

**CITY OF BURLINGTON
HOUSING BOARD OF REVIEW**

**In re: David and Elliot Wolff's Request
for a Hearing Regarding Withholding
of Security Deposit for 51 N. Union St.
Apt. 4 by BPJS Mgmt., LLC**

}
}
}
}
}
}

**Security Deposit Appeal
No. 2020-12**

Order Regarding Timeliness of Tenants' Appeal

On May 29, 2020, David and Elliot Wolff (hereafter "tenants") petitioned the Housing Board of Review for a hearing related to the withholding of \$226.96 of David Wolff's \$1,198 security deposit by Landlord BPJS Management, LLC.¹ The rental unit at issue is 51 North Union Street, Apartment 4. Tenants' request for a hearing indicates that David Wolff occupied the dwelling unit until May 17, 2019. Upon the filing of Tenants' request for a hearing, the Landlord objected to the Board hearing the appeal because the Tenants' request was filed beyond the 30-day limit contained in Burlington Code of Ordinances (BCO) § 18-120(e). On June 9, 2020, the Board ordered the Tenants to file with the Board a statement explaining why their delay in filing a request for a hearing was justified by extraordinary circumstances, excusable neglect, or some other valid reason.

On June 19, 2020, the Tenants filed a 14-page explanation of the delay in filing their appeal. It was supported by 14 exhibits. The Landlord has declined to respond to the Tenants' arguments. For the reasons stated herein, the Board DENIES Tenants' request for a hearing as untimely.

Upon receiving notice from a landlord of the intent to withhold any part of a security deposit, a tenant is entitled to have this Board review the reasonableness of the deductions. BCO § 18-120(e). The ordinance contains deadlines for requesting a hearing:

The request shall be submitted in writing by the tenant to the office of the city clerk within thirty (30) days of receipt of notice of the opportunity to request a hearing or, in the absence of such notice, within forty-four (44) days of the date the tenant vacated or abandoned the rental unit.

¹ David Wolff signed a lease as a tenant and Elliot Wolff signed the lease as a co-signor or guarantor. This opinion refers to David and Elliot Wolff together as tenants merely for simplicity of reading, not as an opinion regarding their rights or obligations under the lease.

Id. Tenants contend that the use of “shall” in § 18-120(e) is not mandatory, and that the Board has discretion to afford tenants a hearing. The question before the Board is what the City Council intended when it inserted the word “shall” before § 18-120(e)’s time-for-filing limitations.

The use of “the imperative ‘shall’ generally means that the provision is mandatory.” State v. Lohr, 2020 VT 41, ¶ 8, --- Vt. ---, --- A.3d ---. That rule is not absolute. The word “shall” in a statute or ordinance may be non-mandatory (also called “directory”) if the provision does not contain a consequence for non-compliance. State v. Singer, 170 Vt. 346, 348, 749 A.2d 614, 615-16 (2000), In re Soon Kwon, 2011 VT 26, ¶ 17, 189 Vt. 598, 19 A.3d 139. The Board must consider the whole of the ordinance when determining whether the “shall” here is mandatory, not just an isolated phrase. State v. Berard, 2019 VT 65, ¶¶ 12-13, --- Vt. ---, 220 A.3d 759.

In the past, the Board has held that the timeframe for filing a request for a hearing is mandatory, and the Board has dismissed appeals filed beyond the 30-day deadline. In re Stemple, *Findings of Fact, Conclusion of Law, and Order* (Burlington Housing Bd. of Review Oct. 17, 2006). Further, the language of § 18-120(e) does not confer upon the Board any power to extend the deadlines or hear untimely-filed cases for good cause. This supports the inference that the consequence for late-filing is that there will be no hearing. Further, the Vermont Supreme Court has held that the City Council’s used the mandatory “shall” in other parts of § 18-120. Soon Kwon, 2011 VT 26, ¶ 17. The Board concludes that the timeline for filing a request for hearing in § 18-120(e) is mandatory and that Tenants’ case must be dismissed.

The Tenants contend § 18-120(e)’s 30-day appeal period cannot be enforced because, in their view, it conflicts with the procedure established in 24 V.S.A. § 5005(b)(1)-(4). See 9 V.S.A. § 4461 (providing a municipality may establish a housing board of review to hear security-deposit disputes), 24 V.S.A. § 5005(b)(5) (providing that a housing board of review must hold a security-deposit hearing consistent with the procedure in 24 V.S.A. § 5005(b)(1)-(4)). Section 5005(b)(2) of Title 24 provides that an “appeal shall be taken within seven days from the date of the order appealed from *unless a different period is specified by ordinance.*” (emphasis supplied). Here, the City Council has provided for a longer period of appeal

than required by ordinance. This argument does not aid the Tenants and the Board declines to find § 18-120(e) inconsistent with state statute.

Even if the “shall” is not mandatory in § 18-120(e), the Board would not exercise its discretion to grant the Tenants a hearing. When determining whether an appeal period may be extended for excusable neglect, the Board may look to factors such as the length of the delay, the reasons for the delay, whether the delay was in the control of the movant, and whether there would be any prejudice to the proceedings. Ying Ji v. Heide, 2013 VT 81, ¶ 11, 194 Vt. 546, 82 A.3d 1160. Tenants’ exhibits show that the Landlord provided them with notice of their right to appeal to this Board within 30 days of the Landlord’s notice. Tenants’ Ex. 3. The Landlord sent notice by certified mail to Tenant Elliot Wolff on May 23, 2019. Id. Tenants’ memorandum arguing in favor of finding justifiable delay focuses on Tenant David Wolff’s busy Spring and Fall semesters at the University of Vermont and the Smithsonian Institution, *Tenant’s Response to Order Regarding June 15, 2020 Hearing (“Tenants’ Memorandum”)* at 4-5, but does not explain why Tenant Elliot Wolff, who received the withholding notice from the Landlord by certified mail, could not have made a timely request for a hearing before the Board. Tenants’ contend that Elliot Wolff could not get David Wolff’s attention to discuss the matter during this period, id. at 5, until Tenant David Wolff became unemployed due to the ongoing COVID-19 pandemic in the middle of April, 2020. Id. This is contradicted by Tenants’ Exhibit 4, which is a June 26, 2019 email from Tenant Elliot Wolff that begins “[h]aving reviewed your ‘Security Deposit Return’ with my son David, as well as the lease we signed for his occupancy of Apartment 4 . . . we find the following errors and request return of the remainder of our deposit for the following reasons”

Tenants’ other exhibits show the Tenants and Landlord engaged in discussions about the security deposit in June, July, and September 2019, Tenants’ Exs. 4, 5, 6, 7, 8, and 9, culminating with the Landlord again informing the Tenants in September 2019 that they could have appealed to this Board. Tenants’ Ex. 9. Tenants waited from September 2019 until May 2020 to request a hearing. Tenants’ Ex. 10. Contrary to Tenants’ contention that the Landlord engaged in delay tactics, *Tenants’ Memorandum* at 13, the record shows that the Landlord twice informed the Tenants of their appeal right. They did not exercise those

rights. Here, the exhibits and memorandum filed by the Tenants do not justify a finding of excusable neglect. The exhibits show, and the Board finds, that the Landlord informed the Tenants of their right to appeal, that the Tenants together made detailed objections to the withholding on June 26, 2019 in an email to the Landlord, that the Landlord again informed the Tenants of the right to appeal to this Board in September 2019, and that they did not pursue an appeal to this Board until May 2020. The Board further finds that the delay in filing was within the Tenants' control, and the Board finds that the delay was not the result of excusable neglect.

The Tenants contend that the Landlord's objection on timeliness grounds should be considered waived because the Landlord did not serve the Tenants with the objection. *Tenants' Memorandum* at 6, 12-13. The Board fails to see how the Tenants' were prejudiced by the Landlord's objection. The Board's June 9 Order furnished the Tenants' notice of the Landlord's objection and an opportunity to be heard, and Tenants have filed a thorough response. The Board declines to find the Landlord's objection waived.

Tenants' appeal is dismissed as untimely.

DATED at Burlington, Vermont this 1st day of July, 2020.



Joshua S. O'Hara, Chair
Housing Board of Review