BEFORE THE

COMMISSION ON LANDLORD-TENANT AFFAIRS

FOR MONTGOMERY COUNTY, MARYLAND

In the Matter of Xavier Garcia and Jennifer Barreto **Complainants**	
v.	**Case No. 13290**
Vikram Kushawaha and Vijay Bala Kushawaha Rental Facility: 14123 Armilla Court, Burtonsville, MD 20866 (Rental License No. 10909) **Respondents**	

Order

DECISION AND ORDER

The above-captioned case having come before the Commission on Landlord-Tenant Affairs for Montgomery County, Maryland (the "Commission"), pursuant to Sections 29-10, 29-14, 29-41, 29-44 and 29-47 of the Montgomery County Code, 2001, as amended ("County Code"), and the Commission having considered the testimony and evidence of record, it is therefore this 27th day of February, 2003, found, determined, and ordered, as follows:

BACKGROUND

On March 28, 2002, Xavier Garcia and Jennifer Barreto (the "Complainants"), former tenants at 14123 Armilla Court, Burtonsville, Maryland (the "Property"), a licensed single family rental facility in Montgomery County, Maryland, filed a formal complaint with the Office of Landlord-Tenant Affairs, within the Department of Housing and Community Affairs (the "Department"), in which they alleged that Vikram Kushawaha and Vijay Bala Kushawaha (the "Respondents"), owners of the Property, failed to refund any portion of their security deposit plus interest within 45 days after the termination of their tenancy, in violation of § 8-203(e)(1) of the Real Property Article, Annotated Code of Maryland, 1999, as amended ("State Code").

At the public hearing in this matter, the Complainants orally requested that the Commission award them, in addition to the full refund of their security deposit plus accrued interest, three times that amount as a penalty based on the Respondents' unreasonable withholding of their security deposit.

After determining that the complaint was not susceptible to conciliation, the Department duly referred this case to the Commission for its review, and on September 10, 2002, the Commission voted to hold a public hearing. The public hearing was initially set for November 12, 2002. Although both the Complainants and the Respondents were present on that date, one of the Commissioners had a last

minute emergency that prevented her from attending. Therefore, the public hearing was postponed and reset for December 12, 2002.

Subsequent to the Commission's assertion of jurisdiction on Case No. 13290, the Respondents on October 10, 2002 filed a separate complaint against Complainants with the Department (See page 110 of Commission's Exhibit No. 1), wherein they requested that the Commission award them $706.00 in damages, representing sums in excess of the Complainants' security deposit plus interest, to which the Respondents claimed they were entitled by virtue of lost rent for the period December 1 – 10, 2001, and physical damage to the Property they alleged was caused by the Complainants. Normally, the Department treats such a later-filed claim as an independent proceeding, assigns it a new case number, and sets the matter down for a conciliation conference. However, given the substantial delay that had ensued in setting this matter for hearing, the failure of conciliation of Complainants' complaint, and the fact that the Respondents' claim involved the identical set of facts and circumstances as are raised by the subject complaint, the Commission proceeded to consolidate the Respondents' claim with the Complainants' complaint, and set both matters down for hearing.

After receiving notice from the Department that the public hearing, originally scheduled for November 12, 2002, had been rescheduled for December 12, 2002, the Respondents filed a second complaint with the Department against the Complainants (See page 111 of Commission's Exhibit No. 1), in which they stated, "Attorney's fees has [sic] not been paid based on our lease agreement." They further asserted that to resolve their claim, the Complainants must "Mail me a check in the amount of $600.00 to pay for the attorney's fee needed for the hearing on 11-12-02," the original hearing date.

The public hearing in the matter of Xavier Garcia and Jennifer Barreto v. Vikram Kushawaha and Vijay Bala Kushawaha, relative to Case No. 13290, as well as the cross-complaints filed by the Respondents, commenced on December 12, 2002, and concluded on that date. The record reflects that the Complainants and the Respondents were given proper notice of the hearing date and time. Present at the hearing and presenting testimony and evidence were Complainant, Jennifer Barreto, on behalf of herself and Xavier Garcia, and the Respondents, Vikram Kushawaha and Vijay Bala Kushawaha. The Respondents were represented at the hearing by attorney Mark Hessel. The Commission also subpoenaed the Department's Inspector Ronald Feaster. Though he appeared, he was not called to testify.[1[1]]

Without objection from the Complainants or the Respondents, the Commission entered into the record of the hearing the case file compiled by the Department, identified as Commission's Exhibit No. 1.

Before proceeding with the December 12, 2002 hearing, the Panel Chair inquired of Complainant Jennifer Barreto whether she had seen all Respondents' complaints, including the request for attorney's fees against her and Mr. Garcia. She confirmed that she had seen both and was agreeable to hearing them along with Complainants' claims.

The Panel Chair also inquired of Respondents as to the basis of their claim for attorneys fees, in light of a provision of Montgomery County Code which prohibits lease provisions authorizing a landlord to collect attorneys fees from a tenant, except where the fees are reasonable and are awarded by a court. Upon inquiry regarding Respondents' knowledge of this statutory provision, the Respondents withdrew their claim for attorneys fees. Thereafter, the Commission proceeded to hearing in the matter.

FINDINGS OF FACT

Based on the testimony and evidence of record, the Commission makes the following findings of fact:

1. The Respondents are the owners of the Property, and based on the testimony of Respondent Vikram Kushawaha, he is the owner or co-owner of a total of 65 rental properties in Montgomery County, Maryland.

2. Respondent Vikram Kushawaha is fully conversant with the requirements of the State security deposit law "…regarding sending notices to tenants relating to their security deposits at the end of the lease." (See Transcript, page 131, lines 3-7).

3. On March 5, 2000, the Complainants and Respondents entered into a lease agreement for the rental of the Property (the "Lease"), for a term of one year and 24 days, commencing on March 7, 2000, and ending April 30, 2001. (See pages 2 – 5 of Commission's Exhibit No. 1).

4. At the commencement of the tenancy, the Complainants paid the Respondents a security deposit in the amount of $1,275.00**2[2]** which is receipted in the Lease.

5. On or about March 13, 2000, the Complainants created a walk-through inspection report (See pages 6 – 9 of Commission's Exhibit No. 1) in which they listed, in addition to other items, the following deficiencies in the Property: (A) stove – knobs rotted; (B) living room walls – dirty, chipped small areas; (C) bedroom 2 walls – holes poorly patched; (D) bedroom 3 walls – holes poorly patched; and (E) basement carpeting/floors – leaking basement leaving molded patches. Based on the credible testimony of Complainant Jennifer Barreto, the Commission finds that the list of deficiencies created by the Complainants on or about March 13, 2000, accurately reflects the physical condition of the Property on that date. Furthermore, the Commission credits the testimony of the Complainant, Jennifer Barreto, that although the inspection list was never given to the Respondents, she discussed all of the items listed in the inspection report with Respondent Vikram Kushawaha and requested that he repair them.

6. In response to the inspection report created by the Complainants, the Respondents installed new carpeting throughout the entire Property shortly after the commencement of the Complainants' tenancy.

7. The Respondents, however, did not freshly paint the interior surfaces of the Property prior to the Complainants' tenancy. This finding is supported by the Complainants' March 13, 2000, inspection report, and the credible testimony of Complainant Jennifer Barreto, that the Respondents provided three (3) cans of paint to the Complainants at the commencement of their tenancy advising them that if they wanted the Property painted, they had to do it themselves.

8. After the expiration of the initial Lease term, the Complainants remained as tenants in the Property on a month-to-month basis.

9. On August 1, 2001, the Respondents increased the Complainants' monthly rent from $1,275.00 to $1,375.00.

10. By a letter dated November 1, 2001, the Complainants' notified the Respondents that "Our approximate move-out date is December 1, 2001." The Complainants' notice to vacate also included their forwarding address of 14015 Castle Boulevard, #102, Silver Spring, Maryland 20904. The Commission finds, based on the testimony of the parties, that this letter was hand-delivered by the Complainants to the Respondents on November 6 or 7, 2001, together with the Complainants' November 2001 rental payment. The Commission finds that because the Complainants' notice to vacate was not delivered to the Respondents until November 6 or 7, 2001, which is after the "Rent Due Date," November 1, 2001, the notice did not expire until December 31, 2001.

11. The Commission credits the testimony of Complainant Jennifer Baretto that due to a leak in the water heater, the Complainants were without sufficient hot water for 7 to 10 days in the month of November 2001, and that they reported this condition to the Respondents on numerous occasions. In addition, by a letter dated November 26, 2001, the Complainants advised the Respondents of the following problems in the Property and requested that they be repaired:

a. Light switch plate in 3rd level hallway bathroom. (Original request made late October and November 8);

b. Slow leak in 3rd level hallway bathroom toilet. (Original request made November 8);

c. Slow leak from hot water heater. (Requests made November 18, 20, 21, 23 and 26).

12. On December 1, 2001, the Complainants and Respondent Vikram Kushawaha, conducted a final walk-through inspection of the Property at which time an inspection report was written up by the Respondent, and certain notations were made thereon by the Complainants indicating that certain damages alleged by the Respondents were disputed. (See page 14 of Commission's Exhibit No. 1). The final walk-through inspection report also included the Complainants' new mailing address in Silver Spring, noted above.

13. The Complainants vacated the Property and returned all Property keys to the Respondents late in the evening of December 1, 2001, having paid November 2001 rent in full to the Respondents.

14. The Respondents re-rented the Property to a new tenant effective December 11, 2001, for $1,625.00 a month rent (See pages 24 – 28 of Commission's Exhibit No. 1), and therefore, the Complainants' tenancy and obligation to pay rent to the Respondents ceased as of December 10, 2001.

15. The Respondents failed to send notice to the Complainants, directed to their last known address at 14015 Castle Boulevard, #102, Silver Spring, Maryland 20904, within 45 days after the termination of the Complainants' tenancy, by January 24, 2002, advising them of the disposition of their security deposit. As noted above, the Respondents had been notified on at least two occasions by the Complainants of their new mailing address, 14015 Castle Boulevard, #102, Silver Spring, Maryland 20904,

16. By a letter dated February 12, 2002, and mailed to the Complainants at their new mailing address on February 13, 2002, as evidenced by the envelope in which Complainants received

said notice (See page 105 of Commission's Exhibit No. 1), which is more than 45 days after the termination of the Complainants' tenancy, the Respondents sent the Complainants a notice bearing the date January 4, 2002, which set forth an itemized list of damages being claimed against their security deposit, itemized as follows:

Security Deposit:	$1,275.00
Interest:	76.50
Total	**$1,351.50** [3][3]

Charges:

(a)	Unpaid rent (December 1-5, 2001)	$ 229.00
(b)	Repair damaged carpet	275.00
(c)	Repair hole in living room wall and paint 3 walls	225.00
(d)	Repair damaged living room ceiling	250.00
(e)	Patch holes in small bedroom and paint walls/ceiling	215.00
(f)	5 gallons antique white paint	60.00
(g)	Replace damaged door jamb and paint	125.00
(h)	Replace damaged refrigerator crisper	140.00
(i)	replace 3 stove knobs	15.00
(j)	Return check fee	25.00

(k)	Unpaid water bill	269.00
	Total	$1,828.00

The Respondents' notification of the disposition of the Complainants' security deposit also contained a demand for payment of $477.00 by the Complainants within 30 days. The Commission credits the testimony of Complainant Barreto that the Complainants did not receive the notice of damages dated January 4, 2002, until on or about February 14, 2002.

17. The Commission does not find credible or believable the Respondents' testimony or evidence that a notice of damages was sent to the Complainants' old address or new address within 45 days after the termination of the Complainants' tenancy. On the contrary, the Commission finds that no such notice was sent before February 13, 2002. The Commission does not find credible Respondent Vikram Kushawaha's testimony that he routinely addresses such notices to tenants regarding disposition of security deposits to the address of the rental property rather than a new known address. He offered no documentary evidence to show that this is routine procedure on his part, and the Complainants denied receiving a copy of any such notice mailed to the subject Property. In this case, more importantly, the Respondent had the Complainants' new mailing address, and therefore, there would have been no need to send the notice to the Property address. Furthermore, based on Respondent Vikram Kushawaha's own statement that he is fully conversant with the requirements of the State security deposit law regarding sending notices to tenants relating to their security deposits at the end of the lease, it is not credible that he routinely sends notices to the rented property, or that he did not understand that the Complainants provided their new address so that the notice would be sent to them there.

18. Based on the Complainants' failure to issue proper notice to vacate to the Respondents, they are liable to the Respondents for December 2001 rent in the amount of $1,375.00. However, the Respondents received from the new tenant (Nelson) pro rata rent in the amount of $1,121.82 for the 21 day period of December 11 through December 31, 2001 ($1,625.00 new monthly rent x 12 months = $19,500.00 yearly rent ÷ 365 days = $53.42 daily rent x 21 days = $1,121.82), thus reducing the amount of rent owed by the Complainants to $253.18 ($1,375.00 December 2001 rent owed by the

Complainants less $1,121.82 pro rata December 2001 rent paid by new tenant Nelson = $253.18). Therefore, the Respondents were within their right to assess the amount of $253.18 for unpaid December 2001 rent against the Complainants' security deposit.

19. Pursuant to Paragraph 2 of the Lease, entitled "Additional Charges," the Respondents were within their right to assess against the Complainants' security deposit a $25.00 returned check fee for a rent check which was returned from the Complainants' bank for insufficient funds in August 2000.

20. The Complainants failed to pay the final water bill for the Property in the amount of $269.00 which was their obligation pursuant to Paragraph 11, "Utilities," of the Lease, and the Respondents incurred actual expense, in the amount of $269.00, to pay that bill and therefore, the Respondents were within their right to assess this amount against the Complainants' security deposit.

21. The Complainants were without sufficient hot water in the Property for about ten (10) days, from November 18 to 27, 2001, due to a defective and leaking water heater. The Commission finds that the Complainants reported this condition to the Respondents on several occasions, both orally and in writing, and the Respondents failed to respond or correct the problem within a reasonable amount of time. (See page 13 of Commission's Exhibit No. 1). This finding is supported by the credible testimony of Complainant Jennifer Barreto and the photographic evidence she introduced at the hearing (See photographs at pages 43 to 51 of Commission's Exhibit No. 1). The Commission further finds that the lack of hot water reduced the value of the Complainants' tenancy by 15% for the month of November 2001.

22. Based on the credible testimony of the Complainant Jennifer Barreto and the photographic evidence she introduced at the hearing (see page 40 of Commission's Exhibit No. 1), the Commission finds that the Complainants caused very minor damage (2 dime-sized bleach spots) to a small section of the wall-to-wall carpet at the entrance to the living room. The bill for carpet replacement submitted into evidence by the Respondents at the hearing (See Respondents' Exhibit No. 10) includes the cost of installing new 9/16" padding, the cost of installing 12 square yards of new carpet, and the disposal of old carpet and padding. The existence of minor bleach stains or spots on the carpet in the entrance of the living room would not necessitate the removal and replacement of the padding which, most likely would not have been damaged by such spots or stains. Furthermore, the existence of two dime-sized bleach spots would not necessitate the replacement of 12 square yards of carpet. In reviewing the Complainants' photographic evidence, the Commission finds that the basement carpet was significantly damaged by a leaking water heater (See page 43 of Commission Exhibit No. 1), a problem the Complainants reported to the Respondents on many occasions and for which there is no evidence that such damage was caused by the Complainants. The Commission further finds based on the photographs, that the damage to the basement carpet is the type of damage that

would have required the removal and replacement of not only the carpet, but the padding as well. Based on the credible testimony of the Complainant Jennifer Barreto regarding the condition of the living room carpet at the end of her tenancy, and based on the photographic evidence showing the condition of the living room carpet and the condition of the basement carpet at the end of the Complainants' tenancy, the Commission believes that the bill for carpet replacement submitted into evidence by the Respondents at the hearing was for replacement of the basement carpet and padding, not for the replacement of the living room carpet and padding.

Therefore, the Commission finds that although the Complainants caused minor damage to a small section of carpet in the living room of the Property in excess of ordinary wear and tear as a result of their tenancy, the Respondents did not submit sufficient credible testimony or evidence that they incurred any actual expense to repair that damage. Rather, the Commission finds that the evidence and testimony suggests that the Respondents incurred actual expenses in the amount of $275.00 to repair damage to the *basement* carpet, which was not damage caused by the Complainants. Therefore, the $275.00 assessed against the Complainants' security deposit for carpet replacement is disallowed.

23. The Complainants caused one hole, the approximate size of a baseball, in a wall in the living room of the Property, which constitutes damage in excess of ordinary wear and tear. The Commission finds that this is the only damage caused to the living room walls by the Complainants during their tenancy, and the Respondents would have been within their right to assess against the Complainants' security deposit the cost to repair this damage. However, the Respondents assessed against the Complainants' security deposit $225.00 to "Patch all the holes in the living/dining room walls, sand it and paint 3 walls with high quality semi-gloss paint." This repair work was well beyond the scope of the damage caused by the Complainants. Because the Respondents failed to provide a breakdown of the bill for these repairs, the Commission finds that only one wall, not three, was damaged by the Complainants and therefore, the Complainants are liable for only one-third of the cost incurred, which amount is $75.00 ($225.00 ÷ 3 = $75.00).

24. The Commission finds that the Respondents incurred actual expense to purchase paint to re-paint the damaged wall in the living room of the Property. However, the Respondents assessed against the Complainants' security deposit $60.00, the entire cost of 5 gallons of paint @ $12.00 per gallon, not simply the amount of paint needed to re-paint one wall damaged by the Complainants. The Commission finds that it would take approximately one gallon of paint to re-paint the one damaged wall in the living room of the Property. Therefore, the Complainants are liable for the cost of one gallon of paint which is $12.00.

25. The Complainants did not cause damage to the ceiling in the living/dining room area of the Property. The damage to the ceiling was caused by a leaking toilet which was the Respondents'

obligation to repair. This finding is supported by the credible testimony and evidence of Complainant Jennifer Barreto that she first reported this problem to the Respondents on November 8, 2001, and reiterated it on November 26, 2001, however, the Respondents failed to repair the leaking toilet or the damage the leak caused to the ceiling in the living/dining room until after the Complainants vacated the Property. Again, the Commission does not find credible or believable the testimony of Respondent Vikram Kushawaha that "…they [Complainants] never complained to me that there was a leak." (See Transcript page 101, line 3). Based on the foregoing, the Commission finds that the $250.00 assessed against the Complainants' security deposit for repair of the ceiling in the living/dining room was unreasonable and is disallowed.

26. The Complainants did not cause any damage to the walls or ceilings of the bedrooms in the Property in excess of ordinary wear and tear as a result of their tenancy. At the time the Complainants moved into the Property, March 2000, there were holes in the walls in the small, second-floor bedroom that had been poorly patched and the walls had not been freshly painted. This finding is supported by both the credible testimony of Complainant Jennifer Barreto and the evidence she presented at the hearing, specifically the move-in inspection report dated March 13, 2000, which accurately identified the condition of the walls. Furthermore, the Commission does not find credible or believable the testimony of Respondent Vikram Kushawaha that the Complainants damaged the walls in any bedroom in the Property. Therefore, the $215.00 assessed against the Complainants' security deposit for the repair and painting of holes in the walls in the small, second-floor bedroom was unreasonable and is disallowed.

27. The Complainants did not damage or remove 3 knobs from the stove in the kitchen at the Property during their tenancy. At the time the Complainants moved into the Property, March 2000, the control knobs on the stove were damaged. This finding is supported by both the credible testimony and evidence presented at the hearing by Complainant Jennifer Barreto specifically the move-in inspection report dated March 13, 2000, which stated that the stove knobs were "rotted." The Commission finds that because this damage was pre-existing, it was the Respondents' responsibility to repair or replace the defective knobs prior to the Complainants' tenancy, and therefore, the $15.00 assessed against the Complainants' security deposit for replacement of the knobs was unreasonable and is disallowed.

28. The Complainants did not damage or remove the crisper drawer from the refrigerator in the Property at any time during their tenancy. This finding is supported by the credible testimony of Complainant Jennifer Barreto that at the time the Complainants moved into the Property, the crisper was not in the refrigerator, but was being stored by the Respondents in the basement, and that Respondent Vikram Kushawaha advised the Complainants to leave it there, and the Complainants

followed that advice. The Commission finds that because the Complainants left the crisper in the state and location it was in at the commencement of their tenancy, the $140.00 assessed against the Complainants' security deposit for replacement of the refrigerator crisper was unreasonable and is disallowed.

29. The Complainants did not cause any damage to the door jamb in the master bedroom in the Property. The Respondents failed to provide credible testimony or sufficient probative evidence at the hearing that this damage was caused by the Complainants. This finding is supported by the credible testimony of Complainant Jennifer Barreto that the door jamb was not damaged during the Complainants' tenancy, and that this damage claim was never discussed with Respondent Vikram Kushawaha at the time of the final walk-through inspection. The Commission also credits Ms. Barreto's testimony that Respondent Vikram Kushawaha added this item to the inspection list after the inspection had been completed and after Complainants had vacated the Property. Therefore, the $125.00 assessed against the Complainants' security deposit for repair of the door jamb in the master bedroom was unreasonable and is disallowed.

30. Overall, the Commission finds that the Respondents had a reasonable basis to withhold from the Complainants' security deposit the cost they actually incurred to repair and re-paint a damaged living room wall, which was damage caused to the Property in excess of ordinary wear and tear, which is $87.00 ($12.00 for paint and $75.00 for labor), unpaid rent for the period December 1 – 10, 2001, in the amount of $253.18, the unpaid water bill in the amount of $269.00, and the return check fee, in the amount of $25.00, which sum is $634.18.

31. Based on the testimony and evidence at the hearing, the Respondents had no reasonable basis to assess the following costs against the Complainants' security deposit: (A) $198.00 overcharged for repair and repainting of living room walls ($225.00 labor + $60.00 paint = $285.00 — $87.00 actual cost incurred = $198.00 overcharge); (B) carpet replacement ($275.00); (C) living room ceiling repair ($250.00); (D) repair and paint bedroom walls ($215.00); (E) replacement of stove knobs ($15.00); (F) replacement of refrigerator crisper ($140.00); and (G) replacement of master bedroom door jamb ($125.00), which sum is $1,218.00.

32. Based on the foregoing, the Respondents' should have refunded to the Complainants the sum of $ 717.32, which represents the total amount of the Complainants' security deposit ($1,275.00), plus accrued interest ($76.50), less the actual costs they incurred to repair damages caused

by the Complainants in excess of ordinary wear and tear ($87.00), unpaid rent ($253.18), return check fee ($25.00), and unpaid water bill ($269.00). The failure of the Respondents to refund this amount to the Complainants within 45 days after the termination of their tenancy, was without justification and has caused a defective tenancy.

32. The Commission finds that the Respondents properly withdrew their claim for attorney's fees at the start of the hearing, after the Panel Chair inquired of Respondents the basis of their claim for attorney's fees in light of the applicable section of Montgomery County Code which prohibits lease provisions authorizing a landlord to collect attorney's fees from a tenant, except where the fees are reasonable and are awarded by a court.[4][4]

CONCLUSIONS OF LAW

Accordingly, based upon a fair consideration of the testimony and evidence contained in the record, the Commission on Landlord-Tenant Affairs concludes:

1. Paragraph 22 of the Lease, entitled "Termination-Hold Over," states, in pertinent part regarding the obligation of the Complainants to give notice to the Respondents of their intention to vacate the Property that, "Either Landlord/Agent or Tenant may terminate this Lease at the expiration of said Lease or any extension thereof by giving the other thirty (30) days written notice of termination prior to the Rent Due Date." The Rent Due Date is defined in the first paragraph of the Lease as "on the first day of each and every month." In this case, the Complainants are chargeable with the rent loss suffered by the Respondents for the period December 1 through December 10, 2001, because Complainants' notice to vacate was not delivered to the Respondents until November 6 or 7, 2001, which is after the November 2001 "Rent Due Date." As a result, the Complainants' notice did not

expire until December 31, 2001. Therefore, the Complainants were obligated to pay the Respondents rent for the entire month of December 2001 in the amount of $1,375.00.

However, based on the Respondents' re-rental of the Property as of December 11, 2001, at a higher monthly rental rate, i.e. $1,625.00 per month, which partially mitigated the lost rent caused by Complainants' improper notice to vacate, the Complainants are only liable to the Respondents for pro-rata rent for the period December 1 through 10, 2001. In determining the amount of lost rent suffered by the Respondents as a result of the Complainants' improper notice to vacate, the Commission must consider: (1) § 8-203(f)(2) of the State Code which states, "The security deposit is not liquidated damages and may not be forfeited to the landlord for breach of the rental agreement except in the amount that the landlord is actually damaged by the breach;" and (2) § 8-203(f)(3) of the State Code which states, "In calculating damages for lost future rents any amount of rents received by the landlord for the premises during the remainder if any, of the tenant's term, shall reduce the damages by a like amount." In this case, the Respondents received from the new tenant $1,121.82 rent for the 21 day period of December 11 through December 31, 2001, calculated as follows: $1,625.00 monthly rent x 12 months = $19,500.00 ÷ 365 days = $53.42 daily rent x 21 days = $1,121.82; thus reducing the amount of rent owed to the Respondents by the Complainants to $253.18, calculated as follows: December 2001 rent owed by Complainants ($1,375.00) less December 2001 rent paid by new tenant ($1,121.82) = $253.18 unpaid December 2001 rent).

2. The Respondents failed to issue to the Complainants an itemized list of damages together with a statement of the costs incurred to repair that damage, directed to the last known address of the Complainants, within the 45 days after the termination of their tenancy, which constitutes a violation of § 8-203(g)(1) of the State Code, and therefore, pursuant to § 8-203 (g)(2) of the State Code, the Respondents have forfeited their right to withhold any portion of the Complainants'

security deposit for damages. The fact that the Respondents withheld portions of the Complainants' security deposit for damages, despite the fact that they had not complied with the requirements under § 8-203 of the State Code, has caused a defective tenancy.

3. Pursuant to § 8-203 of the State Code, a landlord can withhold from a tenant's security deposit "unpaid rent, damage due to breach of lease or for damage by the tenant … in excess of ordinary wear and tear to the leased premises…owned by the landlord." The Respondents' failure to send timely notice to the Complainants regarding physical damages caused to the Property by the Complainants in excess of ordinary wear and tear forfeited the Respondents' right to withhold the cost incurred to repair that damage from the Complainants' security deposit. However, the Respondents did not forfeit their right to withhold from the Complainants' security deposit money owed to the Respondents unrelated to their claim of physical damages caused to the Property by the Complainants, i.e. unpaid rent ($253.18), the return check fee ($25.00), and the unpaid water bill ($269.00), which were the Complainants' obligation to pay pursuant to the terms and conditions of the Lease. Therefore, the Respondents were within their right to withhold $547.18 from the Complainants' security deposit.

4. Pursuant to § 8-203(e)(4) of the State Code, 1999, as amended, "If the landlord, without a reasonable basis, fails to return any part of the security deposit, plus accrued interest, within 45 days after the termination of the tenancy, the tenant has an action of up to threefold of the withheld amount, plus reasonable attorney's fees." To award a penalty of up to threefold the withheld amount of the deposit, as requested by the Complainants, pursuant to Section 29-47(b)(3) of the County Code, the Commission must consider the egregiousness of the Respondents' conduct in wrongfully withholding all or a portion of the Complainants' deposit, whether or not the Respondents acted in bad faith, and any prior history by the Respondents of wrongful withholding of security deposits.

Although the Respondents have forfeited their right to withhold any portion of the Complainants' security deposit for damage to the Property, the Complainants did cause damage to the Property in excess of ordinary wear and tear, and the Respondents incurred actual expense to repair that damage in the amount of $87.00 (repair and re-paint damaged living room wall). Furthermore, the Complainants owed rent to the Respondents for the period December 1 – 10, 2001, in the amount of

$253.18, a return check fee in the amount of $25.00, and an unpaid water bill in the amount of $269.00. Nevertheless, the Respondents failed to refund any portion of the Complainants' $1,275.00 security deposit and $76.50 accrued interest, when they had no reasonable basis to withhold more than $634.18. Although the Commission is concerned that the Respondents attempted to assess damages against the Complainants' security deposit for repairs that were either pre-existing, not in excess of ordinary wear and tear or not the Complainants' responsibility to repair or maintain, it concludes that the Respondents' actions in withholding the Complainants' security deposit do not rise to the level of egregiousness or bad faith that would warrant the awarding of a penalty. Therefore, the Complainants' request for a threefold penalty of the withheld amount is hereby DENIED.

5. Based on the Commission's findings that the Respondent had no reasonable basis for withholding more than $634.18 from the Complainants' security deposit, the initial cross-complaint filed by the Respondents on October 10, 2002, wherein they requested that the Commission award them $706.00 in damages in excess of the amount of the Complainants' security deposit is unsupported and without any merit and is hereby DISMISSED with prejudice.

6. Pursuant to Paragraph 9, "Maintenance," subparagraph 3 of the Lease, the Complainants had an obligation to "promptly report to Landlord any problems requiring repairs or replacement beyond general maintenance," and the Respondents were "responsible for replacement of or repairs to…plumbing…systems" in the Property, including the water heater. In this case, the Complainants on several occasions, both orally and in writing, reported to the Respondents that the water heater in the Property was defective and leaking, and that they were without sufficient hot water, but the Respondents failed to respond or correct the problem. The Respondents' failure to respond to the Complainants' request to repair the water heater constitutes a substantial breach of the Lease by the Respondents, and based on the experience of the members of this Commission hearing panel, reduced the value of the Complainants' leasehold during the month of November 2001 by 15%, and has caused a defective tenancy. Therefore, the Commission concludes that the Complainants are entitled to a rent refund of $206.25 ($1,375.00 rent x .15 = $206.25).

7. Based on the Respondents' violation of § 8-203(g)(1) of the State Code, they have forfeited their right to withhold any portion of the Complainants' security deposit for damages. In this case, the damages are $87.00 incurred by the Respondents to repair and repaint the living room walls. Although the Respondents have forfeited their right to withhold $87.00 from the Complainants' security deposit, their right to pursue the Complainants in a separate action in the District Court of Maryland for actual damages in the amount of $87.00 is not foreclosed simply because they failed to send the

Complainants proper notice of those damages within 45 days after the termination of the tenancy as required by the State Code.[5][5]

ORDER

In view of the foregoing, the Commission on Landlord-Tenant Affairs hereby Orders:

1. The Respondents to pay the Complainants **$1,010.57**, which sum represents the Complainants security deposit ($1,275.00), plus accrued interest ($76.50), less the damages rightfully withheld ($547.18), plus a rent refund ($206.25).

2. The Respondents' two cross-complaints are DISMISSED with prejudice;

3. The Respondents to issue notice to the tenant(s) at any and all rental properties they own, operate or manage in Montgomery County, Maryland, that the provision in their lease agreement regarding attorney's fees is invalid, unenforceable and in violation of Section 29-27(n) of the County Code. Respondents are to provide copies of each and every such notice to the Commission via the Department.

Commissioner Travis Nelson, Commissioner Mattie Ligon and Commissioner Roger D. Luchs, Panel Chair, concurred in the foregoing decision unanimously.

To comply with this Decision and Order, the Respondents, Vikram Kushawaha and Vijay Bala Kushawaha, must: (1) forward to the Office of Landlord-Tenant Affairs, 100 Maryland Avenue, 4th Floor, Rockville, MD 20850, within thirty (30) calendar days of the date of this Decision and Order, a check made payable to Jennifer Barreto and Xavier Garcia, in the full amount of $1,010.57; and (2) forward to the Department of Housing and Community Affairs, Attention Roger D. Luchs, Chair, Commission on

Landlord-Tenant Affairs, 100 Maryland Avenue, 4th Floor, Rockville, MD 20850, within thirty (30) calendar days of the date of this Decision and Order Commission, copies of all notices sent to tenants regarding attorney's fees.

The Respondents, Vikram Kushawaha and Vijay Bala Kushawaha, are hereby notified that Section 29-48 of the County Code, 2001, as amended, declares that failure to comply with this Decision and Order is punishable by a $500.00 civil fine Class A violation as set forth in Section 1-19 of the County Code. This civil fine may, at the discretion of the Commission, be imposed on a daily basis until there is compliance with this Decision and Order.

In addition to the issuance of a $500.00 civil fine Class A violation, should the Commission determine that the Respondents have not, within thirty (30) calendar days of the date of this Decision and Order, made a bona fide effort to comply with the terms of this Decision and Order, it may also refer the matter to the Office of the County Attorney for additional legal enforcement.

Any party aggrieved by this action of the Commission may file an administrative appeal to the Circuit Court for Montgomery County, Maryland within thirty (30) days from the date of this Decision and Order, pursuant to the Maryland Rules governing administrative appeals. Pursuant to Section 29-49 of the County Code, 2001, as amended, should the Respondents choose to appeal the Commission's Decision and Order, they must post a bond with the Circuit Court in the amount of the award ($1,010.57) if they seek a stay of enforcement of this Order.

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Roger D. Luchs, Panel Chairperson

Commission on Landlord-Tenant Affairs

6[1] The Commission notes that two witnesses were subpoenaed by the Commission to appear at the November 12, 2002 hearing, Housing Inspector Ronald Feaster, and contractor Frank Caceres. However, only Inspector Feaster was subpoenaed to appear at the rescheduled hearing date of December 12, 2002.

7[2] The Commission notes that the Paragraph 3 of the Lease, entitled "Security Deposit," states that the security deposit was to be $1,912.90. However, no evidence was offered by the parties that a security deposit of more than $1,275.00 was paid by the Complainants to the Respondents.

8[3] The Commission notes that the total amount of security deposit plus accrued interest is listed on the notice as $1,351.00, and the correct amount is $1,351.50.

9[4] The Commission takes official notice of the fact that on August 12, 2002, fully two (2) months before the Respondents filed their claim against the Complainants for $600.00 in attorney's fees, the Commission issued a Decision and Order in the matter of Nina Waters-Sherrod v. Vikram Kushawaha and Vijay Bala Kushawaha, relative to Case No. 11783, which, in addition to disallowing the Kushawahas' claim for attorney's fees in that case, advised the Kushawahas in the Conclusions of Law section of the Order that Paragraph 29 of their lease, entitled, "Attorney's Fees," which is identical to Paragraph 29 in Complainants' Garcia and Barreto's Lease, was unenforceable and in violation of Section 29-27(n) of the County Code. However, at the hearing on December 12, 2002, the Commission inquired of Respondent Vikram Kushawaha the basis of his claim for $600.00 attorney's fees allegedly incurred in connection with the postponed hearing date of November 12, 2002, which led to the following exchange between Panel Chair Luchs and Mr. Kushawaha, beginning at Page 128, line 4 of the Transcript:

Luchs: Are you aware, Mr. Kushawaha, that there's a rather severe limitation on when a landlord can even put a clause for attorney's fees in the lease in Montgomery County? Montgomery County Code specifically limits and restricts it.

Kushawaha: **I'm not aware of it**. And that was a mistake because I spoke to Ms. Moody about, there was another hearing like this, and she corrected the whole thing, and I have given her

the new copy of the lease. And that's what I'm using. Okay? Because this one I got from somebody else, that's what happened. (Emphasis added).

Luchs: Yes, but if you know that that was a mistake and there's a new lease which corrects a mistake, I'm not sure where you got this one, then why are you here asking for all these attorney's fees when you know this lease provision isn't valid?

Kushawaha: No, that's what I'm saying to you sir, that I assume that it's invalid, but you make the decision whether it's there or not. If it's not, then ——

Luchs: Yes, but I'm saying why, if you — I mean have you read the statute, in the statutory provision on attorney's fees provision in the leases?

Kushawaha: **No, I have not.** (Emphasis added).

The Commission finds Mr. Kushawaha's testimony on the issue of attorneys fees to be completely lacking in credibility and indeed finds disturbing that he would seek attorneys fees from the tenant for a hearing that did not take place through no fault of her own.

10[5] In making this determination, the Commission takes judicial notice of the following two cases. In the first case, Turner v. Lyon, Case No. C-506 (Supreme Court of Colorado, 189 Colo. 234; 539 P.2d 1241; 1975 Colo.), the court noted that under Colorado law, a secured landlord forfeited her right to bring an action against the tenant for damage to the premises if she failed to return the security deposit or provide an explanation for retaining it within 30 days, while an unsecured landlord would not lose such a cause of action. The court held that the statute imposed an unreasonable and discriminatory class distinction between secured and unsecured landlords, and held the clause by which the right to bring an action for damage to the premises was forfeited to be unconstitutional and stricken from the statute. In the second case, Durene v. Alcime, Case No. 83-2410 (Court of Appeals of Florida, Third District, 448 So. 2d 1208; 1984

Fla. App.), the court affirmed the judgment of the lower court in finding that the landlord's counterclaim for general damages under a residential lease was not defeated by notice requirements that pertained only to damages against the security deposit.