DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-14-30,571

In re: 1635 Holbrook Street, N.E. #3

Ward Five (5)

HOLBROOK STREET, LLC
Housing Provider/Appellant

v.

SYLVIA R. SEEGERS
Tenant/Appellee

DECISION AND ORDER

July 15, 2016

McKOIN, COMMISSIONER. This case is on appeal to the Rental Housing Commission ("Commission") from a final order of 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] 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 Procedure Act ("DCAPA"), D.C. OFFICIAL CODE § 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899, 1 DCMR §§ 2920-2941, and 14 DCMR §§ 3800-4399, govern these proceedings.

[1] OAH assumed jurisdiction over contested 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) (2007 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 (2010 Repl.).

I. PROCEDURAL HISTORY

On August 27, 2014, Sylvia R. Seegers ("Tenant"), residing in Unit #3 of 1635 Holbrook Street, N.E. ("Housing Accommodation"), filed tenant petition TP 30,571 ("Tenant Petition") against Holbrook Street, LLC ("Housing Provider"). The Tenant Petition raised the following claims against the Housing Provider:

1. The building where my/our Rental Unit(s) is/are located is not properly registered with the Rental Accommodations Division.

2. The rent increase was larger than the increase allowed by any applicable provisions in the Act.

3. The rent was increased while my/our Rental Unit(s) was/were not in substantial compliance with the D.C. Housing Regulations.

Tenant Petition at 2; R. at 13.

Evidentiary hearings were held before Administrative Law Judge Margaret A. Mangan ("ALJ") on January 13, 2015 and February 2, 2015. The ALJ issued a final order on September 22, 2015: Sylvia R. Seegers v. Holbrook Street, LLC, 2014-DHCD-TP 30,571 (OAH Sept. 22, 2015) ("Final Order"); R. at 229-38.

In the Final Order, the ALJ made the following findings of fact:[2]

1. The Housing Accommodation located at 1635 Holbrook Street, NE, is a four-unit apartment building where Tenant Sylvia Seegers has lived for almost 10 years. Tenant entered into a residential lease with A. Spencer, then the owner, for Unit 3 at the Housing Accommodation on September 1, 2006. RX 200. The lease does not refer to an exemption.

2. Sam Swiller purchased the Housing Accommodation, as well as 1627, 1657, and 1659 Holbrook Street, NE, in December 2013, and formed Holbrook Street, LLC. He purchased the Property with the understanding that all buildings were exempt from rent control.

3. In January 2014, Tenant complained to Housing Provider about cracks in the walls, a bullet hole in a window, cracks in a sink, roaches, and rodents.

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

4. After Tenant's request, on April 9, 2014, an Inspector from the Inspection and Compliance Administration, Code Compliance Division, issued a Notice of Housing Code Violations (NOV) for Tenant's unit. The NOV specified:

   [Table of violations omitted; *See* Final Order at 2-3; R. at 236-37]

5. On August 7, 2014, the Inspector re-inspected Tenant's unit and issued a Notice of Violation that specified:

   [Table of violations omitted; *See* Final Order at 3; R. at 236]

6. In September 2014, Tenant's rent was increased from $450 per month to $1,100 per month.

7. The CPI-W in 2014 was 1.4%.

8. The Housing Accommodation was fully occupied on January 1, 1980. (Testimony of Sylvia Seegers). Tenant's mother resided in an apartment at the Housing Accommodation from 1972 until her death in 2009. PX 101. During that time, one unit may have been vacant.

9. On March 31, 1978, a Registration form was filed for 1659 [*et al.*] Holbrook Street, NE. PX 103.

10. On July 20, 1987, Arthur Spencer, then owner of the Housing Accommodation in question here filed a Registration/Claim of Exemption Form for 1635 Holbrook Street, NE. The exemption claimed was: "Building previous exempt under § 206(a)(4) of the Rental Housing Act of 1980." PX 106.

11. On April 29, 2014, Housing Provider Holbrook Street, LLC, filed with the Rental Accommodation Division (RAD) a Registration/Claim of Exemption Form. The exemption claimed was "Building that has been previously exempt under § 206(a)(4) for [sic] the Rental Housing Act of 1980." PX 102.

Final Order at 2-4; R. at 235-37.

In the Final Order, the ALJ made the following conclusions of law:[3]

A. Exemption

1. Housing Provider claims that the Housing Accommodation is exempt under the Act[] because it was previously exempt under § 206(a)(4) of the

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

Rental Housing Act of 1980. D.C. Official Code § 42-3502.05(a)(4). To be exempt under § 206(a)(4), [a] housing accommodation must have been "continuously vacant and not subject to a rental agreement since January 1, 1980...." Eligibility for this exemption, if proven, does not change with the transfer of ownership. *Cooper v. Bahry*, TP 22,397 (RHC[] Aug[.] 16, 1993) at 3.

2. The party asserting an exemption has the burden of proving entitlement to the exemption. *Goodman v. DC 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); *Saryinski*, TP 28,162 at 7[.]

3. Citing *Cooper v. Bahry*, TP 22,397, *supra*, Housing Provider argues that the statute of limitations bars a challenge to an exemption that was filed more than three years ago. In *Cooper*, the Rental Housing Commission affirmed a decision in which the hearing examiner applied the statute of limitations to the date an exemption was granted as well as to the date of a rent adjustment. A recent Court of Appeals decision makes clear, however, that the three year limitations period does not apply to the date a document was filed, but to the "*effective date of the [rent] adjustment.*" *United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n*, 101 A.3d 426, 431 (D.C. 2014) (emphasis in original) (citing D.C. Official Code § 42-3502.06(e)[)]. In *United Dominion*, a tenant filed a tenant petition within three years of a rent increase, and in that petition could challenge an improperly perfected rent ceiling adjustment filed more than three years before.

4. Similarly, in this case, Tenant can challenge rent increases and the Claim of Exemption that occurred within three years of her filing a tenant petition. Thus, Tenant can challenge the April 29, 2014, Claim of Exemption filed by this owner. That Claim of Exemption was based on a claim of continued exemption from the Claim of Exemption Form filed on July 27, 1987. That Claim of Exemption was based on the premise the Housing Accommodation had been vacant since 1980. Accordingly, for Housing Provider to prove that he is entitled to an exemption under § 206, he must establish that the Housing Accommodation was properly exempt in 1980 by being vacant. To hold otherwise would allow a housing provider, intentionally or not, to file an unsupported claim of exemption and assert that it governs all rental agreements into perpetuity. *See generally, United Dominion* at 432.

5. Proof of Housing Provider's entitlement to an exemption today requires credible, reliable evidence that the underlying exemption was valid. The underlying exemption claimed was that the Housing Accommodation had

been continuously vacant since 1980. The unchallenged evidence at the hearing, however, is that the Housing Accommodation had not been continuously vacant since 1980. Tenant had first-hand knowledge of the continued occupancy in the building, unlike the tenant in *Cooper v. Bahry*, who relied on hearsay testimony. Hence, Housing Provider has failed to prove that it was exempt from the rent stabilization provisions of the Rental Housing Act. Tenant has a viable claim challenging the rent increase.

B. Rent Increase

1. Because the [H]ousing [A]ccommodation is not exempt, annual rent increases are limited to the CPI-W plus 2%, not to exceed 10%. D.C. Official Code § 42-3502.08. Housing Provider here sent Tenant a demand for a rent increase in September 2014, increasing rent from $450 per month to $1,100 per month, a 110% increase. Because the 2014 CPI-W was 1.4%, Housing Provider could not lawfully increase the rent more than 3.4%, which is $15.30.

2. A second challenge to the rent increase is that the increase occurred when the rental unit had substantial housing code violations. The Rental Housing Act provides that:

> Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless:
> (A) The rental unit and the common elements are in substantial compliance with the housing regulations, if noncompliance is not the result of tenant neglect or misconduct. Evidence of substantial noncompliance shall be limited to housing regulations violation notices issued by the District of Columbia Department of Consumer and Regulatory Affairs and other offers of proof the Rental Housing Commission shall consider acceptable through its rulemaking procedures[.]

D.C. Code § 42-3502.08(a)(1)(A).

3. Tenant offered evidence of Notices of Violation from April 9 and August 7, 2014. Unabated between the two inspections was the infestation of rodents, a violation deemed substantial as a matter of law. 14 DCMR [§] 4216[.2](i). Hence, the rental unit was not in substantial compliance with housing regulations at the time of the September 2014 rent increase.

4. In sum, Tenant proved that the rent was increased in an amount higher than allowed by the Act and that the rent was increased while the rental unit was not in substantial compliance with the housing regulations. Tenant is entitled to a rent refund for the rent increase demand of $650 ($1,100-$450), whether the increase was paid or not. *Kapusta v. D.C.*

Rental Hous. Comm'n, 704 A.2d 286, 287 (D.C. 1997). In addition, Tenant's rent is rolled-back to $450 per month until the housing violations are abated and Housing Provider properly implements a rent increase.

5. The rules implementing the Rental Housing Act provide for the award of interest on rent refunds calculated from the date of the violation to the date of the issuance of the Final Order. 14 DCMR 3826.2. The interest rate imposed is the judgment interest rate used by the Superior Court of the District of Columbia on the date of issuance of the decision. See 14 DCMR 3826.3; *Joseph v. Heidary*, TP[ ]27,136 (RHC July 29, 2003); *Marshall v. D.C. Rental Hous. Comm'n*, 533 A.2d 1271, 1278 (D.C. 1987). The Superior Court interest rate is currently 2% per annum, 0.002% per month. The chart below calculates the refund and interest due.

[Table of rent refund calculations omitted; *See* Final Order at 7; R. at 232]

Final Order at 4-6; R. at 233-35.

The Housing Provider filed a timely Notice of Appeal on October 2, 2015, ("Notice of Appeal"). In the Notice of Appeal, the Tenant raises the following issues:[4]

1. The Order is erroneous to the extent that it determined that the Housing Accommodation is not currently exempt from rent stabilization.

2. The Order is erroneous to the extent that it invalidated the April 29, 2014 Claim of Exemption form for this Housing Accommodation.

3. The Order is erroneous to the extent that it invalidated the July 20, 1987 Claim of Exemption form for this Housing Accommodation.

4. The Order is erroneous to the extent it determined that the Housing Provider received rent from the Tenant for a portion of the period covered by the Petition.

5. The Order is erroneous to the extent that it awarded a rent refund and interest for rent not paid by the Tenant.

6. The Order is erroneous as there is no evidence in the record that there were housing code violations at the time that the rent was increased on September 1, 2014.

[4] The issues on appeal are recited here in the language and numbering used by the Housing Provider in the Notice of Appeal.

7. The Order is erroneous as there is no evidence in the record that Tenant advised the landlord of ongoing housing code violations.

8. The Order is erroneous to the extent it awarded damages as to which claims were barred by the statute of limitations.

Notice of Appeal at 1-2.

The Tenant filed a Motion for an Order Requiring Appellant Holbrook Street, LLC to Establish an Escrow Account or Post a Supersedeas Bond on April 28, 2016 ("Escrow Motion"). The Housing Provider filed an Opposition to the Escrow Motion on May 11, 2016. The Commission granted the Escrow Motion on May 20, 2016 ("Escrow Order"), and ordered that the Housing Provider establish an escrow account or post a bond by June 9, 2016. On June 1, 2016, the Housing Provider filed a Motion for Reconsideration of the Escrow Order. The Motion for Reconsideration of the Escrow Order was denied by the Commission on June 9, 2016, however, the Commission extended the time by which the Housing Provider was required to comply with the Escrow Order until June 21, 2016.

The Housing Provider filed a brief in support of their appeal on May 16, 2016 ("Housing Provider's Brief"), and the Tenant filed a brief in response on June 8, 2016 ("Tenant's Brief"). The Commission held a hearing on June 15, 2016.

II. PRELIMINARY ISSUE

On July 5, 2016, the Tenant filed a Motion to Dismiss Appellant Holbrook Street LLC's Appeal for Failure to Comply with the Escrow Order ("Motion to Dismiss"). The Commission is satisfied that because the Housing Provider did not establish an escrow account or post a supersedeas bond by June 21, 2016, the Commission has the authority to dismiss the Appellant's appeal. *See* Kamerow v. D.C. Rental Hous. Comm'n, 891 A.2d 253, 256-57 (D.C. 2006); Mullin v. D.C. Rental Hous. Comm'n, 844 A.2d 1138, 1141 (D.C. 2004). *See also* Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP, 68 A.3d 697, 708 (D.C. 2013) (stating that a trial

court has the authority to dismiss an action when a plaintiff fails to comply with an order of the court).[5]

Nonetheless, District of Columbia Court of Appeals ("DCCA") and Commission precedent "manifest[s] a preference for resolution of disputes on the merits[.]" Dep't of Hous. and Cmty. Dev. – Rental Accommodations Div. v. 1433 T Street Assocs., LLC, RH-SC-06-002 (RHC May 21, 2015) (quoting Grayson v. AT&T Corp., 15 A.3d 219, 228 (D.C. 2011), and Clampitt v. American Univ., 957 A.2d 23, 2 (D.C. 2008)); *see also* Johnson v. Payless Shoe Source, Inc., 841 A.2d 1249, 1258 (D.C. 2004); Miranda v. Contreras, 754 A.2d 277, 278 (D.C. 2000). The Commission is ready at this time to decide this case on its merits, and disposing of the case on procedural grounds would not expedite its resolution. Moreover, as set forth herein, the Commission affirms the Final Order, which provides the Tenants with the same relief as they would be entitled to for the Housing Provider's failure to comply with the Escrow Order.

For these reasons, the Commission denies the Motion to Dismiss as moot.

[5] The Commission also observes that the Housing Provider has filed a petition for review of the Commission's Escrow Order with the District of Columbia Court of Appeals ("DCCA"). On July 15, 2016, the Housing Provider filed an Opposition to the Motion to Dismiss ("Opposition"). The Opposition asserts, in part, that the Commission lacks jurisdiction over the Motion to Dismiss because of the Housing Provider's appeal to the DCCA. Opposition at 2 (citing Miller v. Thompson, TP 2,139 (RHC Dec. 29, 1988) (Rent Administrator had no jurisdiction where Commission's decision to remand was on appeal to DCCA); Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) (noting that OAH lost jurisdiction after reconsideration of final order denied and appeal filed)). The Commission observes that both cases cited by the Housing Provider relate to appeals of final decisions and orders. Beckford, RH-TP-07-28,895; Thompson, TP 2,139. The Commission is satisfied that it retains jurisdiction to issue this decision and order on the merits of the appeal because the Housing Provider has only sought judicial review by the DCCA of the Commission's procedural order. *See* Rolinski v. Lewis, 828 A.2d 739, 745 (D.C. 2003) ("The requirement of finality serves the important policy goals of preventing the unnecessary delays resultant from piecemeal appeals and refraining from deciding issues which may eventually be mooted by the final judgment." (internal quotation marks and alterations omitted)).

III. ISSUES ON APPEAL[6]

1. The Order is erroneous to the extent that it determined that the Housing Accommodation is not currently exempt from rent stabilization.

2. The Order is erroneous to the extent that it invalidated the April 29, 2014 Claim of Exemption form for this Housing Accommodation.

3. The Order is erroneous to the extent that it invalidated the July 20, 1987 Claim of Exemption form for this Housing Accommodation.

4. The Order is erroneous to the extent it awarded damages as to which claims were barred by the statute of limitations.

5. The Order is erroneous to the extent it determined that the Housing Provider received rent from the Tenant for a portion of the period covered by the Petition.

6. The Order is erroneous to the extent that it awarded a rent refund and interest for rent not paid by the Tenant.

7. The Order is erroneous as there is no evidence in the record that there were housing code violations at the time that the rent was increased on September 1, 2014.

8. The Order is erroneous as there is no evidence in the record that Tenant advised the landlord of ongoing housing code violations.

[6] The Commission, in its discretion, has re-ordered the Housing Provider's issues on appeal for ease of discussion and to group together issues that involve the application and analysis of common facts and legal principles. *See, e.g.*, B.F Saul Prop. Co. v. Nelson, TP 28,519 (RHC Feb. 18, 2016) at n.14; Tenants of 2300 & 2330 Good Hope Rd., S.E. v. Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015) at n.15; Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 28, 2014).

IV. DISCUSSION

A. Exemption of Housing Accommodation

1. The Order is erroneous to the extent that it determined that the Housing Accommodation is not currently exempt from rent stabilization.

2. The Order is erroneous to the extent that it invalidated the April 29, 2014 Claim of Exemption form for this Housing Accommodation.

3. The Order is erroneous to the extent that it invalidated the July 20, 1987 Claim of Exemption form for this Housing Accommodation.

4. The Order is erroneous to the extent it awarded damages as to which claims were barred by the statute of limitations.[7]

The ALJ determined that the September 2014 rent increase was illegal because the Housing Accommodation was not properly registered. The ALJ then rolled the Tenant's rent back to $450 per month and awarded $650 per month for each month of overcharged rent, plus interest. Final Order at 5-6; R. at 233-34. The Housing Provider maintains, however, that, because the Tenant's challenge implicates an exemption that was first claimed more than three years before the Tenant Petition was filed, the statute of limitations bars her claims. *See* Housing Provider's Brief at 5-7.

The Commission's standard of review is contained in 14 DCMR § 3807.1 (2004) and provides the following:

> The Commission shall reverse final decisions of the Rent Administrator [or 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

[7] *See supra* n.6. The Commission, in its discretion, has re-ordered the Housing Provider's issues on appeal for ease of discussion and to group together issues that involve the application and analysis of common facts and legal principles. *See, e.g.*, Nelson, TP 28,519 at n.14; Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 & CI 20,754 at n.15; Barron, TP 28,510, TP 28,521, & TP 28,526.

> evidence on the record of the proceedings before the Rent Administrator [or 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. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.9 (D.C. 1994); 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). 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. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. of Md. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-03 (D.C. 2005)); Nelson, TP 28,519; Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Carpenter v. Markswright, RH-TP-10-29,840 (RHC June 5, 2013).

Under the Act, a housing provider may not implement a rent adjustment unless the rental unit and housing accommodation are properly registered or claimed as exempt from rent stabilization.[8] The Housing Provider maintains that the Housing Accommodation is exempt because it was "previously exempt under § 206(a)(4) of the Rental Housing Act of 1980[.]" D.C. OFFICIAL CODE § 42-3502.05(a)(4) (2012 Repl.). Section 206 of the Rental Housing Act of 1980 provided that the rent stabilization provisions shall apply to each rental unit in the District of Columbia except:

[8] 14 DCMR § 4205.5(c); *see* 14 DCMR § 4202.7.

> Any housing accommodation which has been continuously vacant and not subject to a rental agreement since January 1, 1980[.]

D.C. CODE § 45-1516(a)(4) (1981).

Statutory exemptions to the Act are narrowly construed. *See* Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990); Revithes v. D.C. Rental Hous. Comm'n, 536 A.2d 1007, 1016 (D.C. 1987). The DCCA has held that "a claim of exemption is a defense to a tenant petition that must be proven by the housing provider." Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-29,149 (RHC Mar. 10, 2015) at 30 (citing Goodman, 573 A.2d at 1297, and Revithes, 536 A.2d at 1017); *see also* Best v. Gayle, TP 23,043 (RHC Nov. 21, 1996). Moreover, the Commission has consistently held that "[t]he filing of a claim of exemption form does not ipso facto meet the burden of proof on exemption, because the facts stated therein must be proven not to be a misrepresentation." Butler v. Toye, TP 27,262 (RHC Dec. 2, 2004) at 5 (citing Vista Edgewood Terrace v. Rascoe, TP 24, 858 (RHC Oct. 13, 2000) at 12-13; Revithes at 1011-12).[9]

The Housing Provider argues that the statute of limitations bars the Tenant from challenging the factual basis for the 1987 Claim of Exemption. Housing Provider's Brief at 6. The Housing Provider further claims that the ALJ improperly determined that the three-year statute of limitations period applies to the effective date of the rent adjustment rather than the filing date of the Registration/Claim of Exemption. *See* Final Order at 5; R at 234. The ALJ

[9] The Commission observes that, in addition to proving eligibility for exemption from the Act, a housing provider must also show that proper notice of the exemption was provided to the tenant under D.C. OFFICIAL CODE § 42-3502.05(d). Lutsko, RH-TP-08-29,149 at 38-39. *See also* Carmel Partners, Inc. v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC May 16, 2014) at 4 (finding that a housing provider's failure to provide a tenant notice of the exempt status of a housing accommodation renders the exemption void *ab initio*). Based on its review of the record, the Commission is not satisfied that the Housing Provider provided notice of the Claim of Exemption to the Tenant. Specifically, the Tenant testified before the ALJ that she did not receive notice of an exemption when she signed the lease in 2006, when Holbrook Street, LLC purchased the property in 2013, or any time since. Hearing CD (OAH Jan. 13, 2015) at 2:11-2:14. The Commission therefore determines that the Final Order can also be affirmed on these alternative grounds.

found that the Tenant could properly challenge the rent increase and the 2014 Claim of Exemption, and credited the tenant's "unchallenged" and "first-hand" evidence that the Housing Accommodation was not continuously vacant during 1980. Final Order at 5; R. at 234.

The Act's statute of limitations 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) (2012 Repl.) (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." Nelson, TP 28,519 (citing James Parreco & Son v. D. C. Rental Hous. Comm'n, 67 A.2d 43, 46 (D.C. 1989)).

The Commission has interpreted 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.

Lutsko, RH-TP-08-29,149 at 30.[10] In Lutsko, a tenant filed a petition within three years of a rent increase implemented by a housing provider, who adjusted the rent in reliance upon a claim of exemption filed outside of the three-year period. *Id.* at 2-4. The Commission determined that the tenant's petition was not barred by the statute of limitations because it challenged a rent increase from within the preceding three-year period. *Id.* at 32.

Analogously, the DCCA has affirmed the Commission's determination that the term "effective date," as it is used in D.C. OFFICIAL CODE § 42-3502.06(e), refers to the date on which a rent increase is implemented, regardless of the date that a corresponding rent ceiling

[10] *See* D.C. OFFICIAL CODE § 42-3501.03(28); 14 DCMR § 4200.7.

adjustment was taken and perfected. United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013), *aff'd* United Dominion, 101 A.3d at 431. In Hinman, the Commission determined that a tenant's challenge to a rent increase based on an improperly perfected rent ceiling adjustment from outside of the statute of limitations was timely because the "effective date" of the rent adjustment was within the statutory three-year period. RH-TP-06-28,728; *see* United Dominion, 101 A.3d at 431. Although a claim of exemption was not at issue in Hinman, the Commission is satisfied that its interpretation of the "effective date" of a rent adjustment in that case is persuasive because both the exempt status of a housing accommodation and the perfection of a rent ceiling adjustment relate to the validity of a rent adjustment that has been timely challenged. *See* Hinman, RH-TP-06-28,728; Lutsko, RH-TP-08-29,149 at 30.[11]

In this case, the Tenant challenged a rent increase that was implemented by the Housing Provider from within a three-year period based on the information claimed in the 1987 filing. The Commission is satisfied that under the plain language of D.C. OFFICIAL CODE § 42-3502.06(e), the ALJ correctly decided that the Tenant can challenge the rent increase because it occurred within three years of her filing of the Tenant Petition. *See* Final Order at 5; R. at 234. Further, based on its review of the record, the Commission is satisfied that the ALJ's determination that the Housing Accommodation is not exempt is supported by substantial evidence and in accordance with the Act. *See* 14 DCMR § 3807.1; Fort Chaplin Park, 649 A.2d

[11] The Housing Provider relies on Cooper v. Bahry, TP 22, 397 (RHC Aug. 16, 1993) for the proposition that a tenant cannot challenge a claim of exemption from outside the three-year statute of limitations. *See* Housing Provider's Brief at 5 (citing Cooper, TP 22, 397 at 4). The Commission is satisfied that the cited language from the Procedural History section of Cooper is *dicta*, and not essential to its holding. *See* Nelson, TP 28,519 at 48 n.33 ("Dicta...is defined in relevant part as...not essential to the decision.") (citing BLACK'S LAW DICTIONARY 485 (8th ed. 2004)); Ponte v. Flasar, TP 11,09 (RHC Jan. 29, 1986) (stating that *dicta* cannot be given the full weight of binding precedent). In Cooper, the Hearing Examiner allowed but did not credit the tenant's hearsay testimony regarding the occupancy of the housing accommodation, finding a lack of substantial evidence to support the tenant's position. TP 22, 397 at 5. Here, the ALJ credited the Tenant's direct knowledge and documentary evidence that the Housing Accommodation was occupied in 1980. *See* Final Order at 3-5; R. at 234-36.

at 1079 n.9. The Tenant testified that the Housing Accommodation was occupied during 1980 by her mother, Rebecca Middlebrook, and other tenants. Hearing CD (OAH Jan. 13, 2015) at 2:23-2:24. The Tenant introduced her mother's 1972 lease agreement into evidence, and testified that her mother lived in unit #2 of the Housing Accommodation until her death in 2009. PX 101; R. at 254-57; Hearing CD (OAH Jan. 13, 2015) at 2:23-2:24.[12] The Commission's review of the record shows that the Housing Provider presented no evidence regarding the occupancy of the Housing Accommodation in 1980, and the Housing Provider acknowledged before the Commission that it is unable to contradict the Tenant's evidence. *See* Hearing CD (RHC June 15, 2016) at 11:18-11:21; 11:41. Therefore, the Commission is satisfied that the Housing Provider did not meet its burden of proving the 1987 Claim of Exemption was not a "misrepresentation." Butler, TP 27,262 at 5 (citing Vista Edgewood Terrace, TP 24, 858 at 12-13; Revithes at 1011-12).

Accordingly, the Commission affirms the ALJ's determination that the claim of exemption for the Housing Accommodation was invalid.

B. Rent Refund Calculation

5. The Order is erroneous to the extent it determined that the Housing Provider received rent from the Tenant for a portion of the period covered by the Petition.

6. The Order is erroneous to the extent that it awarded a rent refund and interest for rent not paid by the Tenant.[13]

The Housing Provider asserts that the ALJ erred when calculating the rent refund award beginning in September 2014 because the increased rent amount of $1,100 was not demanded until March of 2015. *See* Housing Provider's Brief at 8. The ALJ made a finding of fact that the

[12] The Tenant also testified with specificity about the tenants in the three other units of the Housing Accommodation during 1980. Hearing CD (OAH Jan. 13, 2015) at 2:24.

[13] *See supra* n.7.

Tenant's rent was increased in September 2014, and awarded rent refund damages beginning at that time. Final Order at 3, 5-7; R. at 232-34, 236. The Tenant maintains that the increased rent demand was effective in September 2014. *See* Tenant's Brief at 14.

The Commission's standard of review, discussed *supra* at 10, requires the Commission to 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. 14 DCMR § 3807.1; Fort Chaplin Park, 649 A.2d at 1079; Burkhardt, TP 28,270. Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Fort Chaplin Park, 649 A.2d at 1079 n.10 (D.C. 1994); Tenants of 1754 Lanier Place, N.W., RH-SF-15-20,126.[14]

The Commission has consistently determined that, under the Act, a tenant may be awarded a rent refund not only if rent is paid, but also if rent is demanded in excess of the legal amount. *See* Kapusta v. D.C. Rental Hous. Comm'n, 704 A.2d 286, 287 (D.C. 1997). Substantial evidence of a rent demand generally includes, but is not limited to, evidence of a letter notifying a tenant of a forthcoming increase in rent owed. *See, e.g.*, Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (crediting a tenant's "undisputed testimony" regarding rent demand and payment).

[14] The Housing Provider argued before the Commission that the Final Order issued by the ALJ is deficient under the DCAPA. Hearing CD (RHC June 15, 2016) at 11:09-11:12, 11:16-11:17. The Housing Provider specifically pointed to the Commission's decision in Washington v. A&A Marbury LLC, which states: "[i]n order to satisfy the requirements of the DCAPA (1) the decision 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." RH-TP-11-30,151 (RHC Dec. 27, 2012) at 19 (citing Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984)). The Housing Provider, however, did not raise this issue in the Notice of Appeal nor in its appellate brief to the Commission. Moreover, for the reasons stated herein, the Commission is satisfied that substantial evidence exists to support the findings of fact and conclusions of law made by the ALJ, as required by the DCAPA as well as the Commission's standard of review. D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 3807.1.

The Commission's review of the record reveals substantial evidence to support the ALJ's finding of fact that the rent increase was demanded in September 2014. 14 DCMR § 3807.1. The Tenant testified that she received two rent demand letters: the first demanded the increased rent amount in March of 2015, and the second, received shortly after the first, informed her that the rent would instead be increased effective September 2014. Hearing CD (OAH Jan. 13, 2015) at 2:09-2:11. Although the Housing Provider's Brief argues that rent was not demanded until March 2015, it fails to mention the second letter that the Tenant testified she received, which demanded rent on September 2014. *See* Housing Provider's Brief at 8. The Commission further notes that the Housing Provider did not contest the date of the rent demand until the Notice of Appeal to the Commission or introduce any evidence to the contrary at the OAH hearing. Notice of Appeal at 2. Because no rent demand letters were admitted into evidence, the ALJ relied on the Tenant's testimony, unchallenged at the evidentiary hearing, that the rent increase was demanded for the month of September 2014. *See* Final Order at 3, 5-7; R. at 232-34, 236. Therefore, the Commission is satisfied that the ALJ was entitled to credit the Tenant's testimony that the increased rent demand was effective in September 2014. *See* Burkhardt, TP 28,270; Tenants of 1754 Lanier Place, N.W., RH-SF-15-20,126; Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) at 32.

Accordingly, the Commission affirms the ALJ's determination that the calculation of the Tenant's award of overcharged rent should begin in September of 2014.

C. Housing Code Violations

7. The Order is erroneous as there is no evidence in the record that there were housing code violations at the time that the rent was increased on September 1, 2014.

8. The Order is erroneous as there is no evidence in the record that Tenant advised the landlord of ongoing housing code violations.[15]

The Housing Provider asserts that the ALJ erred in finding that the rental unit was not in substantial compliance with the housing code during the time of the rent increase. Housing Provider's Brief at 8-9. The Tenant, however, maintains that the housing code violations represented in the Notices of Violation remained unabated through the time of the evidentiary hearing, and including the date of the rent increase. Tenant's Brief at 15; Hearing CD (OAH Jan. 13, 2015) at 2:43-2:47. The ALJ made a finding of fact that housing code violations existed on April 9 and August 7, 2014, and concluded that "the Tenant proved that ... the rent was increased while the rental unit was not in substantial compliance with the housing regulations." Final Order at 6; R. at 233.

As noted *supra* at 10, the Commission will reverse an ALJ's determination if it is not supported by substantial evidence on the record or in accordance with the Act. However, the Commission will not decide a question on appeal where the issue is moot, in other words, if no relief is available to the party raising the issue. *See, e.g.*, Burkhardt, TP 28,270 at 8 (citing McChesney v. Moore, 78 A.2d 389, 390 (D.C. 1951) (stating that "it is not within the province of appellate courts to decide abstract, hypothetical or moot questions, disconnected with the granting of actual relief or from the determination of which no practical relief can follow")); Nelson, TP 28,519 (holding that invalidating a rent ceiling adjustment on one basis renders

[15] *See supra* n.7.

alternative arguments moot) (citing BLACK'S LAW DICTIONARY at 1029-30 (8th ed. 2004) (defining "moot" as "[h]aving no practical significance; hypothetical or academic")).

D.C. OFFICIAL CODE § 42-3502.08(a)(1) (2012 Repl.) states that "the rent for any rental unit shall not be increased above the base rent unless:

> (A) The rental unit and the common elements are in substantial compliance with the housing regulations, [and]
>
> (B) The housing accommodation is registered in accordance with § 42-3502.05[.]

The conjunctive nature of § 42-3592.08(a)(1)(A) & (B) require that both conditions be met for a rent increase to be proper. *See, e.g.*, Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014) at 33 n.18 (citing Sanders v. Molla, 985 A.2d 439, 442 (D.C. 2009) (explaining the statutory use of the word "and" generally serves a conjunctive function)). Therefore, a rent increase is only lawful if both conditions are met. Nelson, TP 28,519.

As described *supra* at 14-15, the Housing Accommodation's Registration/Claim of Exemption form improperly claimed an exemption from the rent stabilization provisions of the Act, and the September 2014 rent increase was therefore unlawful. *See* D.C. OFFICIAL CODE § 42-3502.05(a). The additional argument presented by the Tenant that the rental until was not in "substantial compliance with the housing regulations" at the time of the increase is therefore unnecessary and can provide no further relief to the Tenant. *See* Burkhardt, TP 28,270 at 8; Nelson, TP 28,519.

Accordingly, the Commission dismisses the Housing Provider's appeal of this issue as moot.

V. CONCLUSION

For the foregoing reasons, the Commission determines that ALJ correctly found that the Housing Accommodation was not exempt from the rent stabilization provisions of the Act. The

Commission also affirms the rent refund calculation as being supported by substantial evidence. Finally, as the registration for the Housing Accommodation has been deemed improper, the Commission dismisses the issue of housing code violations as moot. Accordingly, the Final Order is affirmed.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CLAUDIA L. McKOIN, COMMISSIONER

CONCURRENCE:

SZEGEDY-MASZAK, CHAIRMAN, concurring. In its discussion of Part A, addressing issues 1 through 4 on appeal, *supra* at 10-15, the Commission affirms the Final Order with regard to applicability of the statute of limitations to claims of exemption. The Commission addresses those issues on the legal grounds advanced by the parties in this appeal and in accordance with the ALJ's analysis below. *See* Final Order at 4-5; R. at 234-35; Notice of Appeal at 1-2; Housing Provider's Brief at 3-7; Tenant's Brief at 6-11. I agree with the Commission's legal conclusion on those grounds and therefore join its decision fully.

Nonetheless, I write separately to emphasize, as the Commission notes *supra* at n.9, that the Final Order can be affirmed on narrower grounds. The Commission's regulations specifically require that:

> Each housing provider who files a Registration/Claim of Exemption form under the Act shall, prior to or simultaneously with the filing, post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the 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 (2004); Levy v. D.C. Rental Hous. Comm'n, 126 A.3d 684, 387-90 (D.C. 2015); *see* Klingle Corp. v. Burkhardt, TP 28,270 (RHC Apr. 29, 2016) (affirming final order where hearing examiner determined amended registration form was not posted or mailed and declining to address alternative grounds of timeliness). Moreover, as the Commission notes in its decision, exemption from rent stabilization is an affirmative defense that must be proven by a housing provider. *See supra* at 12; Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990); Revithes v. D.C. Rental Hous. Comm'n, 536 A.2d 1007, 1016 (D.C. 1987).

Based on my review of the record, I am not satisfied that there is any substantial evidence that would support a finding that the Tenant was given notice "prior to or simultaneously with" the Housing Provider's filing of a Registration/Claim of Exemption Form on April 29, 2014. *See* 14 DCMR § 4101.6; Levy, 126 A.3d 684 at 387. In the Tenant Petition Complaint Details, the Tenant alleged that she "was never notified or provided disclosures that the Housing Accommodation may be exempt from rent stabilization." R. at 10. At the evidentiary hearing before OAH, the Housing Provider presented no evidence to meet its burden of proving notice. *See generally* Hearing CD (OAH Jan. 13, 2015); Hearing CD (OAH Feb. 2, 2015);[1] Levy, 126 A.3d at 387; Goodman, 573 A.2d at 1297. To the contrary, the Tenant testified before the ALJ that she did not receive notice of an exemption when the current Housing Provider purchased the property in 2013. Hearing CD (OAH Jan. 13, 2015) at 2:11-2:14; *see* 14 DCMR § 4103.1(c) (2004);[2] Levy, 126 A.3d at 387.

---

[1] At the Commission's hearing, counsel for the Housing Provider stated that she believed there was testimony in the record that notice had been provided. Hearing CD (RHC June 15, 2016) at 11:13. The Commission's review of the record reveals that this statement is incorrect. *See generally* Hearing CD (OAH Feb. 2, 2015).

[2] 14 DCMR § 4103.1 provides, in relevant part, the following:

> Each housing provider of a rental unit or units covered by the Act shall file an amendment to the Registration/Claim of Exemption form provided by the Rent Administrator in the following circumstances: . . .

An ALJ's findings must be based on substantial evidence on the record. *See* D.C. OFFICIAL CODE § 2-509(e) (2012 Repl.); 14 DCMR § 3807.1; Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.9 (D.C. 1994); Burkhardt, TP 28,270; Tenants of 1754 Lanier Place, N.W. v. 1754 Lanier, LLC, RH-SF-15-20,126 (RHC Dec. 2, 2015). As counsel for the Housing Provider noted at the Commission's hearing, the ALJ did not make any findings of fact or conclusions of law regarding notice of the exemption. Hearing CD (RHC June 15, 2016) at 11:14-15; *see* Final Order at 2-6; R. at 33-37. Nonetheless, the Commission may affirm a final order where there is no "substantial doubt . . . whether the agency would have made the same ultimate finding[.]" LCP, Inc. v. D.C. Alcoholic Beverage Control Bd., 499 A.2d 897, 903 (D.C. 1985). Because there is no substantial evidence on the record that the Housing Provider notified the Tenant that the Registration/Claim of Exemption Form was filed, I am not satisfied that the Housing Provider met its burden of proof to establish an exemption. *See* Levy, 126 A.3d at 387.

Accordingly, I would affirm the Final Order on these grounds.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823, final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1, 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."

(c) Within thirty (30) days after any change in the ownership or management of a registered housing accommodation[.]

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-14-30,571 was mailed, postage prepaid, by first class U.S. mail on this **15th day** of **July, 2016,** to:

William Mundy, Esq.
Office of the Tenant Advocate
2000 14th Street, N.W., Suite 300N
Washington, DC 20009

Jonathan Levy, Esq.
Maggie Donahue, Esq.
Legal Aid Society of the District of Columbia
1331 H Street, N.W., Suite 350
Washington, DC 20005

Richard W. Luchs, Esq.
Debra F. Leege, Esq.
Greenstein, Delorme & Luchs, PC
1620 L Street, N.W.
Washington, DC 20036

LaTonya Miles
Clerk of the Court
(202) 442-8949