DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-14-30,482 and RH-TP-14-30,555

In re: 3012 Pineview Court, N.E.,

Ward Five (5)

ROY L. PEARSON, JR.
Tenant/Appellant/Cross-Appellee

v.

GARDENIA BROWN
Housing Provider/Appellee/Cross-Appellant

DECISION AND ORDER

May 3, 2018

EPPS, COMMISSIONER: This case is on appeal to the Rental Housing Commission ("Commission") from the Office of Administrative Hearings ("OAH"), based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD").[1] These proceedings are governed by the applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 - 3509.07 (2012 Repl.), the District of Columbia Administrative Procedures Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2010), 1 DCMR §§ 2921-2941 (2010), and 14 DCMR §§ 3800-4399 (2004).

[1] 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 Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of RACD in DCRA were transferred to the RAD in 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 (2012 Repl.).

I. PROCEDURAL HISTORY

On February 12, 2014, Roy L. Pearson, Jr. ("Tenant"), residing in 3012 Pineview Court, N.E. ("Housing Accommodation"), filed tenant petition RH-TP-14-30,482 ("Tenant Petition I") with the RAD against Gardenia Brown ("Housing Provider"), and, on July 28, 2014, the Tenant filed a second tenant petition RH-TP-14-30,555 ("Tenant Petition II") (collectively, "Tenant Petitions"). *See* Tenant Petition I at 1-4; R. at Tab 2; Tenant Petition II at 1-4; R.at Tab 13. In his Tenant Petitions, the Tenant asserted that the Housing Provider violated the Act as follows:

1. The building where my/our Rental Unit(s) is/are located is not properly registered with the RAD.
2. The rent increases are larger than the increases allowed by any applicable provision of the Act.
3. There was no proper 30-day notice of rent increases within 30 days of the effective date of the increases.
4. The Housing Provider did not file the correct rent increase forms with the RAD.
5. The rent demanded exceeds the legally-calculated rent for my/ our units.
6. The rent demanded is in excess of the maximum allowable for my Rental Unit.
7. A Notice to Vacate has been served on me/us, which violates D.C. Official Code § 42-3505.01 (Supp. 2008).

Tenant Petition I at 2; R. at Tab 2; Tenant Petition II at 3-4; R. at Tab 13. On September 8, 2014, OAH issued an order consolidating the Tenant Petitions for a hearing and decision. Order Consolidating at 3; R. at Tab 20.

On October 9, 2014, an evidentiary hearing was held before Administrative Law Judge Caryn L. Hines ("ALJ Hines"). Hearing Transcript (OAH Oct. 9, 2014); R. at Tabs 33A & 33B. On October 13, 2015, with OAH not yet having issued a Final Order, the Tenant sought to re-open the record to allow additional evidence and/or have the ALJ take official notice of the

Housing Provider's continued demand for rent. *See* Tenant-Petitioner's Motion to Re-Open Record for a Limited Purpose at 1-3; R. at Tab 34. In support of his request, the Tenant argued that any damage award should also include damages incurred until the date the Final Order is issued by OAH. *Id.*

On October 21, 2015, ALJ Hines denied the Tenant's request concluding that "the hearing conducted . . . adjudicated Tenant's claims based on evidence presented[.] If Tenant's claims are on-going Tenant's recourse is to file another tenant petition [that] reflects the current status of the claims." *See* Order Denying Motion To Re-Open Record For A Limited Purpose ("Order Denying Request to Reopen the Record") at 1-2; R. at Tab 35. On December 8, 2015, the Tenant sought reconsideration of the Order Denying Request to Reopen the Record. *See* Tenant-Petitioner's Motion For Reconsideration of Order of October 21, 2015 ("Motion for Reconsideration of Reopening the Record") at 1-8; R. at Tab 37.

ALJ Hines left the employ of the OAH before ruling on the Tenant's Motion for Reconsideration of Reopening the Record or issuing a final order on the Tenant Petitions, and the case was transferred to Administrative Law Judge Vytas V. Vergeer ("ALJ"). On October 26, 2016, the ALJ issued a proposed final order ("Proposed Final Order"), R. at Tab 49, giving parties until November 28, 2016, to file exceptions and objections or to request that a hearing be scheduled to make arguments. *See* Order After Change of Judicial Officer; R. at Tab 48. On November 28, 2016, Tenant filed Petitioner's Exceptions to Proposed Final Order and To Order After Change of Judicial Officer ("Tenant's Exceptions to Proposed Final Order"). R. at Tab 50. The Housing Provider did not file a response to the Proposed Final Order.

On December 1, 2016, the ALJ issued a final order: Pearson v. Brown, 2014-DHCD-TP 30,482 & 2014-DHCD-TP 30,555 (OAH Dec. 1, 2016) ("Final Order"); R. at Tab 52. The ALJ made the following findings of fact in the Final Order:[2]

1. Construction of 3012 Pineview Court, NE, Washington, D.C. 20018 was completed in 1988. The building contains seven apartments. Testimony of Gardenia Brown.

2. Respondent Gardenia Brown (Housing Provider) bought one of the condominiums within the building at 3012 Pineview Court, NE, in 1987, shortly before the building was completed. Testimony of Gardenia Brown.

3. On January 15, 1997, Ms. Brown filed a Registration/Claim of Exemption Form with the Rental Accommodations Division (RAD). On the form, she alleged that her rental unit at Pineview Court was exempt from rent control because she owned only one rental unit in the District of Columbia. Testimony of Roy Pearson; testimony of Gardenia Brown; PX 101.

4. On the January 15, 1997, Registration/Claim of Exemption Form, Ms. Brown entered the owner of the condominium as Fort Lincoln Realty (Fort Lincoln), the company that was at least part-owner of the entire building. Fort Lincoln is a corporation. Testimony of Roy Pearson; testimony of Gardenia Brown; PX 101.

5. In filling out the 1997 Registration/Claim of Exemption Form, Ms. Brown did not check the box indicating that the condominium was built after 1975. PX 101.

6. On October 11, 1999, Ms. Brown met Mr. Pearson (Tenant), and they discussed the possibility of Mr. Pearson renting Ms. Brown's unit at 3012 Pine View Court, NE. After viewing the unit, Mr. Pearson filled out an application on that same day, and signed a lease on October 13, 1999. Testimony of Roy Pearson; testimony of Gardenia Brown.

7. On October 15, 1999, Mr. Pearson paid Ms. Brown $585 for November's rent, plus a security deposit of $585. Mr. Pearson received the keys to his unit and moved into the condominium on that date. Testimony of Roy Pearson; testimony of Gardenia Brown.

8. At the time Mr. Pearson first visited the unit in October, the time he signed the lease, and the time he moved into the unit, the 1997 Registration/Claim of Exemption Form was not posted conspicuously in the building, nor

[2] The findings of fact are recited using the same language and numbering as used by the ALJ in the Final Order.

given directly to Mr. Pearson, nor incorporated into or attached to the lease. Testimony of Roy Pearson; Testimony of Gardenia Brown; PX 101.

9. The first four years of the tenancy were uneventful. Mr. Pearson paid his rent in advance in six-month installments, taking Ms. Brown to lunch each time, and never missing a payment. Testimony of Roy Pearson; testimony of Gardenia Brown.

10. In 2001, after Ms. Brown first took a rent increase for the unit, Mr. Pearson questioned it, pointing out what he believed to be the rent ceiling. At that time, Ms. Brown orally informed Mr. Pearson that she was exempt from rent control. She did not provide him with a copy of the Registration/Claim of Exemption Form or any other form of written notification that the unit was exempt from rent control. Mr. Pearson did nothing to challenge that claim. Testimony of Gardenia Brown.

11. Beginning in 2003, during some periods of unemployment, Mr. Pearson occasionally failed to pay rent on time. In each case when Mr. Pearson anticipated that his rent might be late, he gave Ms. Brown advance notice of the situation. Mr. Pearson occasionally relied on charitable agencies to assist him in making rent payments. Some of these agencies required that he be served with a notice to vacate before they would pay for the rent. Mr. Pearson thus asked Ms. Brown on occasion to serve him with a notice to vacate, in order to receive help in making rent payments, which she did. Testimony of Roy Pearson.

12. Mr. Pearson's struggles to timely pay the rent led to a deterioration in his relationship with Ms. Brown. On the first occasion he was unable to pay rent, Ms. Brown showed up at his door and demanded he leave. Testimony of Roy Pearson.

13. Sometime between 2003 and 2005, Housing Provider and Tenant again discussed-that the unit was exempt from rent control. Ms. Brown did not provide Mr. Pearson with a copy of the Registration/Claim of Exemption Form at that time. Testimony of Roy Pearson; testimony of Gardenia Brown; PX 101b.

14. On June 24, 2010, Ms. Brown filed a new Registration/Claim of Exemption Form with the RAD, averring that she owned four or fewer rental units in the District of Columbia. She did not provide Mr. Pearson with a copy of the Form at the time she filed it and did not post it at the unit. PX 111; testimony of Roy Pearson; testimony of Gardenia Brown.

15. In 2013, in researching whether the unit might be exempt from rent control, Mr. Pearson personally went to the RAD and viewed the Registration/Claim of Exemption Forms for the unit on file there. Testimony of Roy Pearson.

16. At no point prior to the filing of exhibits for the Tenant Petitions herein did Ms. Brown provide Mr. Pearson a copy of the 2010 Registration/Claim of Exemption Form or with written notice of her claimed exemption. She provided Mr. Pearson with a copy of the 1997 Registration/Claim of Exemption Form on February 20, 2014. Testimony of Roy Pearson; testimony of Gardenia Brown.

17. Ms. Brown has not filed a new Registration/Claim of Exemption Form with the RAD after she provided written notice of her Claim of Exemption to Mr. Pearson on February 20, 2014. Testimony of Gardenia Brown; testimony of Roy Pearson.

18. The unit in question is the only rental unit in the District of Columbia that Ms. Brown has owned since 1997, and Mr. Pearson has been her only tenant in the District since that time. Testimony of Gardenia Brown.

19. During Mr. Pearson's tenancy, Ms. Brown increased his rent 12 times. Testimony of Roy Pearson.

20. The first rent increase for the unit, effective December 1, 2000, was from $585 to $596. PX 102.

21. The second increase, effective November 1, 2001, was from $596 to $620. PX 103.

22. The third increase, effective May 1, 2002, was from $620 to $650. PX 104.

23. The fourth increase, effective November 1, 2003, was from $650 to $695 PX 105.

24. The fifth increase, effective September 1, 2005, was from $695 to $750. PX 106.

25. The sixth increase, effective August 1, 2006, was from $750 to $788. PX 107,

26. The seventh increase, effective February 1, 2008, was from $788 to $849. PX 108.

27. The eighth increase, effective February 1, 2009, was from $849 to $915. PX 109.

28. The ninth increase, effective April 1, 2010, raised Mr. Pearson's rent from $915 to $949. Testimony of Roy Pearson.

29. For each of the first nine increases, Ms. Brown sent Mr. Pearson a notice of rent increase that gave him at least 30-days' notice of the increase.

None of those notices contained a reason for the increase or were filed with the RAD. PX 102-109; testimony of Roy Pearson; testimony of Gardenia Brown.

30. The date three years prior to the date that Mr. Pearson filed the first tenant petition against Ms. Brown is February 12, 2011. Official notice; TP 30,482.

31. On August 1, 2011, Ms. Brown sent Mr. Pearson a notice increasing his rent from $949 to $1004 per month, effective October 1, 2011. This notice was not filed with the RAD. PX 112; testimony of Roy Pearson.

32. On January 22, 2013, Ms. Brown sent Mr. Pearson a notice increasing his rent from $1004 to $1320 per month, effective March 1, 2013. This notice was not filed with the RAD. PX 113; testimony of Roy Pearson.

33. On December 27, 2013, Ms. Brown sent Mr. Pearson a notice increasing his rent from $1320 to $1386 per month, effective March 1, 2014. This notice was not filed with the RAD. PX 116; testimony of Roy Pearson.

34. Mr. Pearson paid all of the rent increases voluntarily except for the final two - effective March 1, 2013 and March 1, 2014, both of which Mr. Pearson paid under protest. Testimony of Roy Pearson.

35. For the first five years of Mr. Pearson's tenancy, Housing Provider regularly maintained the condominium and had the furnace inspected prior to each winter. Testimony of Roy Pearson.

36. Beginning in December 2012, and continuing until February 2013, there were problems with the furnace for the property, leaving Mr. Pearson with irregular or inadequate heat. Testimony of Roy Pearson.

37. On multiple occasions in December 2012 and January 2013, Tenant informed Housing Provider of problems with the furnace and requested maintenance. Testimony of Roy Pearson.

38. Ms. Brown had repair people work on the furnace five times in the 2012/2013 winter. Mr. Pearson complained about the situation again in January 16, 2013. On January 16, 2013, Ms. Brown told Mr. Pearson that the earliest any technician could check on the furnace would be later in the week. Mr. Pearson then called Ms. Brown's HVAC technician, Vito Plumbing, himself and was told that a repair person could come out the same day, or on the next day at the latest. Testimony of Roy Pearson.

39. On January 16, 2013, Mr. Pearson contacted Ms. Brown, telling her that he had personally contacted Vito Plumbing. Ms. Brown came to the unit with the plumbers shortly thereafter. Once she entered Mr. Pearson's apartment, the two proceeded to get into an argument, with Ms. Brown

contending that she was solely responsible for contacting maintenance people and Mr. Pearson complaining regarding the efficacy of the furnace repair. During the argument, Mr. Pearson warned Ms. Brown that he was going to call the police to have her removed, and Ms. Brown invited him to do so. Mr. Pearson did not call the police. Testimony of Roy Pearson; testimony of Gardenia Brown.

40. Five days after the argument between Ms. Brown and Mr. Pearson, Ms. Brown issued a notice to Mr. Pearson, increasing his rent by 31.5%, from $1004 to $1320 per month, effective March 1, 2013. PX 113.

41. Around the same time, Ms. Brown was told by others that the rent for Tenant's condominium was far below market rate. She investigated this assertion by calling the Washington Overlook Apartments, an apartment complex across the street from the condominium. The rental office informed her that the price of units comparable to Mr. Pearson's unit was $1300 per month. Testimony of Gardenia Brown.

42. After receiving notice of the March 1, 2013 rent increase from $1004 to $1320 per month, Mr. Pearson began researching rent control regulations, looking into Ms. Brown's registration of the condominium and possible housing code violations. He located Ms. Brown's original January 15, 1997 Registration/Claim of Exemption Form and the subsequent one filed on June 24, 2010 shortly thereafter. Testimony of Roy Pearson.

43. On January 30, 2013, eight days after receiving the January 22, 2013 notice of rent increase, Mr. Pearson wrote Ms. Brown an email outlining what he averred were, multiple violations of the law. The email reads, in relevant part:

> Your January 22 letter, purporting to skyrocket my rent level by more than 30%, has no legal effect. [citations omitted] (voiding *all* subsequent rent increases when, prior to signing a lease, a claim of exemption from rent control was not provided to tenant).
>
> I am writing [] to record a much more blatant violation of District of Columbia landlord-tenant law. As you are well aware, this whopping rent increase is retaliatory pay-back.
>
> Under District of Columbia law, you may not retaliate against me, by raising my rent, in whole or in part because I made a written request of you to perform an immediate emergency repair. D.C. Code § 45-305.02 (b) (1).
>
> [U]nder District of Columbia law, you may not retaliate against me, by raising my rent, in whole or in part because I attempted to enforce my rights under my lease with you. D.C. Code § 54-3505.02 (b) (5) [sic]. As

you know, I did so while you were in my apartment on January 17, 2013, and again in an email... th[e] same day.

[Y]ou boldly defied the law then (D.C. Code §§ 22-3302 & 22-404 (a) (l)), so too are you willing to boldly defy and pay the wide range of fines penalties and sanctions under District of Columbia law for retaliatory rent increases—including imprisonment. See D.C. Code § 42-3509.1(a) [sic] (mere Demand for rent in excess of lawful amount entitles tenant to three times the amount by which the demand exceeds the lawful amount, for each month the demand is made, when a housing provider acts in bad faith[.]) PX 113.

44. Later in the same email, Mr. Pearson mentions various ways Ms. Brown could take advantage of free programs on D.C. housing law, or tax deductible paid tutorials which inform landlords of local housing law. PX 113.

45. On February 24, 2013, Mr. Pearson sent a letter to Ms. Brown, with a rent check for $1320 enclosed. In the letter, Mr. Pearson states that he was "making this and future payments under protest and with all rights reserved," and informs Ms. Brown that he believed the lawful rent level was $549 because he was not served a copy of the Registration/Claim of Exemption Form simultaneously with its filing. The letter references a number of D.C. Code sections that he purported support his claim. The letter also informs Ms. Brown of a number of housing code violations, including an alleged lack of heat, and stated that Mr. Pearson intended to file a tenant petition with the DCRA. PX 115.

46. On January 7, 2014, Mr. Pearson sent Ms. Brown an email marked "Re: RE: RE: RE: Emergency Bathroom Plumbing Repair needed." The email states that if Ms. Brown failed to correct housing code violations, Mr. Pearson would be free to have the repair done himself. The email also states:

I will also be filing a legal case to roll back the unlawful rent level, as I previously advised you. Obviously your outrageous conduct over the past year, and the pendency of litigation, make it unwise for me to allow you to rummage through my apartment in my absence. PX 117.

47. In an email on February 13, 2014, one day after filing TP 30,482, Mr. Pearson offered Ms. Brown a settlement plan, asking for a $10,000 payment and a rollback of the rent to $585 per month. Mr. Pearson attached a draft Motion for Summary Adjudication to the email. PX 118a.

48. On February 14, 2014, one day after Mr. Pearson sent Ms. Brown the settlement offer, Ms. Brown filled out a 90-day Notice to Vacate for Personal Use and Occupancy, Ms. Brown filed the notice to vacate with

the RAD on February 18, 2014, prior to serving Mr. Pearson, and the service page was left blank. Testimony of Roy Pearson; PX 120.

49. Ms. Brown owns a significantly larger home than the condominium unit in which Mr. Pearson lives. She wished to move into the condominium to "downsize," in order to save money in preparation for her retirement in three years' time. Testimony of Gardenia Brown.

50. Ms. Brown hired a process server to serve the 90-day Notice to Vacate. That process server did not serve Mr. Pearson the Notice to Vacate until February 21, 2014. The notice stated that Mr. Pearson had until May 15, 2014, to vacate, giving him 83 days from receipt of the notice. Testimony of Gardenia Brown; Testimony of Roy Pearson; PX 120.

51. On February 20, 2014, Mr. Pearson received a copy of the 1997 Registration/Claim of Exemption Form in an envelope taped to his door. Testimony of Roy Pearson; PX 137.

52. Beginning on March 1, 2014, Tenant began to withhold rent independently; he set up a savings account into which he put $1320 per month. On March 11, 2014, Ms. Brown served Mr. Pearson with a notice to vacate for failure to pay rent. On March 28, 2014, Mr. Pearson was served a second notice to vacate for failure to pay rent. Testimony of Roy Pearson.

53. On May 2, 2014, Ms. Brown filed a complaint, 2014-LTB-11162, in the Landlord/Tenant Branch of D.C. Superior Court, for failure to vacate and failure to pay rent, demanding Mr. Pearson pay $1386 per month for the March, April, and May 2014 rent. PX 121.

54. At the hearing in LTB on May 23, 2014, the court ordered Mr. Pearson to begin paying a protective order of $1320 per month into the court registry starting June 2, 2014, pending the outcome of the case. Testimony of Roy Pearson.

55. After the May 23, 2014 hearing in the LTB, Ms. Brown decided to hire counsel. Her counsel advised her to drop her suit against Mr. Pearson for failure to vacate after expiration of the 90-day notice, due to fact that the notice gave Mr. Pearson 83 instead of 90 days to vacate. Testimony of Gardenia Brown.

56. At an August 13, 2014 hearing in the LTB regarding the case based on the 90-day notice to vacate, at the request of Housing Provider's counsel and over Mr. Pearson's objection, the case was dismissed without prejudice. Ms. Brown had instructed her counsel to dismiss the case if there were issues with how the 90-day notice was issued or served. Testimony of Roy Pearson; testimony of Gardenia Brown.

57. From 1978 to 2002, Mr. Pearson worked for Neighborhood Legal Services Program (NLSP), including 1989 to 2002, as the Assistant Director for Legal Operations. He worked for NLSP again from 2003-2004 as a special counsel handling the agency's adoption of technology. Although NLSP handled rental housing issues, Mr. Pearson did not specialize in the field. The last time he had worked with rent control cases was in the late 1970's or early 1980's when the Rental Housing Act of 1975, 1977, or 1980 were in force, and before the requirement to disclose rent control exemptions to tenants was introduced. Testimony of Roy Pearson.

58. After Mr. Pearson's final stint at NLSP, he was unemployed and living off savings until 2005, when he was appointed as an Administrative Law Judge at the Office of Administrative Hearings (OAH), where he worked until 2007. While at OAH, Mr. Pearson did not handle rent control or housing matters. Testimony of Roy Pearson.

59. Tenant was not reappointed as a judge at OAH in 2007, and after that time, again began living off savings. Testimony of Roy Pearson.

60. Ms. Brown has more than twenty years' experience researching and complying with regulations. Her resume also noted her "[e]xcellent organizational, research and communication capabilities, and strong analytical abilities" PX 100a.

61. Ms. Brown was not aware of the requirement to provide a tenant with the Registration/Claim of Exemption Form contemporaneously with the commencement of a tenancy until the filing of the instant tenant petitions. Testimony of Gardenia Brown.

62. Ms. Brown did not respond to any of Mr. Pearson's emails alleging that she was in violation of the law. They were too numerous and she felt "bullied" by the emails because Mr. Pearson used insulting terms in them. Her lack of response to the emails was not intended to indicate that she agreed with their content. Testimony of Gardenia Brown.

63. When Ms. Brown first received a tenant petition from Mr. Pearson, she went to the OAH Resource Center, where she was advised to wait to hear from OAH. Testimony of Gardenia Brown.

64. Ms. Brown raised the rent in 2013 because she believed the new rent would comport better with the rent for comparable units in the area and would better cover her costs of owning the unit. Testimony of Gardenia Brown.

Final Order at 4 -15; R. at Tab 52.

The ALJ made the following conclusions of law in the Final Order:[3]

A. Burden of Proof

1. Generally, Petitioner has the burden of proving by a preponderance of the evidence that Respondent violated the Act. D.C. OFFICIAL CODE § 2-509(b); 1 DCMR 2932.1; Morris v. EPA, 975 A.2d 176, 181-82 (D.C. 2009); Parreco v. D.C. Rental Hous. Comm'n, 885 A.2d 527, 534 n.9 (D.C. 2005). A preponderance of evidence exists where substantial evidence exists to lead the fact-finder to conclude that the existence of a contested fact is more probable than not. Jadallah v. D.C. Dept of Emp't Servs., 476 A.2d 671, 675 (D.C. 1984). Substantial evidence means "more than a scintilla" and is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 676.

2. However, a housing provider asserting an exemption from the Act has the burden of proving her entitlement to the exemption. Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990); Saryinski v. Ken Ross/Ross LLC., TP 28,162 (RHC April 3, 2008) at 6. The standard for satisfying a housing provider's burden of proof of exemption is "credible, reliable evidence." *See* Revithes v. D.C. Rental Hous. Comm'n, 536 A.2d 1007, 1017 (D.C. 1987); Saryinslci, TP 28,162 at 7. The Rental Housing Commission has also expressed the standard as "a preponderance of credible evidence." Graybill v. Goodman, TP 11,578 (RHC June 3, 1988).

B. Certain Rental Units are Exempt from Rent Control

3. The Rental Housing Act of 1985 exempts certain properties from its "rent stabilization" provisions. The "rent stabilization" provisions are those found in D.C. OFFICIAL CODE §§ 42-3502.05(1) through 42-3502.19 (except § 42-3502.17). See D.C. OFFICIAL CODE § 42-3502.05(a). If the property is exempt, OAH does not have jurisdiction over Tenant's claims that rent increases were unlawful, which are governed by § 42-3502.08 of the rent stabilization provisions.

4. With exceptions not relevant here, the Act requires housing providers either to register a housing accommodation containing rental units or file a claim of exemption. D.C. OFFICIAL CODE § 42-3502.05(a)(3)(f); 14 DCMR 4102.2. It is undisputed that Housing Provider in this case filed a Registration/Claim of Exemption Form on January 15, 1997, and again on June 24, 2010, asserting that the property was exempt because Ms. Brown was and is a "small housing provider" who owns fewer than five rental units in the District of Columbia. See D.C. OFFICIAL CODE § 42-

[3] The conclusions of law are recited using the same language as used by the ALJ in the Final Order, except that the Commission has numbered the paragraphs for ease of reference.

3502.05(a)(3). I discuss the substantive merits of Housing Provider's Registration/Claim of Exemption Forms below, but first address which, if any, of Tenant's claims, including his challenge to the Claim of Exemption, are barred by the statute of limitations.

C. Statute of Limitations

5. The Act has within it a statute of limitations, which provides the following:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. *No Petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment*, except that tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider filed his base rent as required by this chapter.
>
> D.C. OFFICIAL CODE § 42-3502.06(e) (emphasis added).

6. There are two issues to be addressed: first, whether the statute of limitations precludes Tenant's challenge to the Housing Provider's Registration/Claim of Exemption Forms, both of which were filed more than three years prior to the date of the first tenant petition; and second, whether the statute of limitations precludes Tenant's challenge to any of the rent increases, many of which occurred more than three years prior to the date of the first tenant petition.

1. The Statute of Limitations Does Not Apply to a Challenge of the Claim of Exemption

7. The Rental Housing Commission addressed the issue of whether the statute of limitations in the Act is a bar to challenging a Claim of Exemption Form filed more than three years previously in Smith Holding Consulate, LLC v. Lutsko, TP 29,149 (RH, March 10, 2015). In Lutsko, the Housing Provider argued that the tenants were precluded from challenging a claim of exemption more than three years after the commencement of the tenancy. The Rental Housing Commission upheld the Administrative Law Judge's (ALJ) determination that the statute of limitations was not a bar in the case, stating:

> The Commission interprets the plain language of D.C. OFFICIAL CODE § 42-3502.06(e) as placing a limitation only on a tenant's challenge to a *rent adjustment* and making no reference on challenges to claims of exemption, which the Commission is satisfied are not rent adjustments [citations omitted]....

Moreover, the statute only references a *tenant's* challenge to a rent adjustment, whereas the DCCA has held that a claim of exemption is a defense to a tenant petition that must be proven by the *housing provider* [citations omitted].

Lutsko, supra, at p. 30 (emphases in original).

8. Thus, the Rental Housing Commission has clearly and decisively addressed the issue of whether the statute of limitations applies to a challenge of a claim of exemption: it does not. Mr. Pearson, then, may challenge the validity of the exemptions filed in 1997 and 2010.

2. The Statute of Limitations Does Apply to Challenges of Rent Increases

9. The result is different, however, when considering whether the statute of limitations applies to rent increases. The three-year limit clearly enunciated in the statute applies to the rent increases implemented by Ms. Brown. The petition was filed February 12, 2014, so only rent increases that occurred after February 12, 2011, can be challenged. Thus, the August 1, 2011, increase from $949 to $1004, and all subsequent rent increases may be challenged. Any claim that stems from a rent increase implemented prior to February 12, 2011, is barred by the statute of limitations and shall be dismissed.

10. The Rental Housing Commission has addressed this issue myriad times. *E.g.*, Sendar v. Burke, HP 20,213 and TP 20,772 (RHC Apr. 6, 1988) (holding that a challenge to any rent increase taken more than three years prior to filing of petition was barred); Levy, RH-TP-06-28,830; United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC July 3, 2013), United Dominion Mgmt. Co. v. Kelly, RH-TP-06-28,707 (RHC Aug. 15, 2013), and United Dominion Mgmt. Co. v. Rice, RH-TP-06-28,749 (RHC Aug. 15, 2013); Smith Prop. Holdings Five (D.C.) LP v. Morris, RH-TP-06-28,833 (RHC Sept. 27, 2013). The Rental Housing Commission's consistency is further bolstered by the legislative history of the statute: "Tenants must file any challenge to any type of rent adjustment within three years after the adjustment takes effect." Statement of Councilmember Jarvis re: Amendment in the Nature of a Substitute to Bill 6-33, at 11.

11. Despite this clear and dispositive legal history, Mr. Pearson argues that the statute of limitations provision of the Act does not prohibit him from challenging any of the rent increases, dating back to the very first one in 2000, 16 years ago. Mr. Pearson relies on a tautological argument based on an unreasonable interpretation of the phrase "effective date" in the statute of limitations. He argues that, since Ms. Brown did not properly register the property or properly file a claim of exemption, none of the rent

increases she took over the years ever had an "effective date." Thus, Mr. Pearson contends the three-year statute of limitations has not yet started to run on any of the rent increases, because the law states that "[n]o Petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the *effective date* of the adjustment." D.C. OFFICIAL CODE § 42-3502.06(e) (emphasis added).

12. The D.C. Court of Appeals has consistently relied on the "plain meaning" of a statute when the words are clear and unambiguous, and interprets words as they are used ordinarily, with their commonly attributed meaning. *See* District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006); *see also* Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007). The Court also rejects interpretations that would lead to absurd results. *See, e.g.*, Belay v. District of Columbia, 860 A.2d 365, 368 (D.C. 2004); Chamberlain v. American Honda Finance Corp., 931 A.2d 1018, 1023 (D.C. 2007) (rejecting overly literal interpretations of statutes and regulations that lead to absurd results).

13. The phrase "effective date," then is to be interpreted with its ordinary use. The Merriam Webster Dictionary defines "effective date" as follows: "the day when a law, rule, contract, etc., starts to be used." http://www.merriam-webster.com/dictionary/effective%20date. Black's Law Dictionary provides that "effective date" means: "Documented date when something is due, like a report or results, or when something is applicable or in effect, like a law, or a restriction or a sale price." http://thelawdictionary.org/effective-date/. Under both of these definitions, the "effective date" of the rent increases is the date that Ms. Brown stated that she expected the new rent level to take effect. It is not coincidental that each of the notices of rent increase issued by Ms. Brown includes the word "effective," followed by a date. PX 103-109, 112, 113, and 116. In each notice, a clause indicates the "effective date" of each rent increase. Indeed, that is the ordinary interpretation of the phrase "effective date," and it is that interpretation I shall rely upon.

14. If Mr. Pearson's interpretation of the word "effective" were to be followed, the statute of limitations would have no meaning. Any Tenant challenging a rent increase must, by definition, be alleging that the rent increase was unlawful, and thus, by Mr. Pearson's reasoning, have no "effective date." A Tenant could allege that a rent increase taken in 1986 occurred when the unit was not in substantial compliance with the housing code; thus, it had no "effective date." The Housing Provider would then be in the position of attempting to defend the condition of his unit 30 years ago. I decline to interpret the statute of limitations in such a way as to completely eviscerate it.

15. The Act's statute of limitations applies to the rent increases that Ms. Brown took on Mr. Pearson's unit, using the "effective date[s]" noted in each rent increase notice. Accordingly, Mr. Pearson may only challenge rent increases that Ms. Brown implemented in the three years prior to the filing of the tenant petition on February 12, 2014. Those increases are: the October 1, 2011 rent increase from $949 to $1004; the March 1, 2013 rent increase from $1004 to $1320; and the March 1, 2014 rent increase from $1320 to $1386. No increases taken prior to February 12, 2011 may be challenged and any claims regarding them are dismissed with prejudice as being outside of the statute of limitations. D.C. OFFICIAL CODE § 42-3502.06(e).

D. Housing Provider is Not Exempt from Rent Control

16. As noted above, the Act exempts certain properties from the "rent stabilization" provisions therein. The "rent stabilization" provisions are those found in D.C. OFFICIAL CODE §§ 42-3502.05(1) through 42-3502.19 (except § 42-3502.17). See D.C. OFFICIAL CODE § 42-3502.05(a). With exceptions not relevant here, the Act requires housing providers either to register a housing accommodation containing rental units or to file a claim of exemption. D.C. OFFICIAL CODE § 42-3502.05(a) (3) (t); 14 DCMR 4102.2. The Act requires a housing provider who has claimed an exemption to give tenants notice that the property is exempt either at the time the lease is executed or at the time an exemption is filed:

> Prior to the execution of a lease or other rental agreement after July 17, 1985, a prospective tenant of any unit exempted under subsection (a) of this section shall receive a notice in writing advising the prospective tenant that rent increases for the accommodation are not regulated by the rent stabilization program.
>
> D.C. OFFICIAL CODE § 42-3502.05(d).

17. The regulations implementing the Rental Housing Act provide that a housing provider who files a claim of exemption "[S]hall, *prior to or simultaneously with* the filing, post, a true copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit or housing accommodation to which it applies, or shall mail a true copy to each tenant of the rental unit or housing accommodation." 14 DCMR § 4101.6 (emphasis added). Failure to give a tenant notice renders the exemption void and the housing accommodation is subject to the rent stabilization provisions of the Act, even if a housing provider would otherwise be eligible for the exemption. Levy v. Carmel Partners, Inc. d/b/a Quarry II, LLC, 126 A.3d 684 (D.C. 2015); Richards v. Woods, TP 27,588 (RHC July 15, 2004) at 4. The regulations provide that any housing provider who has failed to satisfy the registration requirements of the Act 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 rent charged for a rental unit which is not properly registered;* or

(c) Any of the benefits that accrue to the housing provider of rental units exempt from the Rent Stabilization Program.

14 DCMR § 4109.9 (emphasis added).

18. The Rental Housing Commission has held that the Act confers on a tenant "the substantial right" to receive notice of the exemption "prior to the execution of [the] lease," allowing a prospective tenant to make intelligent decisions. *See* Butler v. Toye, TP 27,262 (RHC Dec. 2, 2004); Kornblum v. Charles E. Smith Resid. Realty, TP 26,155 (RHC Mar. 11, 2005).

19. In Levy, 126 A.3d 684, the housing provider served the tenant with notice of the exemption 16 months after the housing provider had filed the Claim of Exemption Form with the RAD. The D.C. Court of Appeals upheld the Rental Housing Commission's ruling that the housing accommodation did not become exempt as of the date the housing provider gave tenant the notice, because notice of the exemption was not provided *prior to or simultaneously* with the filing as required by 14 DCMR § 4101.6. The Court rejected the housing provider's argument that it had thus effectively lost the exemption forever. The Court noted that the Rental Housing Commission clarified that "a housing provider can at any time file an Amended Registration/Claim of Exemption in order to comply with notice requirements of 14 DCMR § 4101.6, if the housing provider had previously failed to meet the requirements of 14 DCMR § 4101.6 with an initial filing." Levy, 126 A.2d at 689; Carmel Partners, Inc. d/b/a Quarry II, LLC v. Levy, Decision & Order Following Remand, RH-TP-06-28,830 & RH-TP-06-28,835 (May 16, 2014) at 28.

20. Here, the housing accommodation could have become exempt when Ms. Brown filed the Claim of Exemption Form on June 24, 2010, if she had simultaneously given Mr. Pearson a copy of the Claim of Exemption Form or posted it at the property. She did neither of those things, however. Therefore, Housing Provider is not entitled to the benefits of an exemption.

21. At the hearing, the parties alluded to a possible exception to the requirement that a housing provider register the property or file a claim of exemption. Notwithstanding the requirements of the Act, a housing provider can claim the benefits of the small landlord exemption and will not be penalized for failing to file a claim of exemption if he or she can prove that "*special circumstances*" exist. Hanson v. D.C. Rental Hous.

Comm'n, 584 A.2d 592, 597 (D.C. 1991). Those special circumstances are: (1) the housing provider was reasonably unaware of the requirement of filing a claim of exemption; (2) the rent charged was reasonable; and (3) the housing provider is not a landlord regularly. *Id.* at 597; Beamon v. Smith, TP 27,863 (RHC July 1, 2005) at 7 (citing Gibbons v. Hanes, TP 11,076 (RHC July 11, 1984) at 3); Boer v. D.C. Rental Hous. Comm'n, 564 A.2d 54, 57 (D.C. 1989). The rationale is that the Act establishes penalties only for "knowing" violations of the Act. As such, a housing provider that is reasonably unaware of the requirements to file a claim of exemption would necessarily demonstrate that the violation was not a "knowing" one. Boer v. D.C. Rental Hous. Comm'n, 564 A.2d 54, 56 (D.C. 1989) (affirming the Commission's application of a special circumstances exception).

22. I need not address the three factors enunciated in Hanson, however, because the special circumstances test does not apply where the housing provider did, in fact, file a claim of exemption. A small housing provider who previously filed a claim of exemption is deemed to have knowledge of the statutory requirements. Budd v. Haendel, TP 27,598 (RHC Dec. 16, 2014); Richards v. Woods, TP 27,588 at 4. There is no special circumstance that would alleviate a housing provider from providing notice to the tenant where a claim of exemption has been filed.

23. Here, Ms. Brown filed not one, but two, Claim of Exemption Forms. But she did not provide a copy of the Claim of Exemption Form to Mr. Pearson when the tenancy commenced in 1999, nor did she provide him with a copy when she filed her second claim in 2010. The uncontroverted evidence is that she first provided a copy of the Claim of Exemption Form to Mr. Pearson in 2013, not simultaneously with her filing of the claim. Any conversations the parties may have had at the beginning of the tenancy or subsequent thereto are not sufficient to meet the requirements of the law. Housing Provider's attorney argued that Mr. Pearson should have known the requirements of D.C. rental housing law, given his prior employment as an attorney who worked at an agency that dealt with D.C. rental housing issues. But any knowledge that Mr. Pearson may or may not have had due to that background is not relevant to the legal requirement that Ms. Brown was required to give Mr. Pearson a copy of the Registration/Claim of Exemption Form simultaneously with her filing of the form.

24. I am sympathetic to housing providers who are not landlords regularly, and who attempt to take the required steps to properly register their property in accordance with the District of Columbia's laws. Indeed, it would have been preferable if the Registration/Claim of Exemption Form included an instruction that read, "You must provide any tenant with a copy of this form simultaneously to filing it," or something to that effect. Or had an RAD employee informed Ms. Brown of all the requirements for

proper registration. It seems that neither of those things occurred. It was, however, Ms. Brown's legal responsibility to investigate fully all the requirements for claiming an exemption to the rent stabilization provisions of the Act. She failed to comply with those requirements.

25. Because at no point has Ms. Brown provided Mr. Pearson with a copy of the Claim of Exemption Form simultaneously with the filing of the claim, Ms. Brown's claim of exemption is void *ab initio*, pursuant to the Levy case. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC Mar. 19, 2012) at 8. Since the Registration/Claim of Exemption Form alleges an exemption to the Act, and that exemption is invalid due to the lack of simultaneous notice to the Tenant, the unit is not properly registered. The Act prohibits increasing rent when a property is not properly registered. D.C. OFFICIAL CODE § 42-3502.08(a); see also 14 DCMR § 4109.2. Thus, taking into account the statute of limitations discussion herein, any rent increases Ms. Brown took or demanded after February 12, 2011, are not valid. The D.C. Court of Appeals has established that the wrong is in demanding the increased rent, not receiving it. Therefore, Tenant is entitled to this refund regardless of proof that he paid any of the increases. Kapusta v. District of Columbia Rental Hous. Comm'n, 704 A.2d 286 (D.C. 1997). Mr. Pearson is entitled to a refund of the difference between the valid rent prior to the illegal increases and the rent demanded from February 12, 2011 through October 2014, when the hearing took place. The rent immediately prior to February 12, 2011 was $949 per month. There was no testimony that $949 was an unreasonable rent for the property. The calculation of the total rent refund of $8,883.00 is reflected in Appendix B, below. The rent is also rolled back to $949 per month until such time as Ms. Brown takes a legally-implemented rent increase.

26. The Rental Housing Commission Rules provide for the award of interest on rent refunds at the interest rate used by the Superior Court of the District of Columbia on the date of the decision from the date of the violation to the date of issuance of the decision. 14 DCMR § 3826; Marshall v. D.C. Rental Hous. Comm'n, 533 A.2d 1271, 1278 (D.C. 1987). Interest at the current 3% per annum rate of the District of Columbia Superior Court is reflected in Appendix B, below, through the date of this decision. The total interest due is $823.72.

E. Willfulness and Bad Faith

27. Under the Act, when a housing provider fails to file the proper forms or a unit is not in substantial compliance with housing regulations, an administrative law judge may award a refund of a rent increase. D.C. OFFICIAL CODE § 42-3509.01(a). As stated above, the rent increases were unlawful and a rent refund with interest is ordered in this case. Tenant has requested an award of treble damages because he contends Housing Provider acted in bad faith in her violations of the Act. In interpreting

"bad faith" for the purposes of treble damages, the Commission has held that a finding of bad faith requires inquiry into the "intent or state of mind of the actor." Third Jones Corp. v. Young, TP 20,300 (RHC Mar. 22, 1990) at 9. The D.C. Court of Appeals has defined "bad faith" as the "intent to deceive or defraud." Bernstein Mgmt. Corp. v. D.C. Rental Hous. Comm'n, 952 A.2d 190,198 (D.C. 2008) (quoting P'Ship Placements, Inc. v. Landmark Ins. Co., 722 A.2d 837, 845 (D.C. 1998)). Housing Provider must have acted out of "some interested or sinister motive" involving "the conscious doing of a wrong because of dishonest motive or moral obliquity." Third Jones Corp. v. Young, TP 20,300 at 9. Although the standard of misconduct required for bad faith has been described as "egregious," *id.* at 8, it is sufficient that a housing provider's actions reflect a "deliberate refusal to perform without just or reasonable cause or excuse," *id.* at 10, or "a continuing, heedless disregard of a duty." Cascade Park Apts., TP 26,197 at 35.

Treble damages are not appropriate here.

28. It is true, as Mr. Pearson argues, that Ms. Brown is a sophisticated, educated person possessing the capacity to understand the complexities of statutes and regulations. Just as it is true, as Ms. Brown's counsel argues, that Mr. Pearson is an attorney and former administrative law judge who could have learned the requirements placed upon a housing provider at the inception of the tenancy. The former truth is more relevant to the proceedings than the latter. The law places no greater obligation on tenants who "should know better" than it does on other tenants. Mr. Pearson was not required to inquire about the Registration/Claim of Exemption Form or be expert in the requirements surrounding that form. Ms. Brown's sophistication, however, is relevant to whether her acts were willful or in bad faith. But ability to analyze regulations and understand complex issues does not make one an expert in navigating the labyrinth that is D.C. rental housing law. And intelligence and education do not equate to complete awareness of the intricacies of regulations, as reflected by Mr. Pearson's own lack of knowledge regarding the requirements imposed upon his housing provider. Regardless of her skills, Ms. Brown is not an experienced housing provider in the District of Columbia. She owns only one rental property in D.C., and has had only one tenant since 1997, Mr. Pearson. The evidence is that she attempted to comply with the regulations as she understood them. That she failed to do so was not a willful act on her part.

29. Mr. Pearson argues that he provided information to Ms. Brown such that she was aware that she was requesting an illegal rent level. That, coupled with her education and work background, he contends is enough to prove that she was acting willfully and in bad faith. The evidence supports the fact that, in January of 2013, Mr. Pearson began to send Ms. Brown long emails regarding the rent level. He told her she was not properly

registered and provided legal cites that allegedly supported this position. He offered her a settlement that involved a significant amount of money and attached a draft of a Motion for Summary Judgment to that offer. He provided information regarding free legal services providers who might be able to advise her on the issues. All of this, Mr. Pearson argues, shows that Ms. Brown had full knowledge of the law, or at least the potential to have that knowledge. Mr. Pearson, in fact, argues that Ms. Brown's failure to respond to these emails constitutes an admission to the validity of their content.

30. Ms. Brown did not take Mr. Pearson's missives to heart, essentially ignoring them. She relied on the fact that she had taken all the actions she was instructed to by the RAD employees and had a Registration/Claim of Exemption font on file with RAD - two, in fact, by 2010. She did not respond to, or even fully read, Mr. Pearson's emails because they contained insulting language and she felt bullied and intimidated by his constantly emailing her. She did not immediately consult an attorney or present Mr. Pearson's emails to the RAD to garner their reaction thereto. Her reaction, while perhaps imprudent, was not unreasonable. Ms. Brown was faced with a man with whom she had gotten into a significant verbal confrontation, who threatened her with jail, who was demanding thousands of dollars and that the rent be rolled back hundreds of dollars per month to its 1997 level, and who was sending numerous, lengthy, and intimidating emails to her. It is a reasonable inference to conclude that Ms. Brown did not find Mr. Pearson's threats or legal analysis to be credible and that she opted to minimize the impact of this barrage of information by ignoring it. Again, this may not have been the wisest course of action - or inaction - that she could have taken, but it is not enough to conclude that she acted with intent to violate the law, *see* Miller v. D.C. Rental Hous. Comm'n, 870 A.2d 556, 558 (D.C. 2005), or "intent to deceive or defraud," Bernstein Mgmt. Corp. v. D.C. Rental Hous. Comm'n, 952 A.2d 190, 198 (D.C. 2008) (quoting P'ship Placements, Inc. v. Landmark Ins. Co., 722 A.2d 837, 845 (D.C. 1998)), or that she acted out of "some interested or sinister motive" involving "the conscious doing of a wrong because of dishonest motive or moral obliquity." Third Jones Corp. v. Young, TP 20,300 at 9.

31. Under these circumstances, I conclude that Ms. Brown did not act in bad faith, and I shall not treble the damages.

32. The Act also provides that if a housing provider willfully collects a rent increase "after it has been disapproved under this chapter" shall be subject to a civil fine of not more than $5,000 for each violation. D.C. OFFICIAL CODE § 42-3509.01(b). First, none of the rent increases have been disapproved until the issuance of this Final Order. Second, for the reasons outlined above, I conclude that Ms. Brown did not act "willfully," within

the meaning of the statute in implementing the rent increases. No fine is appropriate.

F. The 90-Day Notice to Vacate

33. The petitions also include a claim that Ms. Brown served Mr. Pearson with an improper 90-day notice to vacate. Mr. Pearson has proven that to be true, and Ms. Brown has admitted it. Considering how to reduce her expenses, Ms. Brown opted to move from her house into her condominium in the city. She thus had Mr. Pearson served with a 90-notice to vacate for personal use and occupancy, as she was legally entitled to do pursuant to D.C. OFFICIAL CODE § 42-3505(e). From there, however, things went awry. As served, the notice only gave Mr. Pearson 83 days' notice. It was not timely served upon the Rent Administrator, as required by the Act, having been served on the Rent Administrator before it was served on Mr. Pearson. Thus, the notice was in violation of the Act. *See* Pena v. Woynarowsky, 2012 D.C. Rental Hous[ing] Comm[.] LEXIS 10, RH-TP-06-28,817 (RHC Feb. 3 2012) at 23.

34. Aside from voiding the notice, the only penalty available under the Act for serving an illegal notice to vacate is imposition of a fine. D.C. OFFICIAL CODE § 42-3509.01(b). Imposition of a fine requires a finding that the housing provider's violation was willful. *Id.* This, in turn, requires a finding that the housing provider intended to violate the law. *See* Miller v. D.C. Rental Hous. Comm'n, 870 A.2d 556, 558 (D.C. 2005) (holding that a fine may be imposed where the housing provider "intended to violate or was aware that it was violating a provision of the Rental Housing Act"); Quality Mgmt., Inc. v. D.C. Rental How. Comm'n, 505 A.2d 73, 76 n.6 (D.C. 1986) (holding that "willfully" implies intent to violate the law and a culpable mental state); Hoskinson v. Salem, 2005 D.C. Rental Housing Comm[.] LEXIS 333, TP 27,673 (RHC July 20, 2005) at 5 ("'willfully' in § 42-3509.01(b) relates to whether or not the person committing the act intended to violate the law"); Recap - Bradley Gillian v. Powell, 2002 D.C. Rental Housing Comm[.] LEXIS 580, TP 27,042 (RHC Dec. 19, 2002) at 9 (quoting Ratner Mgmt. Co. v. Tenants of Shipley holding that a finding of willfulness requires a showing that "the landlord's conduct was intentional, or deliberate or the product of a conscious choice").

35. I find that Ms. Brown's issuance of the 90-day Notice was not a willful violation of the law. Ms. Brown hired a process server to serve the notice. That process server did not [e]ffect service on Mr. Pearson until February 21, 2014, a week after Ms. Brown filled out the document. In the interim, on February 18, 2014, Ms. Brown filed the document with the RAD. This combination of events le[d] to the notice being invalid. It was not Ms. Brown's intent to serve an illegal notice on Mr. Pearson. After Ms. Brown hired an attorney when Mr. Pearson did not vacate after 90 days, that attorney voluntarily dismissed the complaint in the Landlord and Tenant

Branch of Superior Court due to the aforementioned flaws with the notice. Ms. Brown has essentially voided the notice herself. I conclude that Ms. Brown did not intend to violate the law in issuing the notice. I impose no fine for a willful violation of the Act regarding the notice.

VII. Conclusion

36. In sum, the law requires that housing provider must provide a tenant with a copy of the Registration/Claim of Exemption Form for a rental property at the commencement of the tenancy. And a housing provider cannot correct a failure to do so by simply providing a copy at a later date. To correct such failure, the housing provider must file a new Registration/Claim of Exemption Form and simultaneously provide a copy of that form to the tenant. Ms. Brown has never done that, so her Registration/Claim of Exemption Form is still not valid. Without a valid registration, Ms. Brown is not entitled to take rent increases. The law provides for a three-year statute of limitations to challenge the implementation of a rent increase. Thus, the rent increases Ms. Brown implemented in the three years prior to Mr. Pearson's filing of the petition challenging them are not valid. The rent for the property must be rolled back to the level it was before those increases – $949 – and Ms. Brown must refund the difference in rent charged during those three years. With interest, the total owed to Mr. Pearson is $9,706.72.

37. Ms. Brown also improperly issued a 90-day notice to vacate, chiefly because it gave Mr. Pearson only 83 days. That notice has been rescinded and is void.

38. Ms. Brown's errors, both in failing to timely provide the Registration/Claim of Exemption Form and in issuing the improper 90-day notice, were borne of some combination of confusion, carelessness, and ignorance. They were not borne of intent to violate the law. Accordingly, treble damages and additional fines are not appropriate.

Final Order at 15-34; R. at Tab 52.

On December 5, 2016, the Tenant filed a timely Notice of Appeal with the Commission ("Notice of Appeal"). In the Notice of Appeal, the Tenant raised the following issues:

1. The Findings Of Fact In The Final Order Are Not Supported By Substantial Evidence In The Record, And Undisputed And Material Facts Are Omitted From The Findings Of Fact.

2. The OAH Erred In Omitting Or Misstating Material Issues In The Final Order.

3. The OAH Erred, As A Matter of Law, By Not Rolling Back The Maximum Allowable Rent Level For 3012 Pineview Court, N.E. To Zero And Calculating Rent Overcharges Based On That Rent Level/Maximum Allowable Rent.

4. The OAH Erred, As A Matter Of Law, In Not Complying With The Plain Language Of The Rental Housing Act That Begins The Running of Its Statute of Limitations On The Legally "Effective Date" Of A Rent Increase; Alternatively, The Statute Of Limitations Was Tolled By The Housing Provider's Fraudulent (Or Innocent) Concealment Of Her Obligation To Disclose Her Claim To Exemption To the Tenant in October Of 1999.

5. The OAH Erred, As A Matter Of Law, In Not Concluding That Beginning March 1, 2013 The Housing Provider's Continued Demand For Unlawful Monthly Rents of $1,320.00 And $1,386.00 Per Month Were In "Bad Faith" Because Undisputed Evidence Showed That Prior To March 1, 2013, And Repeatedly Thereafter, The Housing Provider (And Her Counsel) Were Made Aware (With Citations To The Relevant Law) That The Claim Of Exemption On Which Those Rent Increases Were Based Was Void Ab Initio.

6. The OAH Erred, As A Matter Of Law, In Not Concluding That Beginning April 1, 2016 The Housing Provider Was Heedlessly Disregarding Her Duty To Comply With Rent Control Laws Setting The Maximum Allowable Rent For 3012 Pineview Court, N.E. At $0.00, With The Consequence That Her Continued Demand Thereafter For An Unlawful Monthly Rent Of $1,386.00 Per Month From The Tenant Was In "Bad Faith."

7. The OAH Erred, As A Matter of Law, In Ruling That The Pre-Lease Failure To Provide A Prospective Tenant With Written Notice Of A Claim of Exemption Is "Curable" By Posting The Void Ab Initio Claim of Exemption 17 Years After The Tenancy Began.

8. The Housing Provider's Failure To Correct The Failure To Provide The Tenant With Written Notice Of Her Claim To Exemption, Within 10 Days After The Tenant Gave Her Notice Of Her Legal Obligation To Do So On January 30, 2013, Barred (And Bars) The Housing Provider From Ever Increasing The Rent Above $0.00.[4]

9. The OAH Erred, As A Matter Of Law, In Not Re-Opening The Record (When More Than 2 Years Passed Between The Date Of The Evidentiary

[4] On May 2, 2017, Mr. Pearson filed Tenant – Appellant's Notice of Intent to Withdraw Issue Number 8 in his Notice of Appeal. The Tenant then later withdrew Issue Number 8 in open court during the Commission Hearing in this matter. Hearing CD (RHC May 2, 2017).

Hearing And The Issuance Of The Final Order) To Judicially Notice The Undisputed Court Records Showing That the Housing Provider Continued To Demand An Unlawful Monthly Rent of $1,386.00 Per Month In Bad Faith During Those Twenty-Five Months.

10. The OAH Erred, As A Matter Of Law, In Concluding That The Housing Provider Did Not Willfully Violate The Content, Service And Filing Rules For Her February 12, 2014 90-Day Notice To Vacate When The Undisputed Evidence Showed That The 90-Day Notice Itself Advised The Sophisticated Housing Provider That The Content, Service And Filing Of The Notice Was Not In Compliance With The Rental Housing Act of 1985.

11. The OAH Erred, As A Matter Of Law, In Not Beginning With The Presumption There Should Be A Civil Fine Of $5,000.00 For Each Of The Housing Provider's Three Willful Violations Of Her Separate Obligations To Lawfully Issue, Serve And File The 90-Day Notice, And Not Entering Fines In That Amount When The Housing Provider Failed To Introduce Mitigating Evidence.

12. The Successor ALJ Erred In Making Findings of Fact On The Issues Of: (1) Retaliation And (2) Whether the Housing Provider Was In Bad Faith Seeking To Recover Possession Of 3012 Pineview Court, N.E. For Her Personal Use And Occupancy, When The ALJ Who Conducted The Evidentiary Hearing Ruled That Evidence On Those Issues Was Irrelevant And Barred The Tenant From Presenting Any Evidence On Those Issues.

13. Because The Errors In This Case Were Errors Of Law The RHC Can Direct The Entry Of A Final Order Without A Second Hearing.

Notice of Appeal at 1-2. On the same day, in addition to the Notice of Appeal, the Tenant filed a Motion to Have Commission Consider the Petitioner's Exceptions to Proposed Final Order as Appellant's Brief on Appeal. On December 15, 2016, the Housing Provider filed a response to the Tenant's Notice of Appeal ("Response").

On December 16, 2016, the Housing Provider also filed a notice of appeal with the Commission ("Cross Appeal"), raising the following issue:

> The amount of rent increases refunded to Tenant for the period May 2014 through October 2014 should be calculated based on the amount Tenant was paying into the Court Registry during that period, rather than the amount of the rent increase which took effect in March 2014.

Cross Appeal at 1.

On January 9, 2017, the Tenant filed a response to the Housing Provider's Cross Appeal ("Response to Cross Appeal"). In the Response to Cross Appeal, the Tenant asserts, in addition to other arguments against the Housing Provider's issue on appeal, that the Cross Appeal was untimely filed. Cross Appeal Response at 1-4.

On March 9, 2017, the Commission issued notice to the parties that the record had been certified by OAH and setting a date for the Commission's hearing. Notice of Scheduled Hearing and Notice of Certification of Record ("Notice of Certification of Record") at 1. On March 16, 2017, the Tenant filed his brief in support of his Notice of Appeal ("Tenant's Brief"), wherein he incorporates by reference the complete text of the Tenant's Exceptions to Proposed Final Order. Tenant's Brief at 2-4; *see* Tenant's Exceptions to Proposed Final Order; R. at Tab 52.

On March 20, 2017, the Housing Provider filed the Housing Provider's Brief on Appeal ("Housing Provider's Brief") in support of her Cross Appeal. On March 29, 2017, the Housing Provider filed a reply to the Tenant's Brief ("Housing Provider's Reply Brief").

On April 4, 2017, the Tenant filed a Brief of Cross-Appellee in response to the Housing Provider's Brief ("Tenant's Reply Brief"). In addition to responses to the Housing Provider's arguments, the Tenant moved for the dismissal of the Cross Appeal because the Housing Provider failed to comply with the Final Order to pay the Tenant a rent refund within 30 days of the date of service. *See* Tenant's Reply Brief at 19-21.

The Commission held its hearing on this appeal on May 9, 2017. At the hearing, the Tenant appeared on his own behalf, and the Housing Provider appeared through counsel. Hearing CD (RHC May 9, 2017) at 2:00.[5]

[5] On April 23, 2018, the Tenant filed a motion for the Commission to expedite its consideration of his appeal. That motion is hereby denied as moot.

II. PRELIMINARY ISSUES

A. Tenant's Motion to Dismiss Cross Appeal for Failure to Pay Refund

The Tenant argues that the Commission should dismiss the Housing Provider's Cross Appeal for failing to comply with the requirement in the Final Order for the Housing Provider to pay the tenant $9,706.72 within 30 days of the date of service of Final Order. *See* Tenant's Reply Brief at 19-21. The Commission has previously determined, however, that District of Columbia Court of Appeals ("DCCA") precedent establishes that an order to pay a rent refund is not final for enforcement purposes while an appeal of the order is pending. *See* D.C. OFFICIAL CODE § 42-3502.18;[6] Palmer v. Clay, RH-TP-13-30,431 (RHC Jan. 29, 2015) (Order on Motion to Compel) (citing Strand v. Frenkel, 500 A.2d 1368, 1373 n.9 (D.C. 1985); Hanson v. District of Columbia Rental Hous. Comm'n, 584 A.2d 592, 595 (D.C. 1991)).

The Commission observes that by filing the Notice of Appeal, the Tenant has continued to contest and seek review of the merits of the Final Order, concluding that a larger monetary award is owed to him. *See* Notice of Appeal. As a result, no final agency action exists upon which any payment of money may be determined at this time. D.C. OFFICIAL CODE § 42-3502.18; Hanson, 584 A.2d at 595; Palmer, RH-TP-13-30,431 (Order on Motion to Compel). The Commission notes that, unlike prior Commission orders in which a party has moved to establish an escrow account to secure the future payment of a contested rent refund on the grounds that some likelihood exists that the refund might not be paid, the Tenant has filed no such motion in this case and argued only for the outright dismissal of the Housing Provider's Cross Appeal. *See* Tenant's Reply Brief at 19-21; *cf.* SCF Mgmt. v. 2724 11th St., N.W.

[6] D.C. OFFICIAL CODE § 42-3502.18 provides:

> The Rental Housing Commission, Rent Administrator, or any affected housing provider or tenant may commence a civil action in the Superior Court of the District of Columbia to enforce any rule or decision issued under this chapter.

Tenants' Ass'n, Inc., RH-TP-15-30,690 (RHC Sept. 14, 2017) (Order on Motion to Establish Escrow); Holbrook St., LLC v. Seegers, RH-TP-14-30,571 (RHC May 20, 2016) (Order on Motion to Establish Escrow).

For these reasons, the Commission denies the Tenant's request to dismiss the Housing Provider's Cross Appeal. D.C. OFFICIAL CODE § 42-3502.18; Hanson, 584 A.2d at 595; Palmer, RH-TP-13-30,431 (Order on Motion to Compel).

B. Tenant's Motion to Dismiss Cross Appeal as Untimely

In the Tenant's Reply Brief, the Tenant asserts that the Housing Provider's Cross Appeal should be dismissed as untimely because it was filed more than 10 business days after OAH issued the Final Order. Tenant's Reply Brief at 12-14. Specifically, the Tenant maintains that the Cross Appeal was filed one day after the filing due date of December 15, 2016, in accordance with 14 DCMR §§ 3802.2 and 3816.3.

Pursuant to the Commission's rules at 14 DCMR § 3802.2,[7] a notice of appeal must be filed within ten days after a final order is issued, plus three days if the final decision is mailed to the parties. *See e.g.,* Iles v. Butternut Whittier, Assocs. LLC, RH-TP-15-30,666 (RHC Nov. 10, 2016); Philip v. Willoughby Real Estate Co., RH-TP-16-30,800 (RHC Aug. 30, 2016). Pursuant to 14 DCMR § 3816.3,[8] weekend days and legal holidays are excluded from the computation of time periods of ten days or less.

---

[7] 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 Rent Administrator is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.

[8] 14 DCMR § 3816.3 provides:

> When the time period prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

Under OAH Rule 2841.16,[9] OAH is permitted to serve orders on parties by e-mail. The certificate of service attached to the Final Order states that, on December 1, 2016, OAH served the Final Order on the Housing Provider's Counsel both by U.S. mail as well as by e-mail. *See* Final Order at 35; R at Tab 52. If service was made by e-mail, pursuant to 14 DCMR § 3802.2, and without the extension of time provided by 14 DCMR § 3816.3, the Commission determines that the Housing Provider would have had until December 15, 2016, to file the Notice of Appeal. Iles, RH-TP-15-30,666; Philip, RH-TP-16-30,800.[10]

The Housing Provider's notice of appeal was not received by the Commission until December 16, 2016. The Housing Provider maintains that the Final Order was not served on her counsel by e-mail, and that her counsel received only a mailed, paper copy of the Final Order; accordingly, the Housing Provider's "time to file the notice of appeal was therefore extended by three days, and was timely filed on December 16, 2016." *See* Housing Provider's Brief at 1-2.

The Commission's review of the record shows that, on July 16, 2016, a Substitution of Attorney Motion ("Motion to Substitute") was filed with the OAH Clerk of Court, requesting that OAH substitute Attorney Dorene Haney ("Housing Provider's Counsel") for Attorney

---

[9] 1 DCMR § 2841.16 provides:

> The Clerk may serve orders and notices by e-mail to any party who provides an email address and consents, in writing or on the record, to receiving papers by e-mail. The party is responsible for ensuring that the Clerk has an accurate, up-to-date e-mail address. In an emergency, without a party's advance consent, the Clerk may serve orders and notices by e-mail in addition to any other authorized method of service.

[10] Although the Commission's rules are silent with respect to service by e-mail, the Commission determines that the plain language of 14 DCMR § § 3802.2 and 3816.3 provides a three-day extension only in the case of service by physical, U.S. mail. District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006) (plain meaning of statute or regulation generally controls); District of Columbia v. District of Columbia Office of Emp. Appeals, 883 A.2d 114, 127(D.C. 2005) (quoting Jeffrey v. United States, 878 A.2d 1189, 1193 (D.C. 2005)); *see, e.g.,* Presley v. Admasu, RH-TP-08-29,147 (RHC June 18, 2015), and Salazar v. Varner, RH-TP-09-29,645 (RHC June 16, 2015), applying 3-day extension to U.S. mail; *see also* D.C. OFFICIAL CODE § 42-3509.04(a) (3) ("Service may be completed by . . . mail or deposit with the United States Postal Service[.]"); *cf.* 1 DCMR § 2841.13 ("The five (5) additional days added to the response times [for service by mail] does not apply to orders, notices, or papers served by e-mail, even if they are also served by other means.").

Emilie Fairbanks as the Housing Provider's counsel of record. A physical mailing address, 209 Kennedy Street, NW, Washington, D.C. 20011, and an e-mail address, "dhaney@dhaneylaw.com," were both listed for the Housing Provider's Counsel in the Motion to Substitute. *See* Motion to Substitute at 1; R. at Tab 40.[11]

The Commission's review of the record further reveals that the Certificate of Service attached to the Final Order states that it was served by U.S. mail on the Housing Provider's counsel at her correct physical address of record. *See* Final Order at 35; R. at Tab 52. However, the Commission's review of the record shows that the e-mail address stated on the Certificate of Service, "dhaney@haneylaw.com," is missing the letter "d" from the domain name, rather than "dhaneylaw.com," as provided by the Housing Provider's Counsel. *Compare* Motion to Substitute at 1; R. at Tab 40, *with* Final Order at 35; R. at Tab 52.[12]

Because the Commission's review of the record reveals that the Housing Provider's Counsel was not properly served with a copy of the Final Order by e-mail, but was properly served by U.S. mail, the Commission determines that the Housing Provider was entitled to an additional three days to file her Cross Appeal under 14 DCMR §§ 3802.2 and 3816.3.[13] Accordingly, the Commission denies the Tenant's motion to dismiss the Cross Appeal as

---

[11] On July 19, 2016, the ALJ granted the Housing Provider's Motion to Substitute in open court. *See* Hearing CD (OAH July 19, 2016).

[12] The Commission notes that the record contains other instances where certificates of service indicate that OAH used the same, incorrect e-mail address for the Housing Provider's Counsel, including: July 21, 2016 e-mail; R. at Tab 47; Order Denying Petitioner's Motion For Copy of Transcript issued July 21, 2016; R. at Tab 47; Order Denying Petitioner's Motion To substitute This Motion for Still-pending Motion for Reconsideration and to Partially Vacate Amended Order of May 26, 2016; R. at Tab 47; Order After Change of Judicial Officer; R. at Tab 48.

[13] Tenant argues that the Cross Appeal should nonetheless be dismissed because the Housing Provider's remedy for "not receiv[ing] service of the December 1, 2016 Final Order by email on December 1, 2016, was to file a timely motion with the OAH to vacate and re-issue the Final Order." Brief of Cross-Appellee at 13. Because the Commission determines that service was properly made by U.S. mail, and because the Housing Provider timely filed the Cross Appeal based on that method of service, nothing in the Commission's rules or the OAH Rules required the Housing Provider to request a re-issuance of the Final Order.

untimely filed. 14 DCMR §§ 3802.2 & 3816.3; Iles, RH-TP-15-30,666; Philip, RH-TP-16-30,800.

C. Tenant's Motion for Reconsideration and Modification of Order on Certified Record

On March 17, 2017, the Tenant filed Tenant-Appellant's Motion for Preparation of Supplement Index ("Supplemental Index Motion") with the Commission. In the Supplemental Index Motion, the Tenant asserted that eight documents were missing from the record on appeal as transmitted by OAH to the Commission. *See* Supplemental Index Motion at 2. Two of the items identified by the Tenant as missing from the record were Tenant-Petitioner's Notice Of Newly Discovered Binding Authority ("Notice of New Authority") and Supplement # 2 To Tenant-Petitioner's Notice Of Newly Discovered Binding Authority ("Supplement # 2 to Notice of New Authority"). *See id.*

The Commission reviewed the record on appeal and, in an order issued on May 5, 2017, determined that the Supplement # 2 to Notice of New Authority was missing from the certified record. Order on Certified Record at 5. The Commission noted that OAH indicated that it had not received the Notice of New Authority itself, but only an electronic filing cover sheet for that document. *Id* at 5 n.2; *see* R. at Tab 39. *See* Order on Certified Record at 5. The Commission denied the Supplemental Index Motion as moot because the remaining irregularities in the record identified by the Tenant had been corrected through consultation with OAH or the documents were not, in fact, missing from the certified record. Order on Certified Record at 6-7.

On May 12, 2017, the Tenant filed Tenant-Appellant's Motion For Reconsideration and Slight Modification of "Order on Certified Record" ("Motion for Reconsideration of Order on Certified Record"). In the Motion for Reconsideration of Order on Certified Record, the Tenant requests that the Commission issue an "order that [the Notice of New Authority] (already

attached to [the Supplemental Index Motion]) (filed March 31, 2017), be marked as Tab 55 and included as a Supplemental Record." Motion for Reconsideration of Order on Certified Record at 6. The Tenant maintains that the Notice of New Authority was, in fact, attached to his electronic filing along with the cover sheet that OAH included in the certified record. *Id.* at 4-5 & Attachment 3 (screenshot of Tenant's "sent" folder on personal e-mail account). The Tenant argues that, without the addition of the Notice of New Authority, "it is quite likely that the Commission will conclude that counsel for the housing provider should not be held to have understood the significance of the case." *See id.* at 4. The Housing Provider did not file a response to this motion.

The Commission's rules defining the term "Record on Appeal" and its contents provide as follows:

> 3804.1 Upon receipt of a notice of appeal, the Commission shall request in writing that the Rent Administrator forward the complete record of the case, including all tape recordings made at any hearing held before the hearing examiner.
>
> 3804.2 The Rent Administrator shall furnish to the Commission a written inventory of the contents of the record and shall certify the inventory as the complete and official record of the case.
>
> 3804.3 The record on appeal shall consist of the following:
>
> (a) The findings of fact and conclusions of law and the decision from which the appeal is taken;
>
> (b) The tape recordings or transcripts of the hearings before the hearing examiner;
>
> (c) All documents and exhibits offered into evidence at the hearing;
>
> (d) Memoranda, if any, of ex parte communications as required by § 3818;
>
> (e) Notices of hearings and proofs of service;

(f) Landlord registration files and any other documents found in the public record of which the Rent Administrator took official notice; and

(g) All pleadings filed with the Rent Administrator.

14 DCMR § 3804 (emphasis added); *see, e.g.,* Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Feb. 3, 2012). Similarly, OAH's rules for rental housing cases provide that:

The official record of a proceeding shall consist of the following:

(a) The final order and any other orders or notices of the Administrative Law Judge;

(b) The recordings or any transcripts of the proceedings before the Administrative Law Judge;

(c) All papers and exhibits offered into evidence at the hearing; and

(d) All papers filed by the parties or the Rent Administrator at OAH.

1 DCMR § 2939.1.

The Commission observes that "administrative tribunals 'must be, and are, given discretion in the procedural decisions made in carrying out their statutory mandate.'" Prime v. District of Columbia Dep't of Pub. Works, 955 A.2d 178, 182 (D.C. 2008) (quoting Ammerman v. District of Columbia Rental Accommodations Comm'n, 375 A.2d 1060, 1063 (D.C. 1977)).

The Commission's records reveal that the formal transmittal of the entire certified case record from OAH to the Commission occurred on March 2, 2017. *See* Memorandum dated March 2, 2017, to Commission's Clerk of Court from OAH Customer Service Coordinator. Based on the Tenant's claims and the requirements of 14 DCMR § 3804.1-.3, the Commission determines from its review of the certified record and the Tenant's filings on appeal that the essential text of the Notice of New Authority is repeated verbatim in the text of the Tenant's Exceptions to Proposed Order, which appears in the current record on appeal at Tab 50, and which the Tenant's Brief on appeal incorporated by reference. *See* Tenant's Exceptions to

Proposed Order at 34-36; R. at Tab 50; Supplemental Index Motion at 7 (copy of Notice of New Authority).[14]

Based on the Commission's review of the record, the Commission is satisfied that the Tenant's arguments, including citations to relevant authority, have been preserved in the record for the reasons stated above, and the Commission therefore denies the Motion for Reconsideration of Order on Certified Record as moot.

III. TENANT'S ISSUES ON APPEAL[15]

A. Whether OAH erred in determining that the Act's statute of limitations precluded the Tenant's challenges to any of the rent increases that occurred more than three years prior to the date of the first tenant petition.

B. Whether OAH erred in not awarding treble damages or issuing fines.

C. Whether OAH erred by not imposing fines where substantial record evidence establishes that the Housing Provider served the Tenant an improper 90-day notice to vacate.

D. Whether OAH erred in denying the Tenant's request to re-open the record.

E. Whether the findings of fact in the final order are not supported by substantial evidence in the record and undisputed and material facts are omitted from the findings of fact.

---

[14] On March 16, 2017, the Tenant filed his brief in support of his Notice of Appeal ("Tenant's Brief") wherein he incorporates by reference all the text of Tenant's Exceptions To Proposed Order. *See* Tenant's Exceptions To Proposed Order at 17-21; R. at Tab 52; Tenant's Brief at 2-4.

[15] The Commission, in its discretion, and "mindful of the important role that *pro se* litigants play in the enforcement of the Act," Wassem v. Klingle Corp., RH-TP-08-29,489 (RHC Nov. 17, 2016); *see, e.g.*,Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1298-99 (D.C. 1990), has restated the issues raised by the Tenant in his Notice of Appeal to clearly identify the applicable legal principles and to combine overlapping matters. *See, e.g.*, Levy v. Carmel Partners, Inc. d/b/a/ Quary II, LLC, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC Mar. 19, 2012) at n.9; Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8; Chamberlain Apts. Tenant Ass'n v. 1429-51 Ltd. P'ship, TP 23,984 (RHC July 7, 1999). Courts have "long recognized that pro se litigants can face considerable challenges in prosecuting their claims without legal assistance." Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). Especially in cases involving remedial statutes like the Act, courts and administrative agencies have been more disposed "to grant leeway to" *pro se* litigants. Macleod v. Georgetown Univ. Med Ctr., 736 A.2d 977, 980 (D.C. 1999). "[W]hile it is true that a court must construe pro se pleadings liberally . . . the court may not act as counsel for either litigant." Flax v. Schertler, 935 A.2d 1091, 1107 n. 14 (D.C. 2007) (citing Bergman v. Webb (In re Webb), 212 B.R. 320, 321 (Bankr. Fed. App. 1997) (rejecting *pro se* petitioner's argument that the court "should have advised her what other documents she was required to produce")).

IV. HOUSING PROVIDER'S ISSUE ON CROSS APPEAL

Whether the ALJ erred in determining the amount of rent charged to the Tenant for the period of May 2014 through October 2014.

V. STANDARD OF REVIEW

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 [OAH] 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 [OAH].[16]

See Bettis v. Horning Assoc., RH-TP-15-30,658 (RHC Mar. 2, 2017); Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014); Atchole v. Royal, RH-TP-10-29,891 (RHC Mar. 27, 2014); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013). Furthermore, the DCAPA, D.C. OFFICIAL CODE § 2-509(e), requires that an ALJ's decision: "(1) . . . must state findings of fact on each material, contested issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." *See* Perkins v. District of Columbia Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984). If an ALJ's decision does not contain findings of fact and conclusions of law on each material, contested issue, the Commission is required to remand the issue for further consideration. *See* Butler-Truesdale v. Aimco Props., LLC, 945 A.2d 1170, 1171-72 (D.C. 2008); Palmer v. Clay, RH-TP-13-30,431 (RHC Oct. 5, 2015); Washington v. A&A Marbury, Inc., RH-TP-11-30,151 (RHC Dec. 27, 2012); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012); Falconi v. Abusam, RH-TP-07-28,879 (RHC Sept. 28, 2012).

[16] *See supra* at n.1 regarding the transfer of the hearing function from the Rent Administrator to OAH.

The Commission will defer to the ALJ's credibility determinations and weighing of the evidence on the record, so long as the ALJ's decision is supported by substantial evidence, meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Fort Chaplin Park Assocs. v. District of Columbia Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (D.C. 1994) (citing Allen v. District of Columbia Rental Hous. Comm'n, 538 A.2d 752, 753 (D.C. 1988) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938)); Klingle Corp. v. Burkhardt, TP 28,270 (RHC Apr. 29, 2016); Tenants of 1754 Lanier Place, N.W. v. 1754 Lanier, LLC, RH-SF-15-20,126 (RHC Dec. 2, 2015) (Order on Motion for Stay). The Commission will review legal questions raised by an ALJ's interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. United Dominion Mgmt. Co. v. District of Columbia Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship v. District of Columbia Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. of Md., Inc. v. District of Columbia Rental Hous. Comm'n, 877 A.2d 96, 102-03 (D.C. 2005)); B.F. Saul Prop. Co. v. Nelson, TP 28,519 (RHC Feb. 18, 2016); Campbell, RH-TP-09-29,715; Carpenter v. Markswright, Co., Inc., RH-TP-10-29,840 (RHC June 5, 2013).

VI. DISCUSSION OF TENANT'S ISSUES ON APPEAL

A. Whether OAH erred in determining the last lawful rent for the Tenant's rental unit.

Although the Tenant raises a number of issues on appeal, Commission will address one issue first because determination of this issue will affect its consideration of all the other issues raised by the Tenant in this appeal. That issue relates to the ALJ's determination that the Act's statute of limitations[17] precluded the Tenant's challenges to any of the rent increases which

[17] *See* D.C. OFFICIAL CODE § 42-3502.06(e).

occurred more than three years prior to the date that Tenant Petition I was filed. Final Order at 17-21; R. at Tab 52.

The ALJ determined that the Housing Provider's claim of exemption was void *ab initio* because of "a lack of simultaneous notice [of exemption] to the Tenant," thus invalidating any rent increases for the Tenant's unit. Final Order at 26; R at Tab 52.[18] The Tenant maintained throughout the proceedings before ALJ Hines that the rent should be rolled back to the amount of rent initially demanded by the Housing Provider at the commencement of his tenancy in 1999, *i.e.*, $585, and that a refund should be awarded of all rent increases demanded since then, plus interest.[19] The ALJ determined, rather, that the Tenant was entitled to a rent refund of the difference between the last, "valid rent" immediately prior to the illegal increases within the statute of limitations, *i.e.*, $949 per month, and all rent increases demanded between February 12, 2011, and October 2014. Final Order at 26; R at Tab 52. The ALJ awarded a total refund of $8,883, and rolled the rent back to $949 per month until such time as the Housing Provider takes a "legally-implemented rent increase." *Id.*

---

[18] The ALJ determined that:

> Because at no point has Ms. Brown provided Mr. Pearson with a copy of the Claim of Exemption Form simultaneously with the filing of the claim, Ms. Brown's claim of exemption is *void ab initio*, pursuant to the Levy case. Levy v. Carmel Partners, Inc. LLC, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC Mar. 19, 2012) at 8. Since the Registration/Claim of Exemption Form alleges an exemption to the Act, and that exemption is invalid due to the lack of simultaneous notice to the Tenant, the unit is not properly registered. The Act prohibits increasing rent when a property is not properly registered. D.C. OFFICIAL CODE § 42-3502.08(a); see also 14 DCMR § 4109.2. Thus, taking into account the statute of limitations discussion herein, any rent increases Ms. Brown took or demanded after February 12, 2011, are not valid. The D.C. Court of Appeals has established that the wrong is in demanding the increased rent, not receiving it. Therefore, Tenant is entitled to this refund regardless of proof that he paid any of the increases. Kapusta v. District of Columbia Rental Hous. Comm'n, 704 A.2d 286 (D.C. 1997).

Final Order at 26; R at Tab 52.

[19] *See* Tenant Petition I at 3; R. at Tab 2; Tenant Motion for Summary Judgment 8, 15-18; R. at Tab 3; Tenant Pre-Hearing Memorandum at 3, 15-19; R. at Tab 16.

1. Whether the lawful rent is $0.

Following the close of the evidence, but before the ALJ issued the Final Order, the Tenant presented a new theory of liability, based on the "binding authority" of Camacho v. 1440 Rhode Island Avenue Corporation, TP 20,914 (RHC Jan. 6, 1989) at 5-6. *See* Tenant's Exceptions to Proposed Final Order at 34-36; R. at Tab 50.[20] In his Notice of New Authority, the Tenant argued for the first time on March 21, 2016, that his legal rent was $0, because the Housing Provider's claim of exemption was void *ab initio*. Now on appeal, in disputing the ALJ's determination that the Act's statute of limitations precluded the Tenant's challenges to the rent increases which occurred more than three years prior to the date that Tenant Petition I was filed, the Tenant argues that the ALJ erred by: (1) omitting or misstating material issues and overlooking the "binding authority" of Camacho, and (2) not determining all rents ever demanded by the Housing Providers to be illegal, requiring a roll back of the rent to $0. *See* Notice of Appeal at 1-3; Tenant's Exceptions to Proposed Final Order at 47; R. at Tab 50.

As discussed *supra* at 35-36, if an ALJ's decision does not contain findings of fact and conclusions of law on each material, contested issue, the Commission is required to remand the issue for further consideration. *See* Butler-Truesdale, 945 A.2d at 1171-72; Palmer, RH-TP-13-30,431; Washington, RH-TP-11-30,151; Avila, RH-TP-28,799; Falconi, RH-TP-07-28,879. The Commission, however, has consistently held that it may not address issues on appeal that were

---

[20] As discussed *supra* at 31-34, the Tenant maintains that he electronically filed the Notice of New Authority with OAH on March 21, 2016, although OAH has indicated to the Commission that no pleading was attached to the Tenant's e-mail. *Compare* R. at Tab 40 *with* Motion for Reconsideration of Order on Certified Record at 4-5. The Commission notes that March 19, 2016, the date of the relevant e-mail submission, was a Saturday, and OAH's rules deem weekend e-mail filings to be made on the next business day. 1 DCMR § 2841.10.

For the purpose of addressing this issue on appeal, the Commission will assume, without deciding, that the Tenant did in fact file the Notice of New Authority on March 21, 2016. *See also* Motion To Substitute This Motion For Still Pending Motion For Reconsideration and To Partially Vacate Amended Order of May 25, 2016, at 11 n.7;R. at Tab 40; Supplement to Tenant-Petitioner's Notice of Newly Discovered Binding Authority; R. at Tab 41; Tenant's Exceptions to Proposed Final Order; R. at Tab 50.

not properly raised and developed in the proceedings before the OAH. *See, e.g.*, Wilson v. Archstone-Smith Cmtys., RH-TP-07-28,907 (RHC Sept. 29, 2015) (dismissing Tenant's claim that was not raised before the ALJ and raised for the first time before on appeal); *see also* Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012) (dismissing housing provider's claims regarding modification of a rent refund because they were not sufficiently raised and developed before the ALJ); Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012) (stating that housing provider's excuse for his absence from the OAH hearing was never raised or presented to the ALJ, and thus did not constitute a cognizable claim on appeal); Stone v. Keller, TP 27,033 (RHC Feb. 26, 2009) (dismissing issued raised by tenant for first time on appeal). The Commission's review of a case is "limited to the record on appeal and cannot consider issues or evidence not presented" at the hearing level unless "exceptional circumstances" demand otherwise. Goodman v. District of Columbia Rental Hous. Comm'n, 573 A.2d 1293, 1301 (D.C. 1990); *see also* Mack v. District of Columbia Dept. of Emp't. Servs., 651 A.2d 804, 806 (D.C. 1994) (citing John D. Neumann Props., Inc. v. District of Columbia Bd. of Appeals & Review, 268 A.2d 605, 606 (1970)). "[A]bsent a clear miscarriage of justice," no basis exists to warrant the Commission's review of new and or additional claims not timely raised below. *See* Rose v. Wells Fargo Bank, N.A., 73 A.3d 1047, 1054 n.11 (D.C. 2013) (quoting William J. Davis, Inc. v. Young, 412 A.2d 1187, 1189 n.2 (D.C. 1980)).

Here, the Commission confronts a situation in which the ALJ did not address a new theory of liability that the Tenant raised more than a year after the hearing record closed. The Commission observes that the complaint details of Tenant Petition I assert that the legal rent for the Tenant's unit is $585. Tenant Petition I at 3(a); R. at Tab 2. During the proceedings before ALJ Hines, the Tenant did not argue that he was seeking a total refund of all rents ever paid or a

roll back of the monthly rent to $0. *See, e.g.,* Hearing Transcript (OAH Oct. 9, 2014) at 27 (Tenant's opening statement, asserting legal rent level of $585); R. at Tab 33A; *see also* Tenant-Petitioner's Motion to Re-Open Record for a Limited Purpose (filed Oct. 13, 2015) at 2 (asserting continuing damages for rent demanded in excess of $585); R. at Tab 34. The Commission is not satisfied that the Tenant's change of his claims in this case after the close of the evidentiary record provided the Housing Provider with sufficient opportunity to respond to or the OAH to fully consider his new theory of liability and claim for relief. Wilson, RH-TP-07-28,907; Marguerite Corsetti Trust, RH-TP-06-28,207; Tillman, RH-TP-08-29,136; Stone, TP 27,033.

Further, the Tenant presents no argument that "exceptional circumstances" justify addressing this claim on appeal. *See* Goodman, 573 A.2d at 1301. The Tenant asserted when he filed the Notice of New Authority that he had "only recently become aware of the decision" in Camacho. Supplemental Index Motion at 7 (copy of Notice of New Authority). The Commission is not persuaded that a late discovery of potentially applicable case law constitutes "exceptional circumstances." Moreover, the Tenant's argument is "of uncertain merit," *see* Rose, 73 A.2d at 1054 n.11, in light of the statute of limitations, as discussed *infra* at 41-43, and the unclear applicability of Camacho to the fact of this case.[21] Therefore, the Commission is unable to find that it is a "clear miscarriage of justice" to prevent the Tenant from claiming a legal rent level of $0.

Therefore, the Commission dismisses the Tenant's claim that his legal rent was $0, because it was not timely raised before OAH. Rose, 73 A.2d at 1054 n.11; Goodman, 573 A.2d at 1301.

---

[21] The Commission is not aware of, nor has the Tenant cited, any subsequent cases that have applied Camacho, TP 20,914, to set the lawful rent at $0 outside of its specific set of facts involving a hotel room used as a rental unit.

2. Whether the Act's statute of limitations precluded the Tenant's challenges to any of the rent increases that occurred more than three years prior to the date of the first tenant petition.

The Commission observes that substantial evidence in the record supports the ALJ's determination that the period for the rent refund is from October 1, 2011, to October 1, 2014, and that the calculation of the rent refund is based on the rent charged immediately prior to the February 11, 2011, $949. Final Order at 26 & Appendix B; R. at Tab 52.

As discussed *supra* at 35-36, the Commission's standard of review requires it to reverse decisions that are "based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with provisions of the Act, or findings of fact unsupported by substantial evidence in the record." 14 DCMR § 3807.1.

The Act's statute of limitations, in relevant part, provides the following:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment[.]

D.C. OFFICIAL CODE § 42-3502.06(e) (emphasis added). The DCCA has consistently held that "[t]he primary rule of statutory construction is that the intent of the legislature is to be found in the language which it has used." James Parreco & Son v. District of Columbia Rental Hous. Comm'n, 567 A.2d 43, 46 (D.C. 1989)); *see also* Dorchester House Assocs. Ltd. P'ship, 938 A.2d at 702; Nelson, TP 28,519; Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014). The Commission has held that an increase in rent charged must be challenged within three years of the effective date of the adjustment in rent charged. Kennedy v. District of Columbia Rental Hous. Comm'n, 709 A.2d 94, 97-100 (D.C. 1998); Burkhardt, TP 28,270; Smith Prop. Holdings Five (D.C.), LP v. Morris, RH-TP-06-28,794 (RHC July 2, 2014); United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013)

aff'd United Dominion Mgmt. Co., 101 A.3d at 426; Canales v. Martinez, TP 27,535 (RHC June 29, 2005); Greene v. Urquilla, TP 27,604 (RHC Jan. 14, 2005).

The Commission has interpreted the term "effective date," as it is used in D.C. OFFICIAL CODE § 42-3502.06(e), to refer to the date on which a rent increase is implemented, regardless of whether a requisite Registration/Claim of Exemption Form was filed outside of the three-year period. *See* Holbrook St., LLC v. Seegers, RH-TP-14-30,571 (RHC July 15, 2016); Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-29,149 (RHC Mar. 10, 2015). The Commission, however, has also noted that the Act "only references a tenant's challenge to a rent adjustment, whereas the DCCA has held that a claim of exemption is a defense to a tenant petition." Lutsko, RH-TP-08-29,149. "[T]he regulations setting forth the various bases for filing tenant petitions . . . do not specifically provide that a challenge to a claim of exemption is a basis for filing a tenant petition." *Id.* (citing 14 DCMR § 4214.1-.4).

Moreover, the Commission has long recognized that the Council's purpose in including the statute of limitations provision within the Act was to ensure that "[t]enants must file any challenge to any type of rent adjustment within three years after the adjustment takes effect." Kim v. Woodley, TP 23,260 (RHC Sept. 13, 1994) (quoting Statement of Councilmember Jarvis re: Amendment in the Nature of a Substitute to Bill 6-33, at 11); *see also* Kennedy, 709 A.2d at 97-98; Sendar v. Burke, HP 20,213 and TP 20,772 (RHC Apr. 6, 1988) at 20-21. The Commission has also noted in the past that "the very purpose of the [] statute of limitations provision in [D.C. OFFICIAL CODE § 42-3502.06(e)] was to overrule McCulloch[22] and prohibit petitions against rent levels put in place more than three years prior to the petitions' filing." Morris, RH-TP-06-28,794 (quoting Kennedy, 709 A.2d at 96-97).

[22] McCulloch v. District of Columbia Rental Accommodations Comm'n, 449 A.2d 1072 (D.C. 1982) (holding that, under prior law, "with each rental payment that is illegally charged, a new cause of action will arise").

The Commission is satisfied that, under the plain language, and consistent with the legislative intent, of D.C. OFFICIAL CODE § 42-3502.06(e), the ALJ correctly applied the Act's statute of limitations in limiting Tenant's challenge to only those rent increases that occurred within the three years prior to his filing of Tenant Petition I. *See* Final Order at 18-21; R. at Tab 52; D.C. OFFICIAL CODE § 42-3502.06(e); *see, e.g.*, Lutsko, RH-TP-08-29,149; Morris, RH-TP-06-28,794; Hinman, RH-TP-06-28,728; Canales, TP 27,535; Greene, TP 27,604. The Tenant filed Tenant Petition I on February 12, 2014; accordingly, the ALJ correctly determined that the statute of limitations allows the Tenant to challenge rent increases with effective dates after February 12, 2011. *See* Final Order at 18-19; R. at Tab 52; D.C. OFFICIAL CODE § 42-3502.06(e); Lutsko, RH-TP-08-29,149; Morris, RH-TP-06-28,794; Hinman, RH-TP-06-28,728; Canales, TP 27,535; Greene, TP 27,604. Substantial evidence in the record shows that the Tenant's rent was increased on October 1, 2011, from $949 to $1,004, on March 1, 2013, from $1,004 to $1,320, and on March 1, 2014, from $1,320 to $1,386. PX 112; PX 113; PX116 at Tab 23. The Commission's review of the record therefore supports the ALJ's determination that the Tenant could challenge, and was entitled to the calculation of a rent refund and rent rollback based on, the rent charged prior to these rent increases. *See* Final Order at 26 & Appendix B; R at Tab 52; *see e.g.*, Lutsko, RH-TP-08-29,149; Morris, RH-TP-06-28,794; Hinman, RH-TP-06-28,728; Canales, TP 27,535; Greene, TP 27,604.

Accordingly, the Commission affirms the ALJ's application of the Act's statute of limitations.

B. Whether OAH Erred in not awarding treble damages.

Tenant argues that, in declining to award treble damages, the ALJ relied on findings of fact unsupported by substantial evidence in the record, overlooked undisputed material facts in the record, and relied on evidence that ALJ Hines had previously excluded. Notice of Appeal at

1-2. The ALJ did not award treble damages or issue fines in response to the Tenant's request because the ALJ did not find that the Housing Provider's actions were "enough to conclude that she acted . . . out of 'some interested or sinister motive[.]'" Final Order at 29-30; R. at Tab 52.[23]

As discussed *supra* at 35-36, the Commission's standard of review requires it to reverse decisions that are "based upon arbitrary action, capricious action, or an abuse of discretion, or which contains conclusions of law not in accordance with provisions of the Act, or findings of fact unsupported by substantial evidence in the record." 14 DCMR § 3807.1. Moreover, "credibility determinations are 'committed to the sole and sound discretion of the [ALJ].'" Tenants of 2480 16th St., N.W. v. Dorchester House. Associates, LLC, RH-SF-09-20,098 (RHC Sept. 24, 2015) (citing Notsch, RH-TP-06-28,690 (quoting Fort Chaplin Park Assocs., 649 A.2d at 1079 n.10)); *see, e.g.*, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014). Where the Commission has determined that substantial evidence exists to support the ALJ's decision, even substantial evidence to the contrary does not permit the Commission to overturn the ALJ's decision. *See* Tenants of 2480 16th St., N.W., RH-SF-09-20,098; *see e.g.* Siegel v. B.F. Saul Co, RH-TP-06-28,524 (RHC Sept. 9, 2015); Karpinski v. Evolve Mgmt., RH-TP-09-29,590 (RHC Aug. 19, 2014). Although an ALJ has broad discretion to determine credibility and weigh evidence, the Commission's review on appeal requires that a final order contain sufficient detail and explanation with respect to each contested issue for the Commission to be

[23] The Commission notes that the Tenant also argues that the ALJ erred by "blend[ing] and fail[ing] to distinguish between "willful" conduct and bad faith conduct" in the discussion of treble damages. Final Order at 29-30; R. at Tab 52; Tenant's Exceptions to Proposed Order at 44-47; R. at 50. However, the Commission observes that, although the ALJ did not include separate evidentiary summaries for "bad faith" and "willful," the ALJ did provide separate and distinct conclusions with regard to each alleged mental state. Specifically, as to "bad faith," the ALJ determined that the Housing Provider's conduct "may not have been the wisest course of action – or inaction – that she could have taken, but it is not enough to conclude that she acted with . . . 'intent to deceive or defraud' . . . or out of 'some interested or sinister motive' involving 'the conscious doing of a wrong because of dishonest motive or moral obliquity.'" Final Order at 29-30 (citations omitted); R. at Tab 52. As to "willfulness," the ALJ stated the Housing Provider's conduct did not demonstrate an "intent to violate the law." *Id.* (citations omitted). Accordingly, the Commission is satisfied that the ALJ considered the applicability of both distinct legal standards and did not err by blending the elements of claims for treble damages or fines. *See* D.C. OFFICIAL CODE § 42-3509.01(a), (b).

assured that the ALJ's consideration was in accordance with the Act. *See* Carmel Partners, Inc. v. Barron, TPs 28,510, 28,521, & 28,526 (RHC Oct. 27, 2014); Falconi, RH-TP-07-28,879 ("If 'the examiner's decision was not sufficiently detailed to demonstrate that the full record was considered, then the decision must be reversed.'") (quoting Cobb v. Charles E. Smith Mgmt. Co., TP 23,889 (RHC July 21, 1998)).

The Act's penalties provision provides, in relevant part, the following:

> Any person who knowingly (1) 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 by the Rent Administrator . . . for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith)[.]

D.C. OFFICIAL CODE § 42-3509.01(a).

The Commission has consistently held that an award of treble damages under the Act requires the application of a two-prong test: "first, there must be a determination that the housing provider acted knowingly; and second, the housing provider's conduct must be 'sufficiently egregious' to warrant a finding of bad faith." Palmer, RH-TP-13-30,431 (RHC Oct. 5, 2015) (quoting Gelman Mgmt. Co. v. Grant, TP 27,995, 27,997, 27,998, 28,002, & 28,004 (RHC Aug. 19, 2014)); Notsch, RH-TP-06-28,690 (quoting Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013)). *See also* 1773 Lanier Place, N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009); Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005). A finding of bad faith must be based on specific findings of fact that "demonstrate a higher level of culpability," such as "a deliberate refusal to perform without a reasonable excuse and/or manifest[ed] dishonest intent, sinister motive, or heedless disregard of duty." Palmer, RH-TP-13-30,431 (RHC Oct. 5, 2015) (quoting Notsch, RH-TP-06-28,690); Lizama, RH-TP-07-29,063.

The Commission's review of the Final Order reveals that the ALJ failed to make distinct findings of fact and conclusions of law as to whether each of the three unlawful rent increases

was implemented in bad faith. *See* Final Order at 28-30; R. at Tab 52. As a result, the Commission is unable to determine that the ALJ's conclusions of law rationally flow from findings of fact that are supported by substantial evidence in the record. 14 DCMR § 3807.1; Barron, TPs 28,510, 28,521, & 28,526 (RHC Oct. 27, 2014); Falconi, RH-TP-07-28,879.

The Final Order addresses bad faith as a general matter, blending the discussion of events that occurred before and after the second and third increases, rather than with respect to each increase. Final Order at 28-29; R. at Tab 52. Specifically, the Tenant's rent was increased, as relevant to this case: (1) $55, by a notice issued August 1, 2011, to be effective October 1, 2011; (2) $316, by a notice issued January 22, 2013, to be effective March 1, 2013; and (3) $48, by a notice issued December 27, 2013, to be effective March 1, 2014. *See* Final Order at 8-9 and 26; R. at Tab 52. However, the Final Order's conclusion of law regarding bad faith discusses, at some length, the Housing Provider's apparent reaction to the Tenant's claims that his rent was unlawfully high, but does not discuss the fact that the claims were made by e-mail *after* Housing Provider notified the Tenant of the $316 rent increase on January 22, 2013. *Compare* Final Order at 8-12 (findings of fact) *with* Final Order at 28-29 (conclusions of law); R. at Tab 52.

Further, the ALJ does not discuss whether any relationship existed between the Tenant's complaints about the broken furnace in December 2012 and January 2013, the related confrontation between the Housing Provider and Tenant about repair on January 16, 2013, and the January 22, 2013, notice of a substantial rent increase. Although the ALJ also found that the Housing Provider had, sometime in January 2013, spoken to others about the fair market price for the rental unit,[24] the Final Order does not contain any discussion of the weight given by the ALJ to this competing evidence in determining that the Housing Provider did not act in bad faith.

[24] The Tenant maintains in the attachment to the Tenant's Exceptions to Proposed Order that there was no evidence to support the finding of fact that the Housing Provider was told that the rent for nearby apartments was around

The Commission notes, however, that several of the findings of fact related to the broken furnace concern evidence that ALJ Hines excluded. Final Order at 9 (findings of fact 35, 36, & 37); R. at Tab 52. An ALJ's decision must be made exclusively based on evidence admitted into the record. D.C. OFFICIAL CODE § 2-509(c); 1 DCMR § 2821; Washington, RH-TP-11-30,151 at 12-14. During the October 9, 2014, hearing the Tenant testified to systematic heating failures and argued that the "2012-2013 increase in rent was made in bad faith in that the increase was retaliatory showing that the Housing Provider persisted in the increase despite his insisting on heating repairs." Hearing Transcript (OAH Oct. 9, 2014) at 70; R. at Tab 33A. The Housing Provider objected to the admission of this evidence, arguing that the Tenant had not made a claim for reduction in services or retaliation. *Id.* at 69-77. The Tenant maintained that he presented this evidence to prove bad faith. *Id.* at 70-71. ALJ Hines sustained the Housing Provider's objection, finding that the evidence relating to the repairs of the furnace related to claims that were not raised by the Tenant. *Id.* at 76.[25] Nonetheless, no objection was made to the admission of testimony regarding the confrontation between the Housing Provider and Tenant on January 16, 2013, which apparently stemmed from the Tenant's complaints about the furnace, and in fact the testimony was elicited by counsel for the Housing Provider from the Tenant and from the Housing Provider. *Id.* at 160, 215-16; Tab 33B.

Accordingly, the Commission remands for further findings of fact and conclusions of law. On remand, the ALJ is instructed to make findings of fact regarding the maintenance

---

$1,300. The Commission's review of the record reveals that the Housing Provider specifically testified that she called the rental office of the building across the street and was told the rent for a one-bedroom unit was $1,320. Hearing Transcript (OAH Oct. 9, 2014) at 212-215, 230-32; R. at Tab 33B.

[25] The Tenant does not assert on appeal, and did not assert on his Tenant's Exceptions to Proposed Order, that ALJ Hines erred by excluding this testimony, but he instead maintains that the ALJ erred by making findings of fact based on the excluded testimony. *See* Tenant's Exceptions to Proposed Order at 8; R. at Tab 50. The Commission therefore does not address whether the exclusion of the testimony was proper with respect to the issue of bad faith.

requests for the furnace and verbal confrontation that specifically delineate the testimony or other substantial evidence that was admitted on the record from what ALJ Hines excluded. Based on such findings of fact, the ALJ is instructed to separately address whether each of the unlawful rent increases was implemented in bad faith.

C. Whether OAH Erred by Not Imposing Fines where substantial record evidence establishes that the Housing Provider served the Tenant an improper 90-day notice to vacate.

The Tenant argues that "on this record the Housing Provider must be fined $5,000 for each of the three obligations she willfully failed to meet" when she served him with an improper notice to vacate the rental unit. Tenant's Brief at 71. The ALJ did not impose fines in response to the Tenant's request because, although the ALJ concluded that "the Housing Provider had served the Tenant with an improper 90-day notice to vacate," the ALJ further concluded "that the Housing Provider's issuance of the 90-day Notice was not a willful violation of the law." Final Order at 30-31; R. at Tab 52. In support of his argument, the Tenant maintains that (1) he presented evidence and met his burden of proof to establish the Housing Provider's willfulness in issuing the 90-day Notice to Vacate, and (2) that OAH failed to address each of the violations of the Act that the Tenant alleged. Tenant's Brief at 63.

The Act limits the circumstances under which a tenant may be evicted from a rental unit and requires service of prior, written notice to vacate to the tenant. D.C. OFFICIAL CODE § 42-3505.01(a); 14 DCMR § 4300; Dep't of Hous. & Cmty. Dev. – Rental Accommodations Div. v. 1433 T St. Assocs., LLC, RH-SC-06-002 (RHC May 21, 2015). In relevant part, the Act provides that:

> No tenant shall be evicted from a rental unit for any reason other than for nonpayment of rent unless the tenant has been served with a written notice to vacate which meets the requirements of this section. . . . All notices to vacate shall contain a statement detailing the reasons for the eviction, and if the housing

> accommodation is required to be registered by this chapter, a statement that the housing accommodation is registered with the Rent Administrator.

Id. § 42-3505.01(a). The provision of the Act providing for civil fines is D.C. OFFICIAL CODE § 42-3509.01(b), which provides:

> Any person who willfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation.

See 1433 T St. Assocs., RH-SC-06-002 (remanding for findings of fact on possible violation of notice to vacate provisions of Act and whether such violations were willful). The Commission and the DCCA define "willfully" as "a more culpable mental state than the term 'knowingly.'" *See* Miller v. District of Columbia Rental Hous. Comm'n, 870 A.2d 556, 559 (D.C. 2005); Quality Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73, 75 n.6 (D.C. 1986); Washington Cmtys. v. Joyner, TP 28,151 (RHC July 27, 2008) (determining that the term "willfully" addresses an intention to violate the law); *see also* RECAP-Gillian v. Powell, TP 27,042 (RHC Dec. 19, 2002) (stating that the term "willfully" requires an intention to violate the Act); Ratner Mgmt. Co. v. Tenants of Shipley Park, TP 11,613 (RHC Nov. 4, 1988) (explaining that the Act places a heavier burden under D.C. OFFICIAL CODE § 42-3509.01(b) of showing that a housing provider's conduct was "intentional, or deliberate, or the product of a conscious choice"). To find willfulness, and thus impose a fine on a party, the ALJ must make specific findings of fact that "the housing provider intended to violate the Act or at least knew that it was doing so, from which the intent to do so could be inferred." Miller, 870 A.2d at 559; *see also* Quality Mgmt., Inc., 505 A.2d at 75 n.6; Ahmed, Inc. v. Torres, RH-TP-07-29,064 at 20 (RHC

Oct. 28, 2014); Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 22, 2013); Joyner, TP 28,151.

In summarizing the specific findings of fact[26] relevant to the issuance of the 90-day notice to vacate under D.C. OFFICIAL CODE § 42-3505.01(d), and concluding that the Housing Provider's issuance of the 90-day Notice was not a willful violation of the Act, the ALJ stated that the process server hired by the Housing Provider "did not affect service on the Tenant until a week after the Housing Provider had filled out the documents" on February 21, 2014, but that the Housing Provider had "in the interim, on February 18, 2014 filed the document with RAD." Final Order at 31; R. at Tab 52. The ALJ determined that it was not the Housing Provider's "intent to serve an illegal notice" but rather that "[this combination of events le[d] to the notice being invalid." *Id.* The ALJ further found that, with the aid of her attorney, "[the Housing Provider] has essentially voided the notice herself . . . [and that Housing Provider's] errors . . . in issuing the improper 90-day notice were borne of some combination of confusion, carelessness, and ignorance . . . not borne of intent to violate the law." Final Order at 33; R. at Tab 52.

As discussed *supra* at 35-36, the Commission's standard of review is contained in 14 DCMR § 3807.1, and requires the Commission to uphold the decision of the ALJ where it is in accordance with the Act and supported by substantial evidence. The Commission's review of the ALJ's legal conclusions is *de novo*. United Dominion Mgmt., 101 A.3d at 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship, 938 A.2d at 702; Nelson, TP 28,519; Campbell, RH-TP-09-29,715. If an ALJ's decision does not contain findings of fact and conclusions of law on each material, contested issue, the Commission is required to remand the issue for further consideration. *See* D.C. OFFICIAL CODE § 2-509(e); Butler-Truesdale, 945 A.2d at 1171-72;

[26] *See* Findings of Fact 48, 49, 50, 55, 56, and 60, Final Order at 12-15; R. at Tab 52.

Perkins, 482 A.2d at 402; Palmer, RH-TP-13-30,431; A&A Marbury, RH-TP-11-30,151; Avila, RH-TP-28,799; Falconi, RH-TP-07-28,879.

1. Burden of Proof

With respect to the Tenant's claim that he met the necessary burden of proof for willfulness, he maintains that OAH "misstated the evidentiary standard that the Tenant must meet" for the imposition of fines. *See* Tenant's Exceptions to Proposed Order at 64; R. at Tab 50. The Commission is satisfied, however, that the Final Order correctly recites the legal standard under the Act for imposing fines for willful violations. Final Order at 30-32; R. at Tab 52; *see* D.C. OFFICIAL CODE § 42-3509.01(b); Miller, 870 A.2d at 559; Quality Mgmt., Inc., 505 A.2d at 75 n.6; Torres, RH-TP-07-29,064; Beckford, RH-TP-07-28-895; Joyner, TP 28,151. The Tenant specifically asserts that OAH should have applied a presumption that the Housing Provider acted willfully once the Tenant established that the Housing Provider had violated the Act. Tenant's Exceptions to Proposed Order at 64; R. at Tab 50. For the reasons that follow, the Commission finds no support in the Act, regulations, or DCCA or Commission precedent for burden-shifting.

Under the DCAPA, the proponent of a rule or order has the burden of proof. D.C. OFFICIAL CODE § 2-509(b); 1 DCMR § 2932.1 ("The tenant has the burden to prove the claims alleged in the tenant petition[.]"); *see* Tenants of 1754 Lanier Place, N.W. v. 1754 Lanier, LLC, RH-SF-15-20,126 (RHC Mar. 25, 2016); Sheikh v. Smith Prop. Holdings Three (DC), LP, RH-TP-12-30,279 (RHC July 29, 2015). Under the Act, a presumption may arise and the burden of proof may shift when a tenant brings a claim of retaliation pursuant to D.C. OFFICIAL CODE § 42-3505.02(b). In addition, because "statutory exemptions are to be narrowly construed," a housing provider has the burden of proving an exemption from rent stabilization. Goodman, 573 A.2d at 1297 (citing Revithes v. District of Columbia Rental Hous. Comm'n, 536 A.2d 1007, 1017 (D.C.

1987); Remin v. District of Columbia Rental Hous. Comm'n, 471 2d 275, 279 (D.C. 1984)). Outside of these specific circumstances, however, no statutory provision or case law provides an exception to the ordinary burden of proof with respect to the imposition of fines under D.C. OFFICIAL CODE § 42-3509.01(b). *See* 1754 Lanier, LLC, RH-SF-15-20,126 (RHC Mar. 25, 2016) (no burden-shifting to rebut expert testimony of value of services); Sheikh, RH-TP-12-30,279 (no burden-shifting on comparability of units). Therefore, the Commission is satisfied that the OAH did not misstate the evidentiary standard applicable to the Tenant's claim that the Housing Provider willfully served him with an invalid notice to vacate.

2. Failure to Address Each Contested Issue

With respect to the Tenant's second argument, he asserts that the ALJ failed to address each of the three violations that he alleges arose from the issuance of the 90-day notice to vacate. *See* Tenant's Exceptions to Proposed Order at 65; R. at Tab 50. The Commission is satisfied that the ALJ addressed the Tenant's claims that the erroneous timing of service and filing of the notice to vacate were willful violations of the Act and that the ALJ's finding that they were not willful is supported by substantial evidence relating to errors made by the process server used by the Housing Provider. *See supra* at 50; 14 DCMR § 3807.1; Miller, 870 A.2d at 559.

The Commission observes, however, that the ALJ did not make any findings of fact or conclusions of law concerning the contents of notice itself or whether the Housing Provider had willfully failed to comply with the content requirements. *See* Final Order at 12-15; R. at Tab 52; *cf.* D.C. OFFICIAL CODE § 42-3505.01(a);[27] 14 DCMR § 4302.1;[28] 1433 T St. Assocs., RH-SC-

[27] D.C. OFFICIAL CODE § 42-3505.01(a) provides, in relevant part:

> All notices to vacate shall contain a statement detailing the reasons for the eviction, and if the housing accommodation is required to be registered by this chapter, a statement that the housing accommodation is registered with the Rent Administrator. (emphasis added)

[28] 14 DCMR § 4302.1 provides, in relevant part, that:

06-002 (violation of the Act may occur where tenants given document titled "Notice to Vacate" not containing all required elements). The Tenant contends that the Housing Provider filed the 90-day notice to vacate "without a statement in it that [the Housing Accommodation] is exempt from registration and the basis for that exemption." Tenant's Exceptions to Proposed Final Order at 65; R. at Tab 51. During the October 9, 2014, evidentiary hearing, the Tenant testified to this omission, and the 90-day notice was admitted into evidence. *See* Exhibit 120 (Notice to Vacate dated Feb. 14, 2014); R. at Tab 23; Hearing Transcript (OAH Oct. 9, 2014) at 142-47; R. at Tab 33A.

The Commission observes that the ALJ did not evaluate the adequacy of the contents of the notice to vacate itself or the intent with which the Housing Provider completed the notice in view of the insufficiencies, omissions, or inaccuracies alleged by the Tenant. Specifically, the Commission's review of the Final Order shows that the ALJ failed to evaluate whether, as claimed by the Tenant, the notice to vacate failed to include a statement that the Housing Accommodation is registered with the Rent Administrator or exempt from rent stabilization or whether any omission was willful. *See* Final Order at 30-33; R. at Tab 52; D.C. OFFICIAL CODE § 42-3505.01(a); 14 DCMR § 4302.1(c).

Based upon the above, the Commission determines that the ALJ failed to make findings of fact and conclusions of law on all material, contested issues, as required by the DCAPA. *See* D.C. Official Code § 2-509(e); Butler-Truesdale, 945 A.2d at 1171-72; Perkins, 482 A.2d at 402;

In order to be valid, a notice to vacate shall include the following:

. . .

(c) A statement that the housing accommodation is registered with the Rent Administrator, and the registration number, or a statement that the accommodation is exempt from registration, and the basis for the exemption[.]

Palmer, RH-TP-13-30,431 (RHC Oct. 5, 2015); A&A Marbury, RH-TP-11-30,151; Avila, RH-TP-28,799; Falconi, RH-TP-07-28,879.

Accordingly, the Commission remands this issue to the ALJ for further findings of fact and conclusions of law on whether the Housing Provider willfully violated her obligations under the Act with respect to the contents of a 90-day notice to vacate for personal use and occupancy. D.C. OFFICIAL CODE § 42-3505.01(a); 14 DCMR § 4302.1(c).

D. Whether OAH Erred in Denying the Tenant's Request to Re-open the Record.

The Tenant contends that OAH erred in denying his request that the rent refund include compensation for rent charged up until the date the Final Order was issued. *See* Tenant's Exceptions to Proposed Order at 53; R. at Tab 50. Relying on Levy v. District of Columbia Rental Housing Commission, 126 A.3d 684, 693 (D.C. 2015), the Tenant argues the ALJ erred in "the computation of rental overcharges by limiting it to the date of the last evidentiary hearing." Tenant's Exceptions to Proposed Order at 56; R. at Tab 50.

As discussed *supra* at 35-36, the Commission's standard of review requires it to reverse decisions that are "based upon arbitrary action, capricious action, or an abuse of discretion, or which contains conclusions of law not in accordance with provisions of the Act, or findings of fact unsupported by substantial evidence in the record." 14 DCMR § 3807.1. The Commission observes that a determination of whether to re-open the evidentiary record or take official notice of anything to supplement the evidentiary record at the trial level is within the discretion of the ALJ, and will be reversed only for an abuse of discretion. Levy, 126 A.3d at 693 (citing Howard Univ. Hosp. v. District of Columbia Dep't of Emp't Servs., 960 A.2d 603, 612-13 (D.C. 2008) (agency's refusal to consider new evidence on review not abuse of discretion)); District of Columbia v. Pub. Serv. Comm'n of District of Columbia, 802 A.2d 373, 379 (D.C. 2002)

(agencies may exercise their discretion in determining admissibility of evidence.); Roundtree v. United States, 581 A.2d 315, 328 (D.C. 1990). Given the flexibility of their proceedings, administrative agencies are "invested with a correspondingly greater discretion than trial judges in determining the admissibility of evidence." Haight v. District of Columbia Alcoholic Beverage Control Bd., 439 A.2d 487, 491 (D.C. 1981)); *see* Nelson, TP 28,519. A decision will be reversed for abuse of discretion "only if no valid reason is given or can be discerned[.]" Estopina v. O'Brian, 68 A.3d 790, 795 (D.C. 2013); Johnson v. United States, 398 A.2d 354, 364 (D.C. 1979); *see also* Sherman v. Adoption Ctr. of Wash., Inc., 741 A.2d 1031, 1037-38 (D.C. 1999) (denial of motion to amend pleading need only be "predicated on some valid ground"); Burkhardt, RH-TP-06-28,708.

The ALJ did not conclude that the Levy case provided any support "for a change in [ALJ] Hines' denial of [the Tenant's] motion to reopen the record." *See* Order Denying Petitioner's Motion To Substitute This Motion For Still-Pending Motion for Reconsideration and to Partially Vacate Amended Order of May 26, 2016 ("Order Denying Request to Reopen the Record and to Partially Vacate Amended Order of May 26, 2016") at 4; R. at Tab 47. In denying the Tenant's request to reopen the record, the ALJ stated:

> Mr. Pearson is clearly knowledgeable regarding how to file a new tenant petition to resolve any outstanding claims. He has also been afforded the opportunity to amend his current Tenant Petition to include such claims, an opportunity he declined to take advantage of.
>
> Mr. Pearson's argues that Levy v. DC Rental Housing Commission, 126 A.3d 684 (DC 2015) should lead to a different conclusion. The Levy court, however, stated unequivocally that an Administrative Law Judge (ALJ) is not required to re-open or supplement the record in circumstances such as these. In Levy, after the Rental Housing Commission (RHC) had remanded a case to the ALJ years after the initial decision, the ALJ did not hold a new hearing or supplement the record. Instead, the ALJ issued an order granting damages calculated through the date of the original evidentiary hearing. The DC Court of Appeals was clear:

> "Although neither the Act nor RHC regulations explicitly require that damages be calculated up to and including the date of the last evidentiary hearing, it is a basic principle of administrative law that decisions 'should rest solely upon evidence appearing in the public record of the agency proceeding.' [citation omitted]."
>
> *Id.* at 692.
>
> The Court did not order the ALJ to re-open the record or take official notice of anything to supplement the record. It did enumerate a number of options available to Petitioners who find themselves in Mr. Levy's (or [Tenant's]) position, but did not require the ALJ to afford any of those options to Mr. Levy.

See Order Denying Request to Reopen the Record and to Partially Vacate Amended Order of May 26, 2016 at 3; R. at Tab 47.

The Commission observes that, a year after denying the Tenant's oral request to allow the record to remain open, ALJ Hines, on October 21, 2015, denied the Tenant's first written request to reopen the record to allow additional evidence concerning computation of rental overcharges. *See* Hearing Transcript (OAH Oct. 9, 2014) at 269; Order Denying Request to Reopen the Record at 2; R. at Tab 35. In denying the Tenant's request, ALJ Hines stated "the hearing conducted . . . adjudicated Tenant's claims based on evidence presented . . . If Tenant's claims are on-going Tenant's recourse is to file another tenant petition [that] reflects the current status of the claims." Order Denying Request to Reopen the Record at 2; R. at Tab 35.

On December 8, 2015, the Tenant sought reconsideration of ALJ Hines' denial. *See* Tenant-Petitioner's Motion For Reconsideration of Order of October 21, 2015 ("Motion For Reconsideration of Order of October 21, 2015") at 1-7; R. at Tab 37. Tenant's reconsideration motion was never ruled on and after 90 days was denied as a matter of law. *See* Second Order Denying Request to Reopen the Record at 1 n.1; R. at Tab 47; 1 DCMR § 2938.1.[29] On June 1,

[29] OAH Rule 2938.1 provides, in relevant part:

2016, the Tenant filed a second written request seeking to have the record reopened to allow additional evidence concerning computation of rental overcharges. *See* Motion to Substitute this Motion for Still Pending Motion for Reconsideration and to Partially Vacate Amended Order of May 25, 2016 ("Motion for Reconsideration and to Partially Vacate Amended Order of May 25, 2016"); R. at Tab 40. Relying on Levy, the Tenant argued that the record "must be reopened" to allow evidence of rent demands made after the evidentiary hearing. *See id.*

The Commission is satisfied that the ALJ provided valid reasons in responding to the Tenant's Motion for Reconsideration and Partially Vacate Amended Order of May 25, 2016, and that denying the Tenant's request to reopen the record was not an abuse of discretion. *See* Second Order Denying Request to Reopen the Record at 3-4; R. at Tab 47; Levy, 126 A.3d at 693; *see, e.g.*, Estopina, 68 A.3d at 795; Sherman, 741 A.2d at 1037-38; Burkhardt, RH-TP-06-28,708. Although the DCCA in Levy suggested that a tenant who claims ongoing rent overcharges "could file a prompt motion to reopen the proceeding to more accurately establish damages," the Court nonetheless found that there was "no manifest injustice in limit[ing] [the tenant's] recovery to the period up to [the evidentiary hearing], which is the amount [the Tenant] properly established under the [Commission's] reasonable procedures." Levy, 126 A.3d at 693-94.

Based upon its review of the record, the Commission is satisfied that the ALJ did not abuse his discretion by not reopening the record, because the Tenant both had the option and ability to file a separate tenant petition and had previously declined the opportunity to amend his current Tenant Petitions. Second Order Denying Request to Reopen the Record at 3; R. at Tab

---

> Motions for reconsideration, a new hearing, or relief from a final order shall be decided according to the Rules found in Section 2828, except OAH Rule 2828.15 shall not apply in rental housing cases. In a rental housing case, an Administrative Law Judge should rule on any motion filed under this section within ninety (90) calendar days of its filing. If an Administrative Law Judge has not done so, the motion is denied as a matter of law.

47. Because the ALJ's exercise of discretion was based on a valid reason given in the record, that exercise will not be reversed on appeal. Estopina, 68 A.3d at 795; Johnson, 398 A.2d at 364; Sherman, 741 A.2d at 1037-38; Burkhardt, RH-TP-06-28,708.

Accordingly, the Commission affirms the ALJ's decision on this issue.

E. Whether the findings of fact in the final order are supported by substantial evidence in the record and undisputed and material facts are omitted from the findings of fact.

In accordance with the DCAPA, an ALJ is required to make findings of fact that are based on substantial evidence in the record. D.C. OFFICIAL CODE § 2-509(e) ("The findings of fact and conclusions of law shall be supported by and in accordance with the reliable, protective, and substantial evidence."); *see* Notsch, RH-TP-06-28,690 (explaining that where an ALJ's findings are supported by substantial evidence, the findings will not be overturned even if substantial evidence exists to the contrary); Hago, RH-TP-08-11,552 & RH-TP-08-12,085.

As discussed *supra* at 35-36, the Commission's standard of review is contained in 14 DCMR § 3807.1, and requires the Commission to uphold the decision of the ALJ where it is in accordance with the Act and supported by substantial evidence. The Commission is required to give deference to the ALJ's findings of fact that are supported by substantial evidence in the record. *See* Selk v. District of Columbia Dep't. of Emp't. Servs., 497 A.2d at 1056; 424 Q Street Ltd. P'ship. v. Evans, TP 24,597 (RHC July 31, 2000). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." Marguerite Corsetti Trust, RH-TP- 06-28,207 (citation omitted). *See* also Fort Chaplin Park Assocs., 649 A.2d at 1079; Allen, 538 A.2d at 753 (citation omitted).

When assessing credibility determinations on appeal, "the relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence." Gary v. District of Columbia Dep't of

Emp't Servs., 723 A.2d 1205, 1209 (D.C. 1998); *see* Tenants of 2480 16th St., N.W., RH-SF-09-20,098; Notsch, RH-TP-06-28,690. The Commission has consistently held that "credibility determinations are 'committed to the sole and sound discretion of the hearing examiner.'" Notsch, RH-TP-06-28,690 (citation omitted). *See, e.g.*, Nelson, TP 28,519; Tenants of 2480 16th St., NW, RH-SF-09-20,098; Burkhardt, RH-TP-06-28,708.

The Tenant asserts that six findings of fact are not supported by substantial record evidence: Findings of Fact 12, 41, 55, 56, 61, and 62. *See* Tenant's Exceptions to Proposed Final Order, Attachment ("Tenant's Specific Exceptions");[30] R. at Tab 51.

1. Contested Findings of Fact Supported by Substantial Evidence.

The Commission's review of the record shows that the following findings of fact in the Final Order are supported by substantial evidence on the record. *See* D.C. OFFICIAL CODE § 2-509(e); Notsch, RH-TP-06-28,690; Hago, RH-TP-08-11,552 & RH-TP-08-12,085.

a. Finding of Fact 12

The Tenant disputes the ALJ's finding that "[the Tenant's] struggles to timely pay the rent led to a deterioration in his relationship with [the Housing Provider]" and argues that it is not supported by the substantial evidence. *See* Tenant's Specific Exceptions; R. at Tab 51. The

[30] As noted *supra* at 26, the Tenant's Brief adopts and incorporates by reference the relevant legal arguments made in the Tenant's Exceptions to Proposed Final Order. The Tenant attached to the Tenant's Exceptions to Proposed Final Order an 11 page document proposing specific corrections and identifying specific claims of error to many of the findings of fact in the Proposed Final Order. The Commission observes that the Tenant did not provide any numbering for this multipage attachment.

In addition to the enumerated findings of fact challenged by the Tenant, the Commission notes that the Tenant asserts a number of "material facts" were omitted by the ALJ. The Commission observes that the asserted omissions relate to the Tenant's argument that Camacho, TP 20,914, requires the ALJ to find that all rents ever demanded by the Housing Provider were illegal requiring a roll back of the rent to $0. *See* Notice of Appeal at 1-3; Tenant's Exceptions to Proposed Final Order at 47; R. at Tab 50. For the reasons discussed *supra* at 38-41, the Commission is satisfied that the ALJ did not err by failing to apply Camacho.

Tenant attributes the deterioration of his relationship with the Housing Provider to his repeated complaints about the heating system failure in 2013. *Id.*

The Commission's review of the record shows that both parties presented testimony about the Tenant's finances and the assistance programs he relied on to pay the rent. *See* Hearing Transcript (OAH Oct. 9, 2014) at 179-80, 182-84, & 210-13; R. at Tab 33B. Additionally, the Commission observes that during the evidentiary hearing the Tenant testified to the Housing Provider's outrage the first time he did not pay the rent on time. *See id.* Thus, even though the Tenant provided evidence to the contrary of what the ALJ found, the Commission is satisfied that substantial record evidence supports the ALJ's finding. *See* Gary, 723 A.2d at 1209; Tenants of 2480 16th St., N.W., RH-SF-09-20,098; Notsch, RH-TP-06-28,690.

b. Finding of Fact 41

The Tenant also disputes the ALJ's finding that "[the Housing Provider] was told by others that the rent for Tenant's condominium was far below market rate and the rental office informed [the Housing Provider] that the price of units comparable to [the Tenant's] unit was $1300 per month." *See* Tenant's Specific Exceptions; R. at Tab 51. The Tenant argues that "there is no support for this finding in the record . . . and that it is not relevant to any of the issues in TP 30,482." *Id.*

The Commission observes that the Housing Provider and the Tenant both presented testimony that the Tenant's condominium was below market rate and that the Housing Provider testified that she had learned that comparable units were priced at $1,300. *See* Hearing Transcript (OAH Oct. 9, 2014) at 210-13, 229-30; R. at Tab 33B. The Commission also observes that this evidence is relevant to the Housing Provider's motivation for increasing the Tenant's rent and whether she did so in bad faith. *See supra* at 46-47. Therefore, the

Commission is satisfied that substantial evidence in the record supports the ALJ's finding of fact regarding what the Housing Provider believed to be a reasonable rent for the Tenant's unit.

c. Findings of Fact 55 and 56

The Tenant further disputes the ALJ's finding that "[a]fter the May 23, 2014 hearing in the LTB, [the Housing Provider's] counsel advised her to drop her suit against [the Tenant] for failure to vacate after expiration of the 90-day notice, due to fact that the notice gave [the Tenant] 83 instead of 90 days to vacate." *See* Tenant's Specific Exceptions; R. at Tab 51. The Tenant argues that "there is no record support for this finding of fact." *Id.* The Tenant also asserts that the ALJ erred in finding that "[a]t an August 13, 2014 hearing in the LTB regarding the case based on the 90-day notice to vacate, at the request of Housing Provider's counsel and over Mr. Pearson's objection, the case was dismissed without prejudice. Ms. Brown had instructed her counsel to dismiss the case if there were issues with how the 90-day notice was issued or served." *See* Tenant's Specific Exceptions; R. at Tab 51. The Tenant argues that "there was no credible support for this finding in the record . . . the undisputed and documentary evidence establishes the exact opposite to be true." *Id.*

The Commission's review of the record shows that during the Housing Provider's testimony concerning the parties' related landlord tenant matter, the Housing Provider testified to instructing her attorney to dismiss the case against the Tenant once the Housing Provider learned from her attorney that there were problems with the 90-day notice. *See* Hearing Transcript (OAH Oct. 9, 2014) at 225-27; R. at Tab 33B. The Commission is therefore satisfied that these findings of fact are supported by substantial evidence in the record.

d. Finding of Fact 62

The Tenant further contests the ALJ's finding that "[the Tenant's e-mails] were too numerous and [the Housing Provider] felt 'bullied' by the emails because [the Tenant] used

insulting terms in them." *See* Tenant's Specific Exceptions; R. at Tab 51. The Tenant argues that "there was no credible support for this finding in the record . . . the undisputed and documentary evidence establishes the exact opposite to be true." *Id.*

The Commission's review of the record reveals that the Housing Provider testified to feeling bullied by the large number of e-mails and being called names by the Tenant in those e-mails. *See* Hearing Transcript (OAH Oct. 9, 2014) at 217-20; R. at Tab 33B. Therefore, the Commission is satisfied that substantial evidence in the record supports the ALJ's finding of fact regarding the Housing Provider's beliefs in response to the Tenant's e-mails.

Based on its review of the record, the Commission is satisfied that Findings of Fact Twelve, Forty-one, Fifty-five, Fifty-six, and Sixty-two are supported by substantial record evidence.[31] Accordingly, the decisions of the ALJ on these issues are affirmed.

2. Findings of Fact 61 Is Not Supported by Substantial Evidence

The Tenant disputes the ALJ's finding of fact numbered 61, that "[t]he Housing Provider was not aware of the requirement to provide a tenant with the Registration/Claim of Exemption Form contemporaneously with the commencement of a tenancy until the filing of the instant tenant petitions." *See* Tenant's Specific Exceptions; R. at Tab 51. The Tenant argues that there is no credible support for this finding in the record and that "[the] evidence in the record establishes the exact opposite[.]" *Id.*

[31] The Tenant also disputes the ALJ's finding that the Housing Provider "wished to move into the condominium to 'downsize,' in order to save money in preparation for her retirement in three years' time." *See* Tenant's Specific Exceptions; R. at Tab 51. Tenant argues that the Housing Provider's "reasons for alleging she wished to evict [the Tenant] and occupy [the rental unit] were not an issue in TP 30,555, and was not actually litigated. The only relevant evidence was that she issued the 90 day notice, because requiring [the Tenant] to move – for any reason [–] would defeat the purposes of the Rental Housing Act[.]" *Id.* The Commission observes that evidence of the Housing Provider's purpose in seeking to have the Tenant vacate may be relevant to whether the Housing Provider willfully violated the Act. *See* D.C. OFFICIAL CODE § 42-3509.01(b); Miller, 870 A.2d at 559.

Based on a review of the record, the Commission is unable to identify substantial evidence as to whether the Housing Provider was aware of the specific requirement to provide a tenant with the Registration/Claim of Exemption Form petition. The Commission observes that the Housing Provider was neither asked any questions nor provided any testimony concerning her knowledge of the requirement to provide the form. *See* Hearing Transcript (OAH Oct. 9, 2014) at 206-09, 229-31; R. at Tab 33B.

Accordingly, the Commission determines that the ALJ Finding of Fact sixty-one is not supported by substantial evidence. However, because the ALJ did not find that the Housing Provider met the special circumstances exception or rely on this finding of fact in determining whether the Housing Provider had increased the rent in bad faith, the Commission is satisfied that this error is harmless. *See* 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))).

VII. DISCUSSION OF HOUSING PROVIDER'S ISSUE ON CROSS APPEAL

Whether the ALJ erred in Determining the Amount of Rent Charged to the Tenant for the Period of May 2014 Through October 2014.

The Housing Provider contends that the ALJ erred by calculating the amount of rent refunded to the Tenant for the period May 2014[32] through October 2014 based on "the rent increase that [the Tenant] was never required to pay [$1,386 per month]," rather than based on the "rent actually demanded during the time period [$1,320 per month]." *See* Housing

[32] The Commission observes that the Housing Provider in her Brief states that the Tenant "began paying monthly rent into the court registry in the amount of $1,320" in May 2014, pursuant to a protective ordered issued by the court. Housing Provider's Brief at 3.

Provider's Brief at 6. The Housing Provider argues that, commencing in June 2014, a protective order issued by the Landlord and Tenant Branch of the Superior Court of the District of Columbia ("LTB") in the parties' related case, 2014 LTB 11162 ("LTB Case"), required the Tenant to pay $1,320 per month into the court registry, thereby "supersed[ing] the Housing Provider's decision to increase the rent" to $1,386 in March 2014. *See* Housing Provider Brief at 6, 10. Accordingly, the Housing Provider maintains that the Tenant's monthly payment of $1,320 into the court registry constitutes "the rent actually demanded during the period [of the rent refund]" and "should therefore [have] form[ed] the basis of the ALJ's rent refund calculation." Housing Provider's Notice of Appeal at 1-2, for 2014.

As discussed *supra* at 39-40, the Commission has consistently held that it may not address issues on appeal that were not properly raised and developed in the proceedings before OAH, unless "exceptional circumstances" amounting to a clear miscarriage of justice demand otherwise. *See* Goodman, 573 A.2d at 1301; Wilson, RH-TP-07-28,907; Marguerite Corsetti Trust, RH-TP-06-28,207; Tillman, RH-TP-08-29,136; Stone, TP 27,033.

The Commission's review of the record does not show that the Housing Provider ever asserted before OAH that the rent lawfully owed by the Tenant was $1,320, rather than $1,386.

The Commission's review of the October 9, 2014, hearing transcript reveals very limited discussion of the protective order issued in the LTB Case. The Tenant testified that he had been ordered to pay $1,320 starting June 2014 into the Court Registry. *See* Hearing Transcript (OAH Oct. 9, 2014) at 115; R. at 33A. The Housing Provider's counsel stated during the hearing that "the appropriate rent is $1,386 per month . . . [w]e're going forward with the landlord/tenant case, it's Drayton stayed until after this court makes a decision." *Id.* at 269; R. at Tab 33B. Further, the Commission's review of the record does not reveal any support for the Housing

Provider's representation in her brief that she consented to the amount or rent set by the LTB at the time the protective order was issued. *See id.* Nor has the Commission's review of the hearing transcript revealed any evidence concerning the specific circumstances or reasoning relied upon by the LTB in setting the amount of the protective order. *Id.* The Commission also notes that the Housing Provider did not file any exceptions or objections to the Proposed Final Order in which this issue could have been raised.

The Commission observes that the Housing Provider claimed the issue of consent for the first time in this case in her Cross Appeal. Moreover, the Housing Provider has not provided any explanation or legal authority that would support a claim that "exceptional circumstances" would allow the Commission to reach this issue that was not raised before OAH. *See generally* Housing Provider's Brief. Therefore, the Commission shall not consider the Housing Provider's claim that the ALJ erred in determining the amount of Rent Charged to the Tenant for the Period of May 2014 through October 2014. Wilson, RH-TP-07-28,907; Marguerite Corsetti Trust, RH-TP-06-28,207; Tillman, RH-TP-08-29,136; Stone, TP 27,033.

Accordingly, the Commission affirms the Final Order on this issue.

VIII. CONCLUSION

In accordance with the foregoing, the Commission affirms the Final Order in part and remands it in part. Specifically, with respect to the Tenant's issues on appeal, the Commission affirms the Final Order on the application of the Act's statute of limitations in D.C. OFFICIAL CODE § 42-3502.06(e) to the rent increases implemented and rent levels charged within the three years prior to the filing of the Tenant Petition. *See supra* at 36-43. The Commission also affirms the Final Order on the applicable standards for imposing fines on the Housing Provider under D.C. OFFICIAL CODE § 42-3509.01(b). *See supra* at 48-54. The Commission also affirms OAH's denial of the Tenant's motions to reopen the evidentiary record after the conclusion of

the hearing. *See supra* at 54-58. The Commission also affirms the Final Order on the findings of fact that are supported by substantial evidence in the record. *See supra* at 59-62.

The Commission remands this case for clarified findings of fact and conclusions of law on the issue of whether the Housing Provider acted in bad faith each time the Tenant's rent was increased, in accordance with D.C. OFFICIAL CODE § 42-3509.01(a). *See supra* at 43-48. The Commission also remands this case to the OAH for further findings of fact and conclusion of law on the issue of whether the Housing Provider willfully failed to comply with the content requirements under D.C. OFFICIAL CODE § 42-3505.01(a) for the 90-day notice to vacate that was issued to the Tenant and, if so, to determine the appropriate fines to be imposed.[33] *See supra* at 52-54. Finally, the Commission reverses the Final Order with respect to finding of fact 61, but determines that the error is harmless because the finding of fact was not relied on for any conclusion of law. *See supra* at 62-63.

With respect to the Housing Provider's issue on cross-appeal, the Commission affirms the Final Order's calculation of the rent refund owed to the Tenant under D.C. OFFICIAL CODE § 42-3509.01(a) based on the rent increase demanded in March 2014. *See supra* at 63-65.

---

[33] The Tenant asserts that the Commission "can direct the entry of a final order without a second hearing" because of legal errors by the ALJ. *See* Notice of Appeal at 2. On the issue of the contents of the notice to vacate, however, the Commission remands due to a failure of the ALJ to make findings of fact in the first instance. *See* Butler-Truesdale, 945 A.2d at 1171-72; Perkins, 482 A.2d at 402; Palmer, RH-TP-13-30,431 (RHC Oct. 5, 2015); A&A Marbury, RH-TP-11-30,151; Avila, RH-TP-28,799; Falconi, RH-TP-07-28,879. Because it is not the Commission's role to act as the fact-finder, the issue must be remanded for the ALJ to review the evidence in the record and make all necessary findings of fact. On remand, the ALJ shall determine whether the present record is sufficient to decide the issue or whether further evidentiary proceedings are necessary.

SO ORDERED.

MICHAEL T. SPENCER, CHAIRMAN

DIANA HARRIS EPPS, COMMISSIONER

LISA M. GREGORY, 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 (2012 Repl.), "[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-14-30,482 and RH-TP-14-30,555 was mailed, postage prepaid, by first class U.S. mail on this **3rd day** of **May 2018,** to:

Roy L. Pearson, Jr.
3012 Pineview Court, N.E.
Washington, DC 20018
Served by Hand

Dorene Haney, Esq.
Neal & Haney, PLLC
209 Kennedy Street, N.W.
Washington, DC 20011

LaTonya Miles
Clerk of Court
(202) 442-8949

GOVERNMENT OF THE DISTRICT OF COLUMBIA
DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Rental Housing Commission

RH-TP-14-30-482
RH-TP-14-30,555

In re: 3012 Pineview Court, N.E.,

Ward Five (5)

ROY L. PEARSON, Jr.
Tenant/Appellant/Cross-Appellee

v.

GARDENIA BROWN
Housing Provider/Appellee/Cross-Appellant

ACKNOWLEDGEMENT OF RECEIPT OF DECISION AND ORDER

May 3, 2018

The undersigned, Roy L. Pearson Jr., Tenant/Appellant in the above-reference case, hereby confirms that he has personally received a copy of the following document, Decision and Order dated May 3, 2018, in the above-reference case. Said Decision and Order were given to Mr. Pearson, Jr., during a professional visit to the Rental Housing Commission on May 3, 2018.

R M Pearson — 5/3/18

Roy L. Pearson, Jr.
3012 Pineview Court, N.E,
Washington, DC 20018
(Tenant/Appellant/Cross-Appellee)

Date

LaTonya Miles — 5/3/18

LaTonya Miles
Clerk of Court

Date