DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 99-AA-1422
99-AA-1538

MARILYN KILLINGHAM, PETITIONER,

v.

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION, RESPONDENT.

WILSHIRE INVESTMENT TRUST, INTERVENOR.

Petition for Review of a Decision of the
District of Columbia Rental Housing Commission

(Argued October 17, 2002 Decided November 27, 2002)

Marilyn Killingham, *pro se*.

Jonathan R. Schuman for intervenor.

Robert R. Rigsby, Corporation Counsel at the time, *Charles L. Reischel*, Deputy Corporation Counsel, and *Mary T. Connelly*, Assistant Corporation Counsel, filed a statement in lieu of brief for respondent.

Before STEADMAN, SCHWELB, and FARRELL, *Associate Judges*.

Opinion for the court PER CURIAM.

Concurring opinion by *Associate Judge* SCHWELB at page 3.

PER CURIAM: Petitioner seeks review of a decision of the District of Columbia Rental Housing Commission rejecting her claim of retaliation by the housing provider and ordering a rent refund in an amount petitioner contends was inadequate. She also challenges the Commission's denial of her motion to reconsider its decision. A review of the record demonstrates that the Commission dealt carefully and correctly with each issue

petitioner presented to it on appeal from the attorney examiner's decision. In particular, while noting that the attorney examiner had misallocated the burden of proof in rejecting the retaliation claim, the Commission determined from the examiner's "painstaking" review of the evidence and findings of fact that the error was harmless, because the housing provider had convincingly rebutted the statutory presumption of retaliation. *See* D.C. Code § 42-3505.02 (2001).

We find no error in the Commission's resolution of this issue or in its computation of the rent refund to which petitioner was entitled. *See Harris v. District of Columbia Rental Hous. Comm'n*, 505 A.2d 66, 69 (D.C. 1986) (setting forth this court's standard of review of Commission decisions). We likewise find no error in the Commission's thorough treatment of petitioner's motion for reconsideration.[1] On the record presented, we reject petitioner's argument that only a remand to the attorney examiner for new findings of fact or conclusions of law could remedy the error in the examiner's conclusion "that the evidence, when viewed in its totality, does not support, by the weight of clear and convincing evidence, *the [p]etitioner's allegations* of retaliatory actions" (emphasis added).[2] As the Commission pointed out, the examiner found that the housing provider had "contested every aspect of the [p]etitioner's allegations of retaliation with specificity,

---

[1] Some of petitioner's arguments in the motion were made for the first time in that document, and were properly rejected for that reason. *Cf. Killingham v. Wilshire Invs. Corp.*, 739 A.2d 804, 811 n.7 (D.C. 1999).

[2] The parties do not dispute — and the attorney examiner found — that the circumstances in this case gave rise to a presumption of retaliatory action by the housing provider. *See* D.C. Code § 42-3505.02 (b). The burden thereupon shifted to the *housing provider* to "come[] forward with clear and convincing evidence to rebut this presumption," failing which the examiner would have been required to ("shall") "enter judgment in the tenant's favor." *Id.*

item-by-item." The examiner's recitation of the housing provider's evidence in that regard spanned nearly three single-spaced pages of his opinion, and led him to credit the housing provider's assertion that "the true basis of the problems [alleged to constitute retaliation] was a serious negative cash flow, which had driven the [provider] to the edge of bankruptcy, largely occasioned by only having 35 of the 128 units rented in the [p]etitioner's building." Moreover, the examiner made that determination after initially phrasing the statutory question before him — correctly — as "[w]hether the evidence presented by the [housing provider] was sufficient to *overcome a legal presumption* of . . . retaliation, *by the weight of clear and convincing evidence*, as required by D.C. Code [§ 42-3505.02], as further codified by 14 DCMR 4303.3 and 4303.4" (emphasis added). Whatever misunderstanding the examiner ultimately may have had concerning the burden of proof, we agree with the Commission that there is no reasonable likelihood that a remand for reconsideration in light of the proper standard would lead the examiner to a different result on this record. *See, e.g., Arthur v. District of Columbia Nurses' Examining Bd.*, 459 A.2d 141, 146 (D.C. 1983) (reversal and remand required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed).

Affirmed.[3]

SCHWELB, *Associate Judge*, concurring: Although I concur in the judgment, I believe that the misallocation of the burden of proof by the hearing examiner presents a close and somewhat troubling issue. I therefore write separately to express my views.

[3] Petitioner has filed what amounts to a request for two of the judges on the division to recuse themselves from deciding this matter. Those judges have considered and rejected the request.

We have held in a number of cases that assignment of the burden of proof may be of critical importance in determining the outcome of a case. For example, in *Kea v. Police & Firemen's Ret. & Relief Bd.*, 429 A.2d 174 (D.C. 1981), we reversed an agency order terminating disability payments to a former United States Park Police officer because the agency misallocated the burden of proof by requiring the officer to prove "with reasonable medical certainty" that he had not recovered from injuries suffered when he was shot while on duty. We stated that "the proper allocation of the burden of proof is among the essential rules of evidence which must be observed in adjudication by administrative agencies." *Id.* at 175.

The effect of a misallocation of the burden depends not only on the weight of the evidence, but also on the nature of the burden of proof that has been misallocated. "In the usual civil case . . . where the standard of proof is a preponderance of the evidence, a misallocation will likely be consequential only where the evidence approaches equipoise, *i.e.*, '[w]here proven facts give equal support to each of two inconsistent inferences.'" *District of Columbia v. Kora & Williams Corp.*, 743 A.2d 682, 693 (D.C. 1999) (alteration in original) (quoting *Pennsylvania R. Co. v. Chamberlain*, 288 U.S. 333, 339 (1933)). Where the burden of proof is more onerous, however, a misallocation may surely be "consequential" and perhaps determinative even where the evidence is significantly out of equipoise. To take an extreme example, if the court were to instruct the jury in a criminal case that the defendant is required to prove his innocence beyond a reasonable doubt, then, and putting aside applicable constitutional requirements, *see Sullivan v. Louisiana*, 508

U.S. 275 (1993),[1] the defendant might be found guilty even if a preponderance of the evidence pointed to his innocence.

In the present case, the hearing examiner apparently believed that the tenant was required to prove retaliation by clear and convincing evidence, while in fact, as the agency and the court both recognize, this very formidable burden should have been imposed upon the landlord. The shift in burden was a substantial one. In such instances, I would ordinarily vote to remand the case to the trier of fact to determine whether *he* – and not the Commission – would find that the landlord had carried the day by clear and convincing evidence.

As the court points out, however, the hearing examiner initially phrased the statutory issue correctly, and the agency viewed the proof as overwhelming. Viewing the case as a whole, and the more than ample evidence supporting the Commission's view that the landlord met its burden, I am inclined to agree that a remand would be futile. As the court indicates, the hearing examiner would probably reach the same conclusion on remand, with respect to the merits of the case, as he reached initially. Under the circumstances, I am not prepared to vote to reverse.

---

[1] The Supreme Court held in *Sullivan* that a constitutionally deficient reasonable-doubt instruction cannot be harmless error. As Justice Scalia wrote for the Court, "to hypothesize a guilty verdict that was never in fact rendered [because reasonable doubt was not defined with constitutional adequacy] – no matter how inescapable the findings to support that verdict might be – would violate the jury trial guarantee." 508 U.S. at 279. There is at least a superficial similarity between *Sullivan* and the present case, for here, too, the trier of fact never found that the landlord had met its burden by clear and convincing evidence. *Sullivan*, however, implicated the Sixth Amendment right to a jury trial; this case does not.

Nevertheless, a determination by the Commission or the court as to what the hearing examiner would have found if the burden of proof by clear and convincing evidence had been placed on the landlord, as it should have been, is not an easy one to make. I therefore think it important to emphasize that a misallocation of the burden of proof by clear and convincing evidence is different from (and far more difficult to characterize as harmless) than a misallocation of the burden of proof by a preponderance of the evidence.