

George E. Pataki
Governor



Judith A. Calogero
Commissioner

New York State Division of Housing and Community Renewal
Office of Rent Administration
Gertz Plaza
92-31 Union Hall Street
Jamaica, NY 11433

December 1, 2006

This is in response to your September 5, 2006 letter and follow-up letter of November 20, 2006, which have been forwarded to me for a reply. We apologize for the delay in responding. Please note that any future requests for opinion letters should be addressed to Gregory C. Fewer, Esq., Director, Policy and Legislative Liaison Unit.

You request an opinion letter based upon the following:

I am the Managing Agent of the above-referenced building. I am writing to you about a particular rent stabilized apartment in which the tenant pays for her own electricity. I am fully aware of DHCR Bulletin 84-4 (updated annually) which provides that when such a tenant installs an air conditioner which protrudes past the building line, the landlord is entitled to charge the tenant five dollars per month.

The facts concerning the tenant in question are as follows. On August 3, 2006 the tenant had delivered, and shortly thereafter privately installed, a brand new air conditioner which protrudes past the building line. On August 23, 2006, the tenant declined to include the five dollar a month surcharge in her rent check, which was submitted on that day, on the ground that the new air conditioner replaced one for which no fee was paid. It is accurate to say that no fee was paid on the old one because, when I first began to work here, in 1985, I did not know the interiors of apartments and only charged the monthly fees for new air conditioners that followed the start of my tenure. My position, of course, is that this new air conditioner falls under the Bulletin and my twenty year old custom did not provide tenants of long tenure with perpetual immunity from permitted surcharges.

The tenant claims to have spoken to DHCR personnel, and even a supervisor, who advised her that she did not have to pay. The tenant cannot provide the names of her DHCR sources of information

Later on the same day, I called DHCR at 866/275-3427 and spoke with a representative, [redacted] who said I was right. Indeed, he asked me to hold, while he checked with a supervisor, after I asked for "[redacted] name. He came back on the line and told me his supervisor confirmed our position.

Thereafter I called another representative of DHCR, [redacted] in Queens. She confirmed my position's correctness once again. I know that [redacted] is a DHCR representative of long standing, well versed in the technicalities of your statutes and regulations.

I respectfully request that you provide an opinion letter to me at your earliest convenience, based on the facts presented, so that I may show it to the tenant and resolve this matter quickly.

Please be advised that opinion letters are designed to provide guidance regarding issues or regarding categories of situations. Intensively fact specific contexts are better resolvable through adjudicatory proceedings, whether in the courts or before this agency. However, we can provide the following general information.

As indicated in the *Twenty First (21st) Annual Update of Section B of Supplement No. 1 to Operational Bulletin 84-4*, within the *Electrical Exclusion Buildings* section, "Owners can collect the charges from rent stabilized tenants without an order from DHCR. *However, an owner cannot collect the charges now for an air conditioner if the owner did not begin charging for the air conditioner at the time it was installed or within a reasonable period of time thereafter.*" The Update continues: "A reasonable period is generally considered to be that amount of time in which an owner would be expected to learn that the air conditioner was installed." Furthermore, *Fact Sheet #27 – Air Conditioners* provides that "*If the owner fails to charge the tenant within a reasonable period of time after the installation, the owner waives the right to collect the charge.*" (italics supplied)

Accordingly, if the initial air conditioner installation was made during a prior ownership, and that owner did not collect an air conditioner surcharge after the air conditioner was installed, such owner effectively waived his or her entitlement to collect the surcharge. Once an owner waives the right to collect an air conditioner surcharge, the surcharge becomes permanently non-collectible so that any subsequent owner would also be precluded from collecting the surcharge. The fact that a tenant replaced a window air conditioner with a new one in the exact same location does not permit the owner to now collect a previously waived surcharge. Again, please also note that what constitutes "waiver" would require fact-finding, which might be conducted in an overcharge or other relevant proceeding.

For your convenience, we attach *Fact Sheet #27 – Air Conditioners* and the *Twenty First (21st) Annual Update of Section B of Supplement No. 1 to Operational Bulletin 84-4*.

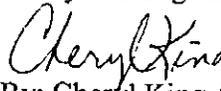
Finally, please accept our sincere apologies for the conflicting information that you received from DHCR staff.

We trust that we have responded as fully as possible to your inquiry under the circumstances.

Please be advised that this opinion letter is not a substitute for a formal agency order issued upon prior notice to all parties and with all parties having been afforded an opportunity to be heard.

Very truly yours,

Gregory C. Fewer
Director
Policy and Legislative Liaison Unit


By: Cheryl King
Senior Attorney

GCF:CK

CC: Deputy Commissioner Roldan
(col-2097)