



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

REVIEW CONSIDERATION DECISION

Dispute Codes Rev, OP

Basis for Review Consideration

On June 4, 2020 the Tenant applied for a review consideration of a decision issued on June 2, 2020. Section 79 of the *Residential Tenancy Act* provides only 3 grounds on which a party may request that a decision or order be reviewed:

79 (1) *A party to a dispute resolution proceeding may apply to the director for a review of the director's decision or order.*

(2) *A decision or an order of the director may be reviewed only on one or more of the following grounds:*

(a) a party was unable to attend the original hearing because of circumstances that could not be anticipated and were beyond the party's control;

(b) a party has new and relevant evidence that was not available at the time of the original hearing;

(c) a party has evidence that the director's decision or order was obtained by fraud...

The Tenant requests that the decision be reviewed on the ground(s) of all three of the grounds outlined above.

Facts and Analysis- Unable to Attend the Original Hearing

Residential Tenancy Policy Guideline 24 outlines the test to be met for demonstrating that the applicant was unable to attend the original hearing:

In order to meet this test, the application must establish that the circumstances which led to the inability to attend the hearing were both:

- *beyond the control of the applicant, and*
- *could not be anticipated.*

A dispute resolution hearing is a formal, legal process and parties should take reasonable steps to ensure that they will be in attendance at the hearing. This ground is not intended to permit a matter to be reopened if a party, through the exercise of reasonable planning, could have attended.

In the application for review, the applicant was asked to explain what happened that was beyond their control or that could not have been anticipated that prevented them from attending the original teleconference hearing. The applicant responded as follows:

“ I was unable to attend the hearing by phone as I was in critical pain and had been hospital prior to the hearing. I had authorized an agent on my behalf and was unable to attend to her phone call. She had text me and my wife rejected the call and advised her I am unable to attend her call via text – I was unable to attend.

[Reproduced as Written.]

In this case, I am not satisfied that the tenant was unable to attend. The doctor letters provided by the tenant which is dated June 1, 2020, is related to a back issue which simply indicates the tenant requires rest from work and other activities. It does not say that the tenant is in capable of speaking on the telephone, which the hearing was held by telephone conference and that could have been done comfortably from their home.

The tenant refers to a documented date June 2, 2020, which is alleged from the hospital; however, that was not provided with their review application. Further, the tenant's submission support that they had been released from the hospital earlier and were at home at the time of the hearing.

While I accept the tenant may have back issues; however, the reason the tenant's agent provided at the hearing is contrary to the tenant's submissions.

JD testified at the hearing the following testimony,

Preliminary Issue 2: Agent attending for tenant

JD attended the first 14 minutes of the hearing. JD explained that she was representing the tenant. JD testified as follows:

1. JD met the tenant the day before the hearing who acknowledged service of the Notice of Hearing and Application for Dispute Resolution; the tenant provided JD with copies of all documentary materials filed by the landlord;
2. the tenant informed JD he was unable to attend the hearing because of his work schedule;
3. the tenant requested JD to attend the hearing on his behalf;
4. the tenant did not provide JD with written authorization to attend as his agent;
5. the tenant did not submit any written authorization for JD to appear as his agent.

[Reproduced as Written.]

In this case the tenant further submits in their submissions that they contacted their agent at 5:30am on June 2, 2020 and informed them that they could not attend due to critical pain. I find if that was truth, it would be unreasonable for JD to provide false testimony at the hearing, which states they had a conversation with the tenant the day prior and that the tenant was unable to attend because of his work scheduled.. I find it more likely than not that the tenant is using their medical issues as an excuse not to attend the telephone hearing.

Base on the above, I am not satisfied that the tenant was unable to attend through no fault of their own. Therefore, I find the tenant has failed to establish ground 1 for review.

Facts and Analysis - New and Relevant Evidence

Residential Tenancy Policy Guideline 24 outlines the test to be met for demonstrating that the applicant has new and relevant evidence that was not available at the time of the original hearing.

A review may be granted on this basis if the applicant can prove that:

- they have evidence that was not available at the time of the original arbitration hearing;
- the evidence is new;
- the evidence is relevant to the matter described in the initial application;
- the evidence is credible; and
- the evidence would have had a material effect on the decision of the Arbitrator.

Only when the applicant has evidence which meets **all five** criteria will a review be granted on this ground.

It is up to a party to prepare for a dispute resolution hearing as fully as possible. Parties should collect and supply all relevant evidence at the dispute resolution hearing. "Evidence" refers to any oral statement, document or thing that is introduced to prove or disprove a fact in a hearing. Letters, affidavits, receipts, records, videotapes, and photographs are examples of documents or things that can be entered into evidence. Evidence which was in existence at the time of the original hearing, and which was not presented by the party, will not be accepted on this ground unless the applicant can show that they were not aware of the existence of the evidence and could not, through taking reasonable steps, have become aware of the evidence.

"New" evidence includes evidence that has come into existence since the dispute resolution hearing. It also includes evidence which the applicant could not have discovered with due diligence before the hearing. New evidence does not include evidence that could have been obtained before the hearing took place. Evidence that "would have had a material effect upon the decision of the Arbitrator" is such that if believed it could reasonably, when taken with the other evidence introduced at the hearing, be expected to have affected the result.

In response to the instruction "List each item of new and relevant evidence and state why it was not available at the time of the hearing and how it is relevant", the applicant for review responded as follows:

"Doctors note from June 1, 2020 ..."

[Reproduced as Written.]

In this case, I find the tenant has failed to prove new or relevant evidence that is

relevant to the issues that were at the hearing. These are documents in support of their review application, not the issues at the hearing. Therefore, I find the tenant has not established ground 2.

Facts and Analysis- Fraud

This ground applies where a party has evidence that the Arbitrator's decision was obtained by fraud.

Residential Tenancy Policy Guideline 24 outlines the test to be met for demonstrating that the decision or order was obtained by fraud.

Fraud must be intended. A negligent act or omission is not fraudulent.

Intentionally providing false testimony would constitute fraud, as would making changes to a document either to add false information, or to remove information rendering the document false. Fraud may arise where a witness has deliberately misled the proceeding by the concealment of a material matter that is not known by the other party beforehand and is only discovered afterwards.

A review may be granted if the person applying for the review provides evidence meeting all three of the following tests:

1. information presented at the original hearing was false;
2. the person submitting the information knew that it was false; and,
3. the false information was used to get the outcome desired by the person who submitted it.

In the review consideration application, the applicant claimed that:

"The picture of the glass was false – This was glass that was broken before and had not been broken in any way to hurt or scare anyone. ..."

[Reproduced as Written.]

In this case, the tenant argues that the decision was obtained based on fraud; however, the Arbitrator heard the evidence at the hearing which was supported by

documentary evidence and made a decision at the hearing. The tenant is attempting to argue that decision. The tenant presented no documentary evidence to support fraud. Therefore, I find the tenant has not established ground 3.

Based on the above, the tenant's application for review is dismissed.

Conclusion

The tenant's application for review is dismissed. The original Decision and Orders issued on June 2, 2020, are confirmed.

This review consideration decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: June 9, 2020

Residential Tenancy Branch