

AGENDA ITEM REQUEST FORM

Department: Rent Program

Department Head: Nicolas Traylor

Phone: 620-6564

Meeting Date: June 19, 2019

Final Decision Date Deadline: June 19, 2019

STATEMENT OF THE ISSUE: In August 2018, the Rent Program's Hearings Unit began processing and hearing petitions in accordance with Chapter 8 of the Rent Board Regulations. To date, the Hearings Unit has processed and heard a total of sixty-three (63) Landlord/Tenant petitions. While administering the provisions of Rent Board Regulation Chapter 8, staff members have ascertained particular nuances in the process that would benefit from clarification. Specifically, staff members have identified three areas where clarity is necessary: (1) length of time the Record can remain open after a hearing, and when it must be closed; (2) when the Executive Director or assigned designee may treat an appeal as a request for reconsideration; and (3) the Standard of Review on appeal.

INDICATE APPROPRIATE BODY

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| <input type="checkbox"/> City Council | <input type="checkbox"/> Redevelopment Agency | <input type="checkbox"/> Housing Authority | <input type="checkbox"/> Surplus Property Authority | <input type="checkbox"/> Joint Powers Financing Authority |
| <input type="checkbox"/> Finance Standing Committee | <input type="checkbox"/> Public Safety Public Services Standing Committee | <input type="checkbox"/> Local Reuse Authority | <input checked="" type="checkbox"/> Other: <u>Rent Board</u> | |

ITEM

- Presentation/Proclamation/Commendation (3-Minute Time Limit)
- Public Hearing Regulation Other:
- 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: AMEND Chapter 8 of the Rent Board Regulations to: (1) amend Regulation 835 to create parameters guiding both how the Record is to remain open and when the Record must be closed; (2) add Regulation 841.5 to articulate the Standard of Review on appeal; and (3) amend Regulation 842 to allow the Executive Director or assigned designee to treat appeals as requests for reconsideration where there is a clear misapplication of the law, the law has changed, there is a problem with the Record, or any other matter where reconsideration would be appropriate considering administrative efficacy. This amendment would also clarify that the Executive Director or assigned designee is the individual who grants a request for reconsideration and not the Hearing Examiner– Rent Program (Nicolas Traylor/Charles Oshinuga 620-6564).

AGENDA ITEM NO:
G-1.



AGENDA REPORT

DATE: June 19, 2019

TO: Chair Gray and Members of the Rent Board

FROM: Nicolas Traylor, Executive Director
Charles Oshinuga, Staff Attorney

SUBJECT: PROPOSED AMENDMENTS TO CHAPTER 8 OF THE RICHMOND RENT BOARD REGULATIONS CONCERNING THE RECORD ON HEARING AND THE APPEALS PROCESS

STATEMENT OF THE ISSUE:

In August 2018, the Rent Program's Hearings Unit began processing and hearing petitions in accordance with Chapter 8 of the Rent Board Regulations. To date, the Hearings Unit has processed and heard a total of sixty-three (63) Landlord/Tenant petitions. While administering the provisions of Rent Board Regulation Chapter 8, staff members have ascertained particular nuances in the process that would benefit from clarification. Specifically, staff members have identified three areas where clarity is necessary: (1) length of time the Record can remain open after a hearing, and when it must be closed; (2) when the Executive Director or assigned designee may treat an appeal as a request for reconsideration; and (3) the Standard of Review on appeal.

RECOMMENDED ACTION:

AMEND Chapter 8 of the Rent Board Regulations to: (1) amend Regulation 835 to create parameters guiding both how the Record is to remain open and when the Record must be closed; (2) add Regulation 841.5 to articulate the Standard of Review on appeal; and (3) amend Regulation 842 to allow the Executive Director or assigned designee to treat appeals as requests for reconsideration where there is a clear misapplication of the law, the law has changed, there is a problem with the Record, or any other matter where reconsideration would be appropriate considering administrative efficacy. This amendment would also clarify that the Executive Director or assigned designee is the individual who grants a request for reconsideration and not the Hearing Examiner– Rent Program (Nicolas Traylor/Charles Oshinuga 620-6564).

FISCAL IMPACT:

There is no fiscal impact related to this item.

DISCUSSION:

Background

On January 24, 2018, the Rent Board adopted Chapter 8 of the Regulations, titled “Petition Process and Hearing Procedures.” This Chapter establishes substantive and procedural rules whereby a Landlord/Tenant may file a petition on various claims. After passing these series of Regulations in January 2018, staff members worked vigorously to acquire adequate staffing and institutional knowledge to properly implement the provisions of Chapter 8 of the Regulations. In August 2018, the Rent Program officially began processing petitions for hearings. To date, the Rent Program has processed and heard 63 Landlord/Tenant petitions and seven appeals. In the course of their work, staff members have identified three areas in Chapter 8 that would benefit from additional clarification: Record of Hearing, Standard of Review on Appeal, and appeals that may be treated as request for reconsideration.

Proposed Amendments to Clarify When the Record Must be Closed and if Necessary, How to Keep the Record Open

Prior to a hearing, parties must submit documentary evidence that they intend to introduce during the hearing. Often times, parties bring additional evidence into the hearing and assuming procedural protections are satisfied, the evidence is admitted. As is often the case with lay-persons, unrepresented parties forget to bring necessary evidence to establish their case or the hearing itself reveals a factual dispute integral to the case, which can only be resolved by additional evidence that is unavailable at the hearing. In those instances, the Hearing Examiner may exercise their discretion to allow for additional evidence to be submitted post-hearing into the Record. Although this may be a proper exercise of power, there are currently no regulations setting the parameters of the exercise of said power. To ensure that this exercise of discretion is not arbitrary, but rather, consistent and fair, staff members are proposing an amendment to Regulation 835 that would explain the Record must be closed after the end of the hearing, but may remain open in certain circumstances. When the Hearing Examiner chooses to keep the Record open, the Hearing Examiner must explain in writing to the parties the basis for keeping the Record open, the length of time it will remain open, and the date on which it will be closed. To ensure administrative efficiency and the timely disposition of pending petitions, the Record cannot remain open longer than a total of sixty days.

Proposed Addition of Regulation 841.5 to Articulate a Standard of Review on Appeal.

After the Hearing Examiner closes the Record and issues a Decision, the parties have thirty-five days to appeal an adverse decision. On appeal, the parties may challenge any aspect of the Decision, including any procedural defects that may have existed during the hearing. Additionally, an appellant may request that the Rent Board conduct an appeal De Novo. Having observed several appeals, staff members have identified a commonly contemplated question regarding the Standard of Review on Appeal. Staff

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members recognize that both the parties and future Rent Boardmembers will benefit from having an articulated Standard of Review in the Regulations. As such, Regulation 841.5 articulates the Standard of Review on Appeal where an appeal is conducted De Novo and when it is conducted as a challenge to the evidence and findings. The Regulation also defines the meaning of Substantial Evidence, Preponderance of the Evidence, and De Novo.

During the appeals process, staff members have also identified areas where matters can be more readily resolved administratively.

Proposed Amendments to Regulation 842 to Permit the Executive Director or Assigned Designee to Treat an Appeal as a Request for Reconsideration

Currently, when a party appeals a matter, it may take as much as several months before the matter is brought before the Rent Board. Where staff members have identified a problem with the Record in a matter on appeal, staff members cannot remedy the error, but rather must send the matter to the Rent Board for an Order of Remand to address the issue of the Record. The result is that the parties may end up waiting several months before the issue can be resolved by the Rent Board, whereas staff members could have administratively remedied the issue within thirty days. To address this issue and related issues, staff members are recommending amending Regulation 842 to allow the Executive Director or assigned Designee to send a matter back to the Hearing Examiner without the requirement of a Rent Board Order, where the issue involves a clear misapplication of the law, a problem with the Record, or a change in the law or any other matter appropriate for reconsideration. In such an event, the Executive Director or assigned Designee must submit a written Order of Reconsideration with specific instructions identifying the good cause underlying the granting of reconsideration and the parameters of the hearing on reconsideration.

Conclusion

Staff members recommend the Rent Board adopt the aforementioned amendments and add a new regulation to Chapter 8 of the Rent Board Regulations to ensure administrative efficiency and enhance fairness within both the hearing and appeals processes.

DOCUMENTS ATTACHED:

Attachment 1 – Regulation 835 of the Rent Board Regulations (Redline Version)

Attachment 2 – Regulation 835 of the Rent Board Regulations (Clean Version)

Attachment 3 – Regulation 841.5 of the Rent Board Regulations (Clean Version)

Attachment 4 – Regulation 842 of the Rent Board Regulations (Redline Version)

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Attachment 5 – Regulation 842 of the Rent Board Regulations (Clean Version)

ITEM G-1 ATTACHMENT 1

835. Hearing Record

- A. The official record of the hearing shall include the following: an audio recording of the hearing; all exhibits, papers, and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted; a statement of all material officially noticed; all recommended and final decisions, orders, and/or rulings; and the reasons for each final decision, order and/or ruling. This official record shall constitute the exclusive record for the decision on the issues raised at the hearing.
- B. Upon the end of a hearing, the Record shall be closed. Once closed, the Record shall not be reopened, and no further evidence shall be accepted from the parties. No statement is needed to close the Record; rather the closure of the Record is a natural consequence of the end of a hearing.
- C. Notwithstanding Regulation 835(B), at the conclusion of the hearing, the Hearing Examiner may keep the Record open for a period not to exceed thirty (30) calendar days to accept additional evidence. Where good cause exists, the Record may be kept open longer than thirty (30) calendar days, but must not remain open longer than sixty (60) calendar days, measured from the date of the conclusion of the hearing.
- D. In all matters where the Record is kept open, the Hearing Examiner shall issue to the parties in writing the basis for keeping the Record open, including a statement of good cause where applicable, the length of the time the Record shall remain open, and the date on which the Record will be closed.

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[Adopted January 24, 2018]

ITEM G-1
ATTACHMENT 2

835. Hearing Record

- A. The official record of the hearing shall include the following: an audio recording of the hearing; all exhibits, papers, and documents required to be filed or accepted into evidence during the proceedings; a list of participants present; a summary of all testimony accepted; a statement of all material officially noticed; all recommended and final decisions, orders, and/or rulings; and the reasons for each final decision, order and/or ruling. This official record shall constitute the exclusive record for the decision on the issues raised at the hearing.

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- D. In all matters where the Record is kept open, the Hearing Examiner shall issue to the parties in writing the basis for keeping the Record open, including a statement of good cause where applicable, the length of the time the Record shall remain open, and the date on which the Record will be closed.

[Adopted January 24, 2018]

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ATTACHMENT 3

841.5 Standard of Review on Appeal

- A. The Standard of Review on Appeal shall be Substantial Evidence. Under the Substantial Evidence standard, the Board shall not reweigh the evidence nor second guess the factual findings of the Hearing Examiner, even if there was contrary evidence in the Record. Instead, the Board shall look only to the evidence contained in the Record which supports the prevailing party, and determine whether there existed Substantial Evidence in the Record to support the Hearing Examiner's findings.

- B. Notwithstanding Regulation 841.5(A), where the Rent Board elects to hear an appeal De Novo, the Standard of Review shall be Preponderance of the Evidence. A De Novo hearing means a new hearing that contemplates an entire, new proceeding of the matter in question, in the same manner in which the matter was originally heard, as if the previous hearing had never occurred. Preponderance of the Evidence means that the party who has the burden of proof must provide evidence that is more likely to be true than not true and, when compared to the other side, outweighs, preponderates over, or is more than the evidence on the other side.

ITEM G-1 ATTACHMENT 4

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. The hearing examiner's decision shall be stayed pending appeal. In its decision, the Board shall order the appropriate party to make retroactive payments over a reasonably appropriate period to restore the parties to the positions they would have occupied had the hearing examiner's decision been the same as that of the Board or had not been stayed.
- C. 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.
- D. 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.
- E. 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.

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- F. 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.
- G. 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.
- H. 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.

I. 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 ~~H~~hearing ~~E~~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.
 - e)d) The decision resulted from a clearly inaccurate application of the law; hearing 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.
- 2) 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 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

ITEM G-1 ATTACHMENT 4

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 ~~reconsideration under subsection (K) (l) is ordered, the all~~ parties will be so notified within 15 days of the filing of the appeal and, ~~within a reasonable time period., schedule a hearing on the reconsidered issues.~~ thereafter, all correspondence shall be directed to the hearing examiner. The threshold issue on reconsideration shall be whether a preponderance of the evidence supports the assertion that good cause existed for the failure to respond to a petition or to appear at a hearing or that the newly offered evidence could not, with reasonable diligence, have been discovered and produced at the hearing. Only if good cause for the failure is found may the hearing examiner reconsider the merits of the petition.

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- B. The hearing examiner's decision shall be stayed pending appeal. In its decision, the Board shall order the appropriate party to make retroactive payments over a reasonably appropriate period to restore the parties to the positions they would have occupied had the hearing examiner's decision been the same as that of the Board or had not been stayed.
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- G. 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.
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- I. 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.
 - 2) 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 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,

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ATTACHMENT 5**

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, within a reasonable time period.