

**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

RH-TP-06-28,708

In re: 3133 Connecticut Ave., N.W., Unit 901

Ward Three (3)

**CHRISTINE L. BURKHARDT**  
Tenant/Appellant

v.

**B.F. SAUL COMPANY, and  
KLINGLE CORPORATION**  
Housing Providers/Appellees

**DECISION AND ORDER**

September 22, 2017

**SZEGEDY-MASZAK, CHAIRMAN.** This case is on appeal to the Rental Housing Commission (“Commission”) from a final order issued by the Office of Administrative Hearings (“OAH”) based on a petition filed in the Rental Accommodations Division (“RAD”) of the District of Columbia Department of Housing and Community Development (“DHCD”).<sup>1</sup> The applicable provisions of the Rental Housing Act of 1985 (“Act”), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 – 42-3509.07 (2001), the District of Columbia Administrative Procedure Act (“DCAPA”), D.C. OFFICIAL CODE §§ 2-501 - 2-510 (2001), and the District of Columbia Municipal Regulations (“DCMR”), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), and 14 DCMR §§ 3800-4399 (2004), govern these proceedings.

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<sup>1</sup> OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (“RACD”) of the Department of Consumer and Regulatory Affairs (“DCRA”) pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01 - 1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD were transferred to the RAD of DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04B (2010 Repl.).

## I. PROCEDURAL HISTORY

On July 14, 2006, Christine Burkhardt, the tenant (“Tenant”), residing at 3133 Connecticut Ave, N.W., Unit 901, Washington, D.C. 20008 (“Housing Accommodation”), filed Tenant Petition RH-TP-06-28,708 (“Tenant Petition”) alleging that B.F. Saul Company (“Housing Provider”) violated the Act as follows:<sup>2</sup>

1. The rent was increased by an amount that was larger than allowed by any applicable provision of the Act.
2. Tenant did not receive a proper 30-day notice of rent increase before the increase was charged.
3. Housing Provider did not file the correct rent increase forms with the Rental Accommodations Division of the Department of Housing and Community Development.
4. The rent exceeded the legally calculated rent ceiling for the unit.
5. The rent ceiling filed with the Rental Accommodations Division was improper.

*See* Tenant Petition at 3; R. at 8.

On December 6, 2010, Administrative Law Judge Erika Pierson (“ALJ”) issued an order that, in relevant part, denied the Tenant’s request to add an claim to the Tenant Petition that the rent was increased while the Housing Accommodation was not properly registered with the RAD, denied the Tenant’s request to add B.F. Saul Property Company as a respondent to the Tenant Petition, and granted the Tenant’s request to add Klingle Corporation as a respondent to the Tenant Petition. *Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (OAH Dec. 6, 2010) (“Order on Pending Motions”)*.<sup>3</sup>

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<sup>2</sup> The Tenant’s claims are recited herein using the same language as appears in the Tenant Petition.

<sup>3</sup> Hereinafter, the term “Housing Provider” shall be used to refer to all three entities named as housing providers/respondents in the Tenant Petition, as amended: B.F. Saul Company and Klingle Corporation. The full procedural history relevant to the registration of the Housing Accommodation and addition of B.F. Saul Property Company is discussed *infra* at 46-53.

An evidentiary hearing was held before the ALJ on January 31, 2011. On August 3, 2011, the ALJ issued a final order, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (OAH Aug. 3, 2011) (“First Final Order”); R. at 1726-45.

On October 11, 2011, the Tenant filed a notice of Appeal (“First Notice of Appeal”) with the Commission, raising 37 issues. The Commission held its hearing on May 29, 2013.

On September 25, 2014, the Commission issued its decision and order (“First Decision and Order”). The Commission dismissed the Tenant’s appeal or affirmed the ALJ on the majority of the issues raised in the First Notice of Appeal, but remanded on two issues: (1) the ALJ failed to rule on the Tenant’s First Motion to Amend; and (2) the ALJ erred by finding that the Tenant had not met her burden of proving that at least 180 days had elapsed since the rent charged was increased on May 1, 2006.

On September 1, 2015, the ALJ issued a revised final order: Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (OAH Sept. 1, 2015) (“Final Order after Remand”).<sup>4</sup> The Final Order after Remand reiterated the findings of fact and conclusions of law made in the First Final Order, but contained revised discussion of the Tenant’s First Motion to Amend and of the rent charged adjustment implemented on May 1, 2006.

In the Final Order after Remand, the ALJ made the following findings of fact:<sup>5</sup>

1. Tenant/Petitioner Christine Burkhardt has resided at 3133 Connecticut Avenue, NW, known as the “Kennedy Warren Apartments,” since 1984. From 1984 to March 2006, Tenant resided in apartment 829. In January 2006, Tenant applied for a larger apartment in the building.

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<sup>4</sup> As transmitted to the Commission by OAH, the record on appeal contains the Final Order after Remand on unnumbered pages between the Tenant’s motion for reconsideration of the original Final Order and the Tenant’s Motion for Reconsideration of the Final Order after Remand. Accordingly, the Commission herein omits citations to the page number in the record when referencing the Final Order after Remand.

<sup>5</sup> The findings of fact are recited using the same language and numbering as the ALJ in the Final Order after Remand.

2. An employee in the rental office named Ms. Churchill, informed Tenant that apartment 901, a two-bedroom unit, had become available due to the death of the tenant. The tenant in 901 died in February 2006. The deceased tenant's family were given time to clear out the apartment and the rent was paid for the apartment through the end of February 2006.
3. Ms. Churchill told Tenant that if she wanted the apartment, she needed to apply quickly because Housing Provider was going to stop renting apartments. Tenant was aware that the Housing Provider intended to take a vacancy increase on apartment 901, but Ms. Churchill did not know the rent amount for the apartment. Mr. Churchill told Tenant she would have to speak with Tanya Marhefka, the property manager, to find out the rent amount and the comparable apartment.
4. Tenant signed the lease for apartment 901 on March 25, 2006. PX 100. Tenant was not given a copy of the lease at that time because it had to be signed by Ms. Marhefka. Ms. Marhefka signed the lease on April 6, 2006. *Id.*
5. After signing the lease, Tenant went to the RAD to look up the amended registration for the property to see what apartment Housing Provider used as a comparable unit for taking a vacancy increase. Tenant was unable to locate an amended registration for apartment 901.
6. Tenant moved into apartment 901 on March 31, 2006. Tenant received a copy of her lease from Housing Provider on May 16, 2006, after making multiple requests. PX 100. The lease states that the monthly rent for the apartment was \$3,915 and that the rent ceiling (maximum amount of rent that could be charged) for the apartment was \$4,483. *Id.*
7. Tenant paid her rent for April and May 2006. After receiving the lease and the amended registration for the apartment in May 2006, Tenant stopped paying rent because she did not believe she was being charged the correct rent amount.
8. [rent history table omitted]
9. On December 23, 2003, Housing Provider filed with the RAD, a "Certificate of Election of Adjustment of General Applicability" (CEAGA), effective February 1, 2004, increasing the rent ceiling for apartment 901 from \$1,661 to \$1,696 (\$35 increase). PX 114. The basis for the increase was the \*2003 CPI-W of 2.1%. *Id.*
10. On October 1, 2004, Housing Provider filed a CEAGA with the RAD, effective November 1, 2004, increasing the rent charged for apartment 901 from \$1,614 to \$1,656 (\$42 increase). PX 115. The filing reflects that the basis for the increase was the "2003 CPI-W of 2.9%." *Id.* The applicable CPI-W for 2003 was 2.1%. 47 DCR 1301 (Feb. 25, 2000). The applicable CPI-W for 2004 was 2.9%. 51 D.C. Reg. 2020 (Feb. 20, 2004).

11. On March 1, 2005, Housing Provider filed a CEAGA with the RAD, effective April 1, 2005, increasing the rent ceiling for apartment 901 from \$1,696 to \$1,745 (\$49 increase). PX 115. The basis for the increase was the 2004 CPI-W of 2.9%.
12. On September 30, 2005, Housing Provider filed a CEAGA with the RAD, effective November 1, 2005, increasing the rent charged for apartment 901 from \$1,656 to \$1,701 (\$45 increase). PX 116. The basis for the increase was the “2005 CPI-W of 2.7%.” *Id.*
13. On March 16, 2006, Housing Provider filed an Amended Registration Form with the RAD to implement an authorized \$179 Capitol Improvement Increase. PX 118. The Amended Registration reflects that the “previous rent ceiling” for apartment 901 was \$4,483, and it was increased to \$4,662. However, the rent ceiling of \$4,483 was based on taking a vacancy increase on the apartment, which did not filed [sic] until 13 days later on March 29, 2006. PX 117. Housing Provider subsequently rescinded the capital improvement increases which were deferred to November 2006.
14. On March 29, 2006, Housing Provider filed an Amended Registration Form with the RAD, which reflects that effective March 1, 2006, the rent ceiling for apartment 901 was increased from \$1,745 to 4,483 (\$2,738 increase), based on a vacancy increase. PX 117. The comparable unit for the increase was apartment 801, which was also a two-bedroom unit in the same tier.

Final Order at 8-10 (footnotes omitted).

The ALJ made the following conclusions of law in the Final Order after Remand:<sup>6</sup>

#### **B. The Vacancy Increase**

1. As a preliminary matter, there were two amended registrations that Tenant alleges Housing Provider failed to properly perfect, only one of which I find relevant. On March 16, 2006, Housing Provider filed an amended registration increasing the rent ceiling for a number of apartments, including apartment 901, based on an approved capital improvement surcharge of \$179. PX 118. The document increases the rent ceiling from \$4,483 to \$4,662, but Housing Provider had not yet filed the vacancy increase, increasing the rent ceiling from \$1,745 to \$4,483[.]
2. However, I find the March 16, 2006, amended registration is not relevant because it was superseded by the March 29, 2006, amended registration. Ms. Marhefka testified that there was a problem with the capitol [sic] improvement surcharges and therefore, after filing the March 16<sup>th</sup> amended registrations to take the

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<sup>6</sup> The conclusions of law are recited here using the same language and headings as used by the ALJ in the Final Order after Remand, except that the Commission has numbered the ALJ’s paragraphs for ease of reference. The Commission also notes that, in the Final Order after Remand, the ALJ used italics to distinguish blocks of text that were added to the original Final Order.

surcharge, it was subsequently rescinded and delayed until a later date. As such, the vacancy increase filed on March 29, 2006, was applied to the rent ceiling on record prior to the March 16, 2006, filing, and superseded that filing. Accordingly, there was no reason to provide notice of the March 16, 2006, amended registration, which was never implemented. Therefore, I will only address whether Housing Provider properly perfected the March 29, 2006, vacancy increase.

3. Tenant's allegations that the rent was increased in an amount higher than allowed by the Act, that she did not receive a proper 30-day notice of rent increase, that Housing Provider failed to file the correct rent increase forms with the RAD, and that the rent exceeded the legally calculated rent ceiling, all arise from the vacancy increase in question and two CPI-W rent ceiling increases.
4. Tenant makes six arguments that the vacancy increase was not valid: (1) Housing Provider did not file the correct forms with the RAD; (2) the comparable unit for the vacancy increase was not a "substantially identical unit;" (3) Housing Provider failed to file the amended registration within 30-days of the vacancy; (4) Housing Provider failed to post the amended registration in a conspicuous, prior to or simultaneously, with the March 29, 2006, filing, as required by § 4101.6; (5) Tenant did not receive proper notice of the vacancy ceiling increase; *and (6) that the vacancy rent ceiling increase was taken in less than 180 days following a previous increase. It is the sixth contention that was reversed by the Rental Housing Commission. As such, Tenant's arguments one through four were affirmed and argument five was not addressed by the Commission and remain unchanged below.* I will address each of these contentions in turn.
5. Prior to August 2006, a housing provider was permitted to take a vacancy rent ceiling adjustment without approval of the Rent Administrator, provided the housing provider timely filed an amended registration form to document the increase and complied with the notice requirements. D.C. Official Code § 42-3502.13; 14 DCMR 4204.9. In order for a housing provider to obtain a rent ceiling adjustment under the former Act, a housing provider was required to "take" and "perfect" the adjustment in accordance with the requirements of the housing regulations. *See Sawyer Prop. Mgmt of Maryland v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 103 (D.C. 2005); 14 DCMR 4200.5. The applicable housing regulations provide:

**4207.5** A housing provider who so elects shall take and perfect a vacancy rent ceiling adjustment in the manner set forth in § 4204.10, and the date of "perfection" shall be the date on which the housing provider satisfies the notice requirements of § 4101.6.

**4204.10** [A] housing provider shall take and perfect a rent ceiling increase authorized by § 206(b) of the Act (an adjustment of general applicability) by filing with the Rent Administrator and serving on the affected tenant or

tenants in the manner prescribed in § 4101.6 a Certificate of Election of Adjustment of General Applicability, which shall:

- (a) Identify each rental unit to which the election applies;
- (b) Set forth the amount of the adjustment elected to be taken, and the prior and new rent ceiling for each unit; and
- (c) Be filed within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.**

**4101.6** Each housing provider who files a Registration/Claim of Exemption form under the Act, shall, **prior to or simultaneously with the filing**, post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the unit or housing accommodation to which it applies, or shall mail a true copy to each tenant of the rental unit or housing accommodation.

(emphasis added). *Paragraphs [sic] 1 through 5 below [conclusions of law 6-20] are unchanged from the first final order, they only appear in a different place. Paragraph [sic] six [conclusions of law numbered 21-31] reflects new findings based on the Commission's remand.*

#### **(1) The Rent Increase Forms**

6. Tenant's petition alleges that Housing Provider failed to file the correct rent increase forms with the RAD. Tenant did not make any arguments regarding what forms she believes should have been filed but were not. I find that the amended registration form filed on March 29, 2006, complied with the regulatory requirements. It identified the unit, set forth the amount of the adjustment and the prior and new rent ceilings, and was filed within 30 days of when Housing Provider was first eligible to take the adjustment. 14 DCMR 4204.9, 4204.10, and 4207.5. Tenant did not identify any other documents she believes Housing Provider should have filed and I cannot make assumptions. Tenant has failed to meet her burden on this issue.

#### **(2) Whether Housing Provider properly used apartment 801 as the comparable unit**

7. In taking a vacancy increase, the Act allows the landlord to increase the rent either by 12% of the current allowable rent or to the amount of a "substantially identical rental unit in the same housing accommodation." D.C. Official Code § 42-3502.13(a) (2005); 14 DCMR 4207.2. The Amended Registration for the vacancy increase identified the comparable unit on which the vacancy increase was based as unit 801. Apartments 801 and 901 are both two-bedroom units located in the same tier of the building. The only evidence Tenant offered that the units were not comparable was that apartment 801 had a microwave installed. The Act provides that for the purposes of a vacancy increase, rental units are

“substantially identical” where they contain essentially the same square footage, the same floor plan, comparable amenities and equipment, comparable locations, and are in comparable physical conditions. D.C. Official Code § 42-3502.13(b). The addition of a microwave alone (which may have been purchased by the tenant), does not make apartment 801 substantially different from 901. Therefore, I find that Tenant failed to establish that 801 was not a comparable unit.

**(3) Whether the vacancy increase was filed within 30 days of the vacancy**

8. Pursuant to §§ 4204.9 and 4204.10(c) of the regulations, a housing provider is required to file an amended registration for a vacancy rent ceiling increase within 30 days of the date it was first eligible for the adjustment. In applying these provisions, the District of Columbia Court of Appeals (Court of Appeals) has held that an amended registration form must be filed within 30 days of when the rental unit becomes vacant. *Sawyer*, 877 A.2d at 109.
9. In this case, the unit in question, apartment 901, became vacant due to the occupant’s death which occurred sometime in February 2006. Neither Tenant nor Housing Provider knew the exact date of death, although Tenant testified she believed it was “on or about the 3<sup>rd</sup> of February 2006.” Transcript (“Tr.”) at 23. Regardless, the 30-day timeframe begins to toll on the date the “rental unit becomes **vacant**.” *Sawyer*, 877 A.2d at 109 (emphasis added). The apartment did not become “vacant,” meaning available to rent, on the day the tenant died. Housing Provider’s witness, Tanya Marhefka, testified credibly that the family was given time to clear out the apartment and the rent was paid through the end of February 2006. Tenant also testified that when she viewed the apartment in February 2006, the former occupant’s belongings were still there. As such, the apartment was not vacant and available to rent until March 1, 2006. Housing Provider, therefore, had until April 1, 2006, to file the vacancy increase.
10. Tenant argued that the 30 days began to run the date the tenant died because of the following provision in the lease: “This lease will automatically terminate upon Tenant’s death.” PX 100. However, Tenant fails to give credit to the rest of the paragraph in the lease which states: “It is understood and agreed that no interest whatsoever in the Lease or the Apartment will pass to Tenant’s heirs, executors, administrators . . . Tenant’s estate shall nevertheless be responsible for payment of Tenant’s outstanding obligations under the Lease, and for the use and occupancy of the Apartment . . . during the administration of the estate until the apartment is actually vacated and surrendered to the Landlord.” PX 100 at 4. By paying rent until the end of February 2006, the family of the former tenant remained in possession of the unit pursuant to the lease and it became vacant on March 1, 2006. Housing Provider filed an amended registration for the vacancy increase on March 29, 2006, with an effective date of March 1, 2006. Therefore, I find that the vacancy increase was timely filed.



#### (4) Posting of the Amended Registration

11. The regulations provide that the date of perfection of a vacancy rent ceiling increase, shall be “the date on which the housing provider satisfies the notice requirements of § 4101.6.” 14 DCMR 4207.5. Section 4101.6 requires a housing provider to either conspicuously post the amended registration or mail it to all affected tenants. 14 DCMR 4101.6.
12. Regarding the posting of the amended registration, Ms. Marhefka testified credibly that Housing Provider maintains all the registration documents for the housing accommodation in a binder in the office that is available to the tenants during business hours or by appointment. Notices are posted in the laundry room informing tenants that a new registration has been filed and is available for viewing. Tenant testified that she has never seen such a posting in the laundry room. However, the fact that Tenant has not seen it, does not mean the postings were not made and I found Ms. Marhefka’s testimony in this regard to be credible. I also find that the laundry room is a sufficiently available and public space to meet the requirements of the Act. While Tenant suggests that not all tenants use the laundry room as they may have their own washers, that does not make it an improper place for posting. Indeed, there is likely no specific place that every tenant in the building visits, but the laundry room is available for them to visit. In this case, Tenant not only viewed the documents in the office, but, without authorization, removed registration documents from the binders. As such, there is no question that she was aware of how to view the documents.
13. A similar issue was addressed by the Court of Appeals in *Tenants Council of Tiber Island-Carrollsbury Square, v. D.C. Rental Hous. Comm’n*, 426 A.2d 868 (D.C. 1981). In that case, which involved a hardship increase, the Court rejected the tenant’s contention that the housing provider was not entitled to an increase because the housing provider failed to comply with the Act’s notice requirements. The court held: “Evidence that the landlord kept a copy of the registration form posted in the resident manager’s office, [e]ven if this method of providing notice does not comply with the literal meaning of [the statute] . . . substantially and sufficiently comports with the intent of the Act.” *Id.* at 875. The court also quoted the following holding from the Rental Housing Commission: “We have previously ruled that a failure to post the registration mandates neither dismissal of hardship petitions nor rent rollbacks. *See* H/P 182, RAC 12/30/76.” *Id.* Therefore, I find that Tenant has failed to establish that Housing Provider did not conspicuously post the amended registration.
14. The remaining question then, is when Housing Provider posted notice of the amended registration. Tenant’s argument on this issue is not entirely clear as throughout her post-hearing brief, Tenant intertwines and confuses the requirements for increasing the rent ceiling and increasing the rent charged. Tenant’s brief states that Housing Provider identified that new rent ceiling in its March 16<sup>th</sup> filing “Therefore, it is impossible that the notice could have been

provided within the 30-days prior required by the Act.” *Tenant’s Post-Hearing Brief* at 7.

15. As previously discussed, the regulations regarding vacancy increases state that the “date of perfection shall be the date on which the housing provider satisfies the notice requirements of § 4101.6.” 14 DCMR 4207.5. Section 4101.6 requires posting in a conspicuous place “prior to or simultaneously with the filing.” 14 DCMR 4101.6. Neither Tenant nor Housing Provider established when notice was posted regarding the amended registration. On direct examination of Ms. Marhefka, Counsel for Tenant established only that Ms. Marhefka did not post notice of the amended registration before it was filed on March 29, 2006. Tr. 58-62. Counsel for Tenant did not establish whether the notice was posted on the day of filing or anytime thereafter. Counsel simply did not ask the question. Counsel for Tenant asked: “If this [Amended Registration] was filed on March 29<sup>th</sup>, with a date of change of March 1<sup>st</sup>, 2006, how was notice provided.” Tr. 60. Ms. Marhefka responded “All the copies of all our amended registration forms were kept in the business office and available for review. And there’s a possibility as well that we - - because we started actually documenting with photographs of posting them in the laundry room.” *Id.* Counsel for Tenant then asked: “Was a copy of this amended registration form file-stamped March 29, 2006, posted 30 days before March 1<sup>st</sup>, 2006,” and Ms. Marhefka replied, “No,” and that line of questioning ended. Tr. 61. Tenant established that the amended registration was not posted before March 29<sup>th</sup>, but did not establish when or if it was posted on or after March 29<sup>th</sup>.
16. Tenant testified that by the time she received a copy of her lease on May 16, 2006, she had also received a copy of the amended registration. Tenant did not however, establish when or how she received the amended registration. Therefore, Tenant has not met her burden on this issue.

**(5) Whether Tenant received proper notice of the vacancy increase**

17. Tenant argues that in addition to posting the notice of amended registration, Housing Provider was required to provide her with notice of the basis for vacancy increase when she occupied the unit. Tenant argued that Housing Provider failed to provide her notice as required by § 4205.4 of the regulations (*Tenant’s Closing Stmt* at 5), which states:

A housing provider shall **implement a rent adjustment** by taking the following actions, and no rent adjustment shall be deemed properly implemented unless the following actions have been taken:

(a) the housing provider shall **provide the tenant of the rental unit not less than thirty (30) days written notice**, pursuant to § 904 of the Act, in which the following items shall be included:

- (1) The amount of the rent adjustment;

- (2) The amount of the adjusted rent;
- (3) The date upon which the adjusted rent shall be due; and
- (4) The date and authorization for the rent ceiling adjustment taken and perfected pursuant to § 4204.9.

14 DCMR [§] 4205.4 (emphasis added).

18. However, this Section is not applicable to Tenant because her rent was not increased. The above regulation applies to **“implement[ing] a rent adjustment.”** Housing Provider did not implement a rent adjustment as defined in the Act. Rather, Housing Provider established a new rent level through the vacancy increase for which Tenant was notified through the lease she signed and there is no additional notice requirement for vacancy increases for an unoccupied unit. Tenant cites the Rental Housing Commission’s decision in *Sawyer v. Mitchell*, TP 24,991 (RHC Oct. 31, 2010) to support her contention that Housing Provider was required to give Tenant notice pursuant to § 4205.4. However, *Sawyer*, specifically involved an increase to the rent charged for an occupied unit wherein the housing provider attempted to implement a previously unperfected vacancy rent ceiling increase. The Commission held “[P]ursuant to § 4205.4 (1998) housing providers must identify to tenants, the date and authorization for the rent ceiling adjustment taken and perfected pursuant to § 4205.4.” *Sawyer*, TP 24,991 at 12. However, the *Sawyer* decision has to be read in the context of its facts. The Commission went on say that the notice in *Sawyer* was improper “because it did not contain the identity of the date and authorization of the perfected and delayed rent ceiling adjustment.” *Id.* *Sawyer* stands for the proposition that, in implementing a vacancy increase as an increase in rent charged for an occupied unit, notice pursuant to § 4205.4 must be provided. *Sawyer* does not extend to the situation here, where a vacancy rent ceiling increase was taken of an unoccupied unit. Subsection (a) of 4205.4, above, specifically states that the housing provider shall “provide the tenant of the rental unit” with notice. While the notice requirements of § 4205.4 apply to increases in rent ceilings and rents charged for occupied units, it does not apply to vacancy rent ceiling increases for an unoccupied unit. When a vacancy ceiling increase is taken on an unoccupied unit, there is no tenant in the rental unit entitled to notice.
19. When the Rental Housing Act was amended in August 2006, there were additional provisions added that would require a housing provider to give a new tenant additional notices regarding vacancy increases, but those provisions are not applicable to increases prior to August 2006. *See.* D.C. Official Code § 42-3502.22 (“Disclosure to Tenants,” effective August 1, 2006) and D.C. Official Code § 42-3402.13(d) (requiring notice of vacancy increase within 15 days of commencement of new tenancy, effective August 1, 2006). Tenant has failed to meet her burden on this issue.

20. Tenant also testified that she did not receive notice of the rent amount until she received a copy of her lease on May 16, 2006. However, I do not credit Tenant's testimony in this regard. Tenant completed an application for a larger apartment in January 2006. RX 212. In February 2006, she learned that apartment 901 had become available. The leasing agent, Ms. Churchill, was not able to tell her the rent amount and referred Tenant to Ms. Marhefka. Tenant did not state whether or when she spoke with Ms. Marhefka. Yet, Tenant moved into the apartment on March 30, 2006, and paid rent for April and May 2006. Therefore, Tenant must have known the rent amount, as she would have had to pay the first month's rent before taking occupancy of the apartment. The rental application completed by Tenant reflects that the rent for apartment 901 was \$3,915. RX 212. However, that amount had to have been written onto the application at a later date as Tenant completed the application on January 21, 2006, before the former occupant died in February 2006. Ms. Marhefka signed the application on March 7, 2006, and most likely wrote in the rent amount at that time as the handwriting matches that of Ms. Marhefka. *Id.* Neither Ms. Marhefka nor Tenant recalled whether Tenant was given a copy of the application. However, Ms. Marhefka testified credibly that once apartment 901 became available, there had to have been additional communication with Tenant, because once the rent amount was determined, Tenant had to qualify for the apartment by establishing that she had income equaling at least 40 times the rental amount. As such, I find that Tenant was aware of the rent amount before she moved into unit 901.

**(6) Whether 180 days had lapsed between rent increases**

21. In the first Final Order, I considered only the timing of the vacancy rent ceiling increase and did not properly however consider whether 180 days had lapsed between the implementation of the vacancy increase in the rent charged and the previous increase in rent charged.
22. Prior to August 5, 2006, when the Rental Housing Act was amended, a housing provider was permitted to increase the "rent charged" once every 180 days. D.C. Official Code § 42-3502.06 (1985) and 14 DCMR 4205.5. The regulations which govern vacancy increases require that a housing provider also comply with § 4205.5 when implementing a vacancy increase:

**4207.6** Where a housing provider increases the rent for a rental unit to an amount equal to or less than the rent ceiling adjustment permitted by § 4207.1, the housing provider shall comply with the provisions of §§ 4205.4 and **4205.5**, and the notices required by §§ 4101.6 and 4205.4(a) may be issued simultaneously to the affected tenant on a form of notice approved by the Rent Administrator.

23. The evidence established that on November 1, 2005, Housing Provider increased the rent charged for unit 901 to \$1,701 by implementing the 2005 CPI-W increase. PX 116. Therefore, Housing Provider could not implement another increase in the rent charged until 180 days has lapsed - May 1, 2006. Housing

Provider implemented the vacancy increase four months later on March 31, 2006, when Tenant moved into the apartment. Therefore, 180 days had not lapsed between rent increases. See *Newton Towers Ltd P'ship v. Newton House Tenant's Ass'n*, TP 20,005 (RHC Feb. 1, 1988) (“We find no error in allowing a vacancy and an automatic rent ceiling adjustment less than two weeks apart provided that there is no corresponding rent increase demanded sooner than 180 days following the last rent increase.”). The Rental Housing Commission held that, under the former Act, there was a mandatory 180 day waiting period to implement the vacancy increase. *Burkhardt v. B.F. Saul Co.*, RH-TP-06-28,708 (RHC Sept. 25, 2014). When Tenant moved into the apartment, she was charged a monthly rent of \$3,915. To determine the amount of rent refund owed, it is necessary to determine the legal rent ceiling for the unit on March 31, 2006.

24. Tenant alleges that her rent exceeds the legally calculated rent ceiling because Housing Provider failed to perfect the November 1, 2004, and November 1, 2005, CPI-W rent ceiling increases and the March 2006 vacancy increase. Rent ceilings have since been abolished as of August 5, 2006, five months after Tenant moved into the apartment.
25. Tenant is correct that the evidence shows that Housing Provider did not perfect the November 2004 rent ceiling increase, which was an increase of general applicability, because the increase was not filed within 30 days of May 1<sup>st</sup>, the effective date of the increase. Under the Act and regulations applicable before August 6, 2006, a housing provider was permitted to increase a tenant's rent ceiling once every 12 months by an amount authorized by the Act through an adjustment of general applicability (CPI-W increase). D.C. Official Code § 42-3502.06 (1985) and 14 DCMR 4205.5. A properly perfected rent ceiling could then be used to increase the rent charged. 14 DCMR 4205.3. The “CPI-W” increase, which is determined by the Rental Housing Commission, is published annually in the D.C. Register with an effective date of May 1. A housing provider had to “take and perfect” the CPI-W increase within 30 days of first being eligible to do so (i.e. with some exceptions, by May 30<sup>th</sup> of each year). 14 DCMR 4204.10; *Sawyer Prop Mgmt of MD, Inc., v. D.C. Rental Hous. Comm'n*, 877 A.2d 96 (D.C. 2005). The maximum amount that a tenant's rent ceiling could be increased was the CPI-W percentage, but not more than 10% of the current rent ceiling. D.C. Official Code § 42-3502.06(b) (1985).
26. On December 23, 2003, Housing Provider filed a CEAGA, effective February 1, 2004, increasing the rent ceiling for unit 901 from \$1,661 to \$1,696 (\$35 increase). PX 114. The CEAGA reflects that the basis for the increase was the 2003 CPI-W increase of 2.1%, which was effective May 1, 2003. However, the rent ceiling increase was not filed by May 30, 2003, and Housing Provider did not establish that it was otherwise eligible to take the increase at a later date. The Rental Housing Commission and the D.C. Court of Appeals have held definitively that “[a] housing provider that fails to meet this thirty-day deadline . . . forfeits its right to the adjustment.” *United Dominion Mgmt. Co. v. D.C. Rental Hous.*

*Comm'n*, 101 A.3d 426, 431 (D.C. 2014). Therefore, the 2004 CPI-W increase cannot be included in the legal rent ceiling for the unit.

27. On March 1, 2005, Housing Provider filed a CEAGA, effective April 1, 2005, increasing the rent ceiling for unit 901 from \$1,696 to 1,745 (\$49 increase). PX 115. The CEAGA reflects that the basis for the increase was the “2003 CPI-W of 2.9%.” However, the CPI-W for 2003 was 2.1%, and Housing Provider had already implemented the 2003 CPI-W increase. The CPI-W for 2004 was 2.9%. The sample notice attached to the CEAGA, which was for a different unit, reflects that the increase was based on the 2004 CPI-W increase. It appears that Housing Provider made an error on the CEAGA and was in fact attempting to take and perfect the 2004 CPI-W increase of 2.9% which is consistent with the rent increased amount of \$49. Because Housing Provider did not file the 2003 CPI-W increase until December 23, 2003, it was not eligible to file the 2004 CPI-W increase until between December 23, 2004, and January 23, 2005. *See Am. Rental Mgmt Co. v. Chaney*, RH-TP-06-28,366 and RH-TP-06-28,577. The increase was filed 35 days late on March 1, 2005, and therefore cannot be included in the legal rent ceiling. Therefore, the legal rent ceiling on March 1, 2005, was \$1,661.
28. The remaining questions are whether Housing Provider properly perfected the vacancy rent ceiling increase on March 29, 2006, and whether Tenant is entitled to a rent refund where Housing Provider implemented the vacancy increase in less than 180 days after a previous increase. Having already addressed and rejected Tenant’s other objections to the vacancy ceiling increase, I find that the vacancy ceiling increase was properly taken and perfected. Housing Provider timely filed the vacancy ceiling increase on March 29, 2006, which was within 30 days of the vacancy, with an effective date of March 1, 2006. Housing Provider increased the rent ceiling to \$4,483 based on a comparable unit (an increase of \$2,738 or 156%). Therefore, the legal rent ceiling for unit 901 on March 31, 2006, was \$4,483, as stated in Tenant’s lease. Housing Provider implemented part of the vacancy increase by increasing the rent for unit 901 to \$3,915, effective March 31, 2006, when Tenant signed her lease. Because the vacancy increase was based on a comparable unit, the fact that the 2004 and 2005 rent ceiling increases were invalid, does not change the amount of the vacancy rent ceiling increase. Even if Housing Provider had never implemented the 2004 and 2005 CPI-W increases, the Act permitted Housing Provider in March 2006, to increase the rent ceiling to that of a substantially identical unit in the same housing accommodation. 14 DCMR 4207.2(b).
29. However, Housing Provider was not permitted to implement the vacancy increase before May 1, 2006. As stated above, Housing Provider implemented the vacancy increase when Tenant moved into unit 901 on March 31, 2006, by increasing the rent charged, through the lease, from \$1,701 to \$3,915, which was less than 180 days after the rent was last increased on November 1, 2005. Therefore, on March 31, 2006, Tenant could not be charged rent higher than \$1,701. *See Greene v. Urquilla*, TP 27,606 (RHC Jan. 14, 2005); 2005 D.C. Rental

Housing Comm. LEXIS 372 (affirming the hearing examiner's holding that where Tenant's lease charged him rent \$15 more than the rent charged in the last filed Certificate of Election, the tenant's rent exceeded the legally calculated rent for the unit and tenant was entitled to a rent refund). And, because I have found that Housing Provider did not properly perfect the 2004 and 2005 CPI-W increases, the maximum rent allowable on March 31, 2006, was \$1,661.

30. The question then is the amount of any refund and whether Housing Provider is permanently barred from implementing the vacancy increase. The facts in this case are identical to two cases decided by the Rental Housing Commission: *Osborn [sic] v. Charles E. Smith Mgmt Co.*, TP 11,294 [sic] (RHC June 11, 1986) and *Town Center Mgmt v. Wynn*, TP 10,694 (RHC Mar. 28, 1988), 1988 D.C. Rental Housing Comm. LEXIS 436. Both of these cases involved a new tenant signing a lease, after a vacancy or CPI-W rent ceiling increase had been perfected, but the lease implemented the increase in less than 180 days after a previous rent increase. In *Osborn*, [sic] a vacancy increase was implemented 30 days too early and in *Wynn*, a CPI-W increase was implemented 28 days too early. In both cases, the Commission held that where the housing provider had perfected its right to the rent ceiling increase by timely filing it with the RAD, the implementation had to be deferred, but that the housing provider was permitted to take the increase once the 180 days had lapsed and no new notice was required. Regarding notice to the tenant, the Commission stated in the *Osborn [sic]* case:

[Tenant] had received actual notice of the landlord's intent to charge this amount when he signed his lease on August 1. His rent was not actually increased on December 1. Instead, a previously charged increase was disallowed for all months in which it was collected prior to December 1. In these circumstances the landlord had no opportunity to send, and there is no requirement for, a separate notice of an increase to be effective on December 1. . . . We might reach a different conclusion on the allowance of this rent increase had the landlord failed to adjust his rent ceiling prior to December 1. But where, as here, the landlord had raised the ceiling prior to the rent increase, and had a right to the rent increase on December 1, we will not penalize the landlord for failure to send notice. This situation is akin to that presented in the Guerra case, supra. . . . The Commission stated in the Guerra decision that it 'was not inclined to further penalize a landlord for the mistake (in the absence of bad faith) by invalidating all subsequent attempts to implement otherwise valid rent [and] ceiling adjustments.'"

*Osborn [sic] v. Charles E. Smith Mgmt Co.*, TP 11,294 [sic]. Relying on *Osborn*, [sic] the Commission held in *Wynn*:

The landlord had followed all the steps necessary to perfect the increase in the rent ceiling and was legally entitled to it as to apartment 303 on October 1, 1981. His filing with the Rent Administrator was public notice of his having taken the 1981 automatic increase. Ms. Wynn received actual notice of the rent to be charged when she first signed her lease; she

was never actually subjected to an increase in the amount of her rent after her tenancy commenced. There was no occasion for the landlord to send Ms. Wynn a notice of increase; the higher amount was included as part of the initial rent.

*Town Center Mgmt v. Wynn*, TP 10,694. Similarly, in this case, Tenant signed a lease on March 31, 2006, agreeing to pay rent of \$3,915, which was less than the legal rent ceiling, and was based on a properly perfected vacancy increase. However, Housing Provider could not charge the increased rent until May 1, 2006, 31 days later. Therefore, Tenant is entitled to a rent refund of \$2,254 (the difference between the rent charged of \$3,915 and the maximum allowable rent of \$1,701) for the one month that Housing Provider charged her rent that exceeded the maximum allowable rent for the unit.

31. **Therefore, Tenant is awarded a rent refund of \$2,254 plus interest of \$432.99, as calculated in Appendix A attached to the Final Order.**

Final Order after Remand at 11-26 (footnotes omitted) (emphasis in original).

On September 16, 2015,<sup>7</sup> the Tenant filed a motion for reconsideration of the Final Order (“Motion for Reconsideration”). R. at 1820-35. On November 13, 2015, the Tenant filed a notice of appeal (“Second Notice of Appeal”) with the Commission. On November 19, 2015, the ALJ issued an order treating the Motion for Reconsideration as a motion for relief from the Final Order and denying the motion for lack of jurisdiction because the Second Notice of Appeal had already been filed (“Order Denying Relief”). R. at 1901-04.

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<sup>7</sup> The Commission notes that the Motion for Reconsideration is date-stamped by OAH as having been filed at 9:02 a.m. on September 17, 2015, despite having been sent by email by the Tenant's counsel at 4:54 p.m. on the previous day. OAH's rules, as in effect at the time, provide that:

The filing date for an e-mail filing received between 9:00 a.m. and 5:00 p.m. on any OAH business day will be the date it is received in the correct OAH electronic mailbox. The filing date for an e-mail filing received at other times will be the next day that the Clerk's Office is open for business. The date and time recorded in the correct OAH electronic mailbox shall be conclusive proof of when it was received.

<sup>1</sup> DCMR § 2841.7 (Dec. 9, 2011). The ALJ states in the Order Denying Relief from Final Order, R. at 1901, that the Motion for Reconsideration was filed on September 16, 2016 before the close of business. Accordingly, the Commission is satisfied that the Motion for Reconsideration was filed on September 16, 2016.



The Second Notice of Appeal raises the following 26 issues:<sup>8</sup>

1. [Fixed Term Lease] The ALJ improperly found that Tenant's rent could be increased after one month when there was a 12 month fixed term lease in place in violation of D.C. Code § 42-3502.08(e). It was error for the ALJ to simply delay the increase rather than invalidate it, and it was error for the ALJ to find that Tenant is only entitled to a rent refund for one month. (*Final Order After Remand at 24, 25.*)
2. [Vacancy Rent Increase] The ALJ erred by failing to find that the Housing Provider did not give proper notice pursuant to 14 DCMR § 4205.4 with respect to the \$2254 May 1, 2006 rent increase, invalidating the increase. (*Final Order After Remand at 18*)
3. [Vacancy Rent Increase] The ALJ erred by failing to find that the Housing Provider did not comply with D.C. Code § 42-3502.05(g) and 14 DCMR § 4103.1(e) with respect to the vacancy rent increase, invalidating the vacancy rent increase. (*Sept. 16, 2015 Request for Reconsideration at 8*)
4. [Vacancy Amended Registration] The ALJ erred by failing to find that the Amended Registrations filed on March 16 and March 29, 2006 contained erroneous information as to the rent ceiling thus invalidating the rent ceiling increases and rent increases based on those filings. (*Final Order After Remand at 24*)
5. [Vacancy Amended Registration] The ALJ's finding that the March 16, 2006 Amended Registration "is not relevant" because it was rescinded, delayed, never implemented, and superseded by the March 29, 2006 Amended Registration' [sic] is not supported by record. (*Finding of Fact #13, Final Order After Remand at 10, 11; Tr. At 58*)
6. [Vacancy Amended Registration] The ALJ erred by failing to find that the Housing Provider did not meet the notice requirements of 14 DCMR [§] 4101.6 with respect to the vacancy rent ceiling increase, invalidating the increase. It was arbitrary to find that "[i]ndeed, there is likely no specific place that every tenant in the building visits" or that the laundry room, in the basement of an apartment building where the apartments have their own washers and dryers was "a sufficiently available and public space to meet the requirements of the Act." (*Final Order After Remand at 16. Nelson v. Klinge Corporation, RH-TP 28,519 Final Decision and Order, March 29, 2010 at 6 (Attachment C to Jan. 28, 2011 Consolidated Motion for Relief, R. at 1500-1559.)*)

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<sup>8</sup> The Commission recites the Tenant's issues in the exact language and number as used in the Second Notice of Appeal. The Tenant's statement of the issues includes a column assigning general categories to the issues, which the Commission includes in brackets for each issue.

7. [Vacancy Amended Registration] The ALJ erred by failing to find that once Tenant affirmatively stated that she did not see a copy of the vacancy amended registration posted in the laundry room on March 29, 2006, she had made a *prima facie* case, and the burden shifted to the housing provider to demonstrate that it had met the notice requirements of [14 DCMR §] 4101.6 with substantial evidence.
8. [Vacancy Amended Registration] It was error for the ALJ by effectively ruling that the invalidity of the 2004 and the 2005 rent ceiling increases had no bearing on the vacancy ceiling increase, thereby giving the Housing Provider a wind fall. (*Final Order After Remand at 23, 24*)
9. [Vacancy Rent Increase] The ALJ erred by failing to find that the Housing Provider did not comply with D.C. Code § 42-3502.05(g) and 14 DCMR § 4103.1(e) with respect to the vacancy rent increase, invalidating the vacancy rent increase. [sic – identical to Issue 3]
10. [Comp. Unit] It was error for the ALJ to find that Tenant’s uncontroverted testimony at the hearing that the rent ceiling for unit 801, when the Housing Provider tried to use it for the vacancy rent ceiling increase, was invalid and therefore not able to be used for the vacancy rent increase, invalidating the vacancy rent ceiling increase. (*Tr. At 24*)
11. [Comp. Unit] ALJ erred by failing to find that the “date of change” for purposes of filing a vacancy rent ceiling increase, was February 3, 2006, the day the former tenant died. Alternatively, [i]f the Court accepts the ALJ’s finding the apartment was “vacant,” meaning available to rent on March 1, 2006, the ALJ erred in failing to find that the landlord suffered no actual vacancy loss pursuant to § 45-1524 and was not entitled to a vacancy increase because they had a qualified tent [sic], ready to move in, as of January 20, 2006, but “otherwise withheld the apartment” from the marked [sic] for 30 days. (*Tr. At 78, Final Order After Remand at 15.*)
12. [Registration] The ALJ erred by failing to find that B.F. Saul Property Company, the management agent named in the Lease, “responsible for managing the apartment project . . . authorized to act on behalf of the owner for notice and service of process for all matters arising under the lease” and to whom “all checks or money orders for rent or other payments are to be made payable” was not the management agent for the Housing Accommodation; likewise, it was error for the ALJ to find that B.F. Saul Company, despite their non-appearance in the Lease, was the management agent for the Housing Accommodation. (*Lease at 1, 10; R. at 1821, 1831*)
13. [Registration] The ALJ erred by failing to find that B.F. Saul Property Company was not properly registered pursuant to D.C. Code Sec. § 42-3502.08, thus Housing Accommodation was not properly registered at the time of [sic] the vacancy increase was taken, invalidating the vacancy rent ceiling and rent

increase. (*Dec. 6, 2010 Order on Pending Motions at 17, 18; R. at 1483, 84*)  
(*Nelson v. Klinge Corporation, RH-TP 28,519 Final Decision and Order, March 29, 2010 at 6, Attachment C to Jan. 28, 2011 Consolidated Motion for Relief from Order R. at 1500-1559*)

14. [Registration] The ALJ erred when she failed to allow Tenant to raise the issue of improper registration at the hearing on the merits after her motion for summary judgment on this issue was denied. (*Dec. 6, 2010 Order on Pending Motions at 14, R. at 1481*)
15. It was an abuse of discretion for the ALJ to fail to hold an evidentiary hearing on the claim of improper registration on remand because Tenant could reach the issue in TP 29,171 when the ALJ had dismissed 29,171 with prejudice on Sept. 14, 2014. (*Final Order After Remand at 6, 7.*) (*A copy of order dismissing TP 29,171 is attached.*)
16. [Abuse of Discretion] It was an abuse of discretion for the ALJ to deny discovery. (*Jan. 4, 2010 Scheduling Order at 7; R. at 1195.*)
17. [Error of Law] It was error for the ALJ to misapply DC Code § 43[sic]-3502.06(e) to rent ceilings and then use this misapplication of the law as a basis for prohibiting tenant, over her specific objections, from presenting evidence of unit 901's rent ceiling history that predated July 14, 2003. (*Jan. 30, 2008 Hearing Tr. At approx.. 14:47:44-15:13:23*) (*Dec. 6, 2010 Order on Pending Motions at 5, 6; R. at 1472, 73, 83*)
18. [Procedural Error] It was an abuse of discretion to limit the issues Tenant could address [at] the hearing to the rent increases for unit 901 effective November 1, 2004, November 1, 2005 and March 25, 2006. (*Dec. 6, 2010 Order on Pending Motions at 1487*)
19. [Procedural Error] It was an abuse of discretion and an error of law to remove filings from the record.
20. [Procedural Error] It was an abuse of discretion and error of law for the ALJ to find that she "need not address the specific points raised in Tenant/Petitioner's Consolidated Motion for Relief from Final Order Under Rule 60(B) and/or Notice of Objections regarding the rulings made in the December 6, 2010 Order on Pending Motions," and, it was arbitrary for the ALJ to find that the discussion of rent increases in the Final Order After Remand "sufficiently addressed Tenant's concerns." (*Final Order After Remand at 26.*)
21. [Damages] It was error for the ALJ to find that the lawful rent was \$1661 without reviewing the landlord's registration file and adding to rent charged or chargeable on April 30, 1985, all properly taken and perfected rent ceiling increases. (*Final Order After Remand at 23 – order of 12/20.*)

22. [Damages] It was error for the ALJ to fail to order a rent rollback and a rent refund.
23. [Bad Faith] ALJ erred by failing to find that Tenant was entitled to a presumption of retaliation because within the 6 months preceding the Housing Provider's unlawful vacancy increase, Tenant had legally withheld all or part of her [sic], was a member of the building's tenants organization association, and a party to TP 28,254, which was filed on January 31, 2006. Likewise it was also error for the ALJ to fail [to] find that the Housing Provider did not provide clear and convincing evidence to rebut the presumption pursuant to D.C. Ann. Code § 42-3505.02(b). (*Burkhardt v. Klingle*. TP 28,270 Decision and Order, Sept. 2, 2006, at 24, Attachment A to the July 14, 2010 motion for Partial Summary Judgment, R. at 13-53-1393) (TR at 84)
24. [Bad Faith] The ALJ erred by failing to find that because the Housing Provider had already been found to have acted in bad faith regarding the rent ceiling increase filed on December 23, 2003 in TP 27,207 but continued to use this unlawful increase as a basis for unit 901's rent ceiling, each increase built upon it was taken knowingly, willfully, and in bad faith. (*Burkhardt v. Klingle*. TP 28,270 Decision and Order, Sept. 2, 2006, Attachment A to the July 14, 2010 Motion for Partial Summary Judgment, R. at 1353-1393)
25. [Bad Faith] It was error for the ALJ to fail to find the Housing Providers failed to honor clauses 1 and 40.1 of the Lease.
26. [Bad Faith] It was error for the ALJ to fail to [sic] that the Housing Provider's conduct was knowing, willful and sufficiently egregious to warrant treble damages.

Notice of Appeal at 2-6.

On November 30, 2015, the Tenant filed a supplement to the Notice of Appeal ("Supplemental Notice of Appeal"), raising the following four issues related to the ALJ's denial of the Motion for Reconsideration:

1. It was error for the ALJ to rule on Tenant's Motion For Reconsideration, which was denied by rule (OAH Rule 2828.5) forty-five (45) days after was filed on 9/16/15 and six days after an appeal had been filed with the Rental Housing Commission. Because the Motion was denied by rule, there was no pending Motion for the ALJ to make a ruling on. In any event, the filing of the appeal removed any motion from her jurisdiction, and the Order on Tenant's Motion for Relief from Final Order is a nullity.
2. It was error for the ALJ to find that the additional five days 1 DCMR § 2812.5 adds to the ten-day period to file a motion for reconsideration when the final order

is served by mail did not apply to Tenant because she filed her Motion for Reconsideration with the court via email. The 9/1/15 Order upon which the Motion for Reconsideration is based was served *only* by mail, and the Motion for Reconsideration was timely filed and received by OAH on 9/16/15. The ALJ provides no support for her contention that “[w]here a party does not mail a motion for reconsideration, it must be filed within the 10-day period.”

3. It was error for the ALJ to find that Tenant’s 9/16/15 Motion for Reconsideration was untimely, and therefor [sic] converted to a Motion for Relief From a Final Order pursuant to 1 DCMR § 2828.11.
4. It was error for the ALJ to fail to find that the Notice of Appeal from the 9/1/15 Final Order, filed with the Commission on 11/13/15, was timely filed.

Supplemental Notice of Appeal at 1-2.

The Tenant filed a brief on September 20, 2016 (“Tenant’s Brief”). The Housing Provider filed a response to on October 5, 2016 (“Housing Provider’s Brief”). The Commission held its hearing on March 29, 2017.<sup>9</sup>

## **II. PRELIMINARY ISSUES – SUPPLEMENTAL NOTICE OF APPEAL**

In the Order Denying Relief, the ALJ determined that the Motion for Reconsideration was, first, untimely as a motion for reconsideration or a new hearing because it was filed by email and not entitled to the five-day extension for mailing, and second, outside of OAH’s jurisdiction because, by November 19, 2015, the Second Notice of Appeal had been filed, and jurisdiction therefore assumed by the Commission pursuant to 14 DCMR § 3802.3. Nonetheless, the ALJ stated in the Order Denying Relief that, if she had jurisdiction, she would have granted relief in part to conduct a further hearing on the applicability of Osburn v. Charles E. Smith

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<sup>9</sup> On May 13, 2016, the Commission granted the Tenant’s motion to expedite its proceedings, but noted that it had not yet received the certified record of the case from OAH. After the record was received, the Commission’s hearing was originally scheduled in this case for October 27, 2016. However, several continuances were granted before the hearing was ultimately held on March 29, 2017.

Mgmt Co., TP 11,294 (RHC June 11, 1986), and Town Center Mgmt. v. Wynn, TP 10,694 (RHC Mar. 28, 1988), under 14 DCMR § 4205.4.<sup>10</sup> Order Denying Relief at 2; R. at 1902.<sup>11</sup>

The Tenant's Supplemental Notice of Appeal asserts that the ALJ erred by treating the Tenant's Motion for Reconsideration as untimely, and thereby converting it into a motion for relief from judgment, and by issuing the Order Denying Relief after the Motion for Reconsideration had been automatically denied. *See* Supplementation Notice of Appeal at 1-2.

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<sup>10</sup> 14 DCMR § 4205.4 provides as follows:

A housing provider shall implement a rent adjustment by taking the following actions, and no rent adjustment shall be deemed properly implemented unless the following actions were taken:

- (a) The housing provider shall provide the tenant of the rental unit, not less than thirty (30) days written notice pursuant to § 904 of the Act, the following:
  - (1) The amount of the rent adjustment;
  - (2) The amount of the adjusted rent;
  - (3) The date upon which the adjusted rent shall become due; and
  - (4) The date and authorization for the rent ceiling adjustment taken and perfected pursuant to 4202.9;
- (b) The housing provider shall certify to the tenant, with the notice of rent adjustment, that the rental unit and the common elements of the housing accommodations are in substantial compliance with the housing regulations or if not in substantial compliance, that any noncompliance is the result of tenant neglect or misconduct;
- (c) The housing provider shall advise the tenant, with the notice of rent adjustment by petition filed with the Rent Administrator; and
- (d) The housing provider shall simultaneously file with the Rent Administrator a sample copy of the notice of rent adjustment along with an affidavit containing the names, unit numbers, date and type of service provided, certifying that the notice was served on all affected tenants in the housing accommodation.

In Sawyer Prop. Mgmt. v. Mitchell, TP 24,991 (RHC Oct. 31, 2002), *aff'd* Sawyer Prop. Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n, 877 A.2d 96 (D.C. 2005), the Commission determined that a preserved vacancy rent ceiling adjustment could not be later-implemented as an increase in the rent charged without providing the tenant notice in total compliance with 14 DCMR § 4205.4.

<sup>11</sup> Despite the ALJ's ruling in its favor by denying reconsideration or relief, the Housing Provider filed a motion for reconsideration of the Order Denying Relief, asserting that the ALJ failed to, "[b]efore *granting* any motion under [§ 2828], issue an order allowing the opposing party an opportunity to respond to the motion." 1 DCMR § 2828.13 (emphasis added). Based upon our review of the record, the Commission is satisfied the Housing Provider was not denied any opportunity to respond required by the OAH Rules because the ALJ did not grant the motion that the Housing Provider would have opposed. *See id.*

The Tenant also asserts that, because the Motion for Reconsideration was timely filed, the ALJ erred by ruling on it after it was denied by operation of law at the expiration of the 45-day period for the ALJ to rule on such a motion. *See id.* at 1.

Ordinarily, “the denial of a Motion for Reconsideration is not an appealable order.” Perry v. Sera, 623 A.2d 1210, 1214 n.10 (D.C. 1993). As the District of Columbia Court of Appeals (“DCCA”) has clarified, however, “if a Motion for Reconsideration has tolled the timing requirements for an appealable order, and an appeal is timely noted following the denial of the Motion for Reconsideration, both the appealable order and the Motion for Reconsideration may be reviewed.” Ware v. D.C. Dep’t of Emp. Servs., 2017 D.C. App. LEXIS 82, \*7 n.3 (D.C. Apr. 13, 2017) (citing Puckrein v. Jenkins, 884 A.2d 46, 54 n.8 (D.C. 2005)). For the following reasons, the Commission determines that the Motion for Reconsideration tolled the time for the Tenant to file an appeal, and that the ALJ’s denial of the motion should be vacated and the case remanded for further proceedings.

In relevant part, OAH’s rules provide the following:

2828.3 Within ten (10) calendar days after a final order has been served, any party may file a motion asking the Administrative Law Judge to change the final order. Such a motion is a “motion for reconsideration or for a new hearing.” . . .

2812.5 When a party may or must act within a specified time period after service, and service is made by United States mail, commercial carrier, or District of Columbia Government inter-agency mail, five (5) calendar days are added after the period would otherwise expire, unless a statute or regulation provides otherwise. . . .

2938.2 If any party files a motion for reconsideration or for a new hearing within the ten (10) calendar day deadline specified in Subsection 2828.3, an Order will not be final for purposes of appeal to the Commission until the Administrative Law Judge rules on the motion or the motion is denied as a matter of law under Subsection 2828.15. . . .

2828.11 An Administrative Law Judge shall treat any motion asking for a change in a final order as a motion for relief from the final order, if the motion is

not filed within the ten (10) calendar day deadline specified in Subsection 2828.3, regardless of the title that a party gives to that motion. . . .

2828.15 An Administrative Law Judge should rule on any motion [for reconsideration or relief] within forty-five (45) calendar days of its filing. If an Administrative Law Judge has not done so, the motion is denied as a matter of law. . . . After expiration of any applicable deadline, the Administrative Law Judge, in his or her discretion, may issue a statement of reasons for denying the motion, but any such statement has no effect on the time for seeking judicial review or filing any other appeal.

1 DCMR §§ 2812, 2828, 2938 (Dec. 31, 2010) (“OAH Rules”).<sup>12</sup>

**A. Whether the Motion for Reconsideration Was Timely Filed and Tolloed the Time to File a Notice of Appeal**

The Tenant maintains that the ALJ erred in the Order Denying Relief by finding that, under OAH Rule 2828.11, the Motion for Reconsideration had to be treated as a motion for relief from judgment, because it was not filed within the ten-day period following the Final Order after Remand. Supplemental Notice of Appeal at 1.

Pursuant to OAH Rule 2828.3 and 2938.2 any motion for reconsideration in response to the Final Order after Remand had to be filed within ten calendar days of September 1, 2015, plus any time allowed by OAH Rule § 2812.5. As noted above, OAH Rule 2812.5 provides that “[w]hen a party may or must act within a specified time period after service, and service is made by United States mail, . . . five (5) calendar days are added[.]” The “plain meaning”<sup>13</sup> of OAH Rule 2812.5 applies the five-day extension when the service that activates a deadline is effected

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<sup>12</sup> 1 DCMR § 2800.5 provides that chapters 28 and 29 of Title 1 of the DCMR may be cited as “OAH Rule \_\_\_\_[.]” As noted *infra* at 26, the OAH Rules were amended while the Motion for Reconsideration was pending. Accordingly, the Commission herein cites the effective dates of the OAH Rules where relevant.

<sup>13</sup> The DCCA has explained that a court must look at the “plain meaning” of the words of a statute or regulation when the words are clear and unambiguous and construe the words according to their ordinary sense and with the meaning commonly attributed to them. See District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006); see also Dorchester House Assocs L.P. v. D.C. Rental Hous. Comm’n, 938 A.2d 696, 702 (D.C. 2007); Novak v. Sedova, RH-TP-15-30,652 (RHC Nov. 20, 2015); Tenants of 4021 9th St., N.W. v. E&J Props., LLC, HP 20,812 (RHC June 11, 2014).



by U.S. mail, irrespective of the method used by a party to respond within the deadline. *Id.*; *see, e.g., Wassem v. B.F. Saul Co.*, RH-TP-06-28,220 & RH-TP-6-28,649 (RHC Mar. 31, 2016) (determining that five-day extension applied where final order was served on parties by mail); *cf. Clark v. Bridges*, 75 A.3d 149, 151-52 (D.C. 2013) (under D.C. App. R. 4(a), five-day extension applies when notice of entry of judgment in D.C. Superior Court must be served by mail). Therefore, contrary to the ALJ's determination in the Order Denying Relief, the Commission determines that the plain language of OAH Rule 2812.5 permits a five-day extension for the filing of the Motion for Reconsideration.

The Commission's review of the record reveals that the certificate of service for the Final Order after Remand states that it was served on the Tenant by U.S. mail at her home address. Final Order after Remand at 30. The Motion for Reconsideration was filed on September 16, 2015, exactly 15 calendar days after Final Order after Remand was issued. *See* OAH Rule 2812.2 ("In computing any time period measured in days, the day of the act, event, or default from which the period begins to run shall not be included."). Therefore, the Commission is satisfied that the five-day extension applies, that the Motion for Reconsideration was timely filed in response to the Final Order, and that the time for the Tenant to file an appeal of the Final Order after Remand was tolled. OAH Rule § 2812.5.<sup>14</sup>

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<sup>14</sup> The Commission observes that the DCCA has consistently interpreted the five-day mailing extension permitted by its rules not merely as an increase in the number of calendar days to run, but as two separate time periods, the first of which, for mailing, must conclude on a business day. *See Clark v. Bridges*, 75 A.3d 149, 151 (D.C. 2013) (citing *Singer v. Singer*, 583 A.2d 689 (D.C. 1990) ("Treating the time periods separately resulted in the motion's being timely, because the last day of the first period, counted separately, was Sunday[.]"); D.C. App. R. 4(a)(6). The Commission does not need to determine in this case whether OAH's rule should also be applied as two separate periods, because the Motion for Reconsideration was timely under either method of calculating the extended deadline.

## **B. Whether the ALJ Erred by Issuing the Order Denying Relief**

The Commission's review of the ALJ's Order Denying Relief and the Tenant's Supplemental Notice of Appeal reveals several contradictions and unresolved questions. First, the Tenant argues that the ALJ erred by denying to Motion for Reconsideration because OAH lacked jurisdiction to decide the Motion for Reconsideration after the Second Notice of Appeal was filed; however, a purported lack of jurisdiction over the Motion for Reconsideration was the very reason provided the ALJ for denying the motion, since OAH necessarily has jurisdiction to determine its jurisdiction. *See Wash. Fed. Savings & Loan Ass'n v. Whiteside*, 488 A.2d 936, 937 (D.C. 1986); *Taylor v. Bain*, TP 28,071 (RHC June 28, 2005); *Hampton House Tenants' Ass'n v. Shapiro*, CI 20,677-20,682 (RHC Mar. 15, 1996).

Second, under the OAH rules in effect at the time the Tenant filed the Motion for Reconsideration, the motion was denied automatically by OAH Rule 2828.15 after 45 days, that is, on November 2, 2015.<sup>15</sup> Although the ALJ later denied the Motion for Reconsideration because of the pending appeal of the Final Order after Remand, nothing in the Order Denying Relief indicates that the ALJ considered that the appeal had been filed because of the prior, automatic denial of the Motion for Reconsideration.

The Commission additionally observes that, on October 13, 2015, before the ALJ ruled on the Motion for Reconsideration, OAH adopted a notice of emergency and proposed rulemaking to revise its rules of procedure. *See* 62 D.C. Reg. 14365 (Nov. 6, 2015).<sup>16</sup> As relevant to the Tenant's Motion for Reconsideration, the revised rules extend the 45-day limit

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<sup>15</sup> October 31, 2015, a Saturday, was precisely 45 days after the filing of the Motion for Reconsideration. However, OAH's rules provide that "the last day of the period shall be included unless OAH is closed on that day. In that case, the period runs until the end of the next day on which OAH is open." 1 DCMR § 2812.3.

<sup>16</sup> The DCAPA provides that rules promulgated on an emergency basis "may become effective immediately" so long as they are "forthwith [] published and filed" in the *D.C. Register*. D.C. OFFICIAL CODE § 2-505(c).

provided by OAH Rule 2828.15 to 90 days in rental housing cases. *Id.* at 14416; OAH Rule 2939.1 (Oct. 16, 2015). If the 90-day extension under the revised OAH Rules had applied, the Second Notice of Appeal would have been prematurely filed and the Motion for Reconsideration still pending when the ALJ issued the Order Denying Relief.

The ALJ, however, did not expressly make any determination in the Order Denying Relief that either the 45-day extension under the prior rules or the 90-day extension under the amended, emergency rules applied to the Tenant's Motion for Reconsideration. Instead, the Order Denying Relief makes no reference at all to the rules that automatically deny a motion after a specified time period. *See* OAH Rules 2828.15 & 2939.1 (Oct. 16, 2015).

Similarly, the ALJ did not make any suggestion in the Order Denying Relief that it was being issued as a "statement of reasons" for denying the Motion for Reconsideration under OAH Rule 2828.15 (or OAH Rule 2938.1 (Oct. 16, 2015)). The ALJ merely determined that, because the Second Notice of Appeal had been filed (and without any apparent consideration that the appeal had been filed because of the automatic denial of the Motion for Reconsideration), the Commission had taken jurisdiction over the case. *See* 14 DCMR § 3802.3 (2004).

Third, the Commission notes that the Tenant timely filed the Second Notice of Appeal within ten days of the automatic denial of reconsideration, as provided by the prior version of the OAH Rules. Puckrein, 884 A.2d at 54 n.8; *see* 14 DCMR § 3802.2 (2004);<sup>17</sup> 14 DCMR § 3816.3 (calculating all periods of ten days or less under the Commission's rules as business days). The Commission determines that the Supplemental Notice of Appeal was also timely filed following the Order Denying Relief, albeit more than ten days after the Motion for Reconsideration had

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<sup>17</sup> 14 DCMR § 3802.2 provides:

A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the [Office of Administrative Hearings] is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.

been, arguably, automatically denied. The OAH Rules specifically provide that, after an automatic denial of a motion for reconsideration or relief, “the Administrative Law Judge, in his or her discretion, may issue a statement of reasons for denying the motion, but any such statement has *no effect on the time for seeking judicial review or filing any other appeal.*” OAH Rule 2828.15 (emphasis added). As noted, based upon its review of the record, the Commission is unable to determine whether the Order Denying Relief was a “statement of reasons” for the prior, automatic denial of the Motion for Reconsideration.<sup>18</sup> If so, the Commission’s review of the record suggests that stated reasons would be not in accordance with the Act, the Commission’s regulation at 14 DCMR § 3802.2, and the OAH Rules, insofar as OAH had jurisdiction through the date of automatic denial, since the Second Notice of Appeal was not filed until after that date.

Finally, the Commission observes that the ALJ states in the Order Denying Relief that she would have granted relief or reconsideration on several of the grounds asserted by the Tenant. Order Denying Relief at 2; R. at 1902. Specifically, the Tenant identified two typographical errors in the calculation of the rent ceiling and allowable rent charged. Further, the ALJ explicitly agreed with the Tenant that further consideration was necessary to determine whether Osburn, TP 11,924, and Wynn, TP 10,694, are applicable precedent in this matter regarding a remedy for a violation of the 180 day rule in D.C. OFFICIAL CODE § 42-3502.08(g) or whether they are inapposite because, unlike the factual situation in this case, the rental units in Osburn, TP 11,924, and Wynn, TP 10,694, were not occupied at the time the 180-day waiting period on rent increases expired. Order Denying Relief at 2; R. at 1902.

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<sup>18</sup> Although an ALJ has broad discretion on procedural matters, the Commission’s review on appeal nonetheless requires that the exercise of that discretion must be “predicated on some valid ground” that is stated in the record. See First Decision and Order at 27 (quoting Sherman v. Adoption Ctr. of Wash., Inc., 741 A.2d 1031, 1037-38 (D.C. 1999)); Bennett v. Fun & Fitness of Silver Hill, Inc., 434 A.2d 476, 478-78 (D.C. 1981) (abuse of discretion to deny motion amend complaint where order was not “accompanied by a statement of reasons”).

Administrative tribunals are afforded discretion in the procedural decisions made to carry out their mandate. Prime v. D.C. Dep't of Pub. Works, 955 A.2d 178, 182 (D.C. 2008) (quoting Ammerman v. D.C. Rental Accommodations Comm'n, 375 A.2d 1060, 1063 (D.C. 1977)); *see also* Wassem v. Klinge Corp., RH-TP-08-29,489 (RHC Nov. 17, 2016) (Reconsideration of Order on Appearance at Hearing). Moreover, DCCA and Commission precedent “manifest a preference for resolution of disputes on the merits[.]” Grayson v. AT&T Corp., 15 A.3d 219, 228 (D.C. 2011); Clampitt v. American Univ., 957 A.2d 23, 29 (D.C. 2008); Holbrook Street, LLC v. Seegers, RH-TP-14-30,571 (RHC July 15, 2016); Dep't of Hous. & Cmnty. Dev. – Rental Accommodations Div. v. 1433 T Street Assocs., LLC, RH-SC-06-002 (RHC May 21, 2015).

In light of (1) the ALJ's erroneous computation of the Tenant's time to file the Motion for Reconsideration, *see supra* at 25, (2) the lack of consideration by the ALJ in the Order Denying Relief regarding the nature and purpose of the order, regarding the prior, automatic denial of the Motion for Reconsideration, and regarding whether the Order Denying Relief was a “statement of reasons” under OAH Rule 2828.10, *see supra* at 26-27, (3) the Tenant's diligence in filing timely notices of appeal from both the automatic denial of reconsideration and the Order Denying Relief, *see supra* at 28, and (4) the ALJ's acknowledgement in the Order Denying Relief that further proceedings on the merits are warranted, *see supra* at 28-29, the Commission, in exercise of its discretion on procedural issues and guided by a preference for resolution on the merits, determines that this case should be remanded for the ALJ to rule on the merits of the Tenant's Motion for Reconsideration. *See, e.g.,* Prime, 955 A.2d at 182; Grayson, 15 A.3d at 228; Clampitt, 957 A.2d at 29; Wassem, RH-TP-08-29,489; Seegers, RH-TP-14-30,571; 1433 T Street Assocs., RH-SC-06-002.

On remand, the Commission instructs the ALJ to conduct further proceedings as necessary on the applicability of Osburn, TP 11,924, and Wynn, TP 10,694, as appropriate precedent regarding a remedy for a violation of the 180-day rule in D.C. OFFICIAL CODE § 42-3502.08(g) (2001) because, unlike the factual situation in this case, the respective rental units in Osburn, TP 11,924, and Wynn, TP 10,694 were not occupied at the time the 180-day waiting period on rent increases expired. Order Denying Relief at 2; R. at 1902. Equally important as part of any further proceedings, the ALJ is instructed to provide support for the use of Osburn, TP 11,924, and Wynn, TP 10,694 as applicable precedent for fashioning a remedy in this case for the Housing Provider's violation of the 180-day rule under D.C. OFFICIAL CODE § 42-3502.08(g) (2001), especially in light of other established, apparently conflicting precedent with respect to an appropriate remedy for similar violations of the of the 180-day rule under D.C. OFFICIAL CODE § 42-3502.08(g) (2001) – namely, Penick v. Mason, TP 22,137 (RHC Aug. 31, 1994), and Lovitky v. Smithy Braedon Property Company, TP 11,661 (RHC July 10, 1985).

The Commission observes that a number of the other issues raised by the Tenant in the Second Notice of Appeal are therefore moot until the ALJ issues a revised order based on further consideration of the appropriate remedy in this case. Nonetheless, in the interest of judicial economy and administrative efficiency, the Commission will herein address the other matters raised in the Second Notice of Appeal to the extent they may be resolved prior to any further action by the ALJ. See, e.g., Klingle Corp. v. Tenants of 3133 Connecticut Ave., N.W., CI 20,794 (RHC Sept. 1, 2015) at n.17 & n.18 (reorganizing and rephrasing issues on appeal); Borger Mgmt. v. Lee, RH-TP-06-28,851 (RHC Mar. 6, 2009) (consolidating multiple notices of appeal); *cf.* Bettis v. Horning Assocs., RH-TP-15-30,658 (RHC Mar. 2, 2017) (declining to

address all issues raised on appeal where remand on one issue could lead to further evidentiary hearings).

### III. DISCUSSION – SECOND NOTICE OF APPEAL<sup>19</sup>

#### A. **Issues Decided in the First Appeal**

The Commission’s review of the record shows that, in the Second Notice of Appeal, the Tenant raises four issues related to the vacancy rent ceiling adjustment filed in March 2006, three issues related to related to the statute of limitations, and one issue related to retaliation that were raised in the First Notice of Appeal and decided in the First Decision and Order. Under the “law of the case” doctrine, a court is precluded from reexamining issues resolved in a prior appeal, except under “extraordinary circumstances,” including that “the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice.” Lynn v. Lynn, 617 A.2d 963, 970 (D.C. 1992) (quoting United States v. Turtle Mountain Band of Chippewa Indians, 612 F.2d 517, 521 (Ct. Cl. 1979)); *see also* Lenkin Co. Mgmt., Inc. v. D.C. Rental Hous. Comm’n, 677 A.2d 46, 48 (D.C. 1996); Klinge Corp. v. Tenants of 3133 Conn. Ave., CI 20,794 (RHC Sept. 1, 2015); Williams v. Thomas, TP 28,530 (RHC Dec. 24, 2015).

In general, an issue decided “either expressly or by implication” will be binding in subsequent appeals. Lynn, 617 A.2d at 969 (quoting Lehrman v. Gulf Oil Corp., 500 F.2d 659, 662-63 (5th Cir. 1974)). The critical question in applying the “law of the case” doctrine is thus

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<sup>19</sup> The Commission, in its discretion, has reordered the Tenant’s issues on appeal for ease of discussion and to group together issues that involve the application and analysis of common facts and legal principles. *See, e.g.*, Wilson v. Archstone-Smith Cmnty., LLC, RH-TP-07-28,907 (RHC Sept. 25, 2015) at n.8; Tenants of 2300 & 2330 Good Hope Rd., S.E. v. Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015) at n.15. Nonetheless, for reference and completeness the Commission has retained the numbering used by the Tenant in the Second Notice of Appeal. As noted *supra* at 18-19, Issue 9 is identical to Issue 3, and the Commission therefore omits Issue 9 from the discussion.

whether an issue was actually raised and decided, including by dismissal of the issue on procedural grounds. *See Thompson v. Armstrong*, 134 A.3d 305, 309-10 (D.C. 2016) (finding prior appeal had determined common law defense was waived, but alternative constitutional defense had not been ruled on).

6. **[Vacancy Amended Registration] The ALJ erred by failing to find that the Housing Provider did not meet the notice requirements of 14 DCMR [§] 4101.6 with respect to the vacancy rent ceiling increase, invalidating the increase. It was arbitrary to find that “[i]ndeed, there is likely no specific place that every tenant in the building visits” or that the laundry room, in the basement of an apartment building where the apartments have their own washers and dryers was “a sufficiently available and public space to meet the requirements of the Act.” (Final Order After Remand at 16. *Nelson v. Klinge Corporation*, RH-TP 28,519 Final Decision and Order, March 29, 2010 at 6 (*Attachment C to Jan. 28, 2011 Consolidated Motion for Relief, R. at 1500-1559.*))**
7. **[Vacancy Amended Registration] The ALJ erred by failing to find that once Tenant affirmatively stated that she did not see a copy of the vacancy amended registration posted in the laundry room on March 29, 2006, she had made a *prima facie* case, and the burden shifted to the housing provider to demonstrate that it had met the notice requirements of [14 DCMR §] 4101.6 with substantial evidence.**

In the First Decision and Order, the Commission addressed the Tenant’s assertions in the First Notice of Appeal (and the supporting arguments in her brief (“Tenant’s Brief on First Appeal”)) that the ALJ erred by finding that the notice requirements of 14 DCMR § 4101.6 were satisfied by posting of the Amended Registration Form, which claimed the vacancy rent ceiling adjustment, in the laundry room of the Housing Accommodation. First Decision and Order at 40-42. The Commission determined that the Tenant had not properly raised the argument in the First Notice of Appeal that the holding of Tenants Council of Tiber Island-Carrollsborg Square



v. D.C. Rental Accommodations Comm'n, 426 A.2d 868 (D.C. 1981),<sup>20</sup> was inapplicable because Tiber Island was decided under provisions of the Rental Housing Act of 1975 and that, in any event, the statutory language at issue in that case and this case is virtually identical, and therefore the ALJ did not err in relying on Tiber Island. First Decision and Order at 41-42 n. 31. The Commission further determined that the burden of proof on the claim that the Housing Provider failed to post the Amended Registration Form rested with the Tenant. *Id.* at 41.

The Commission is satisfied that these issues now raised by the Tenant in her Second Notice of Appeal are effectively identical to issues that were raised in the First Notice of Appeal and resolved by the Commission's First Decision and Order. *See Armstrong*, 134 A.3d at 309. The Tenant does not identify any "extraordinary circumstances" to justify re-opening the law of the case, and therefore the Commission will not revisit, under the "law of the case" doctrine, whether posting of the Amended Registration Form in the laundry room was legally sufficient or whether the burden of proving that the Amended Registration Form was posted shifts to the Housing Provider. *See supra* at 31-32; Lynn, 617 A.2d at 970; Klinge Corp., CI 20,794.

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<sup>20</sup> In Tiber Island, under the then-effective statutory requirement to post a copy of a registration statement in a "public place," the DCCA held that:

Evidence was adduced at the hearing that the landlord kept a copy of the registration form posted in the resident manager's office. Even if this method of providing notice does not comply with the literal meaning of [the statutory requirement], we hold that it substantially and sufficiently comports with the intent of the Act.

Tiber Island, 426 A.2d at 875.

- 10. [Comp. Unit (Vacancy Amended Registration)] It was error for the ALJ to find that Tenant’s uncontroverted testimony at the hearing that the rent ceiling for unit 801, when the Housing Provider tried to use it for the vacancy rent ceiling increase, was invalid and therefore not able to be used for the vacancy rent increase, invalidating the vacancy rent ceiling increase. (Tr. At 24)**

In the First Notice of Appeal, the Tenant asserted that “[i]t was error for the ALJ to fail to find that the rent ceiling on Unit 801 was not properly calculated and could not, therefore, form the basis of a valid vacancy rent ceiling increase for unit 901.” First Notice of Appeal at 2. In its First Decision and Order, the Commission determined that the Tenant “has no standing to challenge the rent ceiling of apartment 801.” First Decision and Order at 46 n.36. The Commission is satisfied that these issues are identical, that the “law of the case” doctrine applies to this issue, and that there are no extraordinary circumstances to justify reopening the law of the case on this issue. See Lynn, 617 A.2d at 970; Klinge Corp., CI 20,794.

- 11. [Comp. Unit (Vacancy Amended Registration)] ALJ erred by failing to find that the “date of change” for purposes of filing a vacancy rent ceiling increase, was February 3, 2006, the day the former tenant died. Alternatively, [i]f the Court accepts the ALJ’s finding the apartment was “vacant,” meaning available to rent on March 1, 2006, the ALJ erred in failing to find that the landlord suffered no actual vacancy loss pursuant to § 45-1524 and was not entitled to a vacancy increase because they had a qualified tent [sic], ready to move in, as of January 20, 206, but “otherwise withheld the apartment” from the marked [sic] for 30 days. (Tr. At 78, Final Order After Remand at 15.)**

In the First Notice of Appeal, the Tenant asserted that “[i]t was error for the ALJ to fail to invalidate the vacancy rent ceiling increase because it was not taken within thirty days of the date Housing Provider was first eligible to do so.” First Notice of Appeal at 3. The Tenant elaborated in the Tenant’s Brief on First Appeal that, because the prior tenant of the rental unit had died on or about February 3, 2006, the February date was the date the Housing Provider was

first eligible to take and perfect the vacancy rent ceiling adjustment. *See* First Decision and Order at 38. The Tenant further asserted in her brief on the first appeal that the Housing Provider did not qualify at all for the vacancy rent ceiling adjustment because the Tenant was “ready, willing, and able” to sign a lease for the rental unit. *See id.* at 39 n.30.

In the First Decision and Order, the Commission affirmed the ALJ’s determination that the rental unit “become vacant, meaning available to rent” until March 1, 2006. First Decision and Order at 38-39. The Commission noted that the Tenant had provided no legal support for the contention that the existence of a person “ready, willing, and able” to lease a rental unit is relevant to a housing provider’s eligibility for a vacancy adjustment, and that the Act’s definition of a “tenant” only means a person actually entitled to the use and occupancy of a rental unit. *Id.* at 39-40 n.30. The Commission is satisfied that both of the Tenant’s alternative arguments in the Second Notice of Appeal were resolved in the First Decision and Order, that the “law of the case” doctrine applies to this issue, and that there are no extraordinary circumstances to justify reopening the law of the case on these issues. *See Lynn*, 617 A.2d at 970; *Klingler Corp.*, CI 20,794.

17. **[Error of Law] It was error for the ALJ to misapply DC Code § 43[sic]-3502.06(e) to rent ceilings and then use this misapplication of the law as a basis for prohibiting tenant, over her specific objections, from presenting evidence of unit 901’s rent ceiling history that predated July 14, 2003. (Jan. 30, 2008 Hearing Tr. At approx. 14:47:44-15:13:23) (Dec. 6, 2010 Order on Pending Motions at 5, 6; R. at 1472, 73, 83)**

In the First Notice of Appeal, the Tenant asserted that “[t]he ALJ erred in applying D.C. Code § 45-2516(e).”<sup>21</sup> In the First Decision and Order, the Commission determined that the issue as stated failed to present a “clear and concise statement of the alleged errors” made by the

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<sup>21</sup> Section 206(e) of the Act was previously codified at D.C. CODE § 45-2516(e) (1999 Repl.), but subsequently recodified at D.C. OFFICIAL CODE § 42-3502.06(e) (2001).

ALJ. First Decision and Order at 21. The Commission noted that the Tenant’s Brief on First Appeal contained several pages of discussion on the applicability of the Act’s statute of limitations, but that the expansion of the issue “went beyond ‘developing issues raised in the notice of appeal,’” thus exceeding the permissible scope of the brief. *Id.* at 21 n.15 (quoting Killingham v. Wilshire Inv. Corp., TP 23,881 (Sept. 30, 1999) at 10).

Although the Tenant raises the issue related to the statute of limitations in greater detail in the Second Notice of Appeal, the Commission determines that the “law of the case” doctrine applies to this issue. Lynn, 617 A.2d at 970. The Tenant does not present any “extraordinary circumstances” to justify reopening the Commission’s prior determination that the Tenant waived her statute of limitations argument and is precluded from raising this issue again, having failed to do so clearly the first time. *See* Armstrong, 134 A.3d at 309 (“That ruling did not . . . merely postpone consideration of the issue[.] [T]his holding of waiver . . . became the law of the case.”); *see also infra* at 39 (discussing issues forfeited by the Tenant for failure to raise them in the First Notice of Appeal).<sup>22</sup>

**19. [Procedural Error] It was an abuse of discretion and an error of law to remove filings from the record.**

In the First Notice of Appeal, the Tenant asserted that, related to her assertion that the ALJ erred in applying the statute of limitations, the ALJ erred by “remov[ing] from the record, prior to the hearing, all exhibits previously submitted by the Tenant that pre-dated July 14, 2003.” First Notice of Appeal at 2. In the First Decision and Order, the Commission dismissed

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<sup>22</sup> The Commission also observes that, in any event, the Tenant’s assertion regarding the statute of limitations appears to be without merit under Commission and DCCA precedent. *See* Kennedy v. D.C. Rental Hous. Comm’n, 709 A.2d , 94, 97-98 (D.C. 1998) (statute of limitations applies to rent ceiling adjustments); Klinge Corp. v. Burkhardt, TP 28,270 (RHC Apr. 29, 2016) at 22-23; B.F. Saul Co. v. Nelson, TP 28,519 (RHC Feb. 18, 2016) at n.19; *see also* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm’n, 101 A.3d 426, 430 (D.C. 2014) (exception to bar against challenges to rent ceiling adjustments when increase in rent charged, with effective date within limitations period, utilizes previously-taken rent ceiling increase)

this issue because its review of the record indicated that the Tenant was given the opportunity to present the exhibits in question, and thus it was unclear what error the Tenant was asserting. First Decision and Order at 18 n.11.<sup>23</sup>

In the Second Notice of Appeal, the Tenant raises this issue again, adding an assertion that neither she nor her counsel “received a copy of the 12/20/10 [scheduling order],” which noted that the exhibits had been returned, and that the scheduling order “seems to have been inserted into the official record at some point after February of 2011.” Second Notice of Appeal at 5 n.2. The Commission is satisfied that this is the same issue decided in the First Decision and Order, that there are no “extraordinary circumstances” to justify addressing this issue, and that the Tenant is precluded by the law of the case doctrine from re-litigating whether the ALJ erred in managing the pre-hearing exhibits. Armstrong, 134 A.3d at 309; Lynn, 617 A.2d at 970.<sup>24</sup>

**21. [Damages] It was error for the ALJ to find that the lawful rent was \$1661 without reviewing the landlord’s registration file and adding to rent charged or chargeable on April 30, 1985, all properly taken and perfected rent ceiling increases. (Final Order After Remand at 23 – order of 12/20.)**

In the First Final Order and the Final Order after Remand, the ALJ determined that the lawfully-calculated rent ceiling for the Tenant’s rental unit, prior to the vacancy adjustment, was \$1,661, because the Housing Provider had failed to properly take and perfect adjustments of general applicability in 2004 and 2005. See First Final Order at 15-16; R. at 1740-41; Final

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<sup>23</sup> Specifically, the Commission’s review of the record indicated that the ALJ had returned “all of Tenant’s previously filed exhibits . . . to her former counsel on October 5, 2010.” See Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (OAH Dec. 20, 2010) (Scheduling Order) at 1; R. at 1492. The ALJ ultimately permitted the Tenant’s counsel to file the documents the same day as the evidentiary hearing. See Hearing CD (OAH Jan. 31, 2011) at 9:45-9:50.

<sup>24</sup> The Commission additionally observes that its review of the record does not reveal any prejudice to the Tenant, even if the ALJ did abuse her discretion by returning the exhibits to the Tenant’s counsel. See Hearing CD (OAH Jan. 31, 2011) at 9:45-9:50 (allowing submission of exhibits); see, e.g., Johnson v. United States, 398 A.2d 354, 366 (D.C. 1979) (trial judge’s discretion should be reversed where error “jeopardized the fairness of the proceeding as a whole, or if the error had a possibly substantial impact upon the outcome”).

Order after Remand at 21-23. Based on the Commission's review of the record, the Commission determines that, to the extent the Tenant seeks recalculation of her rent ceiling based on adjustments filed prior to the 2004 adjustment of general applicability, this issue is merely an extension of the Tenant's other claims related to purported violations of the statute of limitations, *see supra* at 35-36, that were dismissed in the First Decision and Order as improperly raised.<sup>25</sup> *See Armstrong*, 134 A.3d at 309; *see also infra* at 39. Accordingly, the Commission determines that the Tenant did not identify any extraordinary circumstances to justify addressing the issue and that the law of the case doctrine applies to this issue. Consequently, the Commission will not reopen consideration of the statute of limitations issue. *Lynn*, 617 A.2d at 970.

**23. [Bad Faith] ALJ erred by failing to find that Tenant was entitled to a presumption of retaliation because within the 6 months preceding the Housing Provider's unlawful vacancy increase, Tenant had legally withheld all or part of her [sic], was a member of the building's tenants organization association, and a party to TP 28,254, which was filed on January 31, 2006. Likewise it was also error for the ALJ to fail [to] find that the Housing Provider did not provide clear and convincing evidence to rebut the presumption pursuant to D.C. Ann. Code § 42-3505.02(b). (*Burkhardt v. Klinge*. TP 28,270 Decision and Order, Sept. 2, 2006, at 24, Attachment A to the July 14, 2010 motion for Partial Summary Judgment, R. at 13-53-1393) (TR at 84)**

In the First Notice of Appeal, the Tenant asserted that “[i]t was error for the ALJ to fail to find that the Housing Provider[']s actions were retaliatory.” First Notice of Appeal at 4. In the First Decision and Order, the Commission affirmed the ALJ's denial of the Tenant's motion to amend the Tenant Petition to add claims of retaliation that were not originally asserted in the Tenant Petition. First Decision and Order at 34-36. The Commission therefore determines that the law of the case doctrine bars consideration of the Tenant's claims of retaliation, and that the

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<sup>25</sup> With respect to the validity of the 2004 and 2005 adjustments of general applicability, *see infra* at 56-60.

Tenant did not identify any extraordinary circumstances to justify addressing this issue.

Armstrong, 134 A.3d at 309; Lynn, 617 A.2d at 970.

### **B. Issues the Tenant Previously Forfeited**

The Commission's review of the record reveals that the Tenant's Second Notice of Appeal raises five claims of error that either relate to issues not raised before the ALJ at the evidentiary hearing or in pleadings by the Tenant or that that are based on determinations made in or prior to the issuance of the First Final Order, and carried forward to the Final Order after Remand, but which the Tenant did not raise in the First Notice of Appeal. The Commission has consistently determined that it will not review issues that are not raised at the administrative hearing level. *See, e.g., Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n*, 642 A.2d 1282, 1286 (D.C. 1994); Bettis v. Horning Assocs., RH-TP-30,658 (RHC Mar. 31, 2017); Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012); Hawkins v. Jackson, RH-TP-08-29,201 (RHC Aug. 31, 2009). Further, as the DCCA has observed, "it is a general principle of appellate practice that 'where an argument could have been raised on an initial appeal, it is inappropriate to consider the argument on a second appeal following remand.'" Thoubboron v. Ford Motor Co., 809 A.2d 1204, 1215 (D.C. 2002) (quoting Hartman v. Duffey, 88 F.3d 1232, 1236 (D.C. Cir. 1996)); *see also Gelman Mgmt. Co. v. Campbell*, RH-TP-9-29,715 (RHC Mar. 11, 2015) at 17-18 & n.17.

3. **[Vacancy Rent Increase] The ALJ erred by failing to find that the Housing Provider did not comply with D.C. Code § 42-3502.05(g) and 14 DCMR § 4103.1(e) with respect to the vacancy rent increase. (Sept. 16, 2015 Request for Reconsideration at 8)**

The Tenant asserts that the ALJ should have invalidated the vacancy rent ceiling adjustment because the Housing Provider did not certify to the Rent Administrator, as required by 14 DCMR § 4101.3(b), that it had complied with the requirement to post notice of the

Amended Registration Form in accordance with 14 DCMR § 4101.6. *See* Tenant's Brief at 15.<sup>26</sup>

In the First Final Order, the ALJ addressed three contentions of the Tenant regarding the invalidity of the March 29, 2006, vacancy rent ceiling adjustment: (1) that it was not filed within thirty days of the Housing Provider's first eligibility; (2) that it was not conspicuously posted; and (3) that it was not timely posted with respect to its filing. First Final Order at 9; R. at 1734. The ALJ further noted that, although the Tenant Petition alleged that the Housing Provider did not file the correct rent increase forms with the Rent Administrator, the Tenant "did not make any arguments regarding what forms she believes should have been filed but were not." *Id.* at 12; R. at 1737.

The Commission's review of the record does not indicate that the Tenant made the assertion before OAH that the Housing Provider failed to certify its compliance with the service or posting requirements of 14 DCMR § 4101.6. In the Tenant's Written Closing Statement ("Tenant's Closing Statement"), filed after the evidentiary hearing, the Tenant asserted that the evidence in the record established that the Housing Provider failed to serve or post the Amended Registration Form, as required. Tenant's Closing Statement at 5-9; R. at 1707-11; *see also*

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<sup>26</sup> In its discretion, the Commission determines that the Tenant is challenging the validity of the vacancy rent ceiling adjustment, because, although the Tenant refers to a "rent increase" in her statement of the issue, the cited regulatory provisions address the filing of Amended Registration Forms, which are used to increase rent ceilings. *See* 14 DCMR § 4103.1(e); *see also* Tenant's Brief at 15-16 (referring to vacancy rent ceiling adjustment filed on March 29, 2006); *see also* Mitchell v. Frank Emmet Real Estate, LLC, RH-TP-14-30,552 (RHC June 3, 2016) (interpreting request in motion based on content and applicable regulation rather than title of motion); Tenants of 3133 Connecticut Ave., N.W. v. Klingle Corp., NV 09-001 (RHC Sept. 1, 2015) (interpreting issue as claim of breach of contract where statutory context did not implicate private agreements).

The Commission's review of the record indicates that the Tenant raised issue, phrased nearly identically, in her First Notice of Appeal. *See* First Notice of Appeal at 3; Tenant's Brief on First Appeal at 11. The Commission observes, however, that in elaborating on this issue during the course of the first appeal, the Tenant asserted that the Housing Provider was required by the Commission's regulations to file an additional Amended Registration Form after implementing the rent ceiling adjustment as an increase in the Tenant's rent charged. *See* Tenant's Brief on First Appeal at 51, 57-58. Now on second appeal, the Tenant's Brief does not advance the argument for a missing, additional filing, but argues instead that the Housing Provider failed to certify to the Rent Administrator that it had served the initial Amended Registration Form. *See* Tenant's Brief at 15. Because the Tenant has abandoned her previous position regarding an additional filing, the Commission will address only the "certification of compliance" argument made in the second appeal.



Issues 6 & 7, *supra* at 32-33. However, the Tenant did not make the additional assertion that the Amended Registration Form itself was defective because it lacked a certification of service or posting. *See id.*<sup>27</sup> Therefore, the Commission determines that, because this claim was not made in the first instance before the ALJ, it is not properly before the Commission on appeal. *See Lenkin Co.*, 642 A.2d at 1286; *Bettis*, RH-TP-30,658; *Tillman*, RH-TP-08-29,136; *Hawkins*, RH-TP-08-29,201.

4. **[Vacancy Amended Registration] The ALJ erred by failing to find that the Amended Registrations filed on March 16 and March 29, 2006 contained erroneous information as to the rent ceiling thus invalidating the rent ceiling increases and rent increases based on those filings. (Final Order After Remand at 24)**
5. **[Vacancy Amended Registration] The ALJ's finding that the March 16, 2006 Amended Registration "is not relevant" because it was rescinded, delayed, never implemented, and superseded by the March 29, 2006 Amended Registration' [sic] is not supported by record. (Finding of Fact #13, Final Order After Remand at 10, 11; Tr. At 58)**

In the First Final Order, the ALJ determined that the Amended Registration Form that was filed on March 16, 2006, was not relevant to the Tenant Petition because the form was "subsequently rescinded and delayed until a later date . . . the vacancy increase filed March 29, 2006, applied to the rent ceiling on record prior to the March 16, 2006, filing[.]" First Final

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<sup>27</sup> The Commission notes that the Amended Registration Form in effect at the time, as published by the Rent Administrator, may not have fully informed a housing provider of its obligation to make such a certification. That form, as it appears in the record of this case, contains, above the signature block, a space for a certification that "the information provided on this form is complete and accurate" and that, if filed by a managing agent, the agent has "the authority from the owner to make such certification." PX 117; R. at 1859. That form, however, does not include a space for a certification of service upon the affected tenant or posting at housing accommodation. In contrast, the Amended Registration Form currently published by the Rent Administrator contains a certification above the signature block that "this Notice was posted in a conspicuous place at the Rental Unit or Housing Accommodation to which it applies, or mailed to each Tenant[.]" *See* "Form 2 -- Housing Provider's Amended Registration Form," Department of Housing and Community Development, <https://dhcd.dc.gov/publication/form-2-housing-providers-amended-registration-form> (modified Mar. 6, 2012). In addition, unlike the Amended Registration Form, the Certificate of Election of Adjustment of General Applicability in effect at the time, used to take and perfect a rent ceiling adjustment based on the CPI-W, also includes an "affidavit of service" form. *See* PX 116; R. at 1852-56.

Order at 7; R. at 1732. With respect to the March 29, 2006, Amended Registration Form, the ALJ found that the Tenant had failed to support her claims in the Tenant Petition that incorrect forms had been filed. *Id.* at 12; R. at 1737.

In the First Notice of Appeal, the Tenant asserted that “[i]t was error for the ALJ to fail to invalidate the rent ceiling increase due to incorrect or false information on the [Amended Registration Form].” First Notice of Appeal at 3. The Tenant further maintained that “[i]t was error for the ALJ to fail to invalidate [Certificates of Election of Adjustments of General Applicability] and [Amended Registration Forms] that contained incorrect or false information or that were otherwise not in compliance with the filing requirements.” *Id.* at 4. In addition, the Tenant raised several other issues relating to the validity of rent ceiling adjustments, based on timeliness of filing and the propriety of the Housing Provider’s registration statement. *Id.* at 2-4.

Regarding Issue 5, the Commission’s review of the record does not indicate that the Tenant raised an issue in the first appeal which asserted that the ALJ erred by finding the March 16, 2006, capital improvement-based rent ceiling adjustment was rescinded and superseded, and therefore irrelevant to this case. The Commission therefore determines that the Tenant is precluded from raising Issue 5 in the Second Notice of Appeal. *See Thoubboron*, 809 A.2d at 1215. Moreover, the Commission notes that in the Tenant’s Brief, the Tenant apparently withdraws Issue 5 from consideration in this appeal, on the grounds that the Housing Provider is not permitted to increase the Tenant’s rent based on the March 16, 2006, Amended Registration Form. Tenant’s Brief at 15. The Commission therefore dismisses Issue 5 and dismisses Issue 4 with respect to the March 16, 2006, Amended Registration Form.

However, with respect to the Tenant’s claim in Issue 4 that the March 29, 2006, Amended Registration Form contained erroneous information, the Commission observes that this

issue was raised previously as a subset of the Tenant's assertions in the First Notice of Appeal that some Amended Registration Forms contained false information. First Notice of Appeal at 3-4. In the Tenant's Brief on First Appeal, the Tenant specifically asserted that the Amended Registration Form contained false information because "the previous rent ceiling[] can be no more than \$1661 ([First Final] Order at 16) not \$1745." Tenant's Brief on First Appeal at 49-51. In its First Decision and Order, however, the Commission failed to include the Tenant's claim regarding erroneous information in the Amended Registration Form, and only summarized the Tenant's arguments regarding the March 29, 2006, Amended Registration Form as follows:

1) [T]hat the ALJ erred in determining that the Housing Provider filed the required amended registration within 30-days of the date it was first eligible to take the rent ceiling adjustment; 2) that the ALJ erred in determining that the Housing Provider timely posted the Amended Registration in a conspicuous place; and 3) that the ALJ erred in determining that the comparable apartment, 801, was substantially similar to the Tenant's unit.

First Decision and Order at 36.

The Commission therefore determines that Issue 4, with respect to the "prior rent ceiling" listed on the March 29, 2006, filing, was neither waived by the Tenant nor decided by the Commission on the first appeal, and is therefore properly before the Commission. Accordingly, this issue is discussed, to the extent it was not previously waived or decided, *infra* at 55-60.

**18. [Procedural Error] It was an abuse of discretion to limit the issues Tenant could address [at] the hearing to the rent increases for unit 901 effective November 1, 2004, November 1, 2005 and March 25, 2006. (Dec. 6, 2010 Order on Pending Motions at 1487)**

Prior to the evidentiary hearing, the Tenant identified three rent adjustments that she was challenging in the Tenant Petition, which were respectively dated November 1, 2004, November 1, 2005, and March 29, 2006. Order on Pending Motions at 5; R. at 1472. Subsequently, the Tenant filed a motion to amend the Tenant Petition to add a claim that the Housing Provider

failed to properly implement any rent increase since the Act became effective in 1985, which the ALJ denied. *See id.* at 6; R. at 1473. Accordingly, the ALJ determined that the only rent adjustments the Tenant could challenge in were those with effective dates less than three years prior to the filing of the Tenant Petition, specifically, the three adjustments previously identified by the Tenant. *Id.* at 6, 22; R. at 1472, 1487; *see* D.C. OFFICIAL CODE § 42-3502.06(e) (2001).

As described *supra* at 35 and 37, in the First Notice of Appeal the Tenant made only a bare assertion that the ALJ had misapplied the statute of limitations. *See* First Notice of Appeal at 2. The Commission's review of the First Notice of Appeal does not reveal any other issue that relates to the Tenant's motion to amend the Tenant Petition to add challenges to rent adjustments prior to 2004.<sup>28</sup> Because the Tenant failed to challenge the ALJ's determination as to which rent adjustments were the subjects of the Tenant Petition in the First Notice of Appeal, the Commission therefore determines that the Tenant is precluded from raising this issue in the Second Notice of Appeal. *See Thoubboron*, 809 A.2d at 1215; *see also Campbell*, RH-TP-9-29,715.

20. **[Procedural Error] It was an abuse of discretion and error of law for the ALJ to find that she “need not address the specific points raised in Tenant/Petitioner’s Consolidated Motion for Relief from Final Order Under Rule 60(B) and/or Notice of Objections regarding the rulings made in the December 6, 2010 Order on Pending Motions,” and, it was arbitrary for the ALJ to find that the discussion of rent increases in the Final Order After Remand “sufficiently addressed Tenant’s concerns.” (Final Order After Remand at 26.)**

On January 28, 2011, after the Order on Pending Motions was issued, the Tenant filed a “Consolidated Motion for Relief from Order under Rule 60(b)” (“Motion for Relief”), R. at

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<sup>28</sup> The Commission additionally notes that its review of the record does not indicate that the Tenant challenges any rent increase within the limitations period that implemented a rent ceiling adjustment taken and perfected more than three years before the Tenant Petition was filed. *Cf. United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm’n*, 101 A.3d 426, 431 (D.C. 2014); *Klinge Corp. v. Burkhardt*, TP 28,720 (RHC Apr. 29, 2016) (affirming invalidation of 2004 adjustment in rent charged based on improperly perfected vacancy rent ceiling adjustment taken in 1994).

1500-09, asserting that the ALJ had made a number of errors of law and fact in the Order on Pending Motions and in a prior order denying partial summary adjudication. In the First Final Order, the ALJ denied the Motion for Relief based on the ALJ's determination that all issues raised by the Tenant in the Motion for Relief were sufficiently addressed in prior orders or in the First Final Order. First Final Order at 18; R. at 1743.

The Commission's review of the First Notice of Appeal does not reveal any claim made by the Tenant that the ALJ erred in denying the Motion for Relief.<sup>29</sup> Because the Tenant had the opportunity to appeal the ALJ's denial of her Motion for Relief in the First Notice of Appeal but failed to do so, the Commission determines that Tenant is precluded from challenging the denial in the Second Notice of Appeal. *See Thoubboron*, 809 A.2d at 1215; *see also Campbell*, RH-TP-9-29,715.

### **C. Issues Related to the Registration of the Housing Accommodation**

The Tenant raises six issues on appeal that the Commission's review of the record shows are related to the question of whether the Housing Accommodation was properly registered in compliance with the Act. *See* D.C. OFFICIAL CODE § 42-3502.05(f); 14 DCMR § 4101. Under the Act, a housing provider is prohibited from increasing the rent ceiling or rent charged for a rental unit unless the housing accommodation is properly registered at the time of the adjustment. D.C. OFFICIAL CODE § 42-3502.08(a)(1)(B) (2001); 14 DCMR § 4101.9.<sup>30</sup> In order

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<sup>29</sup> Based on its review of the record, the Commission notes that the primary issues addressed by the Motion for Relief are the application of the statute of limitations and whether the Tenant would be allowed to amend the Tenant Petition. *See generally* Motion for Relief at 1-10; R. at 1500-09. Because the Tenant raises separate issues on the merits of those determinations which the Commission addresses in this decision and order, the Commission is satisfied that, even if the denial of the Motion for Relief were properly preserved, it would be redundant of those other issues and therefore unnecessary to decide. *See infra* at 60 (discussing mootness of issues on appeal).

<sup>30</sup> D.C. OFFICIAL CODE § 42-3502.08(a)(1) provides, in relevant part:

Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless . . . (B) [t]he housing accommodation is registered in accordance with § 42-3502.05[.]

to be properly registered, the Registration/Claim of Exemption Form for a housing accommodation must be maintained on file with the Rent Administrator containing the current ownership and management information. 14 DCMR § 4103.1(c).<sup>31</sup>

**14. [Registration] The ALJ erred when she failed to allow Tenant to raise the issue of improper registration at the hearing on the merits after her motion for summary judgment on this issue was denied. (Dec. 6, 2010 Order on Pending Motions at 14, R. at 1481)**

The Tenant Petition, as originally filed on July 14, 2006, did not claim that the Housing Accommodation was improperly registered: the box on the Tenant Petition form related to registration claims was not checked, and the Tenant did not make any written statement in the space provided that specifically addressed the registration of the Housing Accommodation. Tenant Petition at 3, 6; R. at 5, 8.

The Tenant first raised the issue of improper registration in her August 15, 2007, Motion for Partial Summary Disposition. Motion for Partial Summary Disposition at 4; R. at 771.<sup>32</sup> In

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The Commission's regulations, 14 DCMR § 4101.9, clarify that neither the rent ceiling nor the rent charged may be increased:

Any housing provider who has failed to satisfy the registration requirements of the Act pursuant to §§ 4101.3 or 4101.4 shall not be eligible for and shall not take or implement the following:

- (a) Any upward adjustment in the rent ceiling for a rental unit authorized by the Act;
- (b) Any increase in the rent charged for a rental unit which is not properly registered; or
- (c) Any of the benefits which accrue to the housing provider of rental units exempt from the Rent Stabilization Program.

<sup>31</sup> 14 DCMR § 4103.1 provides, in relevant part:

Each housing provider of a rental unit or units covered by the Act shall file an amendment to the Registration/Claim of Exemption form provided by the Rent Administrator . . . (c) [w]ithin thirty (30) days after any change in the ownership or management of a registered housing accommodation.

<sup>32</sup> The Commission notes that the OAH date stamp on the Motion for Partial Summary Judgment reflects a filing date of August 15, 2008, and that its placement in the certified record is consistent with that date. See R. at 766. Nonetheless, the Commission's review of the Motion for Partial Summary Judgment and other documents in the record reveals that it was, in fact, filed on August 15, 2007. See, e.g., Order Denying Petitioner's Motion for Partial Summary Disposition, Interrogatory Request, and Subpoena at 2; R. at 456.

the Motion for Partial Summary Disposition, the Tenant asserted that the registration for the Housing Accommodation was improper because it listed “B.F. Saul Company” as the managing agent; the Tenant’s lease, on the other hand, identified “B.F. Saul Property Company” as the managing agent. *Id.* (emphasis added). On October 5, 2007, the Tenant filed a Motion to Amend Complaint, requesting that a claim of improper registration be added, while maintaining that checking the box to claim that a “rent increase was larger than the amount of increase which was allowed” under the Act is sufficient to assert a claim of improper registration. Motion to Amend Complaint at 1; R. at 172.<sup>33</sup>

On November 23, 2007, ALJ Wilson-Taylor denied the Tenant’s Motion for Partial Summary Disposition. Order Denying Petitioner’s Motion for Partial Summary Disposition, Interrogatory Request, and Subpoena (“Order Denying Partial Summary Disposition”) at 6; R.at 460. ALJ Wilson-Taylor determined that the Tenant was not entitled to partial summary adjudication on the issue of registration because Klingle Corporation, as the owner of the Housing Accommodation, was listed on the Registration/Claim of Exemption Form, which she determined was sufficient to be properly registered. *Id.*<sup>34</sup> ALJ Wilson-Taylor did not, at that time, make any ruling on the Tenant’s Motion to Amend Complaint.

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<sup>33</sup> The Motion to Amend Complaint was accompanied by a Praecipe to Amend Caption. R. at 174. The Praecipe to Amend Caption requested change the named housing provider/respondent from “B.F. Saul” to “B.F. Saul Property Co.” and “Klingle Corp.” *Id.* The ALJ granted the Tenant’s request in part on December 6, 2010, because there was no dispute that Klingle Corp. owns the Housing Accommodation and was properly a party. Order on Pending Motions at 19-20; R. at 1486-87. With respect to the request to add B.F. Saul Property Co., the ALJ determined that the request was merely an extension of the Tenant’s Motion to Amend Complaint. *Id.* The Commission is satisfied that the issue of amendment of the case caption is directly related to the Tenant’s claims regarding registration, and therefore reviews these issues together.

<sup>34</sup> Without addressing the merits of ALJ Wilson-Taylor’s determination on which companies were required to be registered, the Commission dismissed the Tenant’s appeal of the Order Denying Partial Summary Disposition in the First Decision and Order because “a denial of a motion for summary judgment is not reviewable on appeal, either during trial or after trial,” because the denial does not operate as a final disposition of the issue. First Decision and Order at 25 (quoting Allen v. Yates, 870 A.2d 39, 45 (D.C. 2005)); *see also* Hammond v. Weekes, 621 A.2d 838, 839 n.1 (D.C. 1993); Morgan v. Am. Univ., 534 A.2d 323, 328-29 (D.C. 1987).

On April 9, 2010, the Tenant filed a motion to amend the Tenant Petition (“Second Motion to Amend”) to add a claim of improper registration. R. at 1229-36. On April 22, 2010, the ALJ<sup>35</sup> issued an Order Granting in Part and Denying in Part Tenant’s Motion to Amend the Petition (“Order on Second Motion to Amend”). R. at 1237. The Order on Second Motion to Amend granted the Tenant’s request to add a claim of retaliation, limited to the period before January 24, 2005, comporting with a related petition that alleged the registration for the Housing Accommodation was invalid after that date. Order on Second Motion to Amend at 3; R. at 1239. On May 5, 2010, the Housing Provider filed a Motion for Reconsideration of the Order on Second Motion to Amend. R. at 1244.

On May 21, 2010, the Tenant filed an omnibus motion to renew a variety of prior motions to amend the Tenant Petition, including the October 5, 2007, Motion to Amend Complaint with regard to the registration issue. Tenant’s Renewed Motion to Amend & Supplement Tenant Petition & Statement of Issues (“Renewed Motion to Amend”) at 1-2; R. at 1280-81. The Renewed Motion to Amend asserted that the Housing Accommodation was improperly registered not only on the same grounds as were asserted in the original Motion to Amend Complaint, but also on the grounds that the Housing Provider was not properly licensed, had unregistered rental units, and had failed to license, disclose, or register subsidiary companies as housing providers. *Id.* at 7-11; R. at 1787-91.

On December 6, 2010, the ALJ Issued an Order on Pending Motions that addressed the Tenant’s request to add a claim of improper registration and the Housing Provider’s Motion for Reconsideration of the April 22, 2010 Order on Second Motion to Amend. Order on Pending

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<sup>35</sup> Sometime prior to November 13, 2009, the Tenant Petition was transferred from ALJ Wilson-Taylor to ALJ Pierson, who is referred to in this decision and order as simply “the ALJ.” *See* R. at 1171.



Motions at 14; R. at 1468-88.<sup>36</sup> In relevant part, the ALJ determined in the Order on Pending

Motions the following:

In [the Motion for Partial Summary Disposition,] Tenant alleged that her rent increases were invalid because the managing agent of the housing accommodation was not properly registered. The motion further alleged that “B.F. Saul Property Company” was the managing agent as opposed or in addition to “B.F. Saul Company,” which Tenant alleges appears on the amended registration. Subsequently, on October 5, 2007, Tenant, filed [the Motion to Amend Complaint]. The motion sought to amend the petition to include an allegation that the property was not properly registered but did not specify what was defective about the registration. The motion stated, “the facts alleged in my Tenant Petition, as originally filed support relief on the grounds of improper registration.” Contrary to Tenant’s assertion, there was nothing in the initial tenant petition to support an allegation of improper registration. With her motion, Tenant filed 302 exhibits. Notably absent from the exhibits is a copy of the registration document. Housing Provider did however file a copy of an Amended Registration filed with the RAD on March 29, 2006, which identified the property owner as Klingle Corporation and the management agent as B.F. Saul Company.

...

It was Tenant’s counsel that renewed the issue of the property registration without referring to the previous orders. Counsel for Tenant challenged the registration on same grounds that the managing agent was not properly registered, but also on additional grounds that Housing Provider was not properly licensed, the housing accommodation had unregistered units, and Housing Provider failed to license, disclose, and register other housing providers.

...

I am persuaded that the Tenant Petition should not be amended to add an allegation of improper registration for the following reasons:

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<sup>36</sup> In the First Notice of Appeal, the Tenant asserted that “[i]t was error for the ALJ to fail to rule on Tenant’s October 5, 2007 Motion to Amend.” First Notice of Appeal at 1. The Commission, addressing this issue in its First Decision and Order and relying on the Docket Sheet in the certified record, determined that the Motion to Amend Complaint was never ruled on, and remanded the issue. First Decision and Order at 26.

On remand, the ALJ stated that she did rule on the October 5, 2007, Motion to Amend Complaint, contrary to both the Tenant’s statement of the issue in the First Notice of Appeal and to the Commission’s conclusion, based on its review of the voluminous record, in the December 6, 2010, Order on Pending Motions. Final Order after Remand at 4-8. The Commission’s review of the record reveals that the ALJ, in her Order on Pending Motions, did make specific reference the Tenant’s October 5, 2007, Motion to Amend Complaint, before determining in general that the issue of improper registration should not be included in the Tenant Petition. Order on Pending Motions at 12; R. at 1479. Accordingly, the Commission’s review of the record indicates that the ALJ did not fail to rule on this issue.

- (1) [A]t least regarding the managing agents, Judge Wilson-Taylor's November 23, 2007, Order decided the issue on the merits. It was Tenant who submitted the issue as a motion for partial summary disposition. When the motion was not decided in Tenant's favor, she then sought to have the issue set for an evidentiary hearing, a second bite at the proverbial apple;
- (2) [T]he remaining time period in question, July 14, 2003, to January 24, 2005, are dates prior to Tenant even residing in the apartment. There is no advantage for Tenant to challenge improper registration when she did not reside in the apartment. A Housing Provider who does not properly register a housing accommodation is prohibited from increasing the rent. In this case, the rent increases which Tenant is challenging occurred after the alleged dates of improper registration;
- (3) Tenant remains a party to the KWTA tenant petition which is still pending in this administrative court. That petition was filed on January 28, 2008, and alleges the property was not properly registered. Tenant may challenge the improper registration in the KWTA petition from January 28, 2005, to the date the record closes. See *Jenkins v. Johnson*, TP 24,410 (RHC Jan. 4, 1995) (when violations are continuing in nature, the Judge may "look forward" from the date the petition was filed, to the termination date of the violation or the date the record closed, which is usually the hearing date.); and
- (4) [A]lthough Tenant has alleged that the managing agent was not properly registered since 2007, Tenant did not raise the additional grounds for improper registration until three years later in 2010. Such a delay is unreasonable especially where Tenant has filed several motions to amend the petition.

Order on Pending Motions at 14-15 (paragraph breaks added, footnotes omitted); R. at 1481-82.

As the Commission noted in the First Decision and Order, an ALJ's ruling on a motion to amend a petition should be decided in accordance with Super. Ct. Civ. R. 15(a). First Decision and Order at 26-27; *see, e.g., Tavana Corp. v. Tenants of 1850-1854 Kendall St., N.E.*, CI 20,694 (RHC Mar. 8, 1996). Super. Ct. Civ. R. 15(a) provides:

[A] party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.<sup>37</sup>

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<sup>37</sup> The Commission notes that, effective June 1, 2017, the D.C. Superior Court revised Rule 15 to add paragraph and subparagraph breaks. The Commission is satisfied that the relevant, substantive rule for amendments to a pleading

A trial court's decision to give leave to amend is based on five factors: "(1) the number of requests to amend made by the movant; (2) the length of time the case has been pending; (3) bad faith or dilatory tactics on the part of the movant; (4) the merit of the proffered pleading; and (5) prejudice to the nonmoving party." Taylor v. D.C. Water & Sewer Auth., 957 A.2d 45, 51 (D.C. 2008) (quoting Sherman v. Adoption Ctr. of Wash., Inc., 741 A.2d 1031, 1034 (D.C. 1979)).

Insofar as Super Ct. Civ. R. 15(a) provides "broad latitude" in granting leave to amend a pleading, a trial judge's determination will be reviewed on appeal only for an abuse of discretion. Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n, 641 A.2d 495, 501 (D.C. 1994) ("[a]bsent a clear showing of an abuse of discretion, the trial court's exercise of its discretion either way will not be disturbed on appeal."); Saddler v. Safeway Stores, Inc., 227 A.2d 394, 395 (D.C. 1967). Applying this standard, the DCCA has determined that "a refusal to allow an amendment is to be upheld if predicated on some valid ground." Sherman, 741 A.2d at 1034. For example, in Sibley v. St. Albans Sch., 134 A.3d 789, 797 (D.C. 2016), the DCCA found that the trial court "did not abuse its discretion in denying appellant's motion to amend because it considered 'the merit of the proffered pleading' and properly concluded that appellant's proposed claim . . . did not have merit."

Based on its review of the record, the Commission is satisfied that the ALJ did not abuse her discretion by denying the Tenant's Motion to Amend Complaint, because the ALJ reasonably considered a number of factors in arriving at her decision, including the following: (1) the Tenant had already, albeit indirectly, sought to add the issue of registration through the Motion for Partial Summary Disposition; (2) the Tenant had sought to renew the issue later without reference to the motions filed in late 2007; (3) the Tenant was a party to other cases which, from

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more than 21 days after the pleading is filed is unchanged. *Compare* First Decision and Order at 27 (quoting prior version of Super. Ct. Civ. R. 15(a)).

the outset, contested the registration of the Housing Accommodation; and (4) significant time had elapsed since the Tenant Petition was filed. See Sibley, 134 A.3d at 797; Taylor, 957 A.2d at 51.<sup>38</sup> The Commission determines from its review of the record that the factors listed above constitute “a valid ground” to support the ALJ’s denial of the Tenant’s Motion to Amend Complaint. See Sibley, 134 A.3d at 797; Taylor, 957 A.2d at 51; Sherman, 741 A.2d at 1034. Therefore, the Commission affirms the ALJ’s determination in the Order on Pending Motions to deny the amendment of the tenant petition to add a claim that the Housing Accommodation was not properly registered.

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<sup>38</sup> With regard to “the merit of the proffered pleading,” the ALJ stated that ALJ Wilson-Taylor had already decided the issue in the Order Denying Partial Summary Disposition. Order on Pending Motions at 14; R. at 1481. The Commission observes that, contrary to the ALJ’s statement, denial of a motion for summary judgment “contemplates further proceedings in the trial court and necessarily leaves issues to be resolved.” McNair Builders, Inc. v. Taylor, 3 A.3d 1132, 1135 (D.C. 2010). Nonetheless, the Commission is satisfied that the ALJ did not abuse her discretion in denying the Motion to Amend Complaint because sufficient, reasonable consideration was given to other factors to disallow the amendment, and therefore the Commission determines that this error is harmless. See Sibley, 134 A.3d at 797; Sherman, 741 A.2d at 1034.

12. [Registration] The ALJ erred by failing to find that B.F. Saul Property Company, the management agent named in the Lease, “responsible for managing the apartment project . . . authorized to act on behalf of the owner for notice and service of process for all matters arising under the lease” and to whom “all checks or money orders for rent or other payments are to be made payable” was not the management agent for the Housing Accommodation; likewise, it was error for the ALJ to find that B.F. Saul Company, despite their non-appearance in the Lease, was the management agent for the Housing Accommodation. (*Lease at 1, 10; R. at 1821, 1831*)
  
13. [Registration] The ALJ erred by failing to find that B.F. Saul Property Company was not properly registered pursuant to D.C. Code Sec. § 42-3502.08, thus Housing Accommodation was not properly registered at the time of [sic] the vacancy increase was taken, invalidating the vacancy rent ceiling and rent increase. (*Dec. 6, 2010 Order on Pending Motions at 17, 18; R. at 1483, 84*) (*Nelson v. Klingle Corporation, RH-TP 28,519 Final Decision and Order, March 29, 2010 at 6, Attachment C to Jan. 28, 2011 Consolidated Motion for Relief from Order R. at 1500-1559*)
  
15. It was an abuse of discretion for the ALJ to fail to hold an evidentiary hearing on the claim of improper registration on remand because Tenant could reach the issue in TP 29,171 when the ALJ had dismissed 29,171 with prejudice on Sept. 14, 2014. (*Final Order After Remand at 6, 7.*) (*A copy of order dismissing TP 29,171 is attached.*)

When no relief is available to a party raising an issue, the issue is moot and will not be addressed by the Commission. *See, e.g., McChesney v. Moore*, 78 A.2d 389, 390 (D.C. 1951) (“it is not within the province of appellate courts to decide abstract, hypothetical or moot questions, disconnected with the granting of actual relief or from the determination of which no practical relief can follow”); *Klingle Corp. v. Burkhardt*, TP 28,270 (RHC Apr. 29, 2016) (housing provider’s appeal of finding of bad faith moot where Commission vacated underlying rent refund); *Holbrook Street, LLC v. Seegers*, RH-TP-14-30,571 (RHC July 15, 2016) (compliance with housing code moot where rent increase invalid because rental unit was not properly registered); BLACK’S LAW DICTIONARY at 1029-30 (8th ed. 2004) (defining “moot” as

“[h]aving no practical significance, hypothetical or academic”). Because the Commission has affirmed the ALJ’s denial of the Tenant’s Motion to Amend Complaint to add the issue of registration to the Tenant Petition, the Tenant’s claims on appeal that the ALJ erred by not finding in the Tenant’s favor on the related registration issues numbered 12, 13, and 15, above, are moot.

**16. [Abuse of Discretion] It was an abuse of discretion for the ALJ to deny discovery. (Jan. 4, 2010 Scheduling Order at 7; R. at 1195.)**

On December 7, 2009, the Tenant filed a Case Summary prior to a status conference scheduled for the same day. R. at 1175. In the Case Summary, the Tenant stated that she anticipated filing a motion to designate the case as complex track in order to permit discovery. Case Summary at 12; R. at 1186.

On January 4, 2010, the ALJ ordered that the case would not be designated as complex track because several prior orders had already denied discovery. Scheduling Order at 7; R. at 1195. Those orders include:

1. Order Denying Partial Summary Disposition (Nov. 23, 2007)); R. at 454-460
2. Order Denying Tenant’s Subpoena Request for Production of Documents (Dec. 6, 2007); R. at 466
3. Order Denying Petitioner’s Motion to Permit One Interrogatory, One Request for Production of Documents, and a Subpoena for Witnesses (Jan. 25, 2008) R. at 489.
4. Order Denying Petitioner’s Request for Subpoenas (Jan. 28, 2008); R. at 521

The Commission’s review of the record reveals that the Tenant’s repeated requests for discovery were all related to the issue of whether B.F. Saul Property Company was a manager of the Housing Accommodation and was therefore required to be listed on the Registration/Claim

of Exemption Form. Because the Commission has affirmed the ALJ's denial of the Tenant's Motion to Amend Complaint to add a claim of improper registration, *supra* at 52-53, the Commission determines that the Tenant's issue on appeal regarding discovery is also moot. See McChesney, 78 A.2d at 390; Burkhardt, TP 28,270; Seegers, RH-TP-14-30,571.

Accordingly, the Commission dismisses this issue on appeal.

**25. [Bad Faith] It was error for the ALJ to fail to find the Housing Providers failed to honor clauses 1 and 40.1 of the Lease.**

The Commission's review of the record reveals that the clauses of the Tenant's lease referenced by the Tenant as grounds for error by the ALJ state that "B.F. Saul Property Company" is the managing agent of the Housing Accommodation. See R. at 120, 129. Notwithstanding the Tenant's labeling of Issue 25 as related to "bad faith," the Commission therefore determines that this issue raised on appeal by the Tenant relates to her Motion to Amend Complaint to add a claim of improper registration. See *supra* at 46. Because the Commission has affirmed the ALJ's denial of the Tenant's Motion to Amend Complaint to add a claim of improper registration, *supra* at 52-53, the Commission determines that the Tenant's issue on appeal regarding discovery is also moot. See McChesney, 78 A.2d at 390; Burkhardt, TP 28,270; Seegers, RH-TP-14-30,571.

Accordingly, the Commission dismisses this issue on appeal.

**E. Whether the "Prior Rent Ceiling" on the March 29, 2006, Amended Registration Form Invalidates the Vacancy Rent Ceiling Adjustment**

**8. [Vacancy Amended Registration] It was error for the ALJ by effectively ruling that the invalidity of the 2004 and the 2005 rent ceiling increases had no bearing on the vacancy ceiling increase, thereby giving the Housing Provider a wind fall. (Final Order After Remand at 23, 24)**

In the First Final Order, the ALJ determined that the Housing Provider had untimely filed Certificates of Election of Adjustments of General Applicability in 2004 and 2005 to adjust the

rent ceiling for the Tenant's rental unit prior to the date she moved in. First Final Order at 16-17; R. at 1741-42. However, the ALJ also determined that, because no rent was demanded from the Tenant under the unlawfully-filed rent ceilings, and because the vacancy adjustment authorized the Housing Provider to take an adjustment not based on those prior rent ceiling adjustments, the Tenant had no action or remedy in contesting the 2004 and 2005 late filings. *Id.* at 17.

In the Final Order after Remand, the ALJ reiterated this determination, stating, "[b]ecause the vacancy increase was based on a comparable unit, the fact that the 2004 and 2005 rent ceiling increases were invalid[] does not change the amount of the vacancy rent ceiling increase." Final Order after Remand at 23-34. As noted *supra* at 41, the Tenant raised the issue of whether the March 29, 2006, Amended Registration Form, which identified and sought the vacancy rent ceiling adjustment, contained erroneous information and was therefore invalid. The Commission's First Decision and Order, however, did not address this specific aspect of the Tenant's numerous reasons for asserting that the vacancy rent ceiling adjustment was invalid. Because the Tenant has properly preserved, this issue, the Commission addresses it herein.

The Commission's standard of review is found at 14 DCMR § 3807.1 and provides the following:

The Commission shall reverse final decisions of the [Office of Administrative Hearings] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the [Office of Administrative Hearings].<sup>39</sup>

The Commission will uphold an ALJ's findings of fact so long as there is substantial evidence on the record to support them. *See Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n*, 649

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<sup>39</sup> As noted *supra* at n.1, jurisdiction over contested cases was transferred from the Rent Administrator to OAH in 2006.



A.2d 1076, 1079 n.10 (D.C. 1994) (defining “substantial evidence” as “such relevant evidence as a reasonable mind might accept as able to support a conclusion”); Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014); Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012). The Commission reviews an ALJ’s conclusions of law *de novo* to determine if they materially misconstrue the Act. United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm’n; 101 A.3d 426, 430-31 (D.C. 2014); Caldwell v. Horning Mgmt. Co., LLC, RH-TP-15-30,710 (RHC Mar. 2, 2017). The Commission, nonetheless, will not reverse a final order on appeal if an error is harmless. *See, e.g.*, United Dominion, 101 A.3d at 430; LCP, Inc. v. District of Columbia Alcoholic Beverage Control Bd., 499 A.2d 897, 903 (D.C. 1985) (“[R]eversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed.” (quoting Arthur v. District of Columbia Nurses’ Examining Bd., 459 A.2d 141, 146 (D.C. 1983))); Tenants of 1754 Lanier Pl., N.W. v. 1754 Lanier, LLC, RH-SF-15-20,126 (RHC Apr. 26, 2016).

The Commission’s regulations require a housing provider that claims a vacancy rent ceiling adjustment to file an Amended Registration Form. *See* 14 DCMR §§ 4103.1(e), 4207.5 (2004). That form requires a housing provider to list the dollar amount of the prior and adjusted rent ceilings for the vacant rental unit, and to state the percentage change. *See* Petitioner’s Exhibit (“PX”) 117 (Amended Registration Form dated Mar. 29, 2006); R. at 1858.

The Commission has determined that strict compliance with the Act’s filing requirements is essential to the enforcement of the Rent Stabilization Program. *See, e.g.*, Leyv v. D.C. Rental Hous. Comm’n, 126 A.3d 684, 688-89 (D.C. 2015) (failure to timely notify tenant of exempt status renders exemption void). For example, in Alpar v. Pollinger, Shannon & Luchs, TP 27,146 (RHC Aug. 8, 2003), the Commission invalidated two certificates of election of

adjustments of general applicability because they contained erroneous information regarding the applicable year and allowable percentage of the rent increase.

The Commission notes that the provision of the Act utilized by the Housing Provider to adjust the rent ceiling, that is, D.C. OFFICIAL CODE § 42-3502.13(a)(2) (2001), does not restrict the vacancy adjustment to a certain percentage of the rental unit's prior rent ceiling; rather, it adopts the rent ceiling of another unit as the new rent ceiling for the vacant unit.<sup>40</sup> In this regard, the ALJ's statement that "the fact that the 2004 and 2005 rent ceiling increases were invalid[] does not change the amount of the vacancy rent ceiling increase" is partially correct; the new dollar amount of the rent ceiling is not affected by the prior amount. *See id.*

However, the Commission observes that the amount of the vacancy adjustment, that is, the difference between the new and prior rent ceilings, can affect a tenant's rights under the Act. Specifically, D.C. OFFICIAL CODE § 42-3502.08(h)(1) (2001) provides that:

Each adjustment in the rent charged . . . may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment. If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.

Accordingly, erroneous information on an Amended Registration Form as to the prior rent may mislead a tenant, housing provider, or court regarding the dollar amounts of preserved, unimplemented rent ceiling adjustments that are available to serve as the basis for an adjustment

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<sup>40</sup> D.C. OFFICIAL CODE § 42-3502.13(a) (2001), as effective at the time the Tenant's rental unit became vacant, provided as follows:

When a tenant vacates a rental unit . . . , the rent ceiling may be adjusted to[:] . . .

- (2) The rent ceiling of a substantially identical rental unit in the housing accommodation[.]

The Commission notes that § 2(f)(2) of the Rent Control Reform Amendment Act of 2006, effective August 5, 2006 (D.C. Law 16-145; D.C. OFFICIAL CODE § 42-3502.13(a)(2) (2007 Repl.)), imposes a 30% limit on "high comp." vacancy adjustments.

in rent charged. *Cf. Sawyer Prop. Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 106-07 (D.C. 2005) (purpose of subsection 208(h) “was to stop housing providers from implementing more than one rent ceiling increase at the same time in a single rent increase, a practice referred to as ‘stacking’”).

Nonetheless, based on the Commission’s review of the record, the Commission determines that any error by the ALJ in finding the prior rent ceiling irrelevant is harmless based on the facts of this case. *See United Dominion*, 101 A.3d at 430-31 (Commission error in stating deferential standard of review was harmless where subsequent analysis effectively *de novo*); *1754 Lanier, LLC*, RH-SF-15-20,126 (error in misstating necessary factors was harmless where subsequent analysis contained findings of fact and conclusions of law on all necessary factors). Rent ceilings were abolished several months after the vacancy adjustment in question was taken, and the Tenant does not claim that any further adjustments in rent charged were implemented while rent ceilings remained in place. *See* D.C. Law 16-145; D.C. OFFICIAL CODE § 42-3502.06(a) (2007 Repl.).<sup>41</sup> Moreover, as the Commission determined in the First Decision and Order, the only rent charged adjustment that implemented the March 29, 2006, vacancy rent ceiling adjustment was invalid on other grounds, namely, the 180-day restriction, and the amount

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<sup>41</sup> The Commission notes that the listing of the higher, “prior” rent ceiling amount does not appear to cause any injury to the Tenant; to the contrary, by listing the higher amount, the Housing Provider claimed to preserve a small “unimplemented rent ceiling adjustment” for later implementation. *See* D.C. OFFICIAL CODE § 42-3502.08(h) (2001). Specifically, the Commission’s review of the record reflects that the rent ceiling of her unit at the time the Tenant moved in was correctly determined, by adopting the rent ceiling of a comparable unit, as \$4,483; by listing the “prior rent ceiling” as \$1745, rather than \$1,661 (the rent ceiling prior to 2004, *see* PX 114; R. at 1835), the Housing Provider claimed a rent ceiling adjustment (*i.e.*, the difference of the prior and new ceilings) of \$2,738, rather than \$2,822. *See* PX 117; R. at 1858.

The Commission also notes that the Order Denying Relief states that, if OAH had retained jurisdiction, the ALJ would have “corrected” the Final Order after Remand by reducing the lawful, new rent ceiling to \$4,399, reflecting the reduction in the prior rent ceiling based on the invalid 2004 and 2005 filings. Order Denying Relief at 2; R. at 1902. The Commission notes that the ALJ did not identify any basis in the Act, regulations, or case law for determining the appropriate relief to include a reduction in the new rent ceiling by the amount of the prior, invalid adjustments; rather, this relief contradicts the ALJ’s prior determination in the First Final Order and Final Order after Remand that the vacancy adjustment rendered the prior, invalid adjustments moot. The Commission, for the reasons illustrated above, is satisfied that the 2004 and 2005 rent ceiling adjustments are moot.

of the adjustment is thus irrelevant to its lawfulness. The Commission is therefore satisfied that the Tenant was not prejudiced by the ALJ's failure to invalidate the Amended Registration Form on the grounds that the "prior rent ceiling" was not correct and that any error by the ALJ with respect to this issue was thus harmless. See United Dominion, 101 A.3d at 430-31; 1754 Lanier, RH-SF-15-20,126.<sup>42</sup>

**D. Issues Moot on Appeal Based on Remand for Further Proceedings on Reconsideration**

As noted *supra* at 53-54, when no further relief can be granted by deciding an issue, the issue is moot and the Commission will not address it on appeal. See McChesney, 78 A.2d at 390; Seegers, RH-TP-14-30,571; BLACK'S LAW DICTIONARY at 1029-30 (8th ed. 2004). Because the Commission remands this case for further proceedings on the applicability of Osburn, TP 11,924, and Wynn, TP 10,694, as precedent regarding the remedy for the Housing Provider's violation of the 180-day limit on increases in rent charged, *see supra* at 26-31, the Commission determines that the following, related issues are moot on appeal until the ALJ address the appropriate remedy.

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<sup>42</sup> For the same reasons, the Commission is also satisfied that the error claimed by the Tenant in the Housing Provider's stated "percentage of increase" on the Amended Registration Form is also harmless. See Tenant's Brief at 14; United Dominion, 101 A.3d at 430-31; 1754 Lanier, RH-SF-15-20,126.

1. **[Fixed Term Lease]** The ALJ improperly found that Tenant's rent could be increased after one month when there was a 12 month fixed term lease in place in violation of D.C. Code § 42-3502.08(e). It was error for the ALJ to simply delay the increase rather than invalidate it, and it was error for the ALJ to find that Tenant is only entitled to a rent refund for one month. (*Final Order After Remand at 24, 25.*)
2. **[Vacancy Rent Increase]** The ALJ erred by failing to find that the Housing Provider did not give proper notice pursuant to 14 DCMR § 4205.4 with respect to the \$2254 May 1, 2006 rent increase, invalidating the increase. (*Final Order After Remand at 18*)
22. **[Damages]** It was error for the ALJ to fail to order a rent rollback and a rent refund.

The Commission's review of the record reveals, and the Tenant's elaboration in the Tenant's Brief explains, that these issues relate to the remedy that the ALJ ordered based on her analysis of Osburn, TP 11,924, and Wynn, TP 10,694. See Final Order after Remand at 24-26; Tenant's Brief at 5-13. The Tenant maintains that, by ordering a rent refund for only the one month (April, 2006) before the 180-day prohibition on rent increases would have ended, the ALJ effectively allowed an illegal rent increase to occur on May 1, 2006, resulting from the Housing Provider's failure to follow the required notice and filing procedures under the Act and regulations. See Tenant's Brief at 8-11; 14 DCMR § 4205. Moreover, the Tenant asserts that this (effective) rent increase violates the Tenant's lease, which, although it provided for the same rent charged on and after May 1, 2006, was in an unlawful amount when the Tenant first moved into her rental unit. See Tenant's Brief at 6-8.

Because the Commission remands this case for the ALJ to undertake further analysis of the appropriate remedy under applicable precedent, *supra* at 26-31, the Commission determines that these issues raised by the Tenant are moot on appeal. See McChesney, 78 A.2d at 390; Burkhardt, TP 28,270; Seegers, RH-TP-14-30,571. Whether the remedy ordered by the ALJ has

the effect of violating either the regulations for implementing a rent increase or imposing a rent increase in violation of the Tenant's lease need not be resolved unless and until the ALJ determines whether Osburn, TP 11,924, and Wynn, TP 10,694 serve as binding precedent or if other cases, including Penick, TP 22,137, and Lovitky, TP 11,661, would be more appropriate precedent in determining the applicable remedy.

Accordingly, the Commission dismisses these issues as moot on appeal.

24. **[Bad Faith] The ALJ erred by failing to find that because the Housing Provider had already been found to have acted in bad faith regarding the rent ceiling increase filed on December 23, 2003 in TP 27,207 but continued to use this unlawful increase as a basis for unit 901's rent ceiling, each increase built upon it was taken knowingly, willfully, and in bad faith. (*Burkhardt v. Klingle*, TP 28,270 Decision and Order, Sept. 2, 2006, Attachment A to the July 14, 2010 Motion for Partial Summary Judgment, R. at 1353-1393)**
26. **[Bad Faith] It was error for the ALJ to fail to [sic] that the Housing Provider's conduct was knowing, willful and sufficiently egregious to warrant treble damages.**

The Act permits the imposition of a trebled rent refund where a housing provider has acted knowingly and in bad faith. D.C. OFFICIAL CODE § 42-3509.01(a) (2001);<sup>43</sup> Bernstein Mgmt. Corp. v. D.C. Rental Hous. Comm'n, 952 A.2d 190, 198 (D.C. 2008); Gelman Mgmt. Co. v. Grant, TP 27,995, 27,997, 27,998, 28,002, & 28,004 (RHC Aug. 19, 2014); 1773 Lanier Place, N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009). In its First Decision and Order, the Commission found that the ALJ had not erred by failing to award a treble rent refund (or to make findings of fact on whether the Housing Provider acted in bad faith) because no rent refund

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<sup>43</sup> D.C. OFFICIAL CODE § 42-3509.01(a) (2001) provides, in relevant part:

Any person who knowingly . . . demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit . . . shall be held liable . . . for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith)[.]

had been awarded in the First Final Order. *See* First Decision and Order at 50; *cf.* Palmer v. Clay, RH-TP-13-30,341 (RHC Oct. 5, 2015) (where tenant asserted bad faith and ALJ awarded rent refund, ALJ erred by not addressing issue of treble damages).

The Commission observes that, although the ALJ awarded the Tenant a rent refund for the violation of the 180-day waiting period, the Final Order after Remand did not address bad faith or a treble refund. *See* Final Order after Remand at 26. However, because the Commission remands this case for a determination of the appropriate remedy, the issue of whether the Housing Provider acted in bad faith is moot until the ALJ makes a final determination as to the calculation of the amount of any rent refund to be awarded. Burkhardt, TP 28,270.

Accordingly, the Commission dismisses these issues as moot on appeal.

#### IV. CONCLUSION

For the foregoing reasons, the Commission affirms the Final Order after Remand in part, remands Final Order after Remand in part, and dismisses the Tenant's appeal in part as moot.

The Commission affirms the Final Order after Remand on the following issues, because the Commission resolved the issues in its First Decision and Order: Issues 6 and 7, relating to the posting of the Amended Registration Form, *supra* at 32-33; Issue 10, relating to the rent ceiling of the comparable unit used in the vacancy rent ceiling adjustment, *supra* at 34; Issue 11, relating to the date of the vacancy of the rental unit, *supra* at 34-35; Issue 17, relating to the statute of limitations, *supra* at 35-36; Issue 19, relating to the return of certain filings to the Tenant, *supra* at 36-37; Issue 21, relating to the statute of limitations, *supra* at 37-38; and Issue 23, relating to the addition of retaliation claims, *supra* at 38-39.

The Commission also affirms the Final Order after Remand on the following issues, because the Tenant could have but failed to raise the issues prior to this appeal: Issue 3, relating to certification of the posting of the Amended Registration Form, *supra* at 39-41; Issues 4 and 5,

to the extent they are related to the March 16, 2006, capital improvement-based rent ceiling adjustment, *supra* at 41-43; Issue 18, relating to the specific rent adjustments being challenged in the Tenant Petition, *supra* at 44; and Issue 20, relating to the denial of the Tenant's motion for relief from various procedural orders, *supra* at 44.

The Commission also affirms the Final Order after Remand on the Following issues because issues of registration are outside the scope of the Tenant Petition: Issue 14, relating to the ALJ's exercise of discretion in denying the Tenant's motion to amend the Tenant Petition, *supra* at 46-53; Issues 12, 13, and 15, relating to the merits of the Tenant's claims of improper registration, *supra* at 53-54; Issue 16, relating to discovery requests relevant to ownership and management information required on a registration form, *supra* at 54-55; and Issue 25, relating to lease clauses describing the ownership and management of the Housing Accommodation, *supra* at 55.

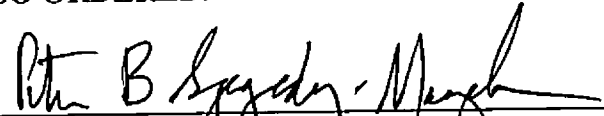
The Commission also affirms the Final Order after Remand on Issue 8, relating to the "prior rent ceiling" on the Amended Registration Form taking the vacancy adjustment, because the record does not reveal any injury or prejudice to the Tenant based on the incorrect prior amount listed on the form. *Supra* at 55-60.

The Commission remands the Final Order after Remand for further proceedings and a decision on the Tenant's Motion for Reconsideration. *Supra* at 21-31. The ALJ is instructed to determine whether Osburn, TP 11,924, and Wynn, TP 10,694, are appropriate precedent regarding a remedy for a violation of the 180-day rule in D.C. OFFICIAL CODE § 42-3502.08(g) (2001), and whether later cases including Penick, TP 22,137, and Lovitky, TP 11,661 (RHC July 10, 1985), control the result in this case or are distinguishable. *See supra* at 30.



Finally, the Commission dismisses the following issues in the Second Notice of Appeal because they are unnecessary to address until the matter of the appropriate remedy is determined by the ALJ on remand: Issues 1, 2, and 22, relating to the Tenant's assertion that limiting the damages for the 180-day rule violation had the effect of implementing a rent increase without notice, *supra* at 61-62; and Issues 24 and 26, relating to treble damages in the event of bad faith, *supra* at 62-63.

**SO ORDERED.**

  
PETER B. SZEGEDY-MASZAK, CHAIRMAN

  
MICHAEL T. SPENCER, COMMISSIONER

### **MOTIONS FOR RECONSIDERATION**

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

### **JUDICIAL REVIEW**

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2016.), "[a]ny person aggrieved by a decision of the Rental Housing Commission...may seek judicial review of the decision...by filing a petition for review in the District of Columbia Court of Appeals. Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

D.C. Court of Appeals  
Office of the Clerk  
430 E Street, N.W.  
Washington, D.C. 20001  
(202) 879-2700

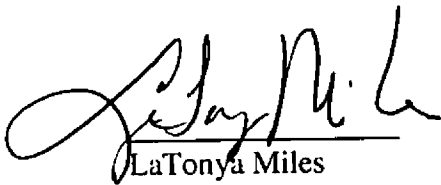
**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-06-28,708 was served by first-class mail, postage prepaid, on this **22nd day of September, 2017**, to:

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