DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-15-30,658

In re: 4100 East Capitol Street N.E., Apt. D-44

Ward Seven (7)

JEROME BETTIS
Tenant/Appellant

v.

HORNING ASSOCIATES
Housing Provider/Appellee

DECISION AND ORDER

March 2, 2017

EPPS, COMMISSIONER. This case is on appeal to the Rental Housing Commission ("Commission") from a final order issued by the Office of Administrative Hearings ("OAH"), based on a petition filed in the Rental Accommodations Division ("RAD") of the 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, 1 DCMR §§ 2921-2941, 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. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of RACD were transferred to the RAD within 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 April 29, 2015, Jerome Bettis ("Tenant"), residing in Unit D-44 of the housing accommodation located at 4100 East Capitol Street, N.E. ("Housing Accommodation"), filed tenant petition 2015-DHCD-TP 30,658 ("Tenant Petition") with the RAD against Horning Associates ("Housing Provider"). *See* Tenant Petition at 1-4; Record ("R.") at 10-13. In his Tenant Petition, the Tenant asserted that the Housing Provider violated the Act as follows:

(1) The housing accommodation is not properly registered with the RAD;[2]

(2) Tenant's rent was increased in an amount higher than allowed by the Act;

(3) There was no proper 30-day notice of rent increase;

(4) Services and/or facilities were substantially reduced; and

(5) Housing Provider retaliated against Tenant in violation of the Act.

Id. at 2-3; R. at 11-12.

On March 29, 2016, Administrative Law Judge Margaret A. Mangan ("ALJ") held a hearing on this matter.[3] Hearing CD (OAH Mar. 29, 2016) at 09:40-09:43. On August 2, 2015, the ALJ issued a final order dismissing the Tenant Petition. Bettis v. Horning Assocs., 2015-DHCD-TP 30,658 (OAH Aug. 2, 2015) ("Final Order") at 1-16; R. at 172-89. The ALJ made the following findings of fact in the Final Order:[4]

1. The Housing Accommodation, located at 4100 East Capitol Street, NE, has a total of 107 rental units in eight building, each of which as four floors.

[2] This claim was withdrawn by the Tenant during the evidentiary hearing. Hearing CD (OAH March 29, 2016) at 9:50-9:52.

[3] The OAH scheduled the matter for mediation on July 17 and December 16, 2015, both of which proved unsuccessful. Final Order at 1; R. at 189. On March 4, 2015, OAH issued a Case Management Order ("CMO") setting the matter for a March 29, 2016 hearing. CMO at 1; R. at 20.

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

2. Tenant Jerome Bettis has rented Unit D-44 from Respondent Horning Brothers since August 2008. His unit has two bedrooms and is on the top floor, facing east. He lives in Unit with his daughter.

3. Tenant filed this tenant petition on April 29, 2015.

A. Services and Facilities

4. When Housing Provider has a message for all tenants at the Housing Accommodation, written notices are placed on the tenants' doors. If the message is confidential, a worker slides the paper under the door. Tenant Bettis objects to this practice, suggesting that Housing Provider hand him the notice or mail it to him.

5. Tenant has a parking pass for a parking lot adjacent to the building. Housing Provider changed some parking rules for new tenants that did not affect Mr. Bettis' parking privileges.

6. Tenant has had conflicts with parents of students at a neighboring school, who park in the Housing Accommodation's lot without permission. Housing Provider hired a security company to monitor those who park in the lot and installed rolling gates. They asked police to have a presence in the area. None of the efforts satisfied Tenant who blames Housing Provider for the lack of safety in the lot and for allowing non-residents to park there.

7. On September 26, 2008, within a month of his move in the bathtub in Tenant's unit was resurfaced. Respondent's Exhibit RX 210.

8. In June 2011, the floor in the kitchen of Tenant's unit was replaced and caulking was applied. RX 211.

9. On June 21, 2012, Tenant reported that there was no air conditioning in his unit. The system was check and reset that day. RX 208.

10. On September 25, 2012, Tenant reported that his garbage disposal was not working. The next day, September 26, the disposal was reset, and a sink stopper was installed. RX 207.

11. On November 14, 2012, Tenant reported to Hosing Provider that his bathroom sink was stopped up. That day, Housing Provider's worker unclogged the sink. RX 207.

12. Housing Provider moved from a paper tickets [sic] for Tenant requested repairs to an electronic system sometime in 2013. RX 213.

13. At times, Tenant has refused workers' access to his rental unit unless the workers produce identification cards, which not all workers have. Work has been delayed because of Tenant's insistence on an ID.

14. On April 3, 2015, Tenant signed a consent form permitting the Department of Consumer and Regulatory Affairs (DCRA) to make a proactive inspection of his unit. RX 215.

15. On April 9, 2014, an inspector from DCRA inspected Tenant's unit and common areas. The inspector issued a Notice of Violation (NOV) for a crack in the glass on the entry door to the building and for missing treads on the stairs. Petitioner's Exhibit (PX) 34. The broken glass on the door was repaired almost immediately. The stair treads were repaired on March 1, 2016. RX 219.

16. In the bathroom of Tenant's unit, Housing Provider replaced some tiles at Tenant's request, but the new tiles do not match the old ones, to Tenant's dissatisfaction. The bathtub was peeling and unsightly at some point after it had been re-glazed in 2008. On December 21, 2015, Housing Provider replaced the bath tub. It would have been replaced sooner, but Tenant refused access to workers who could not produce an ID.

17. The housing accommodation has a laundry room that Tenant considers unsafe. For some time, the drainage system did not work properly. On December 12, 2015, Tenant slipped and almost fell. Housing Provider tried to solve the problem on a few occasions, with different methods, including snaking the drain. Those efforts proved unsuccessful. On February 2, 2016, a NOV was issued for an obstructed drain in the laundry room. PX37. On March 7, 2016, the laundry room drains were cleaned and new pipes installed, resolving the problem.

18. Tenant and his daughter have been bothered by smoke in the building. In response to their complaints, "No Smoking" signs are posted in the lobby. On June 24, 2015, Tenant sent a letter to Housing Provider complaining about air quality in the building. The air circulation system was cleaned, but not to Tenant's satisfaction. In January 2016, a fire inspector visited the building at Tenant's request. The inspector did not smell the smoke Tenant and his daughter had complained about.

19. The intercom system at the housing accommodation did not work for at least a year. The mail carrier has a key and does not need to use the intercom to access the building. Tenant Bettis is the only resident who complained about the intercom, but he did not explain how its absence affected him. On February 2, 2016, a NOV was issued for the intercom not functioning adequately. PX 35. The intercom was repaired on Marcy 28, 2016, the day before the hearing.

20. The common area in Tenant's building has a large window, which has not been cleaned since Tenant moved in.

B. Rent Increases

21. Tenant's rent was increased in 2013, 2014, and 2015. Each of the Housing Provider's Notices to Tenants of Adjustment in Rent Charged (notice of rent increase) was sent at least 30 days before the effective date of the increase. Each included the current rent, dollar adjustment in rent charged, percentage adjustment in the rent charged, the new rent charged, and the effective date of the rent increase. The basis for each rent increase was the applicable CPI-W in each year.

22. Tenant was served with a notice of a rent increase, from $1,170 to $1,196 on March 19, 2013, for a 2.2% rent increase effective on May 1, 2013. RX 203.

23. Tenant was served with notice of a rent increase, from $1,175 to $$1,191 on March 25, 2014 for a 1.4% rent increase effective on May 1, 2014. RX 204.

24. Tenant was served with notice of a rent increase, from $1,180 to $1,198 on March 24, 2015, for a 1.5% rent increase effective on May 1, 2015. RX 205.

25. The Certificates of Notice to RAD of Adjustment in Rent Charged, filed at the same time as the notices of rent increase, certified that the rental units and common areas were in substantial compliance with the Housing Code. RXs 200, 201, 201.

Final Order at 2-5; R. at 185-88.

The ALJ made the following conclusions of law in the Final Order:[5]

A. Statute of Limitations

1. The Act provides a three year statute of limitations for challenging a rent adjustment. D.C. Official Code § 42-3502.06(e). In this case, with a tenant petition field on April 29, 2015, I may consider claims back to April 28, 2012, but no earlier than the 2012 date. The facts include requests for repairs and responses before the 2012 [sic] to demonstrate Housing Provider's response to Tenant's requests.

B. Services and Facilities

2. Tenant alleges that problems with parking, broken glass, missing treads on the stairs, peeling bathtub, unsafe laundry room, cigarette smoke in the building,

[5] 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 fo reference.

malfunctioning intercom, and an obstructed laundry room drain were reductions in series and facilities, supporting rent refunds.

3. The Rental Housing Act provides that where "related services or related facilities supplied by a housing provider for a housing accommodation ... are substantially increased or decreased, the [administrative law judge] may increase or decrease the rent charged, as applicable to reflect proportionally the value of the change in services or facilities." D.C. Official Code § 42-3502.11.

4. The assessment of a tenant's claims for reductions of services or facilities requires a three-part analysis. Karpinski v. Evolve Mgmt., RH-TP-09-29,590 (RHC Aug. 19, 2014); Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2010). First, the tenant must establish that a "related" service or facility was "substantially" reduced. D.C. Official Code § 42-3509.01(a). Although the Act does not state what constitutes a substantial reduction in services, the District of Columbia Court of Appeals has applied the Act's definition of a "substantial violation" as one measure of a substantial reduction in services. This requires a housing condition in violation of a statute or regulation that "may endanger or materially impair the health and safety of any tenant or person occupying the property." Parreco v. D.C. Rental Hous. Comm'n, 885 A.2d at 337 (quoting D.C. Official Code § 42-3501.03(35)). The Rental Housing Commission has held that a determination of whether a reduction is "substantial" is "a function of the 'degree or [sic] loss'. . . substantiated by the length of time that the tenants were without the service." Karpinski v. Evolve Mgmt., RH-TP-09-29,590 at 19 (quoting Newton v. Hope, TP 27,034 (RHC May 29, 2002)). The regulations also provide a list of 14 housing code violations that are deemed substantial as a matter of law, which means the fact that they exist makes them substantial without additional evidence. 14 DCMR [§] 4216.2. In addition, a large number of minor violations can cumulatively amount to a substantial reduction. *Id.*

5. Second, the tenant must present "competent evidence of the existence, duration, and severity of the reduced services." Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005) at 11 (citations omitted).

6. Finally, a tenant must show that the housing provider had knowledge of the alleged reduction in services and that the tenant gave the housing provider reasonable access to the premises and reasonable time to make repairs. Id. If a tenant fails to prove any of the three elements, the entire claim will fail. Karpinski v. Evolve Mgmt., RH-TP-09-29,590 at 19; Kuratu v. Ahmed, Inc., RH-TP-07-28,985 at 24.

7. The remedies for tenants who prove that services or facilities were reduced are set forth in D.C. Official Code § 42-3509.01 (a). One remedy is a rent refund.

The other remedy is a rent rollback. However, as the repairs were made before this Final Order was issued, there is no basis for a rent rollback.

8. When facilities are reduced or eliminated, a housing provider is required to reduce the rent for the housing accommodation by an amount which reflects the monthly value of the decrease in related series or facilities. D.C. Official Code § 42-3502.11; 14 DCMR [§] 4211.6. It is not necessary to assess the value of the reduction in services and facilities with "scientific precision," but I may instead rely on my "knowledge, expertise and discretion as long as there is substantial evidence in the record regarding the nature of the violation duration, and substantiality." Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000) at 8 (citing Calomiris v. Misuriello, TP 4809 (RHC Aug. 30, 1982) and Nicholls v. Tenants of 5005, 07, 09 D St., S.E., TP 11,302 (RHC Sept. 6, 1985).

Problems with parking

9. Tenant expressed frustration with the parking conflicts and testified that the parking lot has safety concerns. The description, however, does not include the specificity needed to meet his burden of proof. What the alleged safety issue was, how it was a related service, and how housing provider was responsible were not explained. Nor was the duration or severity proven as required. *See* Jonathan Woodner Co., TP 27,730 at 11. Hence, Tenant's claim that the parking problems constituted a substantial reduction in a service is denied.

Broken glass and Missing Treads on Stairs

10. An inspector from the Department of Consumer and Regulatory Affairs issued an NOV to Respondent on April 8, 2014, citing cracked glass on the entry door to the building and missing treads on the stairs as violations. PX 34. The glass was repaired soon after the NOV was issued.

11. The regulation applicable to the stairs states: "1. Stairways, steps, and porches shall be firm, and the walking surfaces shall be sufficiently smooth so as to be readily cleaned and provide safe passageways free of tripping hazards. 2 Treads shall be reasonably level and in any flight evenly spaced." 14 DCMR [§] 708. The stair treads were repaired on March 1, 2016, RX 219. Tenant has not established that this reduction in a maintenance service was substantial before it was abated. *See* Kemp v. Marshall Heights Cmty. Dev., TP 24, 786.

Peeling bathtub

12. Within a month of his moving in, Tenant's bathtub was resurfaced. On December 21, 2015, the bathtub was replaced. In the interim, Tenant complained that the tub was peeling and was unsightly. The evidence

presented proves Tenant's dissatisfaction with the condition of the bathtub, but it does not prove a substantial reduction in a related service or facility or when Tenant complained about it.

Laundry room

13. Tenant complained about water in the laundry room, and poor drainage. Housing Provider intervened after his first complaint in an effort to improve the drainage, with efforts, including snaking the drain, which proved ineffective. Only when the laundry room drains were cleaned and new pipes installed, was the problem resolved on March 7, 2016, a month after the Notice of Violation was issued. The early interventions combined with a solution within a month of the NOV indicate that Housing Provider responded in a reasonable time. Hence, the claim for a remedy for the clogged laundry room drain is denied.

Cigarette Smoke in Building

14 Tenant and his daughter complained bitterly about smoke in the building. In response, No Smoking signs were posted in the common areas, and the ventilation system in the building was cleaned. A fire department inspector visited the hosing accommodation, but was not able to detect the smell Tenant had complained about. Without corroboration from the fire official, or objective evidence of a problem caused by smoke, Tenant has not established that a "related" service or facility was "substantially" reduced. D.C. Official Code § 42-3509.01(a).

Malfunctioning Intercom

15. Tenant also complains of a malfunctioning intercom, which was repaired six weeks after the NOV was issued. Before the time, Tenant had complained about the intercom, but the record lacks evidence of how the absence was a substantial reduction. Mail was not delayed. Tenant and his guests were not denied access to the building.

Notices, mismatched tiles, and dirty window

16. Tenant complained that notices were posted on his door, or slid under the door. That delivery system is not acceptable to him but it is not a violation of the Act. He also complained that tiles in the bathroom were replaced with tiles that did not match and that the front window to the building had not been cleaned. Aesthetically, Tenant's unit and the common area would be more pleasing with matching tiles and a clean window, but their current conditions do not violate the Act or regulations.

C. Rent Increases

17. The Rental Housing Act regulates the rent for each rental unit under the Rent Stabilization Program by setting terms and conditions for every increase or decrease in rent for covered units. 14 DCMR [§] 4600 [sic]. Under the Act and regulations, a housing provider is permitted to increase a tenant's rent once every 12 months by an amount authorized by the Act. The most common type of rent increase is known as an adjustment of general applicability or a "CPI-W" increase. The adjustment, which is determined by the Rental Housing Commission (RHC), is based on the "Consumer Price Index for Urban Wage and Clerical Workers (CPI-W), Washington-Baltimore, D.C-MD-VA-WV, All Items." D.C. Official Code § 42-3502.06(b). The adjustment of general applicability allows housing providers to increase rents annually in order to keep up with inflation. It is the RHC's duty to determine the amount of the general applicability adjustment annually and publish it by March 1 of each year. *See id.* And D.C. Official Code § 42-3502.02(a)(3). The adjustment is published annually in the D.C. Register with an effective date of May 1. For most tenants, the maximum amount their rent can be increased is the CPI-W percentage plus 2%, but not more than 10% of the current rent charged. D.C. Official Code § 42-3502.06(b). For tenants who are certified by the Rent Administrator to be elderly or disabled, the maximum increase in rent charged is the CPI-W percentage only. *Id.*

18. To increase a Tenant's rent, the Act requires that a Housing Provider: (a) provide the tenant with at least 30 days written notice; (b) certify that the unit and common elements are in substantial compliance with the housing regulations; (c) provide the tenant with a notice of rent adjustment filed with the RAD; (d) provide the tenant with a summary of tenant rights under the Act; and (e) simultaneously file with the RAD, a sample copy of the notice of rent adjustment along with an affidavit of service. D.C. Official Code § 42-3502.08(f); 14 DCMR [§] 4205.4. A rent adjustment is not deemed properly implemented unless the notice contains: (1) a statement of the current rent; (2) the increased rent; (3) the date upon which the adjusted rent shall be due; and (4) the date and authorization for the rent adjustment. D.C. Official Code § 42-3502.08(f); 14 DCMR [§] 4205.4.

19. The CPI-W in 2013 was 2.2%, 60 D.C. Reg. 1866 (Feb. 15, 2013). In 2014, the CPI-W was 1.4%, 61 D.C. Reg. 1378 (Feb. 14, 2014), and in 2015, it was 1.5%, 62 D.C. Reg. 2201 (Feb. 13, 2015).

20. Respondent's Exhibits 203, 204, and 205 prove that Housing Provider met the 30 day notice requirement for rent increases in 2013, 2014, and 2015. RX's 200, 201, and 202 prove that simultaneously with the notice of rent increase, a copy was sent to RAD. Further, each of the rent increases was taken pursuant to the CPI-W, without an additional 2%.

21. Next, Tenant alleges that his rent was increased when the rental unit was not in substantial compliance with the housing code in violation of D.C. Code § 42-3502.08 (a)(1)(A). Although an inspector issued a Notice of Violation when a proactive inspection was performed in 2014, the violations were not substantial, and hence do not invalidate the rent increases.

D. Retaliation

22. Tenant alleges that Housing Provider retaliated against him by not eliminating the smoke smell at the housing accommodation and by imposing new parking rules. The new parking rules, however, do not apply to Mr. Bettis.

23. "Retaliatory action,' is action intentionally taken against a tenant by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 [D.C. Official Code § 42-3505.02] of the Act." 14 DCMR § 4303.1. [alteration original]

24. The determination of retaliatory action requires a two-step analysis which is outlined in the provisions of the Act and the regulations. First, it must be determined whether the housing provider committed an act that is considered retaliatory under D.C. Official Code § 42-3505.02(a), in response to protected tenant activity. 14 DCMR [§] 4303.4.

25. Protected tenant activities are: [quotation of D.C. OFFICIAL CODE § 42-3505.02(b) omitted].

26. Retaliatory acts include, [quotation of D.C. OFFICIAL CODE § 42-3505.02(a) omitted].

27. Second, a tenant is entitled to a presumption of retaliation if it is established that the housing provider's conduct occurred within six months of the tenant performing one of the six protected acts listed in D.C. Official Code § 42-3505.02(b). If retaliation is presumed, then the burden shifts to the housing provider to provide clear and convincing evidence that its actions were not retaliatory. 14 DCMR [§] 4303.4; *See Youssef v. United Mgmt. Co., Inc.*, 683 A.2d 152, 155 (D.C. 1996). In the absence of a presumption of retaliation (i.e. the tenant did not participate in a protected act within six months of the alleged retaliatory conduct), a tenant must prove retaliation by a preponderance of the evidence.

28. Tenant testified that Housing Provider's refusal to eliminate the smoke smell was retaliatory, but did not indicate what protected act it was against. Hence, Tenant did not prove retaliation as that term is defined in the Act.

Final Order at 5-12; R. at 178-185.

On August 17, 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:

A. Petitioner subject to Unethical and Illegal tactics by District of Columbia (DC) Government Agencies Who have enforcement and adjudication responsibilities for Rental housing function.

B. What is the impact of the judge implementing a time restriction in the middle of a hearing on petitioner's due process?

C. OAH and Administrative Law Judge failed to execute exhibit number PX 001, Witness List.

D. Petitioner takes exceptions to IV. Findings of Fact, A. Services and Facilities

E. Petitioner's repudiation of Final Order claims position.

F. Retaliation

See Notice of Appeal at 4, 7, 15, & 20.[6] A hearing was scheduled for November 9, 2016, and neither party filed a brief on appeal. On November 4, 2016, the Commission granted a continuance requested by the Tenant and rescheduled the hearing for December 14, 2016. Order on Motion for Continuance (RHC Nov. 4, 2016).

On December 14, 2016, when the Tenant did not appear for the hearing, the Clerk of the Court contacted him and was informed by the Tenant that he had not received notice of the scheduled hearing. The Commission then convened the hearing and, with the consent of the counsel for the Housing Provider, the Commission orally, *sua sponte* continued the hearing. Hearing CD (RHC Dec. 24, 2016) at 2:16 pm. On December 15, 2016, the Commission issued an order rescheduling the hearing for January 24, 2017. Order Rescheduling Hearing (RHC December 15, 2016).

[6] The Commission recites the issues as stated in headings used by the Tenant t in his Notice of Appeal.

On January 13, 2017, Tenant filed a motion requesting that the Commission issue subpoenas to secure the appearance of several witnesses ("Motion for Subpoenas"). On January 17, 2017, the Commission issued an order denying the Tenant's motion for subpoenas.[7] Order on Motion for Subpoenas (RHC January 17, 2017).

The Commission held its hearing on this appeal on January 24, 2017. The Tenant appeared on behalf of himself, and the Housing Provider appeared through its counsel of record, Timothy Cole, Esq. Hearing CD (RHC Jan. 24, 2017) at 2:09:03.

II. ISSUES ON APPEAL[8]

A. Whether ALJ abused her discretion in failing to rule on Tenant's proposed witness subpoena requests in violation of 1 DCMR §§ 2824 and 2934.

B. Whether the Petitioner's prosecution of his petition was improperly interfered with by any D.C. Government agency responsible for the enforcement and adjudication of Rental Housing functions.

IV. DISCUSSION

A. Whether ALJ abused her discretion in failing to rule on Tenant's proposed witness subpoena requests in violation of 1 DCMR § 2824 and 2934.

Tenant contends that the Administrative Law Judge erred by not granting his request to subpoena witnesses for the March 29, 2016, evidentiary hearing. Notice of Appeal at 7. The Commission's review of the record reveals the following items that relate to the Tenant's

[7] The Commission's rules prohibit the Commission from issuing subpoenas for potential witnesses to testify on appeal. 14 DCMR § 3807.5.

[8] The Commission notes that the Tenant's twenty-four page Notice of Appeal, filed *pro se*, enumerates seventeen issues of fact and law, and discusses six "items" labeled A-F, several of which contain numerous sub-items or discuss various, purported factual and legal errors. *See supra* at 11 & n.6. The Commission, in its discretion, and "mindful of the mindful of the important role that *pro se* litigants play in the enforcement of the Act," Goodman v. D.C. 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).

request: (1) a CMO[9] issued by the ALJ which discusses the issuance of subpoenas; (2) Tenant's written request to subpoena a total of eight witnesses ("Motion for Subpoenas");[10] and (3) an exchange between the ALJ and the Tenant that took place at the beginning of the evidentiary hearing concerning the Tenant's subpoena request.[11] The record shows that, at the beginning of the March 29th evidentiary hearing, the Tenant inquired of the ALJ about the status of his Motion for Subpoenas and his ability to call witnesses during the hearing. Hearing CD (OAH March 29, 2016) at 10:26:49. The record indicates that the ALJ informed the Tenant that his subpoena requests would be addressed during the hearing. Hearing CD (OAH March 29, 2016) at 10:27:35. However, the Commission's review of the record does not indicate that the ALJ ruled on the Tenant's request to subpoena witnesses. *See generally* Volume I Record Docket Sheet. Nor does the record include testimony from any of the witnesses the Tenant sought to subpoena, other than the Tenant's adult daughter, who also resided in the housing unit during the period that gave rise to the petition. *See generally* Hearing CD (OAH Mar. 29, 2016).

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

> The Commission shall reverse final decisions of the [Office of Administrative Hearings] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the [Office of Administrative Hearings].[12]

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[9] *See supra* n.3.

[10] See Emergency Motion to Effectuate Subpoena for Witnesses and Ruling on Motion for Summary Judgment, filed March 24, 2015; R at 140-44.

[11] Hearing CD (OAH Mar. 29, 2016) at 10:26-10:28.

[12] *See supra* n.1 regarding the transfer of jurisdiction over hearings from the RAD to OAH.

See 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. D.C. 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).

OAH rules provide, for subpoena requests in Rental Housing cases, that "the Clerk shall issue no more than three subpoenas to the tenant side . . . under subsection 2824.5 to compel (t)he appearance at a hearing of any witnesses, including housing inspectors, with knowledge of conditions, repairs, or maintenance in a party's rental unit or any common areas for the three year period immediately before the filing of the petition with the Rent Administrator." 1 DCMR § 2934.1(a). All other subpoena requests "for the appearance of witnesses and production of documents at a hearing shall only be issued by an Administrative Law Judge" and "unless otherwise provided by law or order of an Administrative Law Judge, any request for a subpoena shall be filed no later than five calendar days prior to the hearing." 1 DCMR § 2824.1 & .4.

The record shows that on March 24, 2015 the Tenant filed his Motion for Subpoenas,[13] which plainly states that the Tenant sought to subpoena eight witnesses to provide testimony at the hearing. R. at 140-41. The Commission reviews an administrative judge's decision to grant or deny a subpoena for abuse of discretion. *See* Jones v. D.C. Dep't of Emp't Servs., 451 A.2d 295, 297 (D.C. 1982). Nonetheless, where the Commission's review of the record reveals that no order or ruling was issued on the Tenant's request for Subpoena, the record provides the Commission with no findings of fact or conclusions of law on which to base its review. Consequently, the Commission is unable to determine whether the decision not to grant the Tenant's subpoena request was predicated on "some valid ground," or was otherwise not an abuse of discretion. *See* 14 DCMR § 3807.1; *cf.* Bennett v. Fun & Fitness of Silver Hill, Inc., 434 A.2d 476, 478-79 (D.C. 1981) (finding an abuse of discretion where the trial court's order denying appellant's motion to amend was "not accompanied by a statement of reasons".); *see also* D.C. OFFICIAL CODE § 2-509(e); Butler-Truesdale, 945 A.2d at 1171-72; Palmer, RH-TP-15-30431. Further, the Commission cannot regard the failure to rule on the Tenant's subpoena request as being harmless, as it potentially deprived the Tenant of the opportunity to litigate the relevance of presenting the witness testimony, thereby foreclosing the possibility of obtaining any meaningful review of ALJ's decision. *Cf.* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014) (Commission error in stating deferential standard of review was harmless where subsequent analysis effectively *de novo*); Tenants of 1754 Lanier Pl., N.W. v. 1754 Lanier, LLC, RH-SF-15-20,126 (RHC Apr. 26, 2016) (error in misstating necessary factors was harmless where subsequent analysis contained findings of fact

[13] As discussed infra at 18-21, the Tenant asserts that staff of the OAH interfered with his ability to litigate his case, including by refusing to allow him to file a request for subpoenas. *See* Notice of Appeal at __. There is an indication in the record that the Tenant initially attempted to file his request for subpoena with the OAH Clerk on March 21, 2016. R at 137. Nonetheless, the Commission is satisfied that the Motion for Subpoenas was timely filed five calendar days before the hearing, as required by OAH's rules. *See* 1 DCMR § 2824.4

and conclusions of law on all necessary issues); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.15 (defining "harmless error" as "[a]n error which is trivial . . . and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case") (quoting BLACK'S LAW DICTIONARY 646 (5th ed. 1975)).

Accordingly, the Commission determines that it was an abuse of discretion for the ALJ to fail to rule on the Tenant's Motion for Subpoenas, and thus remands to OAH on this issue, with instructions to issue an order ruling on the Tenant's Motion for Subpoenas in accordance with 1 DCMR §§ 2824 & 2934. *See* 14 DCMR § 3807.1; *see also* Dada v. Children's Nat'l Med. Ctr., 715 A.2d 904, 908 (D.C. 1998) (remanding for a ruling on a discovery motion that was never ruled upon stating that it would not remand "if the trial court's decision on the discovery motion were a foregone conclusion.").

On remand, if the ALJ grants the Tenant's Motion for Subpoenas with respect to any of the witnesses requested, the Commission further instructs the ALJ to hold an evidentiary hearing limited to the testimony of those witnesses, and to issue new or revised findings of fact and conclusions of law based on such witness testimony as may be presented.[14]

In light of the Commission's remand of this issue to OAH, the Commission will not at this time address the legal merits of any of the other issues raised by the Tenant in this appeal related to the evidence on the record, the ALJ's findings of fact, and the ALJ's conclusions of law. The Commission's remand with respect to subpoenas may result in additional evidentiary proceedings leading to new or revised findings of fact and conclusions of law regarding the legal merits of the remaining issues in this appeal. Furthermore, additional legal issues may be raised

[14] The Commission also observes that the ALJ failed to rule on the Opposition to Respondent's Motion to Accept Opposition to Emergency Motion to Cease and Desist and Request for Summary Judgment Nunc Pro Tunc. If it becomes necessary to revisit the issue raised by the summary judgment motion, the ALJ should decide address this matter on remand.

on appeal in event of further OAH proceedings. In its discretion and in the interests of judicial economy and efficiency, the Commission has determined that all legal issues arising in this appeal will more fully and efficiently be addressed once the OAH record is complete and final.

B. Whether the Petitioner's prosecution of his petition was improperly interfered with by any D.C. Government agency responsible for the enforcement and adjudication of Rental Housing functions.

On appeal, the tenant argues that he "was forced to extraordinary measures and confronted with egregious tactics by DC agencies" in his efforts to prosecute his claims. Notice of Appeal at 5. Tenant argues "[t]he District of Columbia government agencies ha[ve] a history of engaging in a pattern and practice of violating [Tenant's] rights to due process and equal treatment in [Office of A]dministrative [H]earing[s] and the D.C. Superior Court." Notice of Appeal at 6. These arguments appear to stem from the Tenant's claim of his discontent with the DCRA housing inspectors scheduling procedures as well as various Office of Administrative Hearings procedures. In addition, the Tenant argues for the first time on appeal, that he "encountered and confronted extreme legal duress" by the "Administrative Law Judge" during the first and second mediation sessions. Specifically, the Tenant asserts that the Administrative Law Judge "demonstrated extreme prejudice and bias" toward him during the mediations below. Notice of Appeal at 5.

The statutory jurisdiction of the Commission is limited to deciding appeals brought by a party before the Commission from decisions of the Rent Administrator or Office of Administrative Hearings under the Act. D.C. OFFICIAL CODE §§ 2-1831.16(b); 42-3502.02(a)(2); 1829 Kalorama Rd. Tenant Ass'n v. Estate of Fletcher, RH-RP-00017 (RHC July 5, 2016). Thus, the Commission is without jurisdiction to grant relief from alleged errors arising out of the practices of DCRA, other District agencies, or the Superior Court of the District of Columbia. Pierre–Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000).

Under OAH rules, ALJ's who serve as mediators do not rule on or render a decision on the underlying disputes. 1 DCMR § 2815.7.[15] Rather, mediation is an "informal negotiation" in which "[n]o party may be compelled to accept a settlement or other resolution of the dispute[.]" 1 DCMR § 2815.1. Mediations are confidential and closed to the public and may not be recorded electronically or in any other manner, with or without the consent of the parties. 1 DCMR § 2815.3.

The Commission's review of on appeal, however, is limited to the official record of the proceeding. 14 DCMR §§ 3807.1; 1 DCMR § 2939.1;[16] *see, e.g.,* Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013) (Commission's review is limited to evidence in the record). Because mediations are confidential, and therefore do not provide the Commission with any record for review on appeal, the Commission lacks jurisdiction under the Act to address this claim by the Tenant on appeal. *See* 1 DCMR §§ 2815 & 2939.1; 14 DCMR § 3807.1.

Moreover, "the Commission has consistently held that it may not review issues that are raised for the first time on appeal." Thomas Ivancie v. Estate of Lewis H. Curd, RH-TP-07-28,989 (RHC March 25, 2016) (stating that the Commission may not review an issue for the first

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[15] 1 DCMR § 2815.7 provides:

> An Administrative Law Judge who conducts mediation may not be the Administrative Law Judge in any subsequent proceedings for the case, but, with the consent of the parties, may issue an order on procedural matters concerning the mediation or reflecting any agreement reached during the mediation.

[16] 1 DCMR § 2939.1 provides:

> 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.

time on appeal where the tenant failed to raise the issue before the ALJ); *see*, e.g. Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994) (District of Columbia Court of Appeal ("DCCA") will not entertain contentions not raised before the agency); Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012) (determining that an issue not raised before the ALJ did not constitute a cognizable legal claim on appeal);[17] Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) at n.13 (noting that the Commission is unable to consider the additional claims raised for the first time in the party's brief on appeal, where the party failed to raise these claims before the ALJ or in its notice of appeal); Barac Co., VA 02-107 (because housing provider failed to raise issue at RACD hearing, despite being placed on notice of it at that hearing, Commission unable to address it for the first time on appeal). Hawkins v. Jackson, RH-TP-08-29,201 (RHC Aug. 31, 2009) (stating that Commission could not consider factual allegations in support of tenant's issues on appeal where they had not been raised below); Stone v. Keller, TP 27,033 (RHC Feb. 26, 2009) (noting that issue that was not raised below could not be raised on appeal).

The Commission's review of the OAH hearing record does not reveal any evidence that the Tenant properly preserved this issue on appeal. For example, there is no indication in the record that the ALJ was asked by any party below to address any of Tenant's complaints or issues concerning the mediation during the course of the hearing or pre-hearing litigation. Moreover, the ALJ could not address any complaints even if raised by one party because the mediation proceedings are confidential and both parties would have to agree to waive the confidentiality. Because the Commission's review of the record reveals that the Tenant failed to

[17] *See* Lenkin Co. Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984) (noting that the Commission, under its rules, is permitted, though not required, to consider issues not raised in the notice of appeal insofar as they reveal plain error).

raise these issues before the ALJ, the Commission may not review these issues for the first time on appeal. *See, e.g.*, Ivancie, RH-TP-07-28,989; Lenkin Co. Mgmt., 642 A.2d at 1286; Morris, RH-TP-06-28,794; Barac Co., VA 02-107. Accordingly, these appeal issues are dismissed.[18]

V. CONCLUSION

In accordance with the foregoing, the Commission (1) remands this case to the OAH for ALJ to rule on the Tenant's subpoena requests; if the ALJ grants the Tenant's subpoena requests, the Commission further instructs the ALJ to reopen the record and hold an evidentiary hearing strictly limited to the presentation of witness testimony authored by those witnesses; and if an additional evidentiary hearing is held, the Commission also instructs the ALJ to issue new or revised findings of fact and conclusions of law based on any substantial evidence on the revised record; and (2) the Commission dismisses the Tenant's issue regarding Government agencies hindrance of his prosecution of the tenant petition.

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

DIANA HARRIS EPPS, COMMISSIONER

MICHAEL T. SPENCER, COMMISSIONER

[18] The Commission notes that Tenant raised issues concerning alleged fraud, conspiracy, bribery and other unethical practices of the DCRA which allegedly occurred June 3, 2016. *See* Notice of Appeal at 22-23. The Commission determines that these issues, now raised for the first time on appeal, do not fall within the scope of the instant appeal and therefore not ripe for review by the Commission at these issues.

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

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

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-15-30,658 was served by first-class mail, postage prepaid, on this **2nd day** of **March, 2017,** to:

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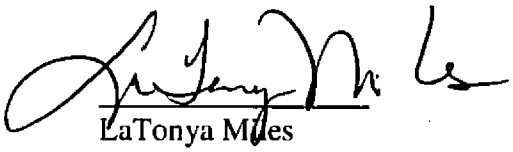

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