ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE DECISION

DAVID MESSINGER, *Appellant,* v. ALLEGHENY COUNTY HEALTH DEPARTMENT, *Appellee.*	: : : : : : : : : : : : : :	In Re: 702 Franklin Street McKeesport, PA 15132 Docket no. ACHD-21-031 <u>Copies Sent To:</u> *Counsel for Appellant:* Jason R. Johns, Esq. ANDERSON & LABOVITZ, LLC 429 Fourth Ave., Suite 602 Pittsburgh, PA 15219 *Counsel for Appellee:* Elizabeth Rubenstein, Esq. 301 39th Street, Building 7 Pittsburgh, PA 15201

DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH <u>DEPARTMENT HEARING OFFICER</u>

I. INTRODUCTION

This case concerns whether the Allegheny County Health Department ("ACHD" or the "Department") acted properly in fining a landlord $13,000 for shutting off a tenant's water and gas service. Appellant David Messinger ("Mr. Messinger" or "Appellant") owns a duplex at 700-702 Franklin Street in McKeesport (the "Property"). Tenant Patricia LaChoppa ("Ms. LaChoppa") resides at 702 Franklin, but eats, cooks, and bathes at 700 Franklin, the other unit in the duplex, because 700 Franklin has heat and running water, but 702 Franklin does not.

Mr. Messinger contends that the $13,000 civil penalty is unwarranted for two reasons. First, he argues that Ms. LaChoppa is not legally an occupant of 702 Franklin because she cooks, bathes, and does most of her household chores and

activities at 700 Franklin. Second, Mr. Messinger asserts that the civil penalty was improper because the Department did not sufficiently demonstrate that Messinger willingly and knowingly terminated the gas and water services to 702 Franklin.

The Department makes a three-fold counterargument. First, that Ms. LaChoppa was legally an occupant of 702 Franklin, per ACHD Rules and Regulations. Second, that there is no legal "willingly or knowingly" requirement for terminating gas and water services. Third, that the gas and water violations continued to exist long after the Notice of Violation was issued to Mr. Messinger.

After reviewing the briefs submitted by the parties, the evidence presented at the hearing, and the applicable law, this tribunal finds that the Department proved by a preponderance of the evidence that Ms. LaChoppa was an occupant of the Property, and that the emergency violations continued to exist at the Property after the Notice of Violation was issued. The $13,000 civil penalty assessed by the Department is affirmed, and Mr. Messinger's appeal is hereby dismissed.

II. EVIDENCE

The following exhibits were offered by Appellant, and admitted into evidence:

A1: Receipts
A2: Docket for Case Number LT-19-000574
A3: Notice of Judgment, Dated August 3, 2021

The following exhibits were offered by the ACHD, and admitted into evidence:

D1: Inspection Report, Dated February 8, 2021
D2: Penalty Assessment, Dated June 21, 2021
D3: Inspection Report, Dated April 20, 2021
D4: Memorandum, Dated October 6, 2020
D5: Memorandum, Dated October 6, 2020
D6: Memorandum, Dated October 7, 2020

D7: Letter, Dated December 10, 2021
D8: Inspection Report, Dated October 23, 2021

III. FINDINGS OF FACT

1. Appellant David Messinger ("Mr. Messinger" or "Appellant") owns a duplex containing both 700 Franklin Street ("700 Franklin") and 702 Franklin Street ("702 Franklin"). (Hearing Transcript ("H.T.") at 6-7).

2. Patricia LaChoppa ("Ms. LaChoppa") resides at 702 Franklin with her husband, James Johnson ("Mr. Johnson"). (H.T. at 13).

3. Ernest LaChoppa ("Mr. LaChoppa") resides at 700 Franklin. (H.T. at 17). He is the ex-husband of Ms. LaChoppa. (*Id.*).

4. Mr. LaChoppa allows Ms. LaChoppa and Mr. Johnson to frequently go to 700 Franklin to do household chores and activities, such as laundry, cooking, and bathing, because the utilities are shut off at 702 Franklin. (H.T. at 21).

5. On or around October 6, 2020, Ms. LaChoppa lodged a housing complaint with the Department alleging that 702 Franklin lacked water and heat, had a leaking ceiling, and that the front porch was falling down. (H.T. at 62).

6. Also on October 6, 2020, after receiving Ms. LaChoppa's complaint, Jeff O'Brien, ("Mr. O'Brien"), an Environmental Health Supervisor for the Department, spoke with Mr. Messinger. Mr. Messinger "explained he was trying to get rid of the tenants at 702 but had not been successful" and that "[Mr. Messinger] thought he was going through eviction" of LaChoppa and Johnson. (H.T. at 65). Mr. O'Brien informed Mr. Messinger that water and heat must be turned back on within 24 hours. (H.T. at 65; Ex. D5).

7. On October 23, 2020, ACHD Inspector Issa Tijani ("Mr. Tijani"), inspected 702 Franklin. (H.T. at 73. During this inspection, Mr. Tijani found emergency violations, including lack of heat and water, as well as several other violations of ACHD Rules and Regulations, Article VI (Housing and Community Environment) ("Article VI"). (H.T. at 47, 62).

8. On December 8, 2020, Mr. Tijani conducted a follow-up inspection. (H.T. at 75-76; Ex. D7). At this inspection, Mr. Tijani noted that no repairs had been made. (H.T. at 76).

9. On December 10, 2020, the Department mailed a Penalty Assessment Warning letter to Mr. Messinger, informing him that if the violations were not repaired, a civil penalty of $2,500 may be assessed.[1] (Ex. D7).

10. On February 8, 2021, Mr. Tijani conducted a third inspection of 702 Franklin, and once again found that no repairs had been made. (H.T. at 76).

11. On February 12, 2021, the ACHD assessed a $2,500 civil penalty against Appellant, and sent an accompanying letter notifying him that additional penalties of $250 per day may be assessed if violations were not corrected by February 27, 2021. (H.T. at 52; Ex. D1).

12. On April 20, 2021, Mr. Tijani inspected 702 Franklin again, and observed that Mr. Messinger had not made the necessary repairs. (H.T. at 78-79).

13. On June 21, 2021, the Department issued a civil penalty of $13,000 against Mr. Messinger for housing violations relating to gas and water at the Property. (Ex. D2).

14. Mr. Messinger timely filed an appeal of the civil penalty, on July 15, 2021. (Notice of Appeal, Filed July 15, 2021).

15. On September 1, 2021, an administrative hearing was held in this matter.

IV. DISCUSSION

A. Burden of Proof and Standard of Review

Pursuant to the Department's Rules and Regulations Article XI, ("Hearings and Appeals"), § 1105(C)(7), the Department bears the burden of proof in an administrative appeal when it assesses a civil penalty. To prevail in this appeal, the Department must prove by a preponderance of the evidence that (1) Ms. LaChoppa was an occupant at 702 Franklin; and (2) that there is no willfulness standard required under Article VI. The preponderance of evidence standard "is tantamount to a 'more likely than not' standard." *Agostino v. Twp. of Collier*, 968 A.2d 258, 269

[1] Mr. Messinger had two compliance dates for repairs; December 17, 2020 for the heat and water, and January 14, 2020 for the remaining violations.

(Pa. Cmwlth. Ct. 2009) (citing *Commonwealth v. McJett*, 811 A.2d 104, 110 (Pa. Cmwlth. Ct. 2002)).

B. Calculation of the $13,000 Civil Penalty

The Department relied on the following information to calculate the $13,000 civil penalty it assessed against Mr. Messinger:

On December 10, 2020, the Department mailed a Penalty Assessment Warning ("PAW") letter to Appellant, warning him that if the violations were not repaired, a civil penalty of $2,500 may be assessed. (Ex. D7). On February 8, 2021, Mr. Tijani conducted his third inspection of the Property, in which he once again observed that no repairs had been made. (H.T. at 76).

On February 12, 2021, the Department assessed a penalty for $2,500 against Appellant. (Ex. D1). This penalty assessment. notified Appellant that additional penalties may be assessed in the amount of $250.00 per day if violations were not corrected by February 27, 2021. (H.T. at 52; Ex. D1). Appellant did not file an appeal of the February 12th Penalty Letter.

Therefore, the Department filed a Praecipe for Judgment on March 17, 2021. At the hearing, Jamie Sokol ("Ms. Sokol"), the Department's Housing Operations Manager, testified that the Department will continue inspecting properties if emergency violations are not corrected. (H.T. at 53). Mr. Tijani returned to the Property on April 20, 2021 and observed Appellant failed to make the necessary repairs. (H.T. at 78-79). On June 21, 2021, the Department assessed its second penalty to Appellant for continuing violations, this time for $13,000. (Ex. D2). The

June 21st Penalty was issued for Appellant's "failure to take action" as specified in the February 12th Penalty Letter. (Ex. D2).

C. Whether Ms. LaChoppa was an "Occupant" of the Property

Article VI of the ACHD's Rules and Regulations defines an "occupant" as "[a]ny person who lives, sleeps, cooks in a dwelling unit or who lives or sleeps in a rooming unit." (Art. VI § 604). Appellant argues that Ms. LaChoppa was not an occupant of 702 Franklin because she and Mr. Johnson did many of their daily activities and chores at 700 Franklin. Mr. Messinger points to Ms. LaChoppa's testimony at the hearing that she and Mr. Johnson use 700 Franklin "to do everything, like,--you know, to cook, take showers, to do laundry, to—to do everything" and that she and Mr. Johnson purchased a new hot water tank and delivered it to 700 Franklin Street. (*Appellant's Brief* at 8). Appellant contends that Ms. LaChoppa was therefore an occupant of 700 Franklin, not 702 Franklin. (*Id.*).

The Department retorts that Ms. LaChoppa qualified as an occupant of 702 Franklin under Article VI. In support of its position, the Department cites Article VI's definition of a "dwelling," as:

> "Any building or structure, or part thereof, which is occupied, intended or designed to be occupied as the residence or sleeping place of one (1) or more persons, including a mobile home as defined below but excluding a trailer. A dwelling may include one (1) or more dwelling units or rooming units or a combination of both." (Art. VI, § 604).

The Department reasons that because Mr. Messinger owns the duplex that contains both 700 Franklin and 702 Franklin, Ms. LaChoppa was unequivocally an occupant of the "building or structure" owned by Mr. Messinger. (*ACHD Brief* at 5).

This tribunal finds that the Department has the better argument here. Ms. LaChoppa provided uncontested testimony at the hearing that although she cannot shower or do laundry at 702 Franklin due to the lack of water and gas, she does sleep at 702 Franklin. (H.T. at 17, 21). Thus, 702 Franklin clearly qualifies as a "sleeping place" under Article VI for determining whether Ms. LaChoppa is an occupant. Further, because Mr. Messinger owns the building containing both 700 and 702 Franklin, Ms. LaChoppa is an occupant of that building, which includes 702 Franklin.

D. Mr. Messinger's Termination of the Water and Gas at the Property

Appellant's next argument is that the $13,000 civil penalty is unwarranted because Mr. Messinger did not willingly or knowingly turn the heat off in order to evict Ms. LaChoppa. (*Appellant's Brief* at 9). In support of his argument, Appellant points to testimony from Ms. LaChoppa and Mr. Johnson that the water was turned off before they moved in to 702 Franklin. (*Appellant's Brief* at 9; H.T. at 71). Appellant concludes from this testimony that "any allegation that Messinger willingly and knowingly terminated the water service in an attempt to evict [Ms. LaChoppa and Mr. Johnson] was patently false." (*Appellant's Brief* at 9).

The Department responds that there is no legal basis for Appellant's claim. The Department cites Article VI § 662, which states, "No owner, operator, tenant or

occupant shall cause any service which is required under this Article to be removed, shut off, or discontinued in any occupied dwelling." The Department also cites to Article VI §§ 625-635, which specifies that landlords are responsible for "Utilities and Fixtures," including gas and water services. (*ACHD Brief* at 5-6). The Department asserts that these Article VI provisions render a landlord "strictly liable regardless of their intent." (*ACHD Brief* at 6).

This tribunal concurs with the Department. There is no requirement in the ACHD's Rules and Regulations that a landlord needs to "willingly" or "knowingly" turn off water or gas service in order to be held liable for creating or prolonging an emergency situation at a property. Appellant points to no statute, case, or regulation that creates a "willingly" or "knowingly" standard for shutting off utilities. Article VI § 662 clearly requires landlords to not shut off any utility, including water, electricity, and gas, unless "actual repairs are in process or during temporary emergencies." (Art. VI § 662). Furthermore, Mr. Messinger admitted in his appeal that the water and gas are currently shut off at 702 Franklin. *See* Notice of Appeal Filed July 15, 2021. Appellant's argument is therefore unconvincing, and the $13,000 civil penalty is affirmed.

V. CONCLUSION

Based on the evidence and testimony presented at the hearing, as well as the relevant Rules and Regulations, this tribunal finds that that the Department proved by a preponderance of the evidence that Ms. LaChoppa was an occupant of the Property, and that the emergency violations continued to exist at 702 Franklin

long after the Notice of Violation was issued. The $13,000 civil penalty assessed by the Department is affirmed. Mr. Messinger's appeal is therefore dismissed. This administrative decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.

__/s/_____
Max Slater
Administrative Hearing Officer
Allegheny County Health Department

November 9, 2021
Dated: