attachment B – Appellant's Filed Objections to Respondent's Petition

Attachment C – Depiction of the Interior of the Subject Property

Attachment D – Respondent's Lease Agreement

Attachment E – Correspondence Concerning Heater Issues

Attachment F – Correspondence Concerning Refrigeration Issues

Attachment G – Correspondence Concerning Skylight Issues

Attachment H – Respondent's Filed Petition

Attachment I – Excerpts of Hearing Examiner's Decision

Attachment J – Respondent's Filed Response to Appellant's Appeal

842. Appeal Process

A. Any appeal shall be filed on a form provided by the Board no later than thirty (30) calendar days after receipt of the notice of the hearing examiner's decision. A party is presumed to receive the decision five (5) business days after it is mailed. The appeal must contain a statement of the specific grounds on which the appeal is based. The Board will not consider an appeal that fails to state any facts or arguments in support of the grounds alleged in the appeal. Except as provided in Section 842(E), no other documents in support of the appeal will be accepted after the appeal deadline unless specifically requested by the Board. The appeal shall be sent to the Board and opposing parties and their representative. Additionally, appellants shall send a copy of the appeal to the hearing examiner whose decision is being appealed. The Board or staff may order that appeals relating to the same building or property, or different properties of the same Landlord, be consolidated. The opposing party shall file any response to the appeal within fifteen (15) calendar days from the date the appeal is filed.

B. At least fourteen (14) calendar days prior to the date set for Board action on the appeal, a Board Staff report shall be prepared recommending that the decision of the hearing examiner be affirmed, modified, reversed or remanded to the hearing examiner for further hearing. Board Staff may supplement the record by including matters of which the Board may take official notice, provided that the parties are notified of such matters at least fourteen (14) days prior to the date set for Board action. Any objection to a staff request for official notice of such matters shall be filed no later than seven (7) calendar days prior to the date set for Board action.

C. At least fourteen (14) calendar days prior to the date set for Board action, all parties shall be notified by mail of the date, time and place set for Board action on the appeal. Copies of the Board Staff recommendation shall be mailed to all parties and their representatives at least 14 days prior to the Board action. Copies of the official record and the staff recommendation shall be available for public review at the Board office at least fourteen (14) days prior to the date set for Board action. Parties may submit written comments to the Board up to seven (7) days prior to the Board action.

D. At the Board meeting at which action on the appeal is scheduled, each party or the party’s representative will be allowed seven (7) minutes to address the Board at the beginning of the hearing in the following order: appellant for five (5) minutes, respondent for seven (7) minutes, appellant for two (2) minutes. For any party addressing the Board who requires translation the allowable times shall be doubled. The Board has the discretion to allow more time.

E. Unless the Board determines that a de novo hearing is required, the Board's decision will be based exclusively on the record before the hearing examiner. Parties shall be instructed not to discuss or comment upon factual matters or evidence that were not presented to the hearing examiner or officially noticed. Parties may discuss or comment upon the legal matters in question and any other pertinent issues raised by the appeal. The Board shall disregard any discussion or comment regarding factual matters that were not in the record before the hearing examiner or officially noticed. The vote of three (3) Board members is required to affirm, modify, remand or reverse the decision of the hearing examiner.

F. The Board's decision to affirm, modify, remand or reverse the decision of the hearing examiner shall be supported by written findings of fact and conclusions of law. When the Board votes to adopt the staff recommendation unchanged, the parties to the appeal will be notified only of the Board's decision. When the Board does not adopt the staff recommendation as written, a written decision of the Board shall be mailed to the parties or their representative of record.

G. Continuances of dates set for Board action on appeals shall be granted by a majority of the Board or by the Executive Director only for good cause shown. A written request and the reasons for it must be received by the Board at least two (2) business days prior to the scheduled hearing, unless good cause is shown for later request. The written request must contain the reasons for the continuance, an explanation of what efforts were made to ascertain the position of the other parties regarding the request for a continuance, and mutually acceptable alternative dates. Copies of this written request must be sent immediately to all other parties and proof of service must accompany the written request filed with the Board.

H. Reconsideration.

1) At the discretion of the Executive Director or their designee, an appeal may be treated as a request for reconsideration and referred back to the Hearing Examiner for such reconsideration only if it is claimed by the appellant that:

a) There was good cause for a failure to respond to a petition; or
b) There was good cause for a failure to appear at a settlement conference or hearing; or
c) The appellant wishes to present relevant evidence that could not, with reasonable diligence, have been discovered and produced at the hearing.
d) The decision resulted from a clearly inaccurate application of the law; staff members discovered a problem with the record; the underlying legal standard upon which the decision is based changed before final disposition of the case, including matters subject to a pending petition for writ of administrative mandamus; or any other reason the case should be remanded for reconsideration for administrative efficiency.

In the event that the Executive Director or their Designee finds good cause exists to treat the appeal as a request for reconsideration, the Executive Director or their Designee shall, within 15 business days from the day to file an appeal has expired, issue an Order of Reconsideration, which shall describe the basis of granting reconsideration, the scope of issues to be reconsidered by the Hearing Examiner, and modified procedures, if any, of the hearing process to expedite the matter for a hearing on reconsidered issues. The Rent Program shall send the Order of Reconsideration to all parties and, schedule a hearing consistent with the Order of Reconsideration within 60 days from the day the Order of Reconsideration was issued.

[Adopted January 24, 2018; Amended November 14, 2018; Sec.(I) Amended July 17, 2019; Repealed Section (B), October 16, 2019]