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 AFTER REMAND

July 20, 2018

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

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[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of RACD in DCRA were transferred to the RAD in DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.).

I. PROCEDURAL HISTORY

The full procedural history of this case is set forth in the Commission's Decision and Order issued March 2, 2017: Bettis v. Horning Associates, RH-TP-15-30,658 (RHC Mar. 2, 2017) ("First Decision and Order"). On April 29, 2015, Jerome Bettis ("Tenant"), resident of Apartment D-44 of the housing accommodation located at 4100 East Capitol Street, N.E. ("Housing Accommodation"), filed tenant petition 30,658 ("Tenant Petition") with the RAD. *See* Tenant Petition at 1-4; R. at Tab 1. The Tenant claimed that the Housing Provider, Horning Associates ("Housing Provider"), violated the Act as follows: (1) the Housing Accommodation had not been properly registered with the RAD;[2] (2) the Tenant's rent had been increased in an amount higher than allowed by the Act; (3) there had been no proper 30-day notice of rent increase; (4) services and/or facilities had been substantially reduced; and (5) the Housing Provider had retaliated against Tenant in violation of the Act. Tenant Petition at 2-3; R. at Tab 1.

A hearing was held before the OAH on March 29, 2016, wherein both parties appeared and presented evidence. A final order was issued on August 2, 2016, by Administrative Law Judge Margaret A. Mangan ("ALJ"), dismissing the Tenant Petition. Bettis v. Horning Assocs., 2015-DHCD-TP 30,658 (OAH Aug. 2, 2016) ("Final Order") at 1-16; R. at Tab 34.

The Tenant filed a notice of appeal from the Final Order with the Commission on August 17, 2016 ("First Notice of Appeal"). In its First Decision and Order, the Commission remanded this case to the OAH for the ALJ to rule on the Tenant's subpoena requests and reserved ruling on the merits of the Tenant's remaining claims.[3] *See* First Decision and Order at 16-17.

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

[3] The Commission also dismissed the Tenant's issues asserting that several District agencies hindered his prosecution of the tenant petition. *See* First Decision and Order at 16-17.

On June 15, 2017, the ALJ issued an order on remand, denying the Tenant's subpoena requests: Bettis v. Horning Associates, 2015-DHCD-30,658 (OAH June 15, 2017) ("Final Order After Remand"); R. at Tab 35. The Final Order After Remand states:

> This case is on remand from the Rental Housing Commission with instructions to rule on Tenant Jerome Bettis' subpoena requests. At the March 29, 2016, evidentiary hearing, I told the parties that I would issue my ruling on the subpoenas during the hearing. However, the hearing ended before I did and I did not address the issue in the Final Order. For the reasons set out below, I deny all subpoena requests, a ruling I was prepared to make on March 29, 2016.
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> Issues remaining from the Tenant Petition filed on April 29, 2015, are whether Housing Provider Homing Associates unlawfully increased Tenant's rent, substantially reduced related services or facilities, or retaliated against Tenant in violation of D.C. Official Code § 42-3505.02. Before the hearing, Tenant withdrew his claim of improper registration.
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> Tenant asked that subpoenas be issued for Tony Atkins, Mark Chisholm, Kenneth Algood, Jaime Yarussi, Russell Brown, Christopher Spellers, and Jagtaar Singh. Testimony from a subpoenaed witness must be relevant to the remaining issues in the Tenant Petition and not be cumulative of other record evidence. I consider the requests in turn. The quoted language below is from Tenant's motion supporting each subpoena request.
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> Tenant seeks a subpoena for the testimony of Tony Atkins, who lives at 4112 East Capitol Street, NE, to "speak on housing issue he called into Benning Woods and Homing Brothers and his involvement in the public nuisance debacle." If with his subpoena, Tenant seeks testimony on a housing issue in Tenant's rental unit, the testimony would be duplicative since Tenant and his daughter testified in detail on conditions in their unit. On the issue of public nuisance, Tenant seeks testimony relevant to 14 DCMR 800.9, a regulation of the Department of Consumer and Regulatory Affairs, not within OAH jurisdiction under the Rental Housing Act.
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> Second, Tenant seeks a subpoena for Mark D. Chisholm, Deputy Director of Constituent Services, in the office of Councilwoman Yvette M. Alexander, Ward 7, to "speak on the danger encountered by legal residents of Benning Woods Apartments in a danger Public Nuisance as a government employee of DC City Council and Ward 7 Councilmember," Again, Tenant seeks testimony relevant to a regulation of the Department of Consumer and Regulatory Affairs (public nuisance). Further the request addresses an issue over which OAH lacks jurisdiction and is a claim rejected by the Rental Housing Commission in the Order remanding this case – that Government employees hindered the prosecution of this tenant petition.
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> Third, Tenant seeks a subpoena for the Kenneth Algood, Investigator in the D.C.

Office of the Attorney General, to "speak on the danger of the Public Nuisance and taking pictures of vehicles possible in violation of DC residency of outside users attending public schools and not living in the District and having access to Benning Woods Apartments parking lot to avoid being ticketed." With this subpoena request, Tenant seeks testimony relevant to regulations of the Department of Consumer and Regulatory Affairs (public nuisance) and the Office of the State Superintendent of Education (residency requirements for public schools). The testimony is not relevant to this rental housing case.

Fourth, Tenant seeks a subpoena for Jaime Yarussi, Communications and Public Relations Specialist, D.C. Office of the Inspector General to "confirm the same action that Mr. Algood and Mr. Chisholm witnessed." Tenant seeks to corroborate the testimony of two witnesses whose subpoenas I have denied. Further, Tenant looks for evidence to support his claim that Government employees hindered the prosecution of this tenant petition, a claim rejected by the Rental Housing Commission.

Fifth, Tenant seeks the testimony of Russell Brown, a resident of 4100 East Capitol Street, NE, to "speak on Public Nuisance and Housing Problems." As with Mr. Atkins, if Tenant seeks testimony on a housing issue in Tenant's rental unit, the testimony would be duplicative since Tenant and his daughter testified in detail on conditions in their unit. On the issue of public nuisance, Tenant seeks testimony relevant to 14 DCMR 800.9, a regulation of the Department of Consumer and Regulatory Affairs, not within OAH jurisdiction under the Rental Housing Act.

Sixth, Tenant seeks a subpoena for the testimony of Christopher Spellers, Fire Inspector, District of Columbia Fire and Emergency Medical Services for the following reason: "While on official inspections to locate source of smoke, witness Anissa Eatmon refusal to permit access to building, allowed another black female in and we gained access only when the other person entered, and outright refused to conduct business with a legal tenant because the tenant filed a tenant petition, and later Ms. Anissa Eatmon and Respondent attorney, Susan Magazine, attempted to control legal tenant method of access for services and facilities and method of payment of monthly rent. Motion for Summary Judgment filed in that action, and OAH has refused to acknowledge and respond."

At the hearing, Tenant and his daughter testified in detail about the smell of smoke in the building. In response to their complaint, Housing Provider cleaned the vents. Later, a fire inspector failed to detect the smoke smell that was Tenant's concern. The fire inspector's testimony on the Housing Provider's alleged refusal to permit access to the building raises an issue outside the jurisdiction of OAH.

Seventh, Tenant seeks the testimony of Jagtaar Singh, Housing Inspector, District of Columbia Department of Consumer and Regulatory Affairs because when he "Inspected property Monday, March 14, 2016 and inspector was shown the

> windows, front of building, grounds, interior of the building and parking lot, cited flooring ground level, top step leading up from D-11, window of D-44 and wall separation of D-44, and looking to determine if the dirty windows, dirty, scarred flooring on floor of D-11 and front entrance area. These are some of the same code violations that Robert Simpkins, Housing Inspector Manager, refused to cite based on the premise the problem was just below the level of the coded." [sic]
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> Inspector Singh inspected the Property one year after the April 29, 2015, filing of the Tenant Petition. Hence, his proposed testimony is about an inspection not within the three year period before the tenant petition was filed. D.C. Official Code § 42-3502.06(e). Further, Tenant's assertion that an earlier inspection was performed by an inspector who refused to cite violations depends on Tenant's testimony alone, which was given at the hearing on March 29, 2016.
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> Finally, also undecided when I issued the Final Order was Tenant's Motion titled "Opposition to Respondent's Motion to Accept Opposition to Emergency Motion to Cease and Desist and Request Summary Judgment Nunc Pro Tunc." The Motion replies to Housing Provider's opposition to his Motion for Summary Judgment, filed on March 29, 2016, and asks this administrative court to grant his Motion for Summary Judgment. Following the filing of the Motion, a full evidentiary hearing was held, making a Motion for Summary Judgment moot.

Final Order After Remand at 1-6; R. at Tab 35.

On June 29, 2017, the Tenant filed a "Request for Reconsideration of Final Order After Remand" timely requesting reconsideration ("Motion for Reconsideration After Remand"). R. at Tab 36. On July 7, 2017, the ALJ issued an order denying the Motion for Reconsideration After Remand ("Order Denying Reconsideration After Remand"). R. at Tab 36.

On July 26, 2017, the Tenant timely filed a notice of appeal with the Commission ("Second Notice of Appeal") from the Final Order After Remand. In the Second Notice of Appeal, the Tenant raised the following issues:[4]

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[4] In the Second Notice of Appeal, the Tenant states that he incorporates by reference his June 29, 2017, Motion for Reconsideration After Remand. *See* Second Notice of Appeal at 1; Motion for Reconsideration After Remand 1-4; R. at Tab 36. The Commission, in its discretion, and "mindful of the important role that *pro se* litigants play in the enforcement of the Act," Wassem v. Klingle Corp., RH-TP-08-29,489 (RHC Nov. 17, 2016); *see, e.g.*, Goodman v. 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). Courts have "long recognized that pro se litigants can face considerable challenges in prosecuting their claims without legal assistance." Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010)

1. Actions taken by OAH violated Tenant's Due Process Rights.

2. The OAH erred in omitting or misstating material issues in the Final Order.

3. ALJ in the Final Order After Remand erred by denying his subpoena request.

4. ALJ failed to rule on the Tenant's claims of retaliations.

See Second Notice of Appeal at 1-5; Motion for Reconsideration After Remand 1-4; R. at Tab 36. The Housing Provider did not file a response. The Commission held a hearing on November 14, 2017. The Tenant was the only party to appear at the Commission hearing.

II. ISSUES ON APPEAL[5]

A. Whether the ALJ Erred in Reviewing the Tenant's Claims for Reductions in Related Services or Facilities.

B. Whether the ALJ erred in concluding that the Tenant had not been retaliated against by the Housing Provider.

C. Whether ALJ abused her discretion in failing to grant Tenant's proposed witness subpoena requests.

D. Whether the ALJ improperly limited the Tenant's prosecution of the Tenant Petition in violation of due process.

(citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). Especially in cases involving remedial statutes like the Act, courts and administrative agencies have been more disposed "to grant leeway to" *pro se* litigants. Macleod v. Georgetown Univ. Med Ctr., 736 A.2d 977, 980 (D.C. 1999). "[W]hile it is true that a court must construe pro se pleadings liberally . . . the court may not act as counsel for either litigant." Flax v. Schertler, 935 A.2d 1091, 1107 n. 14 (D.C. 2007) (citing Bergman v. Webb (In re Webb), 212 B.R. 320, 321 (Bankr. Fed. App. 1997) (rejecting pro se petitioner's argument that the court "should have advised her what other documents she was required to produce").

[5] The Commission notes that the Tenant's first Notice of Appeal, also 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* First Decision and Order at 11-12. In its First Decision and Order, the Commission addressed only two of these issues: the ALJ's failure to address the Tenant's request for subpoenas, and the Tenant's allegation that District agencies had interfered with his prosecution of the Tenant Petition. The Commission determined that the merits of the Tenant's other issues would be properly addressed after a ruling on the subpoena requests. First Decision and Order at 16-17. The Commission, "mindful of the important role that *pro se* litigants play in the enforcement of the Act," Goodman, 573 A.2d at 1298-99, therefore addresses the remaining issues from the first Notice of Appeal in addition to those arising from the Final Order After Remand.

III. DISCUSSION

A. Whether the ALJ Erred in Reviewing the Tenant's Claims for Reductions in Related Services or Facilities.

On appeal the Tenant contests the ALJ's dismissal of his services and facilities claims and asserts that the ALJ's findings of fact and conclusions of law related to these claims are not supported by substantial record evidence.[6] *See* Notice of Appeal at 7-15; Final Order at 7-9; R. at Tab 34.

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 [OAH] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the [OAH].

Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See, e.g.,* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 & n.10 (D.C. 1994); Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012). The Commission will not "substitute [itself] for the trier of fact who heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony." Fort Chaplin Park Assocs., 49 A.2d at 1079; Ahmed, Inc., v. Torres, RH-TP-07-29,064 (RHC

[6] The Tenant raised the following list of reduced services: parking enforcement; construction and repair of parking area; interior ceiling damage throughout entire building; exterior ceiling damage on balconies; unclean air ducts in the housing accommodation; and practice of placing notice on the tenant's rental unit door. *See* Tenant Petition at 5-8; R. at Tab 1. During the hearing, the Tenant provided the following additional list of reduced services: nonfunctioning intercom system; broken and unclean common area exterior windows; poor maintenance workmanship in the tenant's bathroom; extensive flooding in the common area laundry room and rear building access way; unsafe stairs and tread. Hearing CD (OAH Mar. 29, 2016) at 9:58-10:38.

October 28, 2014); Washington Cmtys. v. Joyner, TP 28,151 (RHC Jul. 22, 2008). Accordingly, the Commission has consistently stated that "[w]here substantial evidence exists to support the hearing examiner's findings, even the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ]." Torres, RH-TP-07-29,064; Boyd v. Warren, RH-TP-10-29,816 (RHC June 5, 2013) (quoting Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011)); Loney v. Tenants of 710 Jefferson St., N.W., SR 20,089 (RHC Jan. 29, 2013) at n.13.

Moreover, the DCAPA provides that:

> Every decision and order adverse to a party to the case . . . shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence.

D.C. OFFICIAL CODE § 2-509(e); *see, e.g.*, Butler-Truesdale v. Aimco Props., LLC, 945 A.2d 1170, 1171 (D.C. 2008) ("agencies are required to make findings upon each contested issue of fact"); Georgetown Residents Alliance v. D.C. Bd. of Zoning Adjustment, 816 A.2d 41, 51 (D.C. 2003) ("generalized, conclusory, or incomplete factual findings are insufficient") (citing Levy v. D.C. Bd. of Zoning Adjustment, 570 A.2d 739, 746 (D.C. 1990)); Branson v. D.C. Dep't of Empl. Servs., 801 A.2d 975, 979 (D.C. 2002) (an agency must give "full and reasoned consideration to all material facts and issues") (quoting Dietrich v. D.C. Bd. of Zoning Adjustment, 293 A.2d 470, 473 (D.C. 1972)); Pena, RH-TP-06-28,817; Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012).

"The DCAPA directs an ALJ to focus on the value to be served by his decision, and to also ensure that the ALJ has dealt fully and properly with all of the issues in the case before reaching a decision." Washington v. A&A Marbury, LLC/UIP Prop. Mgmt., RH-TP-11-30,151 (RHC Dec. 27, 2012); *see* Harps v. Robertson, TP-27,371 (RHC 2003) (quoting Brewington v.

D.C. Bd. of Appeals & Review, 287 A.2d 532, 534 (D.C. 1972)); 75B Am. Jur. 2d Trial § 1675 (2012). 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." Harps, TP-27-371 (citing Perkins v. D.C. Dep't of Empl Servs., 482 A.2d 401, 402 (D.C. 1984)); *See also* Butler-Truesdale, 945 A.2d at 1170; Hedgman v. D.C. Hackers' License Appeal Bd., 549 A.2d 720 (D.C. 1988); Nursing Servs., Inc. v. D.C. Dep't of Empl. Servs., 512 A.2d 301, 302-03 (D.C. 1986); Spevak v. D.C. Alcoholic Beverage & Control Bd., 407 A.2d 549, 553 (D.C. 1979).

The Act states that a housing provider is not permitted to reduce or eliminate services "required by law or the terms of a rental agreement" without decreasing the rent to "reflect proportionally the value of the change in services." D.C. OFFICIAL CODE §§ 42-3501.03(26), (27), 42-3502.11.[7] Therefore, where an "unauthorized reduction in services or facilities related to the rental unit" has occurred, a tenant may be awarded a rent refund. 14 DCMR § 4214.4(d).[8]

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[7] D.C. OFFICIAL CODE § 42-3501.03 provides, in relevant part, the following:

> (26) "Related facility" means any facility, furnishing, or equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit, including any use of a kitchen, bath, laundry facility, parking facility, or the common use of any common room, yard, or other common area.
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> (27) "Related services" means services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse.

D.C. OFFICIAL CODE § 42-3502.11 provides the following:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent charged, as applicable, to reflect proportionally the value of the change in services or facilities.

[8] 14 DCMR § 4214.4 provides, in relevant part, that:

The Commission has previously determined that "[t]he reduction in services provision of the Act was drafted to ensure that housing providers provide services required by [the] D.C. Housing Code." Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993). Accordingly, a "failure to provide services required by the housing code constitutes a reduction in services under the Act." Palmer v. Clay, RH-TP-13-30,431 (RHC Oct. 5, 2015); Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (Sept. 27, 2013); (quoting Kuratu v. Ahmed, Inc., TP 28,985 (RHC Dec. 27, 2012)); Cascade Park Apartments v. Walker, TP 26,197 (RHC Jan. 14, 2005); Hemby v. Residential Rescue, Inc., TP 27,887 (RHC Apr. 16, 2004); Shapiro, TP 21,742. The Commission has held that the burden of proof is on the tenant when asserting a claim of reduction of services or facilities under the Act. *See* Atchole v. Royal, RH-TP-10-29,891 (RHC March 27, 2014); Pena v. Woynarowsky, RH-TP-06-28,817 (RHC Feb. 3, 2012); *see also* D.C. Official Code § 2-509(b);[9] Wilson v. KMG Mgmt, LLC, RH-TP-11-30,087 (RHC May 24, 2013); Barnes-Mosaid v. Zalco Realty, Inc., RH-TP-08-29,316 (RHC Feb. 24, 2012); Stancil v. Davis, TP 24,709 (RHC Oct. 30, 2000).

1. Whether the ALJ Addressed Each Material, Contested Issue.

The Commission has consistently held that "[f]indings of fact form the foundation of meaningful review, and where an ALJ fails to make findings of fact on all the issues, or makes incomplete findings of fact, the Commission is left with a record that is insufficient for review." A&A Marbury, RH-TP-11-30,151; *see* Butler v. Toye, TP 27,262 (RHC Dec. 2, 2004); Hines v.

> The tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, complain of and request appropriate relief for any other violation of the Act including, but not limited to, the following: . . .
>
> (d) Any unauthorized reduction in services or facilities related to the rental unit not permitted by the Act or authorized by order of the Rent Administrator[.]

[9] D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, that "[i]n contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof[.]"

Brawner Co., TP 27,707 (RHC Sept. 7, 2004); Tenants of 710 Jefferson St., N.W. v. Loney, SR 20,089 (RHC Sept. 3, 2008) ("insufficient findings deprive the Commission of a 'basis for determining whether the conclusions of law followed rationally from the findings'") (quoting Hedgman, 549 A.2d at 723 (D.C. 1988)); Envoy Assocs., L.P. v. 2400 Tenant Ass'n, TP 27,312 (RHC July 15, 2004); Tenants of 2724 Woodley Place, N.W. v. Lustine Realty Co., HP 20,781 (RHC June 25, 2004) (citing Thorpe v. Independence Fed. Sav. Bank, TP 24,271 (RHC Aug. 19, 1999)).

In the Notice of Appeal, the Tenant asserts that the ALJ failed to adequately address or account for the following issues all of which the Tenant argues he raised during the evidentiary hearing: (1) number of service requests submitted by the Tenant; (2) the length of time Housing Provider has had notice of unwanted smoke in both the rental unit and common area; (3) discontinuation of paper maintenance requests; (4) continued use of unlicensed contractors; (5) the existence of the non-functioning intercom system and its impact on DCRA's ability to perform inspections; (6) the length of time flooding had occurred in the laundry room; (7) the warped and compromised flooring/public walk ways in the common area; (8) the ventilation problems within the rental unit; (9) the continuing problems with the common area stairs; (10) the continued overall unresponsiveness of the Housing Provider's upper management to the parking issue complaints lodged by the Tenant; (11) Housing Provider's inaction with regard to the parking complainants; (12) failure of the Housing Provider to provide the Tenant with information concerning the type of chemicals used in the past to treat the tub in the rental unit; (13) the contractors' level of workmanship hired by the Housing Provider to service to the rental unit; and (14) the damage to the windows in the Housing Accommodation. *See* Notice of Appeal at 7-15.

The Commission's review of the record shows that nine of these issues were raised by the Tenant as parts of or in relation to claims for reductions in related services or facilities that were addressed by the ALJ:

(2) The length of time the Housing Provider had notice of the smell of smoke;

(5) The non-functioning intercom;

(6) The length of time the laundry room was flooding;

(8) The ventilation system;

(9) Problems with the common area stairs;

(10) The unresponsiveness of the Housing Provider's upper management to the Tenant's parking complaints

(11) The Housing Provider's inaction regarding the parking complaints;

(12) The failure to provide information on chemicals used in bath tub repair; and

(13) The level of workmanship by contracts in repairing the Tenant's rental unit.

With respect to issues (2) and (8), (10) and (11), and (12), the Commission determines, *infra* at 24-26 (smell of smoke), 17-19 (parking), and 21-23 (bath tub), respectively, that the ALJ's denials of these claims of reduced services or facilities are supported by substantial evidence and in accordance with the Act, and no further findings of fact or conclusions of law are necessary. With respect to issues (5), (6), (9), and (13), the Commission determines, *infra* at 26-27 (intercom), 23-24 (laundry room), 20-21 (stairs), and 28-31 (workmanship), respectively, that the ALJ's denials of these claims for reduced services or facilities were not supported by substantial evidence or in accordance with the Act, and therefore on remand the ALJ is instructed to address the Tenant's claims to the extent necessary to reach a conclusion of law that is in accordance with the Act on each contested issue.

The Commission's review of the record further shows that three of these issues were raised by the Tenant as part of or in relation to claims of retaliation by the Housing Provider: issues (3) (paper filing of maintenance requests), (4) (continued use of unlicensed contractors), and (14) (failure to repair broken windows). With respect to each of these issues, the Commission determines, *infra* at 36-38, that the ALJ failed to address each claim of retaliation made by the Tenant as required by the DCAPA, and on remand the ALJ is instructed to make findings of fact and conclusions of law to the extent necessary to reach conclusions of law that are in accordance with the Act on each contested issue.

Finally, the Commission's review of the record shows that two of these issues were not addressed by any findings of fact or conclusions of law in the Final Order: (1) the number of service requests submitted by the Tenant; and (7) warped or compromised flooring and public walkways. Both parties presented evidence concerning the nature and frequency of the Tenant's service requests (Hearing CD (OAH Mar. 29, 2016) at 10:03, 10:22, 12:02, 1:24, 1:31, & 2:59-3:00); the Tenant's specific complainants concerning the presence of water at the rear entrance landing and the impact it had on the flooring in that area (Hearing CD (OAH Mar. 29, 2016) at 10:36-10:41, 11:41, 2:24, 2:39, 3:02; PX 124 (025);[10] PX 139 (040); RX 206-209; RX 213). Nevertheless, the Commission observes that the ALJ made no findings of fact in the Final Order concerning the Housing Provider's responsiveness to service requests or the existence a housing code violation at the rear entrance of the building. Final Order 2-4; R. at Tab 34. The Commission therefore concludes that the ALJ failed to make findings of fact on each contested issue concerning the Tenant's services and facilities claims.

[10] The certified record of this case identifies the Tenant's exhibits (the petitioner's exhibits, or "PX") sequentially, beginning with exhibit PX 100. However, these exhibits were, at some point, also labeled with numbering beginning with PX 001. In the Final Order, the ALJ cites to the Tenant's exhibits using the lower, two-digit numbers. The Commission, for clarity, will provide both numbers in this decision and order.

Accordingly, the Commission affirms the Final Order in part, with respect to the claims of reduction in services or facilities that are affirmed herein, and remands this case in part, with respect to the claims of reductions in services or facilities that are remanded herein, claims of retaliation that are remanded herein, and claims of reductions in related services or facilities that the ALJ did not address at all.

2. Whether the ALJ's Findings of Fact Are Supported by Substantial Evidence and Conclusions of Law Correctly Apply the Act.

On appeal, the Tenant argues that the ALJ erred in concluding that related services or facilities were not substantially reduced due to the existence of the following conditions: (a) problems with parking; (b) broken glass and missing treads on stairs; (c) peeling bathtub; (d) laundry room flooding; (e) cigarette smoke in building; (f) malfunctioning intercom; (g) notices posted on the Tenant's door, mismatched tiles, and dirty windows. *See* Notice of Appeal at 15-20.

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. *See* 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)); *see* Holbrook St., LLC v. Seegers, RH-TP-14-30,571 (RHC July 15, 2016); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Carpenter v. Markswright, Co. Co., RH-TP-10-29,840 (RHC June 5, 2013). Nonetheless, the Commission may find that an error of law is harmless where the application of the correct legal standard would not change the ultimate result. *See, e.g.*, United Dominion Mgmt., 101 A.3d at 430 (erroneous statement of deferential standard of review was immaterial where review was in fact

thorough and de novo); LCP, Inc. v. D.C. Alcoholic Beverage Control Bd., 499 A.2d 897, 903 (D.C. 1985) ("[R]eversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed.") (quoting Arthur v. D.C. Nurses' Examining Bd., 459 A.2d 141,146 (D.C. 1983)); 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)).

As discussed *supra* at 9, a tenant may be awarded a rent refund under the Act where an "unauthorized reduction in services or facilities related to the rental unit" has occurred. 14 DCMR § 4214.4(d).[11] A housing provider is not permitted to reduce or eliminate services or facilities "required by law or the terms of a rental agreement" without decreasing the rent to "reflect proportionally the value of the change in services." D.C. OFFICIAL CODE §§ 42-3501.03(27), 42-3502.11.[12] The Commission has held that the burden of proof is on the tenant when asserting a claim of reduction of services or facilities under the Act. *See* Atchole, RH-TP-10-29,891; Pena, RH-TP-06-28,817; *see also* D.C. OFFICIAL CODE § 2-509(b);[13] Wilson, RH-TP-11-30,087; Barnes-Mosaid, RH-TP-08-29,316; Stancil, TP 24,709.

The Commission has consistently applied a three-prong test to tenants' claims of reductions or eliminations of related services or facilities:

> First, the tenant must provide evidence of a reduction and/or elimination of services, and the fact-finder must find that the housing provider eliminated or substantially reduced a service or services at the tenant's rental unit. Lustine

[11] *See supra* n.8.

[12] *See supra* n.7.

[13] *See supra* n.9.

> Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1989). Second, the tenant must establish the duration of the reduction in services, and present evidence to support his allegations. Daro Realty. Inc. v. 1600 16th St. Tenants' Ass'n, TP 4,637 (RHC Oct. 20, 1988) (cited in Cobb v. Charles E. Smith Mgmt., Co., TP 23,889 (RHC July 21, 1998)). Third, the tenant must show that the housing provider had knowledge of the alleged reduction of services. Gelman Co. v. Jolly, TP 21,451 (RHC Oct. 25, 1990).

1733 Lanier Pl. N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009); *see also* Lizama, RH-TP-07-29,063; Pena, RH-TP-06-28,817; Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012); Ruffin v. Sherman Arms, LLC, TP 27,982 (RHC July 29, 2005) (citing Ford v. Dudley, TP 23,973 (RHC June 3, 1999)); Davis v. Madden, TP 24,983 (RHC Mar. 28, 2002). Substantial violations of the housing code are deemed to be substantial reductions in services under the Act. *See* Palmer, RH-TP-13-30,431; Lizama, RH-TP-07-29,063. The Act defines a "substantial violation" of the housing code as "the presence of any housing condition, the existence of which violates the housing regulations, or any other statute or regulation relative to the condition of residential premises and may endanger or materially impair the health and safety of any tenant or person occupying the property." D.C. OFFICIAL CODE § 42-3501.03(35).[14]

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[14] The Commission observes that in the Final Order the ALJ stated that fourteen housing code violations are deemed substantial as a matter of law by the Commission's regulations at 14 DCMR § 4216.2. However, the Commission notes that twenty such violations are actually listed, plus one catch-all provision. Specifically, 14 DCMR § 4216.2 requires the absence of the following conditions:

(a) Frequent lack of sufficient water supply;

(b) Frequent lack of hot water;

(c) Frequent lack of sufficient heat;

(d) Curtailment of utility service, such as gas or electricity;

(e) Defective electrical wiring, outlets, or fixtures;

(f) Exposed electrical wiring or outlets not properly covered;

(g) Leaks in the roof or walls;

(h) Defective drains, sewage system, or toilet facilities;

The Commission will address the seven contested determinations regarding related services or facilities in turn, as listed *supra* at 14.

a. Problems with Parking

In the Final Order the ALJ stated the following regarding the Tenant's claim that he had problems with parking:

> Tenant expressed frustration with the parking conflicts and testified that the parking lot has safety concerns. The description, however, does not include the

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(i) Infestation of insects or rodents;

(j) Lead paint on the interior of the dwelling, or on the exterior of the dwelling where the paint is in a location or in a condition which creates a hazard of lead poisoning to children or the occupants;

(k) Insufficient number of acceptable exits for a dwelling, or from each floor of a rooming house;

(l) Obstructed exits;

(m) Accumulation of garbage or rubbish in common areas;

(n) Plaster falling or in immediate danger of falling;

(o) Dangerous porches, stairs, or railings;

(p) Floor, wall, or ceilings with substantial holes;

(q) Doors or windows which are not sufficiently tight to maintain the required temperature or to prevent excessive heat loss;

(r) Doors lacking required locks;

(s) Fire hazards or absence of required fire prevention or fire control;

(t) Inadequate ventilation of interior bathrooms; and

(u) Large number of housing code violations, each of which may be either substantial or non-substantial, the aggregate of which is substantial, because of the number of violations.

The Commission notes that, in addition to his reduction in services or facilities claims, the Tenant also claimed that his rent was increased while the housing accommodation was not in substantial compliance with the housing code. *See* D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A). In the Final Order, the ALJ dismissed this claim because she determined that none of the violations cited in a 2014 proactive inspection were substantial. *See* Final Order at 10; R. at Tab 34. The Commission below determines that the ALJ erred in dismissing at least two claims of reductions in services that are based on substantial violations of the housing code: the condition of the stair treads and the flooding in the laundry room, under 14 DCMR § 4216.2(o) and (h), respectively. On remand, if the ALJ determines that the Tenant proved the existence, duration, and the Housing Provider's notice of a substantial housing code violation, the ALJ should also then determine whether the Tenant's rent was increased at a time when the Housing Provider had notice that the violation existed.

> 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.

Final Order at 15-16; R. at 34.

The Commission observes that access to parking, when included in the rent for a rental unit, constitutes a related facility under the Act. D.C. OFFICIAL CODE § 42-3501.03(26).[15] The Commission has consistently determined that a whether a reduction or elimination of a related service or facility entitles a tenant to a relief must be "substantiated by the length of time that the tenants were without service." Drell, TP 27,344 (quoting Newton v. Hope, TP 27,034 (RHC May 29, 2002)).

The Commission observes that during the hearing the parties presented a great deal of testimony concerning the use of the Housing Accommodation's parking area and related tensions. Hearing CD (OAH Mar. 29, 2016) at 10:01; 10:51; 11:54; & 1:47. However, the Commission's review of the record reveals testimony of only one occasion on which the Tenant was not able to park (Hearing CD (OAH Mar. 29, 2016) at 10:54) and only one occasion where an altercation ensued involving the Tenant and a non-resident arising from a dispute over the parking area (Hearing CD (OAH Mar. 29, 2016) at 10:03; 10:55). The Commission is unable to find substantial evidence in the record that the Tenant "substantiated the length of time that [he was] without" parking in order to establish a substantial reduction in a related service or facility. Drell, TP 27,344. The Commission is not persuaded that the single occasion on which the Tenant was unable to park or that his frustration, however reasonable, at the conduct of and use of the parking area by non-residents constitutes a "substantial" reduction in his ability to use the

[15] *See supra* n.8.

parking area. Therefore, the Commission is satisfied that the ALJ did not err in dismissing the Tenant's claim related to the Housing Accommodation's parking facilities. *See* Atchole, RH-TP-10-29,891; Kuratu, RH-TP-07-28,985; Drell, TP 27,344.

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

b. Broken Glass and Missing Treads On Stairs

The ALJ stated the following regarding two housing code violations for which the Housing Provider was cited by DCRA:

> An inspector from the Department of Consumer and Regulatory Affairs issued [a Notice of Violation ("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.
>
> 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.

Final Order at 16; R. at Tab 34.

With respect to the broken glass door, the Commission's review of the record shows that the Tenant did not introduce evidence that the Housing Provider had notice of the housing code violation at any date before the April 8, 2014, NOV was issued. *See* PX 133 (034); RX 216. In the Final Order, the ALJ found that "the broken glass on the door was repaired almost immediately," although the Commission's review of the record does not reveal that either the Housing Provider or the Tenant introduced substantial evidence of the exact date. Final Order at 3; R. at Tab 34; *see* Hearing CD (OAH Mar. 29, 2016) at 10:30, 10:36-27. The Commission also observes that the Tenant did not contest that the Housing Provider had made the repairs. *See id.*

As described *supra* at 18, a determination of whether a reduction of services entitles a tenant to relief must be "substantiated by the length of time that tenants were without service." Drell, TP 27,344; Newton, TP 27,034. The Commission's review of the record does not reveal substantial evidence of a specific, or even approximate, date that the cracked window was repaired or any date on which the window remained broken after the Housing Provider was first shown to be on notice in April 2014. Therefore, the Commission is satisfied that the ALJ did not err in concluding the Tenant failed to satisfy the three-prong test of a reduction in related services. Drell, TP 27,344; Lizama, RH-TP-07-29,063; Pena, RH-TP-06-28,817.

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

With respect to the missing tread on the stairs, the Commission's review of the Final Order reveals that the ALJ erred by misapplying the Act and its implementing regulations to the Tenant's claim. Although the ALJ made a finding of fact that the Housing Provider was notified of "missing treads on the stairs" on April 9, 2014, and did not repair the treads until March 1, 2016, *see* Final Order at 3; R. at Tab 34, the ALJ concluded that the tenant failed to establish "that this reduction in a maintenance service was substantial before it was abated." *Id.* at 7.

The ALJ correctly noted that the housing code requires that:

> 708.1 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.
>
> 708.2 Treads shall be reasonably level and in any flight evenly spaced.

14 DCMR § 708 ("Stairways, Steps, and Porches").[16] Pursuant to the Act, a "substantial violation" of the housing code is "the presence of any housing condition, the existence of which

[16] *See also* District of Columbia Property Maintenance Code Supplement of 2013, 12-G DCMR § 305.4 ("Every stair, ramp, landing, balcony, porch, deck or other walking surface shall be maintained in sound condition and good repair, and maintained free from hazardous conditions.").

violates the housing regulations, or any other statute or regulation relative to the condition of residential premises and may endanger or materially impair the health and safety of any tenant or person occupying the property." D.C. OFFICIAL CODE § 42-3501.03(35). The regulations provide that, as a matter of law, "[d]angerous porches, stairs, or railings" are a substantial violation of the housing code. 14 DCMR § 4216.2(o).

"A tenant only has to present evidence that violations . . . are also listed in 14 DCMR § 4216.2 to show that they are 'substantial.'" Drell, TP 27,344; Covington v. Foley Props., Inc., TP 27,985 (RHC June 21, 2006); Vicente v. Jackson, TP 27,614. The Commission is satisfied that 14 DCMR § 4216.2(o) is intended to incorporate the provisions of the housing code found in 14 DCMR § 708 because steps that are not "firm . . . smooth . . . free of tripping hazards . . . [or] reasonably level" are "dangerous." Because the Housing Provider was cited for a violation of the housing code that is listed, albeit generically, in the Act's regulations as substantial in and of itself, the Commission determines that the ALJ erred in analyzing the Tenant's claim of a reduction in maintenance services. 14 DCMR § 3807.1.

Accordingly, the Commission remands this case for further conclusions of law, correctly applying the Act and its implementing regulations, related to the Tenant's claim of a reduction in services arising from the missing tread on the common area stairs. *See also supra* n.14.

c. Peeling Bathtub

In the Final Order, the ALJ concluded that 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." Final Order at 16-17; R. at Tab 35. Although the record evidence establishes that the Tenant proved both duration[17] and that the

[17] Hearing CD (OAH Mar. 29, 2016) at 10:04; PX 122 (023), PX 123 (024), PX 125 (026), PX 127 (028), PX 128 (029), PX 129 (030).

Housing Provider had notice of the Tenant's peeling tub as far back as December 2015;[18] the Commission observes that the ALJ was not persuaded that the condition of the bathtub constituted a substantial reduction in service. Final Order at 16-17; R. at Tab 35; *see* Ford, TP 23,973.

As described *supra* at 7, the Commission's role is not to substitute itself for the ALJ as the trier of fact in evaluating the credibility of testimony and weighing the evidence. *See* Fort Chaplin Park Assocs., 49 A.2d at 1079; Atchole, RH-TP-10-29,891; Marguerite Corsetti Trust, RH-TP-06-28,207; Hago, RH-TP-08-11,552 & RH-TP-08-12,085. The Final Order shows that the ALJ was not persuaded that the testimony and evidence proved anything more that the Tenant's "dissatisfaction with the condition of the bathtub," rather than that the condition constituted a substantial reduction in a related service or facility. Final Order at 16-17; R. at Tab 35. The Commission's review of the record does not show any evidence that would have required the ALJ to find as a matter of law that the condition of the tub was a substantial reduction in services. For example, the housing code requires that "[e]ach facility, utility, or fixture shall be properly and safely installed, and shall be maintained in a safe and good working condition." 14 DCMR § 600.2. The Commission's review of the record does not show that the Tenant's testimony demonstrated that the peeling affected either the safe use or good working order of the bathtub. Therefore, the Commission is satisfied that the ALJ's conclusion that the Tenant failed to prove a substantial reduction in services or facilities with respect to the peeling tub is supported by substantial evidence and in accordance with the Act. 14 DCMR § 3807.1; Ford, TP 23,973.

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

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[18] Hearing CD (OAH Mar. 29, 2016) at 10:13; 1:38; RX 217.

d. Laundry Room Flooding

The ALJ stated the following regarding the Tenant's claims of flooding in the Housing Accommodation's laundry room:

> 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.

Final Order at 8; R. at Tab 34.

The Commission notes that "[d]effective drains, sewage system[s], or toilet facilities" are substantial housing code violations as a matter of law. 14 DCMR § 4216.2(h). The Act requires that a reduction in related services be corrected "promptly." 14 DCMR § 4211.6;[19] Parreco v. D.C. Rental Hous. Comm'n, 885 A.2d 327, 337 (D.C. 2005). The Commission has also consistently stated that unsuccessful efforts to abate substantial housing code violations do not overcome a tenant's claim for the lost value of a related service. Woodner Apartments v. Taylor, RH-TP-07-29,040 (RHC Sept. 1, 2015); Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005); Hutchinson v. Home Realty, Inc., TP 20,523 (RHC Sept. 5, 1989). The Commission's review of the record shows that, although the Housing Provider took steps between the February 2, 2016, NOV and March 7, 2016, to address the flooding in the laundry room, as the ALJ stated, substantial evidence also shows that the Housing Provider's was aware

[19] 14 DCMR § 4211.6 provides:

> If related services or facilities at a rental unit or housing accommodation decrease by accident, inadvertence or neglect by the housing provider and are not promptly restored to the previous level, the housing provider shall promptly reduce the rent for the rental unit or housing accommodation by an amount which reflects the monthly value of the decrease in related services or facilities.

of and had made prior efforts to abate the flooding in the laundry room. Hearing CD (OAH Mar. 29, 2016) at 10:06; 11:41; 11:57; PX 121 (022); PX 143 (044). Specifically, the Tenant's July 1, 2011, letter to Housing Provider stated that "the laundry room poses a hazard . . . the water is permitted to flow on the floor, which poses a significant danger and hazard – slippage." PX 143 (044).

Based on its review of the record, the Commission is not satisfied that the Final Order indicates that the ALJ considered whether the Housing Provider had notice of this substantial housing code violation prior to the issuance of the February 2, 2016, NOV and nonetheless failed to abate the condition. *See* Final Order at 8; R. at Tab 34. Specifically, the conclusion that the Housing Provider "responded in a reasonable time" does not appear to flow rationally, under the applicable precedent, from the findings of fact and substantial evidence on the record. *See* 14 DCMR § 4211.6; Parreco, 885 A.2d at 337; Taylor, RH-TP-07-29,040; Enobakhare, TP 27,730.

Accordingly, the Commission remands the Final Order on this issue for the ALJ to consider all substantial evidence and apply the legal standards established by the Act, regulations, and precedent. *See also supra* n.14.

e. Cigarette Smoke in Building

In the Final Order, the ALJ stated the following regarding the Tenant's claim of substantial reduction of services due to cigarette smoke in the Housing Accommodation:

> 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 housing 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).

Final Order at 8; R. at Tab 34.

The Commission is satisfied that the ALJ's determination that the Tenants failed to prove the existence or extent of smoke in the building or the rental unit is supported by substantial evidence on the record. Enobakhare, TP 27,730. The Commission has consistently stated that credibility determinations are "committed to the sole and sound discretion of the ALJ." *See* Fort Chaplin Park Assosc. 649 A.2d at 1079; Marguerite Corsetti Trust, RH-TP-06-28,207 (citing In re M.A.C., 761 A.2d 32, 42 (D.C. 2000)); Smith Prop. Holdings Three D.C., L. P. v. Tenants of 2601 Woodley Place, N.W., CI 20,736 (RHC June 30, 1999); Ford, TP 23,973. The ALJ has the responsibility to weigh the record evidence and has "discretion to reasonably reject any evidence offered." Harris v. D.C. Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986) (citing Roumel v. D.C. Bd. of Zoning Adjustment, 417 A.2d 405, 408-409 (D.C. 1980)); Kopff v. D.C. Alcoholic Beverage and Control Bd., 381 A.2d 1372, 1386 (D.C. 1977). "In rendering a decision, the [ALJ] is entrusted with a degree of latitude in deciding how he shall evaluate and credit the evidence presented." Harris, 505 A.2d at 69.

The record evidence establishes that both the Tenant and his daughter had smelled smoke both in the rental unit and common areas of the Housing Accommodation, and that the Housing Provider was aware of the Tenant's concerns, but the Commission's review of the record does not reveal any other substantial evidence of either the existence or extent of the smoke in the rental unit or the common area. Hearing CD (OAH Mar. 29, 2016) at 10:17; 10:20; 11:57; 2:00; 2:16; PX 118 (019), 119 (020), 120 (021), & 123 (024). The Commission's role is not to substitute itself for the ALJ as the trier of fact in evaluating whether the Tenants met their burden of proof. *See supra* at 7; Fort Chaplin Park Assocs., 649 A.2d at 1079; Harris, 505 A.2d at 69. The Commission is satisfied that the ALJ was within her discretion to evaluate the credibility of the Tenant and his daughter on this issue and weigh their testimony against the absence of

corroborating evidence. *See* Final Order at 8; R. at Tab 34. Because the Tenant did not prove the existence or extent of a reduction in related services or facilities, the ALJ did not err in denying his claims related to smoke in the building. Atchole, RH-TP-10-29,891; Kuratu, RH-TP-07-28,985; Drell, TP 27,344.

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

f. Malfunctioning Intercom

In the Final Order, the ALJ denied the Tenant's claim that the broken intercom system constituted a substantial reduction in a related service, stating that the "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." Final Order at 8; R. at Tab 34. The ALJ noted that the Housing Provider was cited on February 2, 2016, for the malfunctioning intercom system, *see* PX 134 (035) & 135 (036), and that the system was repaired six weeks later. *Id.* The ALJ found, moreover, that the intercom had not worked for at least a year before the evidentiary hearing, based on the housing provider's testimony. *Id.*; *see* Hearing CD (OAH Mar. 29, 2016) at 11:48 & 1:40.

The Commission determines that the ALJ erred by misapplying the Act in concluding that the Tenant failed to established a "substantial reduction" in a related service or facility. A related facility is "equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit." D.C. OFFICIAL CODE § 42-3501.03(26).[20] "The question of substantiality goes simply to the degree of the loss," and the

[20] The Commission notes that the Housing Provider was cited by DCRA for a violation of 14 DCMR § 705.4 because the intercom on the front door was not working. 14 DCMR § 705.4 provides that "Each door, transom, side light, skylight, door hinge, and door latch shall be in good condition." Assuming, *arguendo*, that the broken intercom violated the housing code with respect to the condition of the door, the Commission observes that the broken intercom could alternatively be considered as a reduction in related services. *See infra* at 26-27. The Commission discusses the intercom as a related facility because it appears to fit more plainly within that definition

degree of loss may be "substantiated by the length of time the tenants were without service." Interstate General Corp. v. D.C. Rental Hous. Comm'n, 501 A.2d 1261, 1263 (D.C. 1985).

The uncontested evidence on the record shows that the intercom, that is, equipment made available to all tenants of the Housing Accommodation, was totally inoperable for at least one year. Hearing CD (OAH Mar. 29, 2016) at 11:48 & 1:40; Final Order at 4; R. at Tab 34. However, the ALJ concluded that the reduction was not substantial based on the fact that non-residents were not prevented from accessing the building, but the Commission is not satisfied that this conclusion has any basis in the Act, regulations, or precedent.[21] Because the ALJ applied criteria not required under the Act, the Commission determines that the ALJ erred in analyzing the Tenant's claim related to the intercom system. Interstate General, 501 A.2d at 1263.

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

g. Notices, Mismatched Tiles, and Dirty Window(s)

In the Final Order, the ALJ concluded that the Tenant's claims concerning the notice delivery system, mismatched tiles, and the Housing Provider's admitted failure to clean the common area window did not violate the Act. The ALJ found that the Housing Provider's method of message delivery "is not a violation of the Act" and that "[a]esthetically, Tenant's unit

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under the Act, but any remedy available to the Tenant is the same in either case. *See* D.C. OFFICIAL CODE § 42-3502.11.

As noted *supra* at 15-16, related services include maintenance of a housing accommodation in compliance with the housing code even if a condition would not be a "substantial housing code violation"

[21] The Commission notes that the fact the intercom system appears to have been a mere convenience might have been relevant to the "fair market value of comparable related services or facilities" in determining the amount of a rent refund owed to the Tenant. 14 DCMR § 4211.9(c). However, the value of a related facility and whether the facility has been substantially reduced or eliminated are separate questions under the Act, and the ALJ did not reach the question of value. Comparably, the Act expressly provides that "telephone answering" may be a related service. D.C. Official Code § 42-3501.03(27). Whether a tenant actually misses any telephone calls or suffers any other inconvenience would not preclude a finding that the elimination of such a service is prohibited by the Act, even if the monthly, monetary value is relatively low. *Cf.* Old v. Charles E. Smith Mgmt., Inc., TP 21,823 (RHC Nov. 19, 1991).

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." Final Order at 8-9; R. at Tab 34.

The Commission's review of the record shows that the Housing Provider had received multiple requests by the Tenant to place all notices under his door. Hearing CD (OAH Mar. 29, 2016) at 10:49, 1:02, 11:47, 2:40, 2:41, & 2:56; PX 115 (016) & 159 (060). Nothing in the Commission's review of the Act, regulations, or precedent suggests that the posting of notices on or under the door of a rental unit constitutes a reduction in related services. *See* D.C. OFFICIAL CODE § 42-3501.03(27), (28); Pena, RH-TP-06-28,817; Drell, TP 27,344.

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

With regard to the dirty window(s), the Commission's review of the record reveals substantial evidence that the Housing Provider was aware that the windows located in the common area had not been cleaned since as far back as 2011 and that the Tenant had complained to the Housing Provider about the condition of the windows. *See* Hearing CD (OAH Mar. 29, 2016) at 9:58 & 1:47; Final Order at 4 (finding that front building window "has not been cleaned since Tenant moved in"). However, as discussed *infra* at 44, the Tenant was not given an opportunity to call a DCRA Housing Inspector as a witness[22] to establish that the Housing Provider had been cited for the uncleanliness of the common area windows on March 14, 2016. *See* Emergency Motion to Effect Issuance of Subpoenas for Witnesses and Ruling on Motion for Summary Judgment, Attachment ("Witness List"); R. at Tab 26; R. at Tab 32; PX 100 (PX 001).[23]

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[22] *See* Hearing CD (OAH Mar. 29, 2016) at 10:27 (ALJ acknowledging receipt of witness list).

[23] The Commission notes that the Tenant twice filed an identical list of proposed witnesses he sought to call at the evidentiary hearing, once electronically on March 24, 2016, and once in person on March 29, 2016. *See* R. at Tab 26 & 32. The identical motion requesting subpoenas included one attachment, the Witness List, which the Tenant labeled as "PX 001." The Witness List also appears in the certified record as PX 100 (and PX 001, *see supra* n.10).

Moreover, the Commission observes that the housing code requires that all "windows . . . shall be clean and free of cobwebs, dirt, dust, greasy film, soot, or any other insanitary matter." 14 DCMR § 800.3. The Commission's regulations do not declare the presence of such a violation to be, by itself, a substantial violation of the housing regulations, that is, "one which may endanger or materially impair the health and safety of any tenant." D.C. OFFICIAL CODE § 42-3501.03(35); *see* 14 DCMR § 4216.2. However, as the Commission has stated, with respect to a "health and safety" requirement for reductions in services:

> While this is a useful test it is not exclusive. It is entirely possible that there could be substantial reductions in services and facilities even where that test is not fully met and even though the alleged violation did not constitute a violation of the housing regulations. A substantial reduction of services or facilities under § 211 and a violation of the housing regulations under § 208 are not synonymous.

Washington Realty Co. v. 3030 30th St. Tenant Ass'n, TP 20,749 (RHC Jan. 30, 1991).[24] As noted *supra* at 10, a reduction in related services occurs when a housing provider fails to provide "services . . . required by law . . . including repairs, decorating and maintenance," which includes repairs and maintenance required by the housing code. D.C. OFFICIAL CODE § 42-3501.03(27); *see* Interstate General, 501 A.2d at 1263. Therefore, the Commission determines that the ALJ erred in dismissing the Tenant's claim on the grounds that the "current conditions do not violate the Act or regulations." Final Order at 9; R. at Tab 34.

The Commission, for clarity, will cite the Witness List as it appears when it was initially filed electronically on March 29, 2016, at Tab 26.

[24] Section 208 of the Act, D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A), as explained in 3030 30th St., TP 20,749, prohibits rent increases where "the rental unit and the common elements are [not] in substantial compliance with the housing regulations." For the purposes of determining *whether a rent increase is valid*, "substantial compliance" with or a "substantial violation" of the housing code must be a material health and safety risk to a tenant. D.C. OFFICIAL CODE §§ 42-3501.03(35), 42-3502.08(a)(1)(A); 14 DCMR § 4216.2. For the purposes of determining *whether related services have been substantially reduced*, however, a health and safety risk may be sufficient, but it is not necessary; nothing under D.C. OFFICIAL CODE § 42-3502.11 limits a tenant's potential remedy where the reduction in services is otherwise substantial. *See* 3030 30th St., TP 20,749. In contrast to the conditions noted *supra* at n.14 that may, if proven, invalidate a rent increase, nothing in the Commission's review of the record suggests that the Housing Provider's alleged violation of 14 DCMR § 800.3, related to the dirty windows, would tend to materially impair the health and safety of any tenant. *See* D.C. OFFICIAL CODE § 42-3501.03(35).

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

With regard to the mismatched tile, the Commission's review of the record shows both the Housing Provider and the Tenant presented evidence concerning the front entrance tile floor as well as the Tenant's bathroom tile wall. The Tenant testified that concrete was used to repair the middle of the "beautiful decorative tile" floor located in the front entrance. Hearing CD (OAH Mar. 29, 2016) at 10:09. The Housing Provider testified that in response to a NOV for a trip hazard in the front entrance, portions of the decorative tile were replaced with concrete. The Housing Provider admitted that the floor was not uniform but they had not been cited by the DCRA inspectors for that. *Id.* at 1:59-2:01. The Housing Provider testified that the floor was level, found no longer to be a trip hazard, and that "it was just made an issue this year and that was from [the Tenant]." *Id.* at 1:58-2:00; RX 221.

With regard to the Tenant's bathroom wall tiles, both the Housing Provider and the Tenant expressed dissatisfaction with the instillation of the tiles. Hearing CD (OAH Mar. 29, 2016) at 11:44, 1:31, & 1:38; PX 138 (039), 150 (051), & 151 (052). The Tenant testified that the bathroom wall tiles were at "one time decorative", but after being replaced the tiles were "nonlinear," "mismatched" that the workers installed the soap dish upside down and therefore unusable, and that there was "no craftsmanship in the work done." *See* Hearing CD (OAH Mar. 29, 2016) at 10:13-10:16. The Commission's observes that the housing code requires that "[e]ach repair shall be done in a workmanlike manner."[25] 14 DCMR § 701.3; *see also* D.C. OFFICIAL CODE § 42-3501.03(27) (related services include "services . . . required by law . . . including repairs, decorating and maintenance"), (28) (related facilities include "any facility,

[25] *See also* District of Columbia Property Maintenance Code Supplement of 2013, 12-G DCMR § 102.5 ("Repairs, maintenance work, [or] installations . . . shall be executed and installed in a workmanlike manner"); Property Maintenance Code § 202 ("WORKMANLIKE. Executed in a skilled manner; e.g., generally plumb, level, square, undamaged and without marring adjacent work.").

furnishing, or equipment . . . including any use of a . . . bath"); Interstate General, 501 A.2d at 1263; 3030 30th St., TP 20,749. Therefore, the Commission determines that the ALJ erred in dismissing the Tenant's claim on the grounds that the "current conditions do not violate the Act or regulations." Final Order at 9; R. at Tab 34.

Accordingly, the Commission remands the Final Order on this issue. On remand, the ALJ is instructed to determine whether the Tenant established a substantial reduction in services due to a prolonged failure to maintain the window in a clean condition and a failure to repair the bathroom tile and front entrance tile in a workmanlike manner, in accordance with the Commission's three-prong test, *see* Drell, TP 27,334, and in accordance with the Commission's determination with respect to potential witness testimony, *infra* at 44.

B. Whether the ALJ erred in concluding that the Tenant had not been retaliated against by the Housing Provider.

The Act provides that "[n]o housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law." D.C. OFFICIAL CODE § 42-3505.02(a).[26]

As the Commission has previously stated, the determination of retaliation is a two-step process. *See, e.g.,* Jackson v. Peters, TP 28,898; Hoskinson v. Solem, TP 27,673 (RHC July 20, 2005); Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003); *see also* Borger Mgmt., Inc., v.

[26] D.C. OFFICIAL CODE § 42-3505.02(a) provides, in full:

> No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

Miller, TP 27,445 (RHC Mar. 4, 2004) (citing Youssef v. United Mgmt. Co., Inc., 683 A.2d 152, 155 (D.C. 1996)). The first step is to determine whether a housing provider committed an act that is considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a). *See* Jackson, TP 28,898; Hoskinson, TP 27,673; Redman, TP 27,104.

Second, for retaliation to be presumed, a tenant must establish that a housing provider's conduct occurred within six months of the tenant performing one of the protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b).[27] *See* Jackson, TP 28,898; Hoskinson, TP 27,673; Redman, TP 27,104. If so, "the statute by definition applies, and the landlord is presumed to have taken 'an action not otherwise permitted by law' unless it can meet its burden under the statute." De Szunvogh v. William C. Smith & Co., 604 A.2d 1, 4 (D.C. 1992) (citing former

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[27] D.C. OFFICIAL CODE § 42-3505.02(b) provides that:

> In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:
>
> (1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;
>
> (2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
>
> (3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;
>
> (4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
>
> (5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or
>
> (6) Brought legal action against the housing provider.

D.C. CODE § 45-2552 (1986 Repl.)); Borger Mgmt., TP 27,445 at 7 (citing Youssef, 683 A.2d at 155); Hoskinson, TP 27,673 at 8-9; Redman, TP 27,104 at 5-6.

As stated above, the Commission will review the Final Order to determine if it contains findings of fact supported by substantial evidence and conclusions of law that are in accordance with the Act. 14 DCMR § 3807.1.

1. January 19, 2016, Claims of Retaliation

The Tenant contends the record evidence demonstrates that on January 19, 2016,[28] the Housing Provider took retaliatory action against him in response to his effort to "determine the source of the [smell of] smoke" inside of the Housing Accommodation. Notice of Appeal at 20. The Tenant claims that by "refus[ing] to allow [him, his daughter, and a fire inspector] access to . . . the on-site business office" the Housing Provider retaliated in response to the Tenant's efforts to investigate, including complaints to the Housing Provider and contacting District government officials. *Id.* Drawing the Commission's attention to a number of exhibits and the testimonial evidence presented at the hearing in support his claim of retaliation, the Tenant argues that the ALJ erred in rejecting his claim of retaliation. Notice of Appeal at 20-23.

In the Final Order, the ALJ did not address the Tenant's claim that the Housing Provider took retaliatory action on January 19, 2016. The ALJ determined only that the Tenant did not identify what protected act he had engaged in and to which the Housing Provider was allegedly responding. Final Order at 12; R. at Tab 34. The only finding of fact the ALJ made which appears to relate to this claim of retaliation is that "[i]n January 2016, a fire inspector visited the

[28] Commission notes that the Tenant referenced January 21, 2016 as the date of the retaliatory action on the part of the Housing Provider. Notice of Appeal at 18-22. However, based on its review of the record, the Commission observes that the events underlying the Tenant's claim of retaliation are alleged to have occurred on January 19, 2016.

building at Tenant's request. The inspector did not smell the smoke Tenant and his daughter had complained about." *Id.* at 4; R. at Tab 34.

Although this alleged retaliatory action occurred approximately nine months after the Tenant Petition was filed, the Commission notes that the Tenant never sought to amend his petition to include the January 19th claim of retaliation. The Commission's review of the record reveals that this claim was first made by the Tenant as his basis for seeking summary judgment, which was filed on March 1, 2016. *See* Corrections to Emergency Motion To Cease and Desist and Request for Summary Judgment to Include Certificate of Service Date ("Motion for Summary Judgment"); R at Tab 12. The Housing Provider opposed the Tenant's Motion for Summary Judgment, arguing that the "issues in [Tenant's] Request for Summary Judgment are the same issues which are being adjudicated in the [Tenant] Petition." Points and Authorities in Support of Opposition to Emergency Motion to Cease and Desist and Request for Summary Judgment ("Opposition to Summary Judgment") at 5; R. at Tab 28. At the evidentiary hearing, the ALJ orally denied the Tenant's Motion for Summary Judgment, concluding there were "enough contested issues of material fact that served to allow this claim to be litigated" during the evidentiary hearing. Hearing CD (OAH Mar. 29, 2016) at 9:49:01-9:52:35. However, after both parties had been allowed to present extensive evidence concerning this claim of retaliation, the ALJ ruled that the evidence would not be considered because the events occurred after the filing of the tenant petition. *Id.* at 10:42:35-10:44, 10:47.

The Commission observes that the OAH Rule governing amendments of tenant petitions provides as follows:

> 2929.6 A party may amend a petition to add additional allegations after the petition has been transferred to OAH, but before the hearing concludes, by moving to amend the petition with the presiding administrative law judge. The movant shall set forth the allegations to be added and the factual basis

> for those allegations. No written motion to amend will be considered unless it recites that the movant sought to obtain the consent of parties affected, and that such consent was granted or denied, including the identity of the party or parties who declined to consent. If the movant does not obtain a response from the opposing party, the movant must demonstrate that the movant made a good faith effort in accordance with Rule 2813.5.
>
> 2929.7 In determining whether a motion to amend a petition should be granted, the Administrative Law Judge will consider: (1) the number of requests to amend; (2) the length of time that the case has been pending; (3) the presence of bad faith or dilatory reasons for the request; (4) the merit of the proffered amendment; (5) any prejudice to the non-moving party; and (6) the orderly administration of justice.

1 DCMR § 2929. The OAH Rules further provide that "[w]here these Rules do not address a procedural issue, an Administrative Law Judge may be guided by the District of Columbia Superior Court Rules of Civil Procedure to decide the issue." 1 DCMR § 2801.1. The Commission notes that, unlike the Superior Court Rules of Civil Procedure ("Super. Ct. Civ. R."), the OAH Rules are silent on whether a tenant petition may be amended by consent, without a motion by the petitioner. Specifically, Super. Ct. Civ. R. 15(b) provides:

> (2) For Issues Tried by Consent. When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move – at any time, even after judgment – to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

See Charlery v. D.C. Dep't of Consumer & Reg. Affs., 970 A.2d 280, 284 (D.C. 2009); Moore v. Moore, 391 A.2d 762, 768 (D.C. 1978) ("failure to object to introduction of evidence related to a 'new issue' is the 'clearest indication of a party's implied consent'"); Kuhn v. Civil Aeronautics Bd., 183 F.2d 839, 841-42 n.3 (D.C. Cir. 1950) ("The applicability of that rule, or its rationale, to an administrative proceeding where there is even less attempt at formalism follows *a fortiori*.").

The Commission determines based on the above that the January 19th claim of retaliation was properly before the administrative court because the Housing Provider, in its Opposition to

Summary Judgment, and by not objecting to and eliciting testimony related to the events of January 19, 2016, consented to the trial of the issue. *See* Charlery, 970 A.2d at 284; Moore, 391 A.2d at 768; Kuhn, 183 F.2d at 841-42 n.3; Super. Ct. Civ. R 15(b); Hearing CD (OAH Mar. 29, 2016) at 10:42:35-10:44:07. Therefore, because the ALJ failed to address this contested issue, the Commission remands this issue to the ALJ for such further proceedings as may be necessary to fully address the Tenant's January 19th claim of retaliation. *See* Perkins, 482 A.2d at 402; *see also* Butler-Truesdale, 945 A.2d at 1170; Hedgman, 549 A.2d at 720; Spevak, 407 A.2d at 553.

If, on remand, the ALJ determines that further factual development is needed in order to make the additional conclusions of law, as outlined above, the ALJ may, in her discretion, hold an evidentiary hearing limited to the foregoing legal standards. *See* D.C. OFFICIAL CODE § 42-3505.02; *see also infra* at 43 (discussing failure to allow Tenant to call witness to events of January 19th).

2. Other Retaliation Claims

During the evidentiary hearing, the Tenant raised several claims of retaliation. In addition to the January 19th claim of retaliation, the Tenant argued that the following actions on the part of the Housing Provider were retaliatory against him: (1) the placing notices on the Tenant's door after he had asked the Housing Provider to stop doing so; (2) failure of Housing Provider to abate the parking tensions; (3) the theft of the Tenant's vehicle from the Housing Provider's parking lot; (4) continued use of unlicensed contractors and the poor workmanship; (5) the Housing Provider's acceptance of substandard work completed in the Rental Unit by the contractors; (6) failure of the Housing Provider to abate the smell of smoke both from inside Rental Unit as well as the common areas; (7) the lack of response by the Housing Provider's Manager Mr. Berkowitz; (8) failure to fix a broken window inside the Housing Accommodation; (9) failure to provide the Tenant with information concerning the chemicals used inside the rental

unit when resealing the tub; and (10) the Housing Provider's refusal to insist that contractors present identification to Tenants upon entering a rental unit to complete work. Hearing CD (OAH Mar. 29, 2016) at 10:48:33-11:26:12. In the Notice of Appeal the Tenant raises these same ten claims of retaliation and additionally argues that the Housing Provider's reductions in related services and facilities constituted retaliation on the part of the Housing Provider. *See* Notice of Appeal at 20-21. In the Final Order, however, the ALJ addressed only one of the Tenant's claims of retaliation: that the Housing Provider refused to eliminate the smell of smoke. *See* Final Order at 10-12; R. at Tab 34.

Although the ALJ recited the legal standards for analysis of retaliation claims under D.C. OFFICIAL CODE §§ 42-3505.02,[29] the Commission is not satisfied that the ALJ's analysis of retaliation contains any substantial discussion of how the ALJ applied the requisite legal standards to the substantial evidence in the record to support the conclusion of law that the "Tenant did not prove retaliation." *See* Final Order at 12; R. at Tab 34. The Final Order lacks any examination of whether either Tenant's actions in attempting to "determine the source of the smoke" inside the housing accommodation qualified as protected acts under the Act; nor is there any form of explanation provided by the ALJ as to whether and how the Housing Provider's failure to abate smell of smoke fall within the definition of retaliatory action under D.C. OFFICIAL CODE § 42-3505.02(a). *See* Perkins, 482 A.2d at 402; Hines, TP 27,707; *see also* Brewington, 287 A.2d at 534 ("The need for articulation of findings requires the decision-

[29] The Commission observes that, in the Final Order, the ALJ described "protected tenant activities" as those enumerated in D.C. OFFICIAL CODE § 42-3505.02(b). Final Order at 11; R. at Tab 34. The Commission notes that the enumerated activities in subsection (b) are those that may be used to trigger a presumption of retaliation. *See* D.C. OFFICIAL CODE § 42-3505.02(b). Subsection (a), however, plainly states that retaliatory action is prohibited in response to a tenant's exercise of "any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law." D.C. OFFICIAL CODE § 42-3505.02(a); *see also* 14 DCMR § 4303.2 ("No housing provider shall take any retaliatory action against any tenant who exercises any rights protected by § 502(a) of the Act." (emphasis added)).

making body to focus on the value to be served by its decision and to express the considerations which must be the bases of decision.").

The ALJ rendered only a few general, conclusory statements without reference to the supporting findings of fact. The ALJ failed to support her conclusion of law on the smell of smoke with any specific references to such evidence showing why the Tenant's actions did not qualify as protected acts under the Act. *See* D.C. OFFICIAL CODE § 42-3505.02(a). Moreover, the ALJ made no findings of fact or conclusions of law on the Tenant's remaining claims of retaliation. *See* D.C. OFFICIAL CODE § 2-509(e); *see supra* at 36-38. Consequently, based upon its review of the ALJ's discussion of this issue in the Final Order, the Commission is unable to make its requisite determination under the DCAPA that the ALJ's conclusion of law "flowed rationally" from the findings of fact. *See* Perkins, 482 A.2d at 402; Hines, TP 27,707; *see also* Brewington, 287 A.2d at 534 ("The need for articulation of findings requires the decision-making body to focus on the value to be served by its decision and to express the considerations which must be the bases of decision.").

Accordingly, the Commission remands all of the Tenant's remaining claims of retaliation, *supra* at 36-38, to the ALJ for findings of fact and conclusions of law that meet the requirements of the DCAPA, D.C. OFFICIAL CODE § 2-509(e), and D.C. OFFICIAL CODE § 42-3505.02(b), as stated herein. *See, e.g.,* Hedgman, 549 A.2d at 720; Hines, TP 27,707.

C. Whether ALJ abused her discretion by failing to grant Tenant's proposed witness subpoena requests.

The Tenant maintains that the ALJ erred by denying his request to subpoena seven witnesses for the March 29, 2016, evidentiary hearing. Second Notice of Appeal at 2-4. The Commission's review of the Tenant's subpoena requests reveals that, of the seven requested witnesses:

> Five witnesses (Algood, Atkins, Brown, Chisholm, and Yarussi) were being called to present evidence in support of his parking-related reduction in services or facilities claim, which he referred to as a "public nuisance;"
>
> Of those, two witnesses (Atkins and Brown) were also being called to present testimony about "housing issues / problems;"
>
> Another witness (Spellers) was being called to present evidence in support of his January 19th claim of retaliation; and
>
> One further witness (Singh) was being called to present evidence of the results of an inspection conducted on March 14, 2016, and in support of the Tenant's claim that his prosecution of his petition was improperly interfered with by District Government agencies.

See Witness List; R. at Tab 26.[30]

The Commission reviews an ALJ'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 discussion or analysis in support of the conclusions reached by the ALJ, the record provides the Commission with nothing on which to base its review; thus, it is unable to determine whether the decision not to grant the Tenant's subpoena request was predicated on "some valid ground," or was otherwise 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"); Pearson v. Brown, RH-TP-14-30,482 & RH-TP-14-30,555 (RHC May 3, 2018); *see also* D.C. OFFICIAL CODE § 2-509(e); Butler-Truesdale, 945 A.2d at 1171-72; Palmer, RH-TP-13-30,431.

The OAH Rules provide, for subpoena requests in rental housing cases, that:

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[30] The Commission notes that the Tenant also requested that witnesses Chisholm, Singh, and Yarussi be subpoenaed to testify regarding "his claim that Government employees hindered the prosecution of this tenant petition," a claim which the Commission previously dismissed in its First Decision and Order at 17-20. *See* Final Order after Remand at 2-3. Although it is unclear if the Second Notice of Appeal continues to challenge the denial of the subpoena requests for this purpose, the Commission is satisfied that the ALJ did not err by denying the subpoena requests on the grounds that the Tenant's claims against the District Government or its agents are not properly before OAH.

> 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.[31]

The Commission will address the denial of each subpoena request in turn, as listed by the ALJ in the Final Order After Remand:

1. "Public Nuisance" Witnesses (Algood, Atkins, Brown, Chisholm, and Yarussi)

The ALJ based the denial of these five witness subpoenas on jurisdictional grounds due to the Tenant's use, of the phrase "public nuisance" in describing the purpose for calling each witnesses. The ALJ interpreted Tenant's use of the phrase "public nuisance" to mean that "[he] sought testimony relevant to 14 DCMR 800.9, a regulation of the Department of Consumer and Regulatory Affairs, not within OAH jurisdiction under the Rental Housing Act." See Final Order After Remand at 2; R. at Tab 35.

The Commission, however, is not satisfied that the ALJ was correct in interpreting the *pro se* Tenant's use of the phrase "public nuisance." The Commission's review of the record shows that, in context, the Tenant's use of the term "public nuisance" reflected the Tenant's

[31] The Commission previously found the Tenant's subpoena request was timely. *See* First Decision and Order at 15 n.13. The Commission notes that the Case Management Order issued by the ALJ on April 29, 2015, instructed that "[t]he clerk can issue up to three subpoenas for . . . tenant side of this case . . . If a party requires more than three subpoenas, you must file a request with the Administrative Law Judge in accordance with OAH Rule 2824." Case Management Order at 3-4; R. at Tab 14.

frustration with the non-residents' use of the Housing Accommodation's parking area. The Commission can find no basis in the record to support the conclusion that the *pro se* Tenant was aware that the term "public nuisance" is a legal term of art or that he was attempting to bring a separate claim under 14 DCMR § 800.9.

Although the Tenant repeatedly used the phrase "public nuisance," he also made specific reference in his subpoena requests to the "danger" caused by the public charter school parents access the Housing Accommodation's parking facilities. *See* Witness List; R. at Tab 26. Extensive testimony on the record relates to the existence of tensions concerning use of Housing Accommodation's parking area. *See supra* at 17-19. Therefore, the Commission's review of the record does not support the ALJ's conclusion that these five witnesses were being called by the Tenant to pursue a claim under the public nuisance regulation. Rather, the Commission is satisfied that the Tenant sought to have these five witnesses present testimony in support of his claimed reduction in parking facilities. However, any error in the ALJ's denial of Tenant's subpoena request for these five witnesses based on the dispute regarding the parking area was harmless[32] in view of the Commission's determination that the ALJ's did not err in denying the Tenant's reduction in related facilities claim, because the Tenant's own testimony showed only one instance in which he was unable to park. *See supra* at 17-19.

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

2. "Housing Issues" Witnesses (Atkins and Brown)

The Commission's review of the Tenant's subpoena motion reveals that the Tenant provided the following purposes for calling each witness:

[32] *See supra* at 14-15 (discussing standard of "harmless error").

Witness Atkins	Speak on housing issue he called into Benning Woods and Horning Brothers, and his involvement in the public nuisance debacle.
Witness Brown	Speak on the public Nuisance and Housing Problems.

Witness List; R. at Tab 26. The ALJ provided the following reasoning for denying the Tenant's subpoena request for both Mr. Atkins and Mr. Brown:

> [I]f Tenant seeks testimony on a housing issue in Tenant's rental unit, the testimony would be duplicative since Tenant and his daughter testified in detail on conditions in their unit.

Final Order After Remand 1-2; R. at Tab 35.

The Commission is not satisfied that the ALJ's decision denying the Tenant's subpoena requests was predicated on "some valid ground" and therefore not an abuse of discretion. *See* 14 DCMR § 3807.1; *cf.* Bennett, 434 A.2d at 478; *see also* D.C. OFFICIAL CODE § 2-509(e); Butler-Truesdale, 945 A.2d at 1171-72; Palmer, RH-TP-13-30,431. As discussed The Commission's review of the record reveals that Tenant presented testimony, documentation, as well as photographic evidence to show that services and facilities, both inside the rental unit as well in the common area, had been substantially reduced. The Commission observes that, in his description of the purpose for calling witnesses Atkins and Brown, the Tenant neglected to identify which of his many services or facilities claims each witness was being call to support. The Commission recognizes the potential for confusion the Tenant's lack of specificity could have caused, however, that did not eliminate the need to give all due credit to the Tenant's requests.

The Commission observes that in denying the Tenant's subpoena requests the ALJ, without providing any discussion or analysis of the record evidence, concluded that the Tenant's purpose for calling both witnesses was to support of "a housing issue *in the Tenant's rental unit.*" Final Order After Remand at 2 (emphasis added); R. at Tab 35. In the absence of any

discussion or analysis, the Commission is not able to evaluate how the ALJ concluded that the witnesses were called to present evidence concerning rental unit issues to the exclusion of common area issues and if so whether that conclusion was based on some valid ground. *See* 14 DCMR § 3807.1; *cf.* Bennett, 434 A.2d at 478; *see also* D.C. OFFICIAL CODE § 2-509(e); Butler-Truesdale, 945 A.2d at 1171-72; Palmer, RH-TP-13-30,431.

Accordingly, the Commission remands this case on this issue with instructions to provide the Tenant with the opportunity to call Witnesses Atkins and Brown to testify regarding reductions in related services or facilities of which they may have knowledge, limited to those issues that the Commission has determined, *supra* at 7-31, were not properly denied in the Final Order.

3. January 19th Retaliation Witness (Spellers)

The Commission's review of the record that the Tenant sought to have Witness Spellers (a fire inspector) present testimony that "[w]hile on official inspections to locate source of smoke, witness[ed] Anissa Eatmon refusal to permit access to building . . . and outright refused to conduct business with a legal tenant because the tenant filed a tenant petition." Witness List; R. at Tab 26. The ALJ denied the Tenant's request to subpoena Witness Spellers because the Tenant and his daughter had testified about, and failed to prove a reduction in related services regarding, the smell of smoke in the housing accommodation and because "the Housing Provider's alleged refusal to permit access to the building raises an issue outside the jurisdiction of OAH." Final Order After Remand at 3; R. at Tab 35.

The Commission observes that the Tenant testified that, on the day he inspected the Housing Accommodation at the Tenant's request, Witness Spellers was unable smell smoke in the Tenant's rental unit and was prevented from inspecting other areas of the Housing Accommodation. Hearing CD (OAH Mar. 29, 2016) at 10:29 & 10:44. Therefore, the

Commission is satisfied that Witness Spellers would not have been able to provide testimony to support the Tenant's services or facilities claim related to the smell of smoke. *See supra* at 24-26.

However, as discussed *supra* at 33-36, the Commission has determined that the Tenant's claim of retaliation by the Housing Provider in refusing him access to the business office was properly raised before the ALJ. Although Witness Spellers was present at the Housing Accommodation on January 19, 2016, for the purpose of investigating the Tenant's smoke-related claims, the record shows, and the Tenant's basis for seeking his testimony was, that Witness Spellers was also present for and observed the interaction between the Tenant and Ms. Eatmon. *See* Witness List; R. at Tab 26; Hearing CD (OAH Mar. 29, 2016) at 10:20, 10:43-10:46, 2:11-2:18, & 3:05-3:07. Therefore, the Commission determines that the ALJ's denial of the Tenant's request to subpoena Witness Spellers was not based on "some valid ground" and was an abuse of discretion. *See* 14 DCMR § 3807.1; *cf.* Bennett, 434 A.2d at 478; *see also* D.C. OFFICIAL CODE § 2-509(e); Butler-Truesdale, 945 A.2d at 1171-72; Palmer, RH-TP-13-30,431.

Accordingly, the Commission remands this case on this issue, with instructions to provide the Tenant with an opportunity to call Witness Spellers to testify regarding the events alleged to be retaliation by the Housing Provider on January 19, 2016.

4. March 2016 Inspection Witness (Singh)

The ALJ denied the Tenant's subpoena request for Witness Singh because his proposed testimony concerned an inspection that he performed in March 2016, which was not "within the three year period before the tenant petition was filed." Final Order After Remand at 3; R. at Tab 35. The Commission has long recognized that evidence of a failure to abate a violation through the date of a hearing is admissible and relevant to determining an award of damages. *See, e.g.,*

Lizama, RH-TP-07-29,063; Torres, RH-TP-07-29,064; Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014).

As discussed *supra* at 28-31, the record evidence established that the Housing Provider was aware of the Tenant's concerns over the condition of the windows, damaged flooring, and unsafe stairs and that the ALJ denied by dismissing or failing to rule on these claims. *See* Witness List; R. at Tab 26. The Commission therefore determines that it was an abuse of discretion to deny the Tenant's subpoena request for Witness Singh because the Tenant was entitled to put on evidence of continuing housing code violations through the date of the hearing. *See* Lizama, RH-TP-07-29,063; Torres, RH-TP-07-29,064; Chaney, RH-TP-06-28,366 & RH-TP-06-28,577.

Accordingly, the Commission remands to OAH on this issue, with instructions to provide the Tenant with an opportunity to call Witness Singh to testify regarding housing code violations or reductions in related services or facilities of which he may have knowledge, limited to those issues that the Commission has determined, *supra* at 7-31, were not properly denied in the Final Order and of which his testimony may show that violations of the Act alleged in the Tenant Petition were ongoing on the date he inspected the Housing Accommodation.

D. Whether the ALJ improperly limited the Tenant's prosecution of the Tenant Petition in violation of due process.

The Tenant argues it was a violation of his due process rights for the ALJ to limit his ability to present evidence of how "the broken intercom affected him." Notice of Appeal at 7. Other than merely stating that the "imposition of time restraints occurred in the middle of the hearing," the Tenant provides no evidence or other record support for his contention of improper restriction of the prosecution of his claims.

As noted *supra* at 7-8, the Commission's standard of review requires it to reverse decisions that are "based upon arbitrary action, capricious action, or an abuse of discretion, of 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." 14 DCMR § 3807.1. "Guiding legal principles" commit the management and conduct of a trial or other evidentiary proceedings to the sound discretion of the presiding judge. Bolton v. Crowley, Hoge & Fein, P.C., 110 A.3d 575, 587-89 (D.C. 2015) (no abuse of discretion where "trial judge became impatient with what he described as Ms. Bolton's 'long narratives' and 'nonresponsive answers'"); Greenwood v. United States, 659 A.2d 825, 828 (D.C. 1995) (trial judge may permit witnesses to be called out-of-turn for practical reasons).

As noted above, the Tenant has failed to provide any evidence or other record support for this claim. He has not identified from the record any specific claim that he was improperly restricted in prosecuting.[33] The Commission's review of the record provides no support for the Tenant's claim that the ALJ abused her discretion in managing the conduct of the evidentiary hearing by improperly restricting the Tenant's prosecution of his claims. *See* Bolton, 110 A.3d at 587; Greenwood, 659 A.2d at 828. For the foregoing reasons, this appeal issue is dismissed.

IV. CONCLUSION

In accordance with the foregoing, the Commission affirms the Final Order and Final Order After Remand in part, and remands the case in part. The Commission affirms the Final Order with respect to whether the ALJ addressed the Tenant's claims of smoke in the Housing Accommodation, the conflict over the parking area, and the condition of the bath tub. *See supra*

[33] For example, the Tenant has not provided any support for his claim that the ALJ's "time restriction" impaired the prosecution of his claim related to the broken intercom. Moreover, as discussed *supra* at 25-27, the Commission determines that the ALJ erred by applying a requirement for the Tenant to show impact beyond the loss of the intercom service or facility.

at 21-23. The Commission further affirms the Final Order with respect to the denial of the Tenant's claims of a reduction in related services or facilities for the parking area, a broken glass door, the peeling bathtub, the smell of smoke in the Housing Accommodation, and the posting of notices on the Tenant's door. *See supra* at 17-31. The Commission further affirms the Final Order After Remand with respect to the Tenant's request to subpoena witnesses to testify about the conflicts in the parking area. *See supra* at 40-41. The Commission finally affirms the Final Order with respect to the Tenant's claims that his prosecution of the Tenant Petition was hindered in violation of due process by the imposition of time limits. *See supra* at 45-46.

The Commission remands this case with respect to make findings of fact or conclusions of law on the Tenant's claim that related services or facilities were reduced due to the failure to respond to a large number of service requests and existence of warped or compromised flooring. *See supra* at 13. The Commission further remands this case with respect to the ALJ's dismissal of the Tenant's claim that related services or facilities were reduced due to condition of certain stairs, the flooding in the laundry room, the malfunctioning intercom, the replacement of tiles, and failure to clear windows. *See supra* at 19-31.

The Commission further remands this case with respect to the ALJ's failure to address whether retaliation occurred on January 19, 2016, despite the parties contesting the issue at the evidentiary hearing. *See supra* at 33-36. The Commission further remands this case with respect to the ALJ's failure to make findings of fact and conclusions of law regarding the Tenant's multiple claims of retaliation in addition to the alleged presence of smoke. *See supra* at 36-38.

The Commission further remands this case with respect to the ALJ's determination in the Final Order After Remand that the testimony of proposed Witnesses Atkins and Brown would be duplicative. *See supra* at 41-43. The Commission further remands this case with respect to the

ALJ's determination in the Final Order After Remand that proposed Witness Spellers could provide no testimony within the jurisdiction of OAH. *See supra* at 43-44. The Commission finally remands this case with respect to the ALJ's determination in the Final Order After Remand that proposed Witness Singh could not offer relevant testimony to ongoing claims of housing conditions that may violate the Act. *See supra* at 44-45.

SO ORDERED.

MICHAEL T. SPENCER, CHAIRMAN

DIANA HARRIS EPPS, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2012 Repl.), "[a]ny person aggrieved by a decision of the Rental Housing Commission...may seek judicial review of the decision...by filing a petition for review in the District of Columbia Court of Appeals. Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH- TP-15-30,658 was mailed, postage prepaid, by first class U.S. mail on this **20th day** of **July, 2018,** to:

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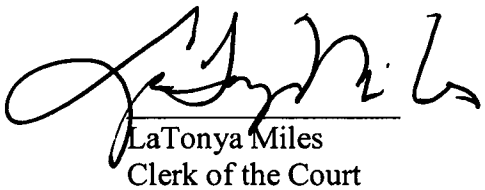

LaTonya Miles
Clerk of the Court
(202) 442-8949