

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,366

RH-TP-06-28,577

In re: 301 G Street, S.W.

Ward Six (6)

AMERICAN RENTAL MANAGEMENT COMPANY

Housing Provider/Appellant/Cross-Appellee

v.

ARLENA CHANEY, et al.

Tenants/Appellees/Cross-Appellants

DECISION AND ORDER

December 12, 2014

McKOIN, COMMISSIONER. This case is on appeal from the District of Columbia Office of Administrative Hearings (OAH), based on a petition filed in the Rental Accommodations and Conversion Division (RACD), Housing Regulation Administration (HRA), of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA).¹ The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 -3509.07, the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501 -510 (2001), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

¹ OAH assumed jurisdiction over tenant petitions from RACD on October 1, 2006, pursuant to § 6(b-1)(1) of the OAH Establishment Act, D.C. Law 16-83, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of RACD were transferred to the Department of Housing and Community Development (DHCD) by § 2003 of the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.).

I. PROCEDURAL HISTORY

On July 1, 2005, and March 27, 2006, respectively, Tenant/Appellee/Cross-appellant Arlena Chaney (Tenant Chaney), residing at 301 G St., S.W., (Housing Accommodation), Unit 426, filed tenant petition RH-TP-06-28,366, on her own behalf, and tenant petition RH-TP-06-28,577, on behalf of the New Capitol Park Towers Tenant Association (Association)² (collectively, Tenant Petitions), against Housing Provider/Appellant/Cross-appellee American Rental Management Company (Housing Provider). On November 17, 2006, Administrative Law Judge Wanda Tucker (ALJ) issued an Order consolidating the two Tenant Petitions, stating that the two cases represented the same or similar issues and would expedite the processing of the petitions and not adversely affect the interest of either party. *See* Order Granting Petitioner's Motion for Consolidation at 1-6; Record (R.) at 237-42.

By order of the ALJ, the parties filed a joint statement of the issues in the consolidated cases on March 2, 2007. *See* Joint Statement of Issues at 1-2; R at 302-03. The Tenant Petitions, as later amended, claimed that the Housing Provider violated the Act as follows:³

1. Housing Provider did not provide proper notice of rent increases;
2. Housing Provider charged rent that exceeded legally calculated rent ceilings;
3. Housing Provider implemented improper rent increases;
4. Housing Provider increased rents while rental units were not in substantial compliance with housing regulations; and

² The Commission refers to Tenant Chaney and the individuals represented by the Association collectively as the "Tenants."

³ The Commission recites the claims at issue in the consolidated cases using the language employed by the ALJ in the Final Order to summarize the Tenants' complaints, except that the Commission has numbered the issues for ease of reference.

5. Housing Provider failed to file proper forms to implement lawful rent increases.

Final Order at 6; R. at 1238; *see also* Joint Statement of Issues at 1-2; R. at 302-03. During the hearing, the ALJ granted the Tenants' motion to add a claim that the Housing Provider violated the Act by taking retaliatory action against the Tenants. Final Order at 6; R. at 1238.

On September 19, 2007, the ALJ issued an order, which was amended on November 7, 2007, in which she determined that the Association did not represent a majority of the tenants of the Housing Accommodation and, as such, lacked standing as a party to Tenant Petition RH-TP-06-28,577. *See* OAH Rule 2924 Order at 1-8; R. at 390-97; Amended OAH Rule 2924 Order at 1-8; R. at 530-37. Nonetheless, the ALJ determined that sixty-seven (67) individual Tenants had authorized the Association to represent them and could proceed as parties to the Tenant Petition. Amended OAH Rule 2924 Order at 5-6; R. at 532-33.

On November 7, 2008, the ALJ granted the Housing Provider's motion *in limine* to preclude the consideration of claims or damages arising after March 26, 2006, the date on which Tenant Petition RH-TP-06-28,577 was filed. *See* Hearing CD (OAH Nov. 7, 2008) at 10:40 - 10:54; *see also* Motion in Limine; R. at 668-72. Evidentiary hearings were held over several days between March 5, 2009, and April 28, 2009. *See generally* Hearing CDs (OAH 2009).

On July 12, 2012, the ALJ issued a Final Order in these consolidated cases: Chaney v. Am. Rental Mgmt. Co., RH-TP-06-28,366 & RH-TP-06-28,577 (OAH July 12, 2012) (Final Order); R. at 966-1243. As relevant to this appeal, the ALJ made the following findings of facts and conclusion of law in the Final Order:⁴

⁴ The findings of fact and conclusions of law are recited here using the same language as the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

V. Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceiling Complaint

V.A. Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceiling Complaint - Findings of Fact (Introduction)

1. Tenant Petitioners complained that Housing Provider charged rent that exceeded the legally calculated rent ceiling. The relevant evidence of record includes Certificates of Election of Adjustments of General Applicability (Certificates of Election or Certificates) and Amended Registration Forms for vacancy rent ceiling adjustments.

V.A.1. Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceiling Complaint – Findings of Fact for Rent Ceiling Adjustments of General Applicability

2. Housing Provider filed a Certificate of Election to increase the rent ceiling for Unit 426 (Arlena Chaney) on June 1, 2001. RX 267. The effective date reflected on the Certificate was December 1, 2001.
3. On June 28, 2002, Housing Provider filed a Certificate of Election with RACD to increase the rent ceilings for units in the [Housing Accommodation] based on the 2001 Consumer Price Index [for Urban] Wage Earners and Clerical Workers (CPI-W). RX 268. The 2001 CPI-W adjustment was 2.6%. Housing Provider entered a June 1, 2002, effective date on the Certificate for the rent ceiling increases. RX 268.
4. On June 16, 2003, Housing Provider filed a Certificate of Election with RACD to increase the rent ceilings for units in the housing accommodation based on the 2002 CPI-W. (First 2003 Certificate). PX 104(1). The 2002 CPI-W adjustment was 2.1%. Housing Provider entered a June 1, 2003, effective date on the Certificate for the rent ceiling increases. PX 104(1).
5. On July 30, 2003, Housing Provider filed another Certificate of Election with RACD to increase the rent ceilings for units in the housing accommodation based on the 2002 CPI-W, which was 2.1% (Second 2003 Certificate). PX 104(4). Housing Provider entered a June 1, 2003, effective date on the Certificate for the rent ceiling increases. PX 104(4).
6. On July 30, 2004, Housing Provider filed a Certificate of Election with RACD to increase rent ceilings for units in the housing accommodation based on the 2003 CPI-W (2004 Certificate). The 2003 CPI-W adjustment was 2.9%. PX 106. Housing Provider entered a June 1, 2004, effective date on the Certificate for the rent ceiling increases. PX 106.
7. On June 10, 2005, Housing Provider filed a Certificate of Election with RACD to increase rent ceilings for units at issue based on the 2004 CPI-W (2005

Certificate). PX 109(5). The CPI-W adjustment was 2.7%. Housing Provider entered a June 1, 2005, effective date on the Certificate for the rent ceiling increases. PX 109(5).

...

V.B. Housing Provider Charged Rents That Exceeded Legally Calculated Rent Ceilings Complaint – Conclusions of Law (General)

8. Before August 5, 2006, the rent that a housing provider could charge for a rental unit was tied to a rent ceiling for the unit. The rent ceiling was the maximum amount that a housing provider could charge as rent and was adjusted through a prescribed regulatory framework. The types of rent ceiling adjustments at issue here are the adjustment of general applicability and the vacancy rent ceiling adjustment.

V.B.1 Housing Provider Charged Rents That Exceeded Legally Calculated Rent Ceilings Complaint – Conclusions of Law; Rent Ceiling Adjustments of General Applicability (2002 through 2006) – Background

9. The adjustment of general applicability allowed housing providers to raise rent ceilings annually for rental units covered by the rent stabilization provisions of the Rental Housing Act. The District of Columbia Rental Housing Commission (Commission) was charged with establishing the amount of the rent ceiling adjustment each year by computing the percent of change in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for the Washington - Baltimore Standard Metropolitan Area during the previous calendar year. The rent ceiling adjustment for a given year was equal to the change in the CPI-W in the previous year, expressed as a percentage. The Commission published the rent ceiling adjustment and its effective date in the District of Columbia Register each year. In calendar years 2003, 2004, 2005, and 2006, the published effective date was May 1.
10. To increase a rent ceiling by the adjustment of general applicability, a housing provider must take and perfect the adjustment. To take and perfect, a housing provider must file with RACD and serve on each tenant occupying a unit to which the rent ceiling adjustment is applied, a *Certificate of Election of Adjustment of General Applicability* (Certificate of Election). The Certificate of Election must be filed and served within 30 days following the date when the housing provider is “first eligible” to take the rent ceiling adjustment.
11. In *Sawyer v. District of Columbia Rental Hous. Comm’n*, the District of Columbia Court of Appeals (Court of Appeals) held, on the facts in that case, that the housing provider was “first eligible” to take and perfect the rent ceiling adjustments within 30 days following May 1, the published effective date of the adjustments for the years at issue. However, the court also allowed that there

might be circumstances under which a housing provider is not “first eligible” to take and perfect a rent ceiling adjustment within the 30-day window following the effective date of the adjustment.

12. The circumstances may arise when applying 14 DCMR [§] 4206.3. This rule allows a housing provider to take and perfect only one rent ceiling adjustment of general applicability in any 12-month period, and provides that the housing provider who elects to do so is not “eligible” to take and perfect another such adjustment during the 12-month period immediately following the perfection date of the prior year adjustment of general applicability.

V.B.2. Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceilings Complaint – Conclusions of Law – First 2003 Certificate

13. The CPI-W adjustment for 2002 was 2.1%, effective May 1, 2003. When applying the *Sawyer* analysis, Housing Provider would have been first eligible to take and perfect the rent ceiling adjustment on May 1st and should have perfected the adjustment by filing a Certificate of Election with RACD no later than 30 days after May 1st; unless Housing Provider took and perfected a CPI-W rent ceiling adjustment less than a year before the May 1st “first eligible” date. Although the year that preceded May 1, 2003, is outside the statutory period, it was necessary to look at that time frame for the sole purpose of determining whether Housing Provider was first eligible to take a CPI-W rent ceiling adjustment on May 1, 2003, or whether Housing Provider was first eligible at a later date because it had taken and perfected a CPI-W adjustment less [than] twelve months before.
14. As noted in Section I.B. of this Order, the statute of limitations period for Arlena Chaney (Unit 426) in RH-TP-[06]-28,366, began on July 1, 2002, and ended on July 1, 2005. Housing Provider filed a Certificate of Election to increase the rent ceiling for Unit 426 on June 15, 2001, which is outside the statute of limitations for Ms. Chaney in RH-TP-[06]-28,366. RX 267.
15. The evidence showed that in 2002, Housing Provider elected to take a CPI-W adjustment for all of the rental units in these consolidated cases by filing a Certificate of Election with RACD. RX 268. The effective date reflected on the Certificate was June 1, 2002; and the Certificate was filed with RACD on June 28, 2002, less than 30 days after June 1, 2002. Therefore, Housing Provider took and perfected a rent ceiling increase for all rental units eleven months before May 1, 2003, and was not eligible to take and perfect another increase for the rental units for another month - on June 1, 2003.
16. The evidence showed that Housing Provider took and perfected the CPI-W rent ceiling adjustment timely on June 1, 2003. PX 104(1). The First 2003 Certificate reflected a June 1, 2003, effective date — the date Housing Provider was first eligible to take adjustment applying the twelve month rule. The Certificate included notice that the adjustment would take effect when the Certificate was

filed with DCRA and served on each affected tenant individually or by posting a copy of the Certificate in a common area of the housing accommodation. The Certificate was filed with RACD on June 16, 2003, less than 30 days after Housing Provider was first eligible to take and perfect the adjustment. Tenants did not allege or prove that the Certificate was not properly served. The First 2003 Certificate increased the rent ceilings for nine units at the housing accommodation by the 2.1% 2002 CPI-W adjustment. *Id.* The First 2003 Certificate was taken and perfected properly. The nine affected rental units are reflected on Table 14.

[Table 14 omitted]

V.B.3. Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceilings Complaint – Conclusions of Law – Second 2003 Certificate

17. As explained above, Housing Provider was first eligible to take the 2002 CPI-W rent ceiling increase on June 1, 2003, and did so for nine rental units. Housing Provider then sought to increase the rent ceilings for Tenant Petitioners' units using the 2002 CPI-W by filing a Second 2003 Certificate. The nine rental units reflected on the First 2003 Certificate also were included on the Second 2003 Certificate. The Second 2003 Certificate was filed on July 30, 2003, more than 30 days after June 1, 2003 — the date Housing Provider was first eligible to take and perfect the adjustment. Thus, Housing Provider did not take and perfect the Second 2003 Certificate timely; and the rent ceiling adjustments Housing Provider sought to implement are invalid.
18. For the nine rental units that appeared on the First and Second 2003 Certificates, the new and prior rent ceiling amounts were identical on the first and Second Certificates. The identical rent ceiling adjustments perfected in the First 2003 Certificate are valid and not rendered invalid because they appeared on the unperfected Second 2003 Certificate. The rental units and affected Tenant Petitioners that appeared on the second certificate are reflected on Table 15. The nine rental units that were reflected on the first 2003 Certificate are indicated by an asterisk.

[Table 15 omitted]

V.B.4 Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceilings – Conclusions of Law – 2004 Certificate

19. The 2003 CPI-W adjustment was 2.9%, effective May 1, 2004. Housing Provider elected to take the adjustment, effective June 1, 2004 — the date Housing Provider was first eligible to take the adjustment, given that Housing Provider properly took and perfected rent ceiling increases on June 1, 2003 (First 2003 Certificate). PX 106. But Housing Provider filed the 2004 Certificate with RACD on July 30, 2004, more than thirty days after it was first eligible to take the adjustment. PX 106. Thus, the rent ceiling adjustments Housing Provider sought

to implement through the 2004 Certificate were invalid. The invalid rent ceiling adjustments could not be passed on as a rent increases [sic].

20. The CPI-W rent ceiling adjustment Housing Provider sought to implement in 2004 are invalid for another reason. Since the CPI-W adjustments that Housing Provider attempted to implement through the Second 2003 Certificate were not taken and perfected properly, the adjustment was invalid for all purposes, including for purposes of establishing an anniversary date for future rent ceiling adjustments. Thus, Housing Provider was first eligible to adjust the rent ceilings for units reflected on the Second 2003 Certificate within 30 days after May 1, 2004. When Housing Provider did not file the Certificate of Election until July 30, 2004, it failed to take and perfect the adjustments for those units within 30 days after May 1, 2004, the date it was first eligible to do so. The invalid rent ceiling adjustments could not be passed on as a rent increases.
21. Housing Provider failed to properly take and perfect the rent ceiling adjustments for the Tenant Petitioners and rental units shown on Table 16 using the 2004 Certificate. The adjustments are invalid.

[Table 16 omitted]

V.B.5. Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceilings – Conclusions of Law – 2005 Certificate

22. The 2004 CPI-W was 2.7%, effective May 1, 2005. Housing Provider elected to take the adjustment, effective June 1, 2005. Housing Provider filed the 2005 Certificate with RACD on June 10, 2005, within 30 days after June 1, 2005. But, as explained above, the rent ceiling adjustments reflected on the 2004 Certificate were not taken and perfected properly, and were therefore invalid. As such, the 2004 certificate was invalid for purposes of establishing an anniversary date for future adjustments. Thus, Housing Provider was first eligible to adjust the rent ceilings for the units within 30 days after May 1, 2005. When Housing Provider did not file the Certificate of Election until June 10, 2005, it failed to take and perfect the adjustments for those units within 30 days after May 1, 2005, the date it was first eligible to do so. Therefore, the invalid rent ceiling adjustments are invalid [sic]. The rental units reflected on the 2005 Certificate are reflected on Table 17.

[Table 17 omitted]

...

V.D. Housing Provider Charged Rents that Exceeded Legally Calculated Rent Ceilings Complaint; Conclusions of Law – Remedies

23. A housing provider who fails to perfect an adjustment of general applicability or a vacancy rent ceiling adjustment through an appropriate and timely filing with the

Rent Administrator forfeits the right to the adjustment. The Commission has consistently held that [the] last legally established rent ceiling remains the rent ceiling unless it is properly adjusted.

24. If a housing provider knowingly charges/demands rent that exceeds the legally calculated rent ceiling, the housing provider violates the Rental Housing Act by demanding rent in excess of the maximum allowable rent for the unit. “Knowing” only requires knowledge of the essential facts that bring the conduct within the purview of the Act; the law presumes knowledge of the resulting legal consequences. In these consolidated cases, Housing Provider had knowledge of the essential facts – it knew that rents and rent ceilings were increased. To the extent that rent ceilings did not conform to the requirements of the Act, and rents were charged that exceed legally calculated rent ceilings, Housing Provider knowingly violated the Act. The remedy for the knowing violation is to refund the excess rent amounts.
25. The correct rent ceiling for each Tenant Petitioners’ unit below, based on the findings of fact and legal conclusions in Section VI.A and VI.B of this Order; and rent amounts charged, rolled back, and refunded, because the amounts exceeded the legally calculated rent ceiling, are set forth in Tables 20-23.

[Table 20, “First 2003 Certificate (PX 104(1)),” omitted]

[Table 21, “Second 2003 Certificate (PX 104(4)),” omitted]

[Table 22, “2004 Certificate (PX 106),” omitted]

[Table 23, “2005 Certificate (PX 109(5)),” omitted]

VI. Housing Provider Implemented Improper Rent Increases Complaint

VI.A. Housing Provider Implemented Improper Rent Increases Complaint; Findings of Fact – Summary

26. Tenants allege that Housing Provider implemented improper rent increases. Relevant documents of record are Notices of Rent Increase Charged, Certificates of Election, and Amended Registration Forms.
27. The Notice of Rent Increase Charged reflect the Tenants’ names and unit numbers, dates of service, previous rents charged, new rents charged, amounts of rent increases, effective dates of the rent increases, bases for the rent increases, rent ceiling increase amounts, and bases for the rent ceiling increases. The Notices show rent increases derived from: CPI-W rent ceiling adjustments filed with RACD and served on Tenant Petitioners during the statutory period; prior preserved and unimplemented CPI-W rent ceiling adjustments; and vacancy rent ceiling adjustments.

28. Certificates of Election reflect Tenant Petitioners' unit numbers, CPI-W adjustments used to increase the rents, effective dates of the CPI-W adjustments, prior rent ceilings, new rent ceilings, effective dates of the changes in rent ceilings, prior rents charged, new rents charged, and dates Housing Provider implemented the rent increases by passing CPI-W adjustments on as rent increases.
29. Amended Registration Forms reflect unit numbers, dates on which the units were vacated, previous rent ceilings; current rent ceilings, citations to the section of the Rental Housing Act that authorized vacancy rent ceiling adjustments; and rent ceiling increase percentages or references to comparable units.
30. The following groups of rent increase documents were proffered: (1) Notices of Rent Increase Charged that reference previously authorized, preserved, and unimplemented rent ceiling increases, with corresponding Certificates of Election to verify previously authorized rent ceiling adjustment amounts; and (2) Notices of Rent Increase Charged that reference previously authorized, preserved, and unimplemented rent ceiling adjustments without Certificates of Election to verify previously authorized rent ceiling adjustments, with no Amended Registration Forms. For some Tenant Petitioners, no Notices of Rent Increases or credible testimony establishing rent increases were proffered.
31. The Tables below reflect each of the scenarios described above:

**VI.A.1. Housing Provider Implemented Improper Rent Increases
Complaint – Findings of Fact – Units with Notices of Rent Increase
Charged with Certificates of Election**

[Table 24 omitted]

**VI.A.2. Housing Provider Implemented Improper Rent Increases
Complaint – Findings of Fact – Units with Notices of Rent Increase
Charged without Certificates of Election**

[Table 25 omitted]

...

**VI.A.4. Housing Provider Implemented Improper Rent Increases
Complaint – Findings of Fact – Units with No Evidence of a Rent
Increase**

32. The following Tenant Petitioners did not proffer Notices of Rent Increases or any other reliable, credible evidence that rents for their units were increased: [list of 25 Tenants and units omitted].

VI.B. Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law

33. As discussed in Section V.B. of this Order, the rent that a housing provider could charge for a rental unit during the statutory period for these consolidated cases was tied to a rent ceiling for the unit. The rent ceiling was the maximum amount that a housing provider could charge as rent. A rent increase was proper if it was based on a properly taken and perfected rent ceiling increase that was properly calculated, and previously unimplemented. The process for taking and perfecting CPI-W and vacancy rent ceiling adjustments is set forth in Sections V.B.2. and V.C. of this Order.
34. The following discussion, based on the Notices, Certificates, and Amended Registration Forms of record, shows which rent increases were allowed by the Rental Housing Act, which were not, and instances where the record evidence fell short of that needed to establish that rent increases were taken.

VI.B.1. Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law – Proper Rent Increases based on Prior Preserved, Previously Unimplemented CPI-W Adjustments

35. The rent increases reflected on the following table were allowed by the Rental Housing Act. Each was based on a prior preserved, previously unimplemented CPI-W rent ceiling adjustment. In each instance, the adjustment was properly taken and perfected, as shown by a Certificate of Election that was filed with RACD and served on the affected tenant within 30 days following the date when the housing provider was first eligible to take the adjustment. And, the rent ceiling amount passed on as rent is less than the prior preserved rent ceiling dollar amount.

[Table 27 omitted]

VI.B.2. Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law – Improper Rent Increases Based on CPI-W Adjustments

36. The rent increases reflected on the following table were not allowed by the Rental Housing Act for one or more of the following reasons: (1) the rent increase amount was above the prior preserved rent ceiling dollar amount; or (2) the Certificate of Election that reflected the CPI-W rent ceiling adjustment was not properly taken and perfected, because it was not filed within 30 days of the date when Housing Provider was first eligible to take the rent ceiling adjustment.

[Table 28 omitted]

...

VI.B.4. Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law – Tenant Petitioner[s] Failed to Prove that Rents were Increased

37. The following Tenant Petitioners did not submit notices of rent increases and rent increases were not established by credible testimony: [list of 25 Tenants and units omitted]

VI.B.5. Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law – Remedies

38. A housing provider who fails to properly perfect a rent ceiling adjustment forfeits the right to the adjustment. And, an improperly perfected rent [ceiling] increase cannot support a rent [charged] increase. When a housing provider increases the rent for a rental unit by passing on an amount tied to an improperly taken and unperfected rent ceiling increase, the rent increase is higher than allowed by the Rental Housing Act and therefore unlawful. Therefore, the tenant, from whom the unlawful rent increase is demanded, is entitled to a refund of the unlawful amount, even if the rent is not paid. The rules implementing the Rental Housing Act allow the award of interest on rent refunds, calculated from the date of the violation of the Act to the date of the Final Order.
39. The interest rate imposed is the judgment interest rate used by the Superior Court of the District of Columbia on the date the order is issued. The Superior Court interest rate is currently 2% per annum (0.0017 per month). The Act also provides for the rollback of rents in addition to rent refunds, where unlawful rent increases have been demanded.
40. No rollback or refund is appropriate for rental units where no rent increase was proven. Where Tenant Petitioners' proved that rents were increased unlawfully, the rents for the rental units are rolled back to the lawful amount and unlawful increase amounts are refunded, as shown on Attachment D [omitted].

VII. Rent Increased while Housing Accommodation not in Substantial Compliance with Housing Regulations Complaint

VII.A. Rent Increased while Housing Accommodation not in Substantial Compliance with Housing Regulations Complaint - Findings of Fact

41. Tenant Petitioners complained that Housing Provider increased the rent for rental units in the housing accommodation while rental units and common areas were not in substantial compliance with the housing regulations.
42. For the most part, Housing Provider increased the rents for the Tenant Petitioners who testified in June and July of 2003, 2004, and 2005. Rents also were increased for Tenant Petitioners who testified in January 2004, 2005, and 2006; February 2004; March 2004, 2005, and 2006; April 2005; May 2005; August 2003 and

2004; September 2003, 2004, and 2005; October 2005; and December 2003 and 2005. Gregory Bums (Unit 503) presented evidence about conditions in Unit 731, which was rented by Tenant Petitioner Thomas J. O'Brien. Housing Provider increased the rent for Unit 731 in May 2005. Mr. O'Brien did not testify.

43. DCRA did not issue any notices of violation of the housing regulations for the housing accommodation between July 1, 2002, and March 27, 2006. At the hearing, 20 Tenant Petitioners described conditions in the housing accommodation that were relevant to categories of conditions that the Rental Housing Commission (RHC) deemed substantial housing violations by rulemaking.
44. Housing Provider turned off the water to tenants units on a number of occasions to repair the water system. Tenant Petitioners testimony pertaining to the number of times varied and specific dates were not provided. Housing Provider issued notices that the water would be turned off for repair purposes eight times in 2004, and five times in 2005. In each instance the water was shut off for less than a full day and Notice was provided one to three days in advance of the day water was to be shut off. The dates or timeframes Tenant Petitioners testified about were not always consistent with dates in Housing Provider's notices.
45. On November 24, 2005, Thanksgiving Day, the housing accommodation experienced a major electricity power outage. See PXs 100, 100a, 100b. Some, but not all, Tenant Petitioners had no lights and or heat that day; and there was no heat or lights in the lobby of the housing accommodation for some part of that day. The duration of the loss of electricity that Tenant Petitioners experienced varied on and after Thanksgiving Day. The rent was not increased in November 2005 for any Tenant Petitioner who testified or for any other Tenant Petitioner.
46. Table 30 below shows dates when rents for the twenty Tenant Petitioners' rental units and Mr. O'Brien's unit were increased, if at all. Evidence considered included Notices of Rent Increases and Affidavits of Service of Notices of Rent Adjustment. The Notices of Rent Increases show rent increase dates and amounts. Affidavits show dates Notices were served, but no rent increase amounts. Tables 31 through 39 show conditions described, by categories established by the RHC; and whether a condition described existed when the rent for a rental unit was increased. The rent increase dates from Table 30 were used for this determination. Tenant Petitioners also described conditions that were not relevant to conditions that the RHC deemed [substantial] housing code violations by rulemaking. Those conditions are shown in Tables 40 through 43.

[Tables 30 - 43, "Rent Increased while Housing Accommodation not in Substantial Compliance with Housing Regulations Complaint; Findings of Fact," omitted]

VII.B. Rent Increased while Housing Accommodation not in Substantial Compliance with Housing Regulations Complaint; Conclusions of Law – Introduction

47. The Rental Housing Act prohibits a housing provider from increasing the rent for a rental unit if the unit and the common areas of the building where the unit is housed are not in substantial compliance with the housing code. And, a housing provider may not implement a rent increase for a rental unit in which substantial housing code violations exist, even where the housing provider has made substantial, but unsuccessful, efforts to abate the violations.
48. “Substantial compliance with the housing code” means the absence of any substantial housing violations. Evidence of substantial noncompliance is limited to notices of housing violations issued by DCRA and other offers of proof that the Rental Housing Commission considers acceptable. Through rulemaking, the RHC has deemed certain conditions to be housing violations and has held that the mere existence of these violations is sufficient to meet the “substantial” test.
49. If a housing provider serves notice of a rent increase while substantial housing code violations exist in a rental unit or a common area of the housing accommodation, the housing provider violates the Rental Housing Act by demanding rent in excess of the maximum rent allowed by the Act. Thus, the demanded increase is invalid and the remedy is to roll back the rent to that in effect before the unlawful rent demand and refund the unlawful increase amount.
50. Tenant Petitioners failed to prove that rents in the housing accommodation were increased while there were violations of the housing regulations in rental units or common areas. This complaint is dismissed with prejudice.

VII.B.1. Rent Increased While Housing Accommodation not in Substantial Compliance with Housing Regulations Complaint; Conclusions of Law – Notices of Violation

51. There is no record evidence that DCRA issued notices of violation for any condition in the housing accommodation between July 1, 2002, and March 27, 2006. Therefore, Tenant Petitioners failed to prove, through notices of violation, that rents were increased while there were substantial violations of the housing regulations.

VII.B.2. Rent Increased While Housing Accommodation not in Substantial Compliance with Housing Regulations Complaint; Conclusions of Law – Conditions Deemed [Substantial] Housing Violations

52. Although DCRA issued no notices of violation for the housing accommodation, Tenant Petitioners sought to prove, through testimony and photographs, that certain conditions that the Commission deemed substantial housing code

violations, by rulemaking, existed when Housing Provider increased rents. Tenants did not meet their burden of proof.

53. Conditions deemed [substantial] Housing code violations include:

- Frequent lack of sufficient water supply;
- Frequent lack of sufficient heat;
- Curtailement of a utility service, such as gas or electricity;
- Leaks in the roofs or walls;
- Infestations of insects or rodents; and
- Accumulation of garbage or rubbish in common areas.

Tenant Petitioner did not meet their burden of proving that conditions deemed [substantial] housing violations existed on dates rents were increase[d] for the following reasons.

54. Tenant Petitioners failed to establish firm dates when offending conditions existed in their rental units and common areas. Tenant Petitioners testified that conditions existed intermittently; over a period of time; during the summer of a given year; or during the statute of limitations period at issue. But, without more, there was no basis for concluding that an offending condition existed on the date a particular rent increase was taken. Some Tenant Petitioners could not recall dates at all. When firm dates were established, like the date of the power outage on November 24, 2005, the dates did not coincide with dates rent increases were taken. See Tables 31 through 39.
55. If proven, substantial housing violations in common areas could provide the bases to roll back and refund rent increases for all Tenant Petitioners. But Tenant Petitioners did not meet their burden of proof in this regard. Certain Tenant Petitioners testified that they observed roaches, rodents[,] and accumulated garbage in common area trash chutes and trash rooms, but specific dates for observations were not provided. Therefore, the testimony provided no basis for concluding that the offending conditions existed on the date a particular rent increase was taken. See Tables 34, 36, and 38.
56. Tenant Petitioners testified that Housing Provider shut the water off frequently, testimony that is relevant to whether Tenant Petitioners experienced a frequent lack of sufficient water supply, a [substantial] housing violation by rulemaking. But Tenant Petitioner's failed to provide specific dates in large part. And, the documentary evidence showed that Housing Provider shut off the water only eight times in 2004 and five times in 2005 for less than a full day each time. These numbers do not establish a frequent lack of water supply. And, there was no evidence to establish that shutting off the water for repair purposes, which promotes compliance with the housing code, constitutes a housing violation.
57. Tenant Petitioners proffered photographic evidence of accumulated trash in common areas; but the photographs were taken after March 2006, the end date for

the statute of limitations for these cases. See Table 38. While the photographs were offered as evidence of the type of conditions observed during the statute of limitations period, the photographs did not establish that the conditions existed on any date other than the date the conditions were photographed, as the conditions captured could have been created or corrected on the same day the photograph was taken. Tenant Petitioners who testified admitted that they did not know how often trash was removed from the premises.

58. Tenant Petitioners also proffered photographs of carpet Housing Provider deposited on the building's grounds after removing it from the common hallways of the housing accommodation. PXs 116(10). Tenant Petitioner Gregory Bums (Unit 503) testified that he took the photographs in April 2006, but the processing date on the back of the photograph reads January 2007. Housing Provider proffered a copy of a contract which showed that the carpet replacement project did not begin until October 2006, a date that is consistent with the January 2007 date. Tenant Petitioner's failed to establish that the discarded carpet was deposited on the grounds of the housing accommodation between July 2002 and March 2006. Therefore, Tenant Petitioners['] photographs did not prove a substantial housing violation [existed] when rents were increased.
59. Tenant Petitioner Joseph Wade (Unit 525) testified credibly that he had inconsistent heat during the winter of 2005, such that he had a frequent lack of sufficient heat. *See* Table 39. But the evidence showed that the rent for Mr. Wade's unit was increased during the statute of limitation period in June 2004, only. Thus, the evidence does not show that the rent for Unit 525 was increased while there were was a substantial housing code violation based on a lack of sufficient heat.
60. For reasons stated above, the testimony proffered, together with the photographic evidence, did not establish that there were substantial housing code violations on dates rents were increased. The evidence proffered was not such relevant evidence as a reasonable mind might accept as adequate to support the legal conclusion.

VII.B.3. Rent Increased While Housing Accommodation not in Substantial Compliance with Housing Regulations Complaint; Conclusions of Law – Conditions Not Deemed [Substantial] Housing Violations

61. Tenant Petitioners complained about a number of conditions in the housing accommodation but failed to prove by a preponderance of the evidence that the conditions constituted substantial housing code violations. See Tables 30 through 43. No notices of violations were issued for the conditions by DCRA; the conditions were not deemed substantial housing code violations by rulemaking; and, the evidence of record does not provide a basis for determining if the conditions derived from a condition deemed a substantial housing violation by rulemaking. Therefore, this evidence did not establish that substantial housing

code violations existed when Housing Provider increased the rents for Tenant Petitioners units.

VII.C. Rent Increased While Housing Accommodation Not In Substantial Compliance with Housing Regulations Complaint; Conclusion of Law

62. For reasons stated in Section VII.B. and Section VII.C., Tenant Petitioners did not prove, by a preponderance of evidence, that Housing Provider increased the rent for rental units in the housing accommodation while rental units and common areas were not in substantial compliance with the housing regulations.

...

XI. Summary of Conclusions of Law

...

63. Tenant Petitioners proved that Housing Provider implemented 54 improper rent increases for 29 Tenant Petitioners; a total of \$88,542.22 in excessive rent increase amounts are refunded to the Tenant Petitioners.

Final Order at 58-138 (footnotes omitted); R. at 1107-87.

On July 18, 2012, the ALJ issued an order amending the Final Order (Amended Final Order) to correct an error in the conclusions of law regarding whether the Housing Provider implemented improper rent increases. Amended Final Order; R. at 1244-76.⁵ The ALJ amended the Final Order as follows:⁶

1. Part VI.B.1., “Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law – Proper Rent Increases based on Prior Preserved, Previously Unimplemented CPI-W Adjustments,” table 27, to remove 14 rent adjustments;
2. Part VI.B.2., “Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law – Improper Rent Increases based on CPI-W Adjustments,” table 28, to add 14 rent adjustments; and

⁵ The Commission observes that the Amended Final Order does not contain internal page numbering.

⁶ The Commission observes that the main text of the Amended Final Order is unchanged from the Final Order, other than certain dollar amounts to reflect changes to the tables of factual findings. *Compare* Amended Final Order; R. at 1266-76, *with* Final Order at 8-9, 98-106, 138-40; R. at 1235-36, 1139-47, 1105-07.

3. Parts I.E., “Summary of Conclusions of Law and Relief Granted,” XI., “Summary of Conclusions of Law,” and XII., “Order,” to increase the award of rent refunds to a total of \$106,811.05.

See Amended Final Order; R. at 1266-76.

On July 19, 2012, the Housing Provider filed a Motion for Reconsideration of the Final Order, *see* R. at 1277-79, and on July 25, 2012, the Housing Provider filed a Motion for Reconsideration of the Amended Final Order, *see* R. at 1284-86. On August 30, 2012, the ALJ issued an Order Granting Motion for Reconsideration (Order on Reconsideration), granting in part both of the Housing Provider’s motions and amending the Final Order accordingly. Order on Reconsideration at 1; R. at 1364. In the Order on Reconsideration, the ALJ made the following conclusions of law:⁷

A. Rent Increases Between March 27, 2006, and April 28, [2009] Are Not Supported by Substantial Evidence

1. Housing Provider challenges this administrative court’s award of damages for the period after March 27, 2006, on grounds that the record contains no evidence of housing code violations beyond that date and moves this administrative court to vacate the unsupported damages. Housing Provider’s argument and supporting legal authority are persuasive. Findings of an administrative agency must be supported by substantial record evidence considered as a whole. And, OAH Rule 2828.5(d) provides that, where substantial justice requires, the presiding Administrative Law Judge may change the final order if the order’s findings of fact are not supported by the evidence.
2. Damages may be awarded through the date of the evidentiary hearing in a rental housing case if the tenant proves that alleged violations began within the statutory period and existed through the date of the hearing. In *Jenkins v. Johnson*, the Commission held: “When violations are continuing in nature, the Commission also ‘looks forward’ from the date the petition was filed, to the termination date of the violation. If the violation did not terminate prior to the timely filing of the petition, and if the record contained evidence of the continuing violation, the remedy of refund . . . may go up to the date the record closed, which is usually the hearing date.”

⁷ The conclusions of law are recited here using the same language as the ALJ in the Final Order, except that the Commission has numbered the ALJ’s paragraphs for ease of reference.

3. Here, the record contains evidence of violations that occurred up to the date the petition was filed—March 27, 2006. Evidence of housing code violations that occurred after that date was not admitted. Admitted evidence pertained to the statutory period at issue in RH-TP-[06-]28,577, from March 27, 2003, to March 27, 2006, and the statutory period at issue RH-TP-[06-]28,366, from July 1, 2002, to July 1, 2005. Therefore, the award of damages from March 28, 2006, through April 28, 2009, the last day of the evidentiary hearing, is not supported by the evidence. Therefore, this Order vacates those portions of the Final Order and Amended Final Order that award damages to Tenant Petitioners for the period beginning March 28, 2006, and ending April 28, 2009, and associated interest on the damages, for an amended total damage award of \$40,148.79. Attachments A and B.

B. Rent Ceilings for Units 113, 122, 123, 201, 410, and 426 Reflected in Tables 27 and 28 were based on Prior Preserved and Previously Unimplemented Rent Ceiling Adjustments

4. In its motion filed on July 25, 2012, Housing Provider requested clarification of the rent ceiling “discrepancies” between Table 27 and Table 28. Specifically, Housing Provider questioned the rent ceilings amounts for Units 113, 122, 123, 201, 410, and 426, pointing out, for instance, that the prior and new rent ceilings in Table 27 for Unit 113 were higher than its prior and new rent ceilings six months later in Table 28. Excerpts of Tables 27 and 28 that reflect the rent ceilings questioned are shown below:

[Table 27 omitted]

[Table 28 omitted]

5. As explained in the Amended Final Order, on or after the date a housing provider first becomes eligible to take a rent ceiling adjustment, the housing provider may elect to implement a CPI-W rent ceiling adjustment or preserve all or a portion of the rent ceiling adjustment to implement on a later date. Tables 27 and 28 show the rent ceiling adjustments that Housing Provider preserved from earlier years and chose to implement on the effective dates of the stated rent increases.
6. The rent increases shown in Tables 27 and 28 for Units 113, 122, 123, 201, 410, and 426 were based on prior preserved and previously unimplemented CPI-W rent ceiling adjustments. In each instance, Housing Provider elected to implement a previously authorized, preserved, and unimplemented rent ceiling adjustment. For instance, on June 1, 2002, Housing Provider was authorized to increase the rent ceiling for Unit 113 by \$49 from \$1,896 to \$1,945. Housing Provider did not utilize this rent ceiling adjustment in 2002. Instead, Housing Provider preserved that rent ceiling adjustment and elected to implement it on April 1, 2003, increasing rent for that unit by \$42 from \$1,411 to \$1,453 as shown in Table 27. That 2002 preserved rent ceiling adjustment, i.e. prior and new rent ceilings for

2002, is what is reflected in Table 27. Six months later, on October 1, 2003—reflected in Table 28—Housing Provider elected to increase the rent for Unit 113 from \$1,453 to \$1,500 by implementing a prior preserved rent ceiling adjustment authorized in 1991. According to the evidence presented, the 1991 authorized rent ceiling adjustment was \$49[,] i.e.[,] an increase in rent ceiling from \$899 to \$948. Thus, Table 28 reflects the 1991 rent ceilings that were implemented on October 1, 2003, to increase Unit 113's rent from \$1,453 to \$1,500.

7. The rent ceilings shown in Tables 27 and 28 for Units 122, 123, 201, 410, and 426 also reflect the rent ceilings for the year that Housing Provider preserved, not the rent ceiling adjustments for the year of the rent increase.

C. February 1, 2004 Rent Increase for Unit 123 was Improperly Calculated

8. Housing Provider also requested that this administrative court explain why the February 1, 2004, rent increase for Unit 123 was invalidated as improperly calculated. Where a housing provider preserves a rent ceiling adjustment, the rent increase later implemented pursuant to the preserved rent ceiling adjustment must not exceed the dollar amount of that preserved rent ceiling. A properly calculated rent increase, therefore, must not exceed the dollar amount of the prior preserved rent ceiling increase.
9. The February 1, 2004, rent increase for Unit 123 exceeded the dollar amount of the preserved rent ceiling adjustment. As shown in the excerpt of Table 28 above, Housing Provider was authorized a rent ceiling adjustment of \$44 on July 1, 1991, which Housing Provider preserved and elected to implement on February 1, 2004. However, on February 1, 2004, Housing Provider increased rent by \$48 from \$1,001 to \$1,049—\$4 above the preserved amount. Accordingly, I found the rent increase amount above the preserved amount improper and invalidated that amount.

Order on Reconsideration at 3-8; R. at 1357-62. The ALJ accordingly ordered that the award of rent refunds would be in the amount of \$40,148,79 in rent rollbacks. *See id.* at 9; R. at 1356.

On September 7, 2012, the Housing Provider filed a timely notice of appeal of the Final Order, as amended by the Amended Final Order and the Order on Reconsideration. *See* Notice of Appeal of Housing Provider/Appellant American Rental Management Company at 1 (Notice of Appeal). The Housing Provider asserted the following errors by the ALJ:

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

2. The [Final] Order is erroneous to the extent it awarded damages based on the alleged failure of [the Housing Provider] to timely file certificates of election and/or amended registration forms.
3. The [Final] Order is erroneous to the extent it awarded damages to [T]enants who did not appear at the hearing.
4. The [Final] Order is erroneous to the extent it awarded damages based on the allegation that rents charged exceeded rent ceilings.
5. The [Final] Order is erroneous to the extent it awarded damages to an unidentified [T]enant.

Notice of Appeal at 2.

On September 10, 2012, the Tenants filed a timely Notice of Cross-appeal of the Final Order, as amended. *See* Tenants' Notice of Appeal at 1 (Notice of Cross-appeal). The Tenants asserted the following errors by the ALJ:

1. [The Final Order incorrectly d]enies associational standing to the [Association].
2. [The Final Order incorrectly e]xcludes petitioners by misapplying rules about res judicata and exemptions that [the Housing Provider] had not filed.
3. [The Final Order incorrectly a]pplies rules regarding the filing and consideration of certificates of election and registration documents.
4. [The Final Order incorrectly i]gnores or mischaracterizes overwhelming evidence of numerous and extensive housing code violations.
5. [The Final Order incorrectly i]gnores evidence in the record and misapplies the law regarding retaliation.
6. [The Final Order incorrectly m]iscalculates the amount of damages and/or rent overcharge refunds.

Notice of Cross-appeal at 2.

The Tenants filed a Brief in Support of Appeal (Tenants' Brief) on March 7, 2013, and the Housing Provider filed a brief (Housing Provider's Brief) on April 5, 2013. The Commission held a hearing on this matter on May 7, 2013. Hearing CD (RHC May 7, 2013).

II. PRELIMINARY ISSUES

A. **The Tenants' Motion to Strike the Housing Provider's Brief**

The Housing Provider filed its brief in this appeal on April 5, 2013. Housing Provider's Brief at 1. On May 1, 2013, the Tenants filed a Motion to Strike the Housing Provider's Brief (Motion to Strike) as untimely filed. The Commission noted at its hearing that it would address this motion in its Final Order. Hearing CD (RHC May 7, 2013) at 2:07-2:09. The Tenants state in their motion that the Commission should consider two issues:⁸

- 1) The [Commission] certified the record and notified the [Housing Provider] on February 14, 2013. Parties must "file briefs in support of their positions within five days of receipt of notification..." 14 DCMR [§] 3802.7. Since Housing Provider's brief supporting its positions was filed without leave or explanation 52 days later on April 5, 2013, must it be stricken as time-barred?
- 2) On March 7, 2013, Tenants filed their brief. Parties must "file responsive briefs within ten days of service of the pleading to which the response is being filed." 14 DCMR [§] 3802.8. Since [the Housing Provider's] responsive brief was filed without leave or explanation nearly 30 days later on April 5, 2013, must it be stricken as time-barred?

Motion to Strike at 1.

The Commission's rule at 14 DCMR § 3802.7 (2004) states that "[p]arties may file briefs in support of their position within five (5) days of receipt of notification that the record in the matter has been certified." The rules also provide that "[p]arties may file responsive briefs within ten (10) days of service of the pleading to which the response is being filed." 14 DCMR § 3802.8. In addition, the Commission's rules for the computation of time provide that: (1) any period of time shall not include the day of the act, event or default from which the designated

⁸ The two issues noted by the Tenants are recited here using the same language as the Motion to Strike, except that the Commission has numbered the Tenants' paragraphs for ease of reference.

time period begins to run; (2) if the last day of the period of computation is a Saturday, Sunday, or legal holiday, then the period runs until the end of the next day that is not a Saturday, Sunday or legal holiday; (3) when the time period is 10 days or less, Saturdays, Sundays, or legal holidays are not included in the computation; (4) legal holidays are provided in D.C. OFFICIAL CODE § 1-612.02 (2001); and (5) if a party is required to serve paper within a prescribed period and does so by mail, three (3) days shall be added to the prescribed period of time for filing. 14 DCMR § 3816.1-.5.⁹

The Commission issued a Notice of Scheduled Hearing and Notice of Certification of the Record on February 14, 2013 (First Notice of Certification), following the filing of the Notice of Appeal by the Housing Provider on September 7, 2012, and the Notice of Cross-appeal on September 10, 2012. The First Notice of Certification set a hearing for March 7, 2013. The Tenants later filed, on February 28, 2013, an Emergency Motion to Set New Hearing Date and for Leave to File a Supporting Brief within Five (5) Days (Emergency Motion). On March 4,

⁹ 14 DCMR § 3816 provides as follows:

- 3816.1 In computing any period of time prescribed or allowed under this chapter, the day of the act, event, or default from which the designated time period begins to run shall not be included.
- 3816.2 The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday.
- 3816.3 When the time period prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.
- 3816.4 Legal holidays shall be those provided in D.C. Official Code § 1-612.02 (2001).
- 3816.5 If a party is required to serve papers within a prescribed period and does so by mail, three (3) days shall be added to the prescribed period to permit reasonable time for mail delivery.
- 3816.6 The Commission, for good cause shown, may enlarge the time prescribed, either on motion by a party or on its own initiative; provided, that the Commission does not enlarge the time for filing a notice of appeal.

2013, the Commission granted the Tenants' request. *See* Order on Motion for Continuance.

Subsequent to the Commission's Order on Motion for Continuance, the Tenants filed their brief on March 7, 2013.¹⁰

The Commission subsequently issued two Notices of Scheduled Hearing and Notices of Certification of the Record: one on March 20, 2013 (Second Notice of Certification), and one on March 26, 2013 (Third Notice of Certification). The Second Notice of Certification incorrectly listed March 7, 2013, as the date for the hearing, and therefore the Third Notice of Certification was issued to correct the date of the hearing to May 7, 2013. Each Notice stated that "the record of the proceedings before the Office of Administrative Hearings has been certified to the Commission. All written briefs and submission in support of an Appeal or Cross Appeal must be filed with the Commission pursuant to 14 DCMR § 3802 (2004)." *See* Notice of Scheduled Hearing and Notice of Certification of the Record (RHC Mar. 20, 2013); Third Notice of Certification; *see also* First Notice of Certification.

As noted, the Commission's rules provide for parties to file briefs within five (5) days of receipt of notification that the record has been certified. 14 DCMR § 3802.7. The Housing Provider filed its brief on April 5, 2013. *See* Housing Provider's Brief at 1. The Commission observes that April 5, 2013, was past the deadline to file a brief, as calculated from the date of the First Notice of Certification, but it was within five (5) business days, plus three (3) days for

¹⁰ The Commission notes that the Order on Motion for Continuance did not explicitly grant the Tenants leave to file their brief out of time. *See* Order on Motion for Continuance at 4-5. Nonetheless, the Tenants' Brief was filed more than five (5) days after the First Notice of Certification, as required by 14 DCMR § 3802.7.

filing by mail, after the Commission issued the Third Notice of Certification. *See* 14 DCMR §§ 3802.7, 3816.1-.5.¹¹

The Commission has discretion as an administrative tribunal to make procedural determinations in order to carry out its mandate. *See* Prime v. D.C. Dept. of Pub. Works, 955 A.2d 178, 182 (D.C. 2008) (citing Ammerman v. D.C. Rental Accommodations Comm'n, 375 A.2d 1060, 1063 (D.C. 1977) (administrative tribunals “must be, and are, given discretion in the procedural decisions made in carrying out their statutory mandate.”); Nader v. FCC, 520 F.2d 182, 195 (D.C. Cir. 1975) (“the [Federal Communications] Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (agencies “should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.”). *See also* 14 DCMR § 3816.6 (“The Commission, for good cause shown, may enlarge the time prescribed, either on motion by a party or on its own initiative”). The Commission is satisfied that its acceptance of the Housing Provider’s Brief does not harm the Tenants or unfairly prejudice their position in this appeal. Acceptance of the Housing Provider’s Brief allows the case to go forward with the parties’ respective positions fully presented and for a more complete resolution of this case on its merits. *Cf.* Briggs v. Israel Baptist Church, 933 A.2d 301, 304 (D.C. 2007) (pleading standards should not be narrowly construed, reflecting a preference for “resolution of disputes at trial on the

¹¹ The Commission observes that the Housing Provider’s Brief is captioned as “Brief of Housing Provider” but described in its text as a “reply brief on appeal.” *See* Housing Provider’s Brief at 1. The Commission notes that parties are provided with ten (10) days to file a reply brief, *see* 14 DCMR § 3802.8, and that the Tenants’ Brief was filed on March 7, 2013, more than ten (10) days before the Housing Provider’s Brief was filed on April 5, 2013. Nonetheless, the Commission, in its discretion, will consider the Housing Provider’s filing as a brief in support of its appeal rather than a reply to the Tenants’ brief.

merits, not on the technicalities of pleading”); Parreco v. D.C. Rental Hous. Comm’n, 885 A.2d 327, 354 (D.C. 2005) (amendments of pleadings are permitted to promote resolution of cases on the merits); United Dominion Mgmt. Co. v. Coleman, RH-TP-06-28,833 (RHC Sept. 27, 2013) (noting preference for resolving cases on their merits); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 7, 2011) (quoting Briggs, 933 A.2d at 304).

In its discretion, and in the interest of resolving contested cases after full briefing on the merits, the Commission determines that March 26, 2013, the date the Third Notice of Certification was issued, may serve as the date of the “notification that the record in the matter has been certified” and the date from which the timeliness of the Housing Provider’s Brief will be governed. *See* 14 DCMR §§ 3802.7, 3816.6; Prime, 955 A.2d 178; Ammerman, 375 A.2d at 1063. Therefore, the Commission determines that the filing of the Housing Provider’s Brief on April 5, 2013, was timely under the Commission’s rules. *See* 14 DCMR §§ 3802.7, 3816.5.

Accordingly, the Commission denies the Tenants’ Motion to Strike.

B. The Housing Provider’s objection to the Tenants’ reservation of issues not briefed

The Tenants’ Brief states that “the Rental Housing Commission need only answer these four straightforward issues” and enumerates the four (4) allegations of error that the Commission addresses in this Decision and Order. Tenants’ Brief at 1-2; *see infra* at 29-31. However, the Tenants’ Brief states, in a footnote, that the Tenants “reserve the right to address orally the others identified in their Notice of [Cross-appeal] at a hearing before the [Commission].” *Id.* at 1 n.1. The Commission’s review of the Notice of Cross-appeal and of the Tenants’ Brief reveals that the two remaining issues not briefed are that the Final Order erroneously: 1) “[e]xcludes petitioners by misapplying rules about *res judicata* and exemptions that respondent had not

filed;” and 2) “[i]gnores evidence in the record and misapplies the law regarding retaliation.”

Compare Notice of Cross-appeal at 2 *with* Tenants’ Brief at 1-2.¹²

The Commission’s review of the recording of its May 7, 2013, hearing reveals that the Tenants did not address the two remaining issues during the presentation of their case. *See generally* Hearing CD (RHC May 7, 2013). In its brief, the Housing Provider objects to the Tenants’ reservation of the two remaining issues, arguing that it would be deprived of the right to fully respond to the issues not included in the Tenants’ Brief if the Commission were to decide the issues. Housing Provider’s Brief at 4.

Under the DCAPA, in a contested case “the proponent of a rule or order shall have the burden of proof.” D.C. OFFICIAL CODE § 2-509(b) (2001); Stancil v. D.C. Rental Hous. Comm’n, 806 A.2d 622 (D.C. 2002). Although the Commission’s rules do not require a party to file a brief in order to raise an issue on appeal, *see* 14 DCMR § 3802.7 (stating that parties “may file” briefs),¹³ this does not relieve the proponent of an appeal of the burden to present the substance of its case. *See* Stancil, 806 A.2d at 622; Kamerow v. Baccous, TP 24,470 & TP 24,471 (RHC Sept. 26, 2002) (“[w]ithout the benefit of a brief, citation to legal authority, or a

¹² The Commission notes that the Tenants’ Notice of Cross-appeal also asserts that the ALJ “[m]iscalculate[d] the amount of damages and/or rent overcharge refunds.” Notice of Cross-appeal at 2. The Tenants’ Brief does not make any argument that the ALJ made any specific mathematical errors. *See generally* Tenants’ Brief; *cf.* Covington v. Foley Props., Inc., TP 27,985 (RHC June 21, 2006) (statement that “The evidence does not support the Petitioner’s rent ceiling is correct” does not raise a specific issue that Commission can address on appeal). Nonetheless, the Commission observes that the Tenants’ other, fully briefed assertions of error would, if accepted, require a recalculation of the awards to the Tenants. To that limited extent, the Commission, in its reasonable discretion, will treat this argument as raised in the Tenants’ Brief. *See, e.g.*, Bratcher v. Johnson, RH-TP-08-29,478 (RHC Mar. 25, 2014); Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013) (Campbell II); Barac Co. v. Tenants of 809 Kennedy St., NW, VA 02-107; Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n. 8.

¹³ 14 DCMR § 3802.7 provides in full:

3802.7 Parties may file briefs in support of their position within five (5) days of receipt of notification that the record in the matter has been certified.

clearer statement of the issue, the Commission cannot accept the housing provider's argument”); Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1989) (“[I]f the notice of appeal or briefs do not cite properly the statutory, regulatory, or case-law basis for the appeal, appellants represented by counsel may find their appeals dismissed for failure to meet the requirements of 14 DCMR [§] 3802.5[(b)]”); *see also* Bardoff v. United States, 628 A.2d 86, 90 n.8 (D.C. 1993) (“[A]ppellants have failed to show the reasons that the court erred in these rulings. It is appellant's burden to demonstrate error.”) (citing Cobb v. Standard Drug Co., 453 A.2d 110, 111 (D.C. 1982)).¹⁴

The Commission observes that the two, single-sentence statements of error in the Notice of Cross-appeal, recited above, provide no citation to legal authority, no reference to the purportedly affected Tenants, and no description of the alleged misapplications of law to any particular facts. *See* Notice of Cross-appeal at 2. As noted, the Tenants, who were represented by counsel, could have, but did not, provide any supplemental argument or detail by written brief or at the Commission’s oral hearing. *See generally* Tenants’ Brief; Hearing CD (RHC May 7, 2013). Therefore, the Commission determines that the Tenants have failed to carry their burden as the proponents of an order reversing the ALJ’s determinations on these issues. D.C. OFFICIAL

¹⁴ The Commission further observes that it is the practice of the D.C. Court of Appeals (DCCA) to treat issues raised but not briefed as abandoned. *See, e.g., BDO Seidman, LLP v. Morgan, Lewis & Bockius, LLP*, 89 A.3d 492, 497 n.3 (D.C. 2014) (where appellant made bare assertion in footnote without supporting argument, “the issue [was] not properly before th[e] court”); Bardoff, 628 A.2d at 90 n.8 (where trial court granted motions to quash subpoenas of several individuals, appellants’ brief on appeal argued specifically with regard to only three; general arguments as to other subpoenas treated as abandoned); *see also* Cratty v. United States, 163 F.2d 844, 851 (D.C. Cir. 1947) (grounds “stated by the appellants but not urged in their brief” treated as abandoned).

CODE § 2-509(b); Stancil, 806 A.2d 622; Bardoff, 628 A.2d 86, 90 n.8; Cobb, 453 A.2d at 111; Kamerow, TP 24,470 & TP 24,471.¹⁵

Accordingly, the Tenants' appeals on the two issues raised but not argued are dismissed.

III. ISSUES ON APPEAL¹⁶

The Tenants raise the following issues on appeal:¹⁷

¹⁵ The Commission does not determine, as the Housing Provider's Brief at 4 appears to suggest, that the Tenants abandoned these issues solely by failing to argue them in the Tenants' Brief. *See* 14 DCMR § 3802.7 (parties "may file" briefs). Rather, as described, the Commission dismisses these issues because the Tenants have not availed themselves of *any* opportunity to present argument on the alleged errors by the ALJ.

¹⁶ The Commission, in its reasonable discretion, discusses the Tenants' issues on cross-appeal before discussing the Housing Provider's issues on appeal, because the Commission determines that the several overlapping factual matters and the application of related legal principles are more efficiently explained and resolved in this order, rather than by the chronological order in which the parties filed their respective appeals. *See, e.g., Atchole v. Royal*, RH-TP-10-29,891 (RHC Mar. 27, 2014) at n. 7; Campbell II, RH-TP-09-29,715; Smith Prop. Holdings Five (D.C.) v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) at n.12; Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013); Tenants of 809 Kennedy St., VA 02-107

¹⁷ The Commission, in its reasonable discretion, has recast the issues on appeal, consistent with the Tenants' language in the Notice of Appeal and Tenants' Brief, to state the issues in a manner which clearly identifies the legal requirements under the Act. *See, e.g., Bratcher*, RH-TP-08-29,478 at 9-10 (despite Tenant's narrative presentation in the notice of appeal, Commission identified cognizable issues); Beckford, RH-TP-07-28,895 at n. 17 (recasting statement of issues on appeal); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013) at n. 7 (Commission interpreted narrative statement of issues on appeal to raise one specific allegation of error); Avila, RH-TP-28,799 at n.8 (issues on appeal recast to state in a manner that clearly and accurately identifies the legal grounds under the Act for appeal).

Although the Commission will not consider an issue not raised in a notice of appeal, *see* 14 DCMR § 3807.4, the Commission, in the exercise of its reasonable discretion, is satisfied that the four (4) issues discussed in the Tenants' Brief, which we have recast as the issues on appeal, are substantially identical to several of the issues raised by the Notice of Cross-appeal. *See, e.g., Bratcher*, RH-TP-08-29,478; Beckford, RH-TP-07-28,895; Watkis, RH-TP-07-29,045; Avila, RH-TP-28,799. Specifically, the Commission in the exercise of its reasonable discretion determines that:

- Issue 1 is raised by the allegation that the Final Order incorrectly "[a]pplies rules regarding the filing and consideration of certificates of election and registration documents;"
- Issue 2 is related to the allegations that the Final Order incorrectly "[a]pplies rules regarding the filing and consideration of certificates of election and registration documents" and "[m]iscalculates the amount of damages and / or rent overcharge refunds," *but see infra* at 40-43 (appeal denied for failure to make clear and concise statement of alleged errors);
- Issue 3 is raised by the allegation that the Final Order incorrectly "[d]enies associational standing to the [Association];"

1. Whether the ALJ erred in finding that some Certificates of Election of General Applicability filed after May 31, 2000, were properly taken and perfected
2. Whether the ALJ erred in failing to determine that notices of rent increases misstated prior rents and sought to take rent increases built on prior unperfected rent ceilings
3. Whether the ALJ erred by denying the Association party status
4. Whether the ALJ erred by failing to find that the Housing Provider increased rents while the Housing Accommodation was not in substantial compliance with the housing regulations

The Housing Provider raises the following issues on appeal:¹⁸

1. Whether the ALJ erred in awarding damages barred by the statute of limitations
2. Whether the ALJ erred in awarding damages based on the alleged failure to timely file Certificates of Election and/or Amended Registration forms
3. Whether the ALJ erred in awarding damages based on the allegation that the rents charged exceeded the rent ceilings
4. Whether the ALJ erred in awarding damages to Tenants who did not appear at the hearing
5. Whether the ALJ erred in awarding damages to an unknown Tenant

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- Issue 4 is raised by the allegation that the Final Order incorrectly “[i]gnores or mischaracterizes overwhelming evidence of numerous and extensive housing code violations.”

Compare Notice of Cross-appeal at 2; *supra* at 21, with Tenants’ Brief at 1-2; *see, e.g.,* Bratcher, RH-TP-08-29,478; Beckford, RH-TP-07-28,895; Watkis, RH-TP-07-29,045; Avila, RH-TP-28,799. For the reasons described *supra* at 26-29, the Commission determines that the Tenants have abandoned their appeals that the Final Order incorrectly “[e]xcludes petitioners by misapplying rules about res judicata and exemptions that respondent had not filed” and “[i]gnores evidence in the record and misapplies the law regarding retaliation.” *See* Notice of Cross-appeal at 2.

¹⁸ The Commission, in its reasonable discretion, has rephrased the Housing Provider’s issues on appeal, to state the issues in a manner which clearly identifies the legal requirements under the Act and reordered the issues to group together claims that involve overlapping legal issues and the application of common legal principles. *See, e.g.,* Atchole v. Royal, RH-TP-10-29,891 (RHC Mar. 27, 2014) at n. 7; Campbell II, RH-TP-06-29,715; Morris, RH-TP-06-28,794; Jackson, RH-TP-12-28,898; Tenants of 809 Kennedy St., VA 02-107. For the complete language of the Housing Provider’s Notice of Appeal, *see supra* at 20.

IV. DISCUSSION OF TENANTS' ISSUES

The Commission's standard of review is found in 14 DCMR § 3807.1, which provides as follows:

The Commission shall reverse final decisions of [an ALJ] 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 [ALJ].

1. Whether the ALJ erred in finding that some Certificates of Election of General Applicability filed after May 31, 2000, were properly taken and perfected

The Tenants argue that the ALJ failed to properly apply the Act and the Commission's regulations to certain evidence in the record, namely, Certificates of Election of Adjustment of General Applicability (Certificates of Election) filed by the Housing Provider after May 31, 2000. *See* Tenants' Brief at 5-12. Specifically, the Tenants assert that it was error for the ALJ to find that the date by which a housing provider must file a Certificate of Election in order to increase a rental unit's rent ceiling "can vary away from May 1 and extend even beyond May 31 . . . based on a footnote in [*Sawyer Prop. Mgmt. Co. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 104 n.5 (D.C. 2005)]." Tenants' Brief at 7.

The Act provides that:

On an annual basis, the [Commission] shall determine an adjustment of general applicability in the rent ceiling This adjustment of general applicability shall be equal to the change during the previous calendar year [in the] Consumer Price Index for Urban Wage earners and Clerical Workers (CPI-W) for all items during the preceding calendar year. . . . A housing provider may not implement an adjustment of general applicability . . . within 12 months of the effective date of the previous adjustment of general applicability[.]

D.C. OFFICIAL CODE § 42-3502.06(b) (emphasis added).¹⁹ In order to adjust a rental unit's rent ceiling pursuant to the annual, CPI-W adjustment, the Commission's regulations, implementing the Act, require a housing provider to:

[T]ake and perfect a rent ceiling increase authorized by [§ 42-3502.06(b)] by filing with the Rent Administrator . . . a [Certificate of Election] which shall . . . [b]e filed . . . within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.

14 DCMR § 4204.10 (2004) (emphasis added); *see Sawyer*, 877 A.2d at 104. In accordance with the Act, the Commission's regulations further provide that:

A housing provider may take and perfect a rent ceiling adjustment of general applicability only once in any twelve (12) month period, and a housing provider who elects to perfect a rent ceiling adjustment for a rental unit under [D.C. OFFICIAL CODE § 42-3502.06(b)] of the Act shall not be eligible to take and perfect another such adjustment during the twelve (12) month period immediately following the date of perfection of the prior adjustment of general applicability.

14 DCMR § 4206.3 (2004) (emphasis added).

The Commission has consistently published the annual CPI-W adjustment of general applicability with an "effective date" of May 1. *See, e.g.*, 48 DCR 1856 (Feb. 23, 2001); 49 DCR 1156 (Feb. 8, 2002); 50 DCR 1809 (Feb. 21, 2003). Thus, notwithstanding the date on which a housing provider has taken and perfected the previous year's adjustment, no housing provider will be "first eligible to take the adjustment" until May 1 of each year, at the earliest. *See* 14 DCMR § 4204.10. However, as the D.C. Court of Appeals (DCCA) has observed:

There may be circumstances (not arising . . . in . . . the present case) under which a housing provider will not be eligible to take an adjustment of general

¹⁹ Effective August 5, 2006, the Rent Control Reform Amendment Act of 2006, D.C. Law 16-109, 53 DCR 4889, abolished "rent ceilings" as a distinct concept under the Act, permitting housing providers to make adjustments only to the actual "rent charged" for a rental unit. The Commission applies the language of the Act as it existed at the time of any specific conduct.

applicability until some time after the published effective date of the adjustment. For example, a housing provider may take and perfect a rent ceiling adjustment of general applicability only once in any twelve month period. [14 DCMR] § 4206.3; *see also* D.C. [Official] Code § 42-3502.06(b). If the first adjustment is perfected on May 31, for instance, the twelve-month rule renders the provider ineligible to take the second adjustment until May 31 of the following year, thirty days later than the published effective date of that adjustment.

Sawyer, 877 A.2d at 104 n.5.

The Tenants argue on appeal that it is “imperative that any adjustment of general applicability be taken and perfected before May 31 of the same year in order to prevent the kind of ‘multiple complications’ resulting from rent ceiling adjustments . . . occur[ring] at random times in a large multi-unit housing accommodation.” Tenants’ Brief at 7 (emphasis removed) (quoting Sawyer, 877 A.2d at 104-05 (regarding 30-day filing requirement for rent ceiling adjustments arising from rental unit vacancies)). They argue that to construe the phrase “first eligible” as suggested in the DCCA’s footnote “would defeat the purpose of the filing requirements.” Tenants’ Brief at 7.

The DCCA has consistently held that “[t]he primary rule of statutory construction is that the intent of the legislature is to be found in the language which it has used.” James Parreco & Son v. D.C. Rental Hous. Comm’n, 567 A.2d 43, 46 (D.C. 1989) (citing United States v. Goldenberg, 168 U.S. 95, 102-03 (1897); Peoples Drug Stores, Inc. v. District of Columbia, 470 A.2d 751, 753 (D.C. 1983)); *see also* Dorchester House Assocs. Ltd. P’ship v. D.C. Rental Hous. Comm’n, 938 A.2d 696, 702 (D.C. 2007); Columbia Plaza Tenants’ Ass’n v. Columbia Plaza, LP, 869 A.2d 329, 332 (D.C. 2005); Carmel Partners, Inc. v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC May 16, 2014) (“plain meaning” of Commission’s regulations). Thus, a statute, or a regulation, will be given its plain meaning so long as that does not produce absurd results or

results that contradict the legislative or regulatory scheme as a whole. Parreco, 567 A.2d at 46; Columbia Plaza, 869 A.2d at 702.

The Commission observes that there is substantially less risk of “rent . . . adjustments . . . occur[ring] at random times in a large multi-unit housing accommodation,” *see Sawyer*, 877 A.2d at 104-05, with regard to the annual CPI-W adjustments of general applicability than with regard to vacancy adjustments; the latter are taken on a considerably more random and unpredictable, unit-by-unit basis, whereas the annual adjustment of *general* applicability, only occurring once a year, will only be available on a less-than-universal basis in exceptional cases. *Compare* D.C. OFFICIAL CODE § 42-3502.06(b) *and* 14 DCMR § 4206 *with* D.C. OFFICIAL CODE § 42-3502.13(a) *and* 14 DCMR § 4207. The Commission is thus satisfied that footnote 5 of Sawyer, 877 A.2d at 104 n.5, correctly describes the plain meaning of “first eligible” in the Act and the Commission’s regulations, and that this construction does not produce absurd results that undermine the functioning of the Act. *See, e.g., Parreco*, 567 A.2d at 46; Columbia Plaza, 869 A.2d at 702. Therefore, in the exercise of its reasonable discretion and consistent with Sawyer, 877 A.2d at 104 n.5, the Commission determines that, even though the Commission makes the annual, CPI-W adjustment available for all housing providers to take on May 1 of each year, a housing provider who took the previous year’s adjustment after that day, but within thirty (30) days of its first eligibility, will not be “first eligible” to take and perfect the current year’s adjustment until twelve (12) months after taking the previous year’s adjustment. *See* D.C. OFFICIAL CODE § 42-3502.06(b); 14 DCMR §§ 4204.10, 4206.3.

With regard to the rent ceiling adjustments challenged on these grounds by the Tenants, the Commission is satisfied that the ALJ did not err in applying the Act and the Commission’s implementing regulations. *See* 14 DCMR § 3807.1; *see also Sawyer* 877 A.2d at 104 n.5.

In applying the above considerations to this appeal, the Commission notes that the Tenants assert that the ALJ should have reduced their lawfully calculated rent ceilings, based on the following Certificates of Election:

- May 1, 2000, CPI-W adjustment, filed May 31, 2000 (Respondent’s Exhibit (RX) 266(b); R. at 2842-51);
- May 1, 2001, CPI-W adjustment, filed June 15, 2001 (RX 267; R. at 2852-62);
- May 1, 2002, CPI-W adjustment, filed June 28, 2002 (RX 268; R. at 2863-70);
- May 1, 2003, CPI-W adjustment, filed June 16, 2003 (Petitioners’ Exhibit (PX) 104(1); R. at 1589-90);
- May 1, 2004, CPI-W adjustment, filed July 30, 2004 (PX 106; R. at 1632-39); and
- May 1, 2005, CPI-W adjustment, filed June 10, 2005 (PX 109(5); R. at 1672-79);

See Tenants’ Brief at 7-8. The Tenants concede that the May 31, 2000, Certificate of Election was timely filed, and argue that it is, in fact, the only valid basis for the rent ceilings of their rental units. *Id.*

For ease of reference, the Commission provides the following table summarizing the ALJ’s determinations, as explained herein:

Table 1: Tenants’ Challenges to Certificates of Election of Adjustment of General Applicability

Year	CPI-W effective	Adjustment effective	First eligible	Certificate Filed	Lawfully perfected?
2000	*	*	*	*	*
2001	*	*	*	*	*
2002	*	June 1	*	*	*
2003 (nine units)	May 1	June 1	June 1	June 16	Yes

2003 (all units)	May 1	June 1	June 1	July 30	No
2004	May 1	June 1	June 1 (nine units); May 1 (remaining units)	July 30	No
2005	May 1	June 1	May 1	June 10	No

* Tenants' challenge barred by statute of limitations

The Commission's review of the record shows that, in the Final Order, the ALJ determined that the earliest rent ceiling adjustment that the Tenants may challenge under the Act's statute of limitations is a June 16, 2003, Certificate of Election. Final Order at 64-65; R. at 1180-81.²⁰ As the ALJ determined, the validity of the 2003 Certificate of Election depended in part on the amount of time elapsed since the previous rent ceiling adjustment of general applicability. Final Order at 64; R. at 1181;²¹ *see* 14 DCMR § 4206.3; Sawyer, 877 A.2d at 104

²⁰ The Tenants' Brief misinterprets the Commission's decisions in Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Feb 24, 2006) and Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Mar. 30, 2006) (Order on Reconsideration), to stand for the proposition that an improperly perfected rent ceiling adjustment may be challenged at any time, regardless of the three-year (3-year) limitation in D.C. OFFICIAL CODE § 42-3502.06(e) ("No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment[.]"). *See* Tenants' Brief at 8-11. As the Commission clarified in United Dominion Mgmt. Co. v. Hinman, TP 28,728 (RHC May 17, 2013), the Act's statute of limitations generally bars challenges to rent or rent ceiling adjustments filed more than three (3) years before the filing of a petition, but does not bar inquiry into the validity of a rent ceiling adjustment, preserved for more than three (3) years, *if such an adjustment is implemented as a rent charged increase within the statutory period.* Hinman, TP 28,278, *aff'd* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, Nos. 13-AA-613, 13-AA-959, & 13-AA-960 (D.C. Oct. 16, 2014); *see also* Kennedy v. D.C. Rental Hous. Comm'n, 709 A.2d 94, 99-100 (D.C. 1998). To the extent that the Housing Provider preserved, and later implemented within the statutory period, the above-listed CPI-W adjustments that were filed in 2002 and earlier, the Commission observes that such claims were addressed on a case-by-case basis by the ALJ in part VI.B. Tables 27 and 28, of the Amended Final Order. *See* Amended Final Order; R. at 1268-74; *see also infra* at 56-59.

Accordingly, the Commission is satisfied that the ALJ did not err in finding that the statute of limitations in D.C. OFFICIAL CODE § 42-3502.06(e), bars challenges to rent increases implemented before July 1, 2002, and March 26, 2003, as applicable to Tenant Chaney's individual Tenant Petition, RH-TP-06-29,366, and the Association-initiated Petition, RH-TP-06-28,577, respectively.

²¹ Specifically, the ALJ stated:

Although the year that preceded May 1, 2003, is outside the statutory period, it was necessary to look at the at time frame for the sole purpose of determining whether Housing Provider was first

n.5. The ALJ found that the Housing Provider filed a Certificate of Election, with a stated effective date of June 1, 2002, adjusting the rent ceiling in every unit at issue, on June 28, 2002. Final Order at 65; R. at 1180; *see* RX 268; R. at 2863-69.²² Accordingly, the ALJ determined that the Housing Provider was not “first eligible” to take and perfect another adjustment of general applicability until June 1, 2003. *See* 14 DCMR §§ 4204.10, 4206.3; Sawyer, 877 A.2d at 104 n.5.

The Commission’s review of the record shows that, in 2003, the Housing Provider filed two Certificates of Election: first, on June 18, 2003, with a stated effective date of June 1, 2003, for nine (9) units at issue in these cases (First 2003 Certificate); and second, on July 30, 2003, also with a stated effective date of June 1, 2003, for every Tenant (Second 2003 Certificate), including those contained in the First 2003 Certificate. Final Order at 64-66; R. at 179-81; *see also* RX 269(c); R. at 2883-85; RX 269(e); R. at 2890-96. The ALJ found, and the Commission is satisfied that substantial evidence supports, that the First 2003 Certificate was properly perfected twelve (12) months after the previous adjustment of general applicability was taken and perfected, and filed within thirty (30) days of the Housing Provider’s first eligibility on June

eligible to take a CPI-W rent ceiling adjustment on May 1, 2003, or whether Housing Provider was first eligible at a later date because it had taken and perfected a CPI-W adjustment less than twelve months before.

Final Order at 64; R. at 1181.

²² The Commission notes that its regulations provide that, for the taking of an adjustment of general applicability, “the date of perfection shall be the date on which the housing provider satisfies the notice requirements of § 4101.6.” 14 DCMR § 4206.4 (2004). Section 4101.6 of the regulations requires a housing provider to “post a true copy of the [relevant] form in a conspicuous place at the rental unit or housing accommodation to which it applies, or [to] mail a true copy to each tenant of the rental unit or housing accommodation.” 14 DCMR § 4101.6 (2004). Consistent with these regulations, administrative practice, specifically, the forms provided by the RACD (now RAD) allows housing providers to file the Certificate of Election with a stated “effective date,” that is, the date on which the Tenants are served the requisite notice and the adjustment is thus perfected, which may be earlier than the date on which the form is filed. The Commission notes that the Tenants have not asserted that the required notice was not provided or was untimely. *See* Final Order at 65; R. at 1180.

1, 2003. Final Order at 65; R. at 1180; 14 DCMR §§ 4204.10, 4206.3; Sawyer, 877 A.2d at 104 n.5. With regard to the Second 2003 Certificate, the ALJ found, and the Commission is satisfied that substantial evidence supports, that the Housing Provider filed the Certificate of Election more than thirty (30) days after June 1, 2003, the date on which it was first eligible to take and perfect the adjustment of general applicability. Final Order at 66; R. at 1179; 14 DCMR §§ 4204.10, 4206.3; Sawyer, 877 A.2d at 104 n.5.

Because the Second 2003 Certificate did not validly take an adjustment of general applicability, the ALJ determined that, with respect to those units that were not also included in the First 2003 Certificate, more than twelve (12) months had passed by the published effective date of the next CPI-W adjustment on May 1, 2004; accordingly, the ALJ determined that the Housing Provider was first eligible to take the adjustment on that date. Final Order at 68; R. at 1177; 14 DCMR §§ 4204.10, 4206.3.²³ As to the nine (9) units included in the First 2003 Certificate, which was validly taken and perfected, the ALJ determined that the Housing Provider was first eligible to take the May 1, 2004 CPI-W adjustment on June 1, 2004, because the First 2003 Certificate, affecting those nine (9) units, had been filed on June 1, 2003. *See* Final Order at 68; R. at 1177. However, the ALJ determined that the Housing Provider failed to properly take and perfect the 2004 CPI-W adjustment because it filed its Certificate of Election on July 30, 2004, with a stated effective date of June 1, 2004. *Id.*; *see also* PX 106; R. at 1632-39. Because the Commission's regulations require that a Certificate of Election be filed within thirty (30) days of the date when a housing provider is first eligible to take an adjustment of general applicability, and the Housing Provider filed its 2004 Certificate of Election more than

²³ In the ALJ's language, the Second 2003 Certificate "was invalid for all purposes, including for purposes of establishing an anniversary date for future rent ceiling adjustments." Final Order at 68; R. at 1177.

thirty (30) days after it was first eligible with respect to all Tenants, the Commission is satisfied that the ALJ's invalidation of this rent ceiling adjustment is in accordance with the Act and supported by substantial evidence. *See* 14 DCMR § 4204.10; Final Order at 68-69; R. at 1176-77.

To take and perfect the May 1, 2005 CPI-W adjustment, the Housing Provider filed a Certificate of Election on June 10, 2005, with a stated effective date of June 1, 2005. *See* Final Order at 70; R. at 1175; PX 109(5); R. at 1672-79. The ALJ determined that, by May 1, 2005, more than twelve (12) months had passed since the Housing Provider had last, validly taken and perfected an adjustment of general applicability and that the Housing Provider was therefore first eligible to take the adjustment on that date. Final Order at 70-71; R. at 1174-75. Because the Housing Provider did not file a Certificate of Election until June 10, 2005, more than thirty (30) days after it was first eligible to do so, the ALJ determined that the rent ceiling adjustment reflected in that Certificate of Election was invalid. *Id.* Based on its review of the record, the Commission is satisfied that the ALJ's determination is in accordance with the Act and supported by substantial evidence. Final Order at 70-71; R. at 1174-75; *see* 14 DCMR §§ 4204.10, 4206.3.

For the reasons described, the Commission is satisfied that the ALJ did not err in applying the Act and the Commission's regulations to the Certificates of Election filed between 2000 and 2005. D.C. OFFICIAL CODE § 42-3502.06(b); 14 DCMR §§ 4204.10, 4206.3; Sawyer, 877 A.2d at 104.

Accordingly, the ALJ's determination on this issue is affirmed.

2. Whether the ALJ erred by failing to determine that notices of rent increases misstated the prior and new rent from one year to the next and sought to take rent increases built on prior unperfected rent ceilings.

In the Notice of Cross-appeal, the Tenants allege that the ALJ erred in applying “rules regarding filing of certificates of election and registration documents,” and that the ALJ miscalculated “the amount of damages and/or rent overcharge refunds.” Notice of Cross-appeal at 2. In the Tenants’ Brief, developing these issues, the Tenants argue that “[r]ent increases charged after August 5, 2006, must be reversed because the housing provider filed incorrect forms with the Rent Administrator.” Tenants’ Brief at 12. The Tenants’ Brief concludes its discussion of this issue by “ask[ing] that all rent increases built on rent levels certified in the 2005 and 2006 certificates be reversed and the rents rolled back to their properly perfected year 2000 rent ceiling.” *Id.* at 16.

The Commission’s rules require a notice of appeal to contain “a clear and concise statement of the alleged error(s) in the decision of the [ALJ].” 14 DCMR§ 3802.5(b).²⁴ *See, e.g., Bohn Corp. v. Robinson*, RH-TP-08-29,328 (RHC July 2, 2014); *Coleman*, RH-TP-06-28,833 (no clear allegation of error where ALJ had ruled in favor of appellant on issue); *Stone v. Keller*, TP 27,033 (RHC Feb. 26, 2009) (determining that the tenant’s bare assertion that her rent was illegal was not a sufficient explanation of the issue on appeal to satisfy the Commission’s requirement of a clear and concise statement of error); *Marbury Plaza, LLC, v. Tenants of 2300*

²⁴ 14 DCMR § 3802.5(b) provides as follows:

The notice of appeal shall contain the following:

- (a) The Rental Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator’s decision appealed from, and a *clear and concise statement* of the alleged error(s) in the decision of the Rent Administrator; (emphasis added)

& 2330 Good Hope Rd., S.E., CI 20,753 & CI 20,754 (RHC Apr. 18, 2005) (Commission cannot review issues that are “vague, overly broad, or do not allege a clear and concise statement of error [in the Final Order].”); Pinson, TP 20,177 (“[I]f the notice of appeal or briefs do not cite properly the statutory, regulatory, or case-law basis for the appeal, appellants represented by counsel may find their appeals dismissed for failure to meet the requirements of 14 DCMR [§] 3802.5[(b)]”).

For the following reasons, the Commission determines that the Tenants have not complied with this requirement.

First, the Tenants state that:

Although the ALJ performed a mechanical check of the rent increase notices to determine whether the forms before and after the [effective date of the Rent Control Reform Amendment Act of 2006,]²⁵ August 5, 2006, contained the required information, she ruled in error that these certificates were correct because she did not check whether the information provided from one year to the next was consistent.

Id. (emphasis added). Nonetheless, the next three pages of the Tenants’ Brief argue only that the Housing Provider’s June 1, 2006, Certificate of Election, RX 273(b); R. at 3179-85 (2006 Certificate), was invalid. *Id.* at 12-16. The Commission observes that June 1, 2006, was not after August 5, 2006. Further, the Tenants argue that the 2006 Certificate “affects rent increase within the three years . . . before the filing of this petition on May 16, 2008,” even though the Tenant Petitions were filed on July 1, 2005, and March 26, 2006. *Compare* Tenants’ Brief at 15, *with* Tenant Petition 28,366 at 1; R. at 18, *and* Tenant Petition 28,577 at 1; R. at 148.²⁶

²⁵ *See supra* n.19.

²⁶ The Commission observes that the Association filed a separate tenant petition against the Housing Provider, on May 16, 2008, in which Association prevailed before OAH. *See Am. Rental Mgmt. Co. v. Chaney*, RH-TP-08-29,302 (RHC May 8, 2014) (Order Dismissing Appeal) (granting motion of Housing Provider to withdraw its appeal).

Accordingly, the Commission is unable to determine from the Tenants' contentions on this issue which specific rent adjustments within the scope of these consolidated cases they allege to have been unlawful. *See Marbury Plaza*, CI 20,753 & CI 20,754.

Second, the Commission's review of the Final Order, as amended by the Order on Reconsideration, does not reveal any findings of fact or conclusions of law made by the ALJ that relate to rent adjustments filed by the Housing Provider after March 26, 2006. *See generally* Final Order at 27-140; R. at 1105-217; Order on Reconsideration; at 1-9; R. at 1356-64. The Commission notes that, on November 7, 2008, the ALJ granted the Housing Provider's motion *in limine* to preclude the consideration of claims arising after the filing of the Tenant Petition in RH-TP-06-28,577 on March 26, 2006. *See* Hearing CD (OAH Nov. 7, 2008) at 10:40 - 10:54; *see also* Motion in Limine; R. at 668-72.

Nonetheless, as noted, the Tenants arguments on appeal relate entirely to filings made later in 2006. *See* Tenant's Brief at 12-16 (specifically referring only to the 2006 Certificate, filed June 1, 2006, and interspersing allegations of error as to unspecified forms filed after August 6, 2006, that may have relied on the information contained in the 2006 Certificate). Accordingly, the Commission is unable to determine the basis of the alleged error(s) by the ALJ in the Final Order. *See* 14 DCMR § 3802.5(b); *Stone*, TP 27,033; *cf.* *Coleman*, RH-TP-06-28,833.

Finally, the Commission observes that it is not clear that the relief the Tenants seek would redress any actual injury. *See* 14 DCMR § 3802.1 ("any party aggrieved by a final decision . . . may obtain review" by the Commission); *cf.* *Nelson v. B.F. Saul Prop. Co.*, RH-TP-10-29,994 (RHC Aug. 16, 2012) (parties lack standing to appeal where they neither "suffered [nor] will sustain some actual or threatened 'injury in fact'" from a final order) (quoting *Maloff*

v. D.C. Bd. of Elections & Ethics, 1 A.3d 383, 391 (D.C. 2010)); Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005) (Commission will not decide issues where “there is no further relief the Commission may grant”); The Tenants’ Brief asks that all rents be rolled back to the rent ceiling as filed in 2000. Tenants’ Brief at 16. However, the Commission’s review of exhibits in the record shows that, as to some units, the rent charged in 2006 was less than the applicable rent ceiling in 2000. *Compare* RX 269(c) (Certificate of Election, dated May 31, 2000); R. at 2842, *with* RX 273(b) (Certificate of Election, dated June 1, 2006); R. at 3179 (*e.g.*, units 104 & 123). Accordingly, the Commission is not satisfied that the relief, in the form of rent rollbacks, requested by the Tenants would redress any injury under the Act for the units identified by the Tenants in the Tenant Petitions. *See* 14 DCMR 3802.1; Nelson, RH-TP-10-29,994; Asher, TP 27,583.

For these reasons, the Commission is not satisfied that the Tenants have provided the Commission with a clear and concise statement of the alleged error by the ALJ regarding the application of the Act or the Commission’s regulations to any rent or rent ceiling adjustments. *See* 14 DCMR § 3802.5(b); Robinson, RH-TP-08-29,328; Coleman, RH-TP-06-28,833; Stone, TP 27,033; Marbury Plaza, CI 20,753 & CI 20,754.

Accordingly, the Tenants’ appeal on this issue is dismissed.

3. Whether the ALJ erred by denying the Association party status

The ALJ issued an OAH Rule 2924 Order on September 19, 2007, and an Amended OAH Rule 2924 Order on November 7, 2007,²⁷ determining that the Association did not

²⁷ The OAH Rule 2924 Order issued on September 19, 2007 was amended by the Amended OAH Rule 2924 Order issued November 7, 2007. The Amended Order corrected errors in the listing of the number of units in the original order of 488 to the correct number of 288, and corrected the calculations used to determine whether the Association represented a majority of the tenants in the housing accommodation. The corrections did not affect the outcome of

represent a majority of the tenants in the Housing Accommodation and therefore denying the Tenants' request to have the Association itself listed as a party to the Tenant Petition. *See* OAH Rule 2924 Order at 1-8; R. at 390-97; Amended OAH Rule 2924 Order at 1-8; R. at 530-37.²⁸ On appeal, the Tenants assert that the ALJ erred by misapplying the OAH rule governing tenant associations. *See* Notice of Cross-appeal at 2; Tenant's Brief at 16-19.

As stated, the Commission's standard of review requires us to reverse decisions that are "based upon arbitrary action, capricious action, or an abuse of discretion, or which contains conclusions of law not in accordance with provisions of the Act, or findings of fact unsupported by substantial evidence on the record." 14 DCMR § 3807.1. "Substantial evidence" has been consistently defined to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n. 10 (D.C. 1994); Allen v. D.C. Rental Hous. Comm'n, 538 A.2d 752, 753 (D.C. 1988); *see also* Jameson's Liquors, Inc. v. D.C. Alcoholic Beverage Control Bd., 384 A.2d 412, 418 (D.C. 1978) ("Substantial evidence is more than a mere scintilla of evidence"); Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sep. 27, 2013) (provided "a hearing examiner's decision . . . flows rationally from the facts and is supported by substantial evidence" the Commission will affirm).

In relevant part, OAH's rules provide as follows:

2924.1 Individual tenants involved in any proceeding shall be individually identified.

the Order. The Amended Order also corrected the number of tenants the Association represented from 68 to 67. Amended OAH Rule 2924 Order, n. 1, R. 537.

²⁸ For purposes of this issue on appeal, all references to the Tenant Petition, unless otherwise noted, are to RH-TP-06-28,577, which Tenant Chaney filed on behalf of the Association; the Association or any other Tenants are not named as parties in Tenant Chaney's individual petition, RH-TP-06-28,366.

2924.2 If a tenant association seeks to be a party, the Administrative Law Judge shall determine the identity and number of tenants who are represented by the association.

2924.3 If a majority of tenants are represented by the association, the association shall be a party, and shall be listed in the caption.

1 DCMR § 2924.1-.3.²⁹

As noted by the ALJ, OAH's rules "do not prescribe the form of evidence that may be used to demonstrate that a tenant association represents a majority of the tenants in a housing accommodation." OAH Rule 2924 Order at 5 n.5; R. at 393; *see* 1 DCMR § 2924. Nonetheless, under the DCAPA, the proponent of a rule or order has the burden to prove all facts essential to their claim by a preponderance of the evidence before an ALJ, *see* D.C. OFFICIAL CODE § 2-509(b); *see, e.g.,* Smith Prop. Holdings. Five (D.C.), LP v. Morris, RH-TP-14-28,794 (RHC Aug. 19, 2014) (Order on Attorney's Fees), and the Commission's standard of review requires it to determine whether substantial evidence on the record supports an ALJ's determination of whether a majority of the tenants of a housing accommodation are represented by a purported

²⁹ The Commission notes that the OAH rules formerly codified at 1 DCMR § 2924 and in effect at the time of the ALJ's Orders, *see* 53 DCR 5674 (July 14, 2006), were subsequently moved to 1 DCMR § 2922 by final rulemaking, *see* 57 DCR 12541 (December 31, 2010). All references herein are to OAH's rules as codified at the time of the ALJ's Rule 2924 Orders.

The Commission further notes that the ALJ issued her Rule 2924 Orders prior to the enactment of the Tenant Organization Petition Standing Amendment Act of 2010 (TOPSA Act), effective September 24, 2010, D.C. Law 18-226, 57 DCR 6920. The Tenants contend that the ALJ's ruling was contrary to the legislative history and plain language of the TOPSA Act. Tenants' Brief at 16-17. The Tenants point out that the Council's purpose in enacting the legislation was to "avoid any 'collateral litigation' resulting from counting tenant majorities." Tenants' Brief at 17. Because the amendments in the TOPSA Act were enacted after the filing of the Tenant Petitions on March 27, 2006, the issuance of the ALJ's OAH Rule 2924 Order on September 19, 2007, the issuance of the Amended OAH Rule 2924 Order on November 7, 2007, and the final day of the evidentiary hearing on April 28, 2009, the Commission determines that the TOPSA Act is inapplicable to the facts of these consolidated cases. *See* Redman v. Potomac Place Assocs., LLC, 972 A.2d 316, 319 n.4 (D.C. 2009) ("retroactive applications of legislation are not to be presumed absent express legislative language or other clear implication that such retroactivity was intended"); TOPSA Act § 6, D.C. Law 18-226, 57 DCR 6920 ("This act shall take effect following approval by the Mayor[,] . . . Congressional review[,] . . . and publication in the District of Columbia Register.").

tenant association. *See* 14 DCMR § 3807.1; In re: Tenants of 800 4th Street, S.W. v. Conn. Mut. Life Ins. Co., CI 20,711 (RHC Apr. 1, 1999); *see* Marbury Plaza, CI 20,753 & CI 20,754 (requiring lists of tenants to be provided to determine the parties to the case); Hampton House Tenants Ass'n v. Shapiro, CIs 20,677-82 (RHC Sept. 15, 1995) (where tenants participated in a hearing in the name of the association, but did not put in the hearing record the names of individual tenants who are members of the association, there is no basis for the hearing officer to determine who could be granted relief as an aggrieved party).

For example, in Borger Mgmt., Inc. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009), the Commission determined that “there was a lack of substantial evidence on the record to support the ALJ’s determination of the identity and number of tenants in the [tenant association,] as required by” the rules. Borger Mgmt., RH-TP-06-28,854.³⁰ The ALJ in that case relied solely upon a document submitted by the petitioners that:

- Was “untitled and undated, without any heading or other information to indicate that it was a list of members of a tenant association or that it even served as such a membership list[;]”
- “[C]ontained three (3) adjacent columns with the following headings: ‘NAME’, ‘APT. #’ and ‘PHONE #[;]’” and
- “Contained thirty-seven (37) names of alleged tenants of the housing accommodation who . . . had signed or printed their names as members of the [association.]”

Id.

In Borger Mgmt., RH-TP-06-28,854, the record contained conflicting testimony regarding both the means by which tenants became members of the association and “whether

³⁰ In Borger Mgmt., RH-TP-06-28,854, the Commission applied the rules for proceedings before the Rent Administrator in 14 DCMR § 3904, which, we noted are essentially identical to the applicable rules of OAH. Borger Mgmt., RH-TP-06-28,854 at n. 16.

[the document] was the only list of members of the tenants association at the time that the petition was filed, and whether the tenant association ever maintained a definitive membership list.” *Id.* The Commission therefore determined that the ALJ’s findings as to the membership of the tenant association were not based on substantial evidence. *Id.* See also Tenants of 4021 9th St., NW v. E&J Props., LLC, HP 20,812 (RHC June 11, 2014) at n.22; Tenants of 2480 16th St. NW v. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Feb. 6, 2014).

In this case, the ALJ determined that, despite several attempts to prove the Association’s representation of a majority of the tenants, the Tenants did not show by a preponderance of the evidence that the Association represented a sufficient number of tenants, as required by OAH’s rules. See Amended OAH Rule 2924 Order at 5-6; R. at 532-33. For the following reasons, the Commission’s review of the record on appeal does not reveal any substantial evidence that the Tenants even claimed that the Association represents a sufficient number of tenants. See 1 DCMR § 2924.3; E&J Props., LLC, HP 20,812; Dorchester House, RH-SF-09-20,098; Borger Mgmt., RH-TP-06-28,854.

The Commission’s review of the record reveals that the Housing Provider represented to the ALJ, and the Tenants did not contest, that the Housing Accommodation includes two hundred and eighty eight (288) rental units, of which five (5) were vacant when the Tenant Petition was filed. Amended OAH Rule 2924 Order at 2-3, R. 535-36. Accordingly, to represent a majority of the tenants in the Housing Accommodation, the Commission is satisfied that the ALJ correctly determined that the Association would have to represent at least one hundred forty two (142) tenants. *Id.* at 4; R. at 534. The Tenants submitted the following documents as evidence of the Association’s membership:

- On March 2, 2007, the Tenants filed, in response to an order by the ALJ, a typed list titled “NCPTTA Tenants Membership Roster” with one hundred

and sixteen (116) names and no other information. *See* R. at 304-07 (March 2 Roster).

- On April 20, 2007, the Tenants provided two additional documents: a second typed list titled “NCPTTA Tenants Membership Roster” (April 19 Roster), containing one hundred and eighteen (118) names and corresponding unit numbers, *see* R. at 331 (repeated) -34;³¹ and a typed list titled “Signature Petition – NCPTA given authorization to represent the following tenant members” (April 19 Petition List) containing seventy four (74) names and corresponding unit numbers, *see* R. at 329-30 (repeated), with several pages attached of signed petitions (Collected Signatures) containing sixty-seven (67) printed names, signatures, dates of signatures, and corresponding unit numbers, after accounting for duplicates, *see* R. at 322 -28 (repeated).
- On October 2, 2007, after the ALJ issued the initial OAH Rule 2924 Order, the Tenants once again submitted a document titled “NCPTTA Tenants Membership Roster” (October 2 Roster), containing one hundred and twenty four (124) names and corresponding unit numbers, *see* R. at 421-23, and another document titled “Signature Petition – NCPTA given authorization to represent the following tenant members,” (October 2 Petition List), containing seventy nine (79) names and corresponding unit numbers, *see* R. at 418-20.
- Finally, on October 15, 2007, the Tenants submitted a document titled “NCPTTA Tenants Membership Roster” (October 15 Roster), containing one hundred and thirty six (136) names and corresponding unit numbers, *see* R. at 442-44, and a document titled “Signature Petition – NCPTA given authorization to represent the following tenant members,” (October 15 Petition List), containing ninety six (96) names and corresponding unit numbers, *see* R. at 439-41.

On appeal, the Tenants argue that the ALJ erred by requiring the Tenants to provide signatures, stating that 1 DCMR § 2924 only requires the determination of the identity and number of tenants represented by the Association. Tenants’ Brief at 17. The Tenants further assert that one hundred eight-seven (187) residents of the Housing Accommodation “expressed

³¹ The Commission notes that the record contains an error in page numbering. After page 333, the numbering restarts at “324,” and all subsequent pages in the record are numbered sequentially based on that mistake. As needed for clarity, the Commission will refer to pages as “repeated” if the relevant page is the second use of that number.

the desire to be represented by” the Association, and accordingly one hundred twenty (120) tenants were denied the opportunity to participate in this petition. Tenants’ Brief at 18.³²

The Commission’s review of the record does not reveal any basis for the Tenants’ assertion that one hundred eighty-seven (187) individuals were members of, or represented by, the Association; rather, the largest membership list, which the Commission notes was submitted after the ALJ issued the OAH Rule 2924 Order, contains only one hundred thirty-six (136) names. *See* October 15 Membership Roster; R. at 442-44. Moreover, the Tenants do not identify on appeal, nor does the Commission’s review of the record reveal, any substantial evidence regarding when or in what manner the claimed one hundred and eighty-seven (187) individuals purportedly “expressed [their] desire” to join with the Association. The ALJ did allow the participation of the sixty-seven (67) Tenants as to whom consent to representation was expressed by their signing of a form explicitly authorizing the Association or its attorney to represent them in the Tenant Petition. Amended OAH Rule 2924 Order at 5-6; R. at 532-33; *see* Collected Signatures; R. at 322-28 (repeated).

Similar to the facts in Borger Mgmt., RH-TP-06-28,854, the Commission’s review of the record in this case reveals the following: (1) conflicting statements as to the membership of the Association; (2) the lists of purported members are unsigned; (3) the lists of purported members provide no indication as to the date the tenants became members or consented to be represented by the Association; and (4) no submission by the Tenants with regard to the process for residents

³² The Tenants additionally argue that the ALJ’s denial of party status to the Association was erroneous because “all categories of claims in this petition can be established without the participation of each individual tenant” and the tenants “established a clear pathway to prove commonly shared claims.” Tenants’ Brief at 18. The Commission notes that nothing in 1 DCMR § 2924 requires a putative tenant association to prove, or permits one to be a party merely because of, the commonality of claims or the adequate representation of all association members. *Cf.* Fed. R. Civ. P. 23(a) (certification of class action).

of the Housing Accommodation to become members of the Association. *Compare* March 2 Roster; R. at 304-07, April 19 Roster; R. at 331 (repeated) -34, October 2 Roster; R. at 421-23, *and* October 15 Roster; R. at 442-44, *with* April 19 Petition List; R. at 329-30 (repeated), October 2 Petition List; R. at 418-20, *and* October 15 Petition List; R. at 439-41.

The Commission is therefore satisfied that the ALJ did not err by finding that the evidence on the record did not support the Association's claimed representation of any residents other than those sixty seven (67) individuals who appear in the Collected Signatures. Amended OAH Rule 2924 Order; R. at 531-37; *see* 1 DCMR § 2924; E&J Props., LLC, HP 20,812; Dorchester House, RH-SF-09-20,098; Borger Mgmt., RH-TP-06-28,854. The Commission is further satisfied that the ALJ did not err in finding that the Association failed to demonstrate that it represented at least one hundred and forty-two (142) tenants (i.e., a majority of the residents of the Housing Accommodation), and that the Association itself therefore would not be a party and would not be named in the case caption. *See* 1 DCMR § 2924.3 (association representing a majority "shall be a party, and shall be listed in the caption"); E&J Props., LLC, HP 20,812; Dorchester House, RH-SF-09-20,098; Borger Mgmt., TP 28,854.

Accordingly, the ALJ's determination on this issue is affirmed.

4. Whether the ALJ erred by failing to find that the Housing Provider increased rents while the housing accommodation was not in substantial compliance with housing regulations.

The Tenants assert on appeal that the ALJ erred because evidence on the record establishes that rent increases were taken while there were a "large number of housing code violations . . . , the aggregate of which is substantial[.]" Tenants' Brief at 19 (quoting 14 DCMR § 4216.2(u)). They contend that the ALJ acknowledged the existence of housing code violations

but refused to reverse multiple rent charged increases implemented during the period of July 1, 2002, to March 26, 2006. Tenants' Brief at 19-20.

As stated, the Commission will reverse decisions of an ALJ that “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. With respect to housing code issues generally, the Act provides that:

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

D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A) (2001); *see, e.g., Atchole v. Royal*, RH-TP-10-29,891 (RHC Mar. 27, 2014); *Beckford*, RH-TP-07-28,895; *Caesar Arms, LLC v. Lizama*, RH-TP-07-29,063 (RHC Sept. 27, 2013); *1773 Lanier Place, N.W., Tenants' Ass'n v. Drell*, TP 27,344 (RHC Aug. 31, 2009).

The Commission's regulations define “substantial compliance with the housing regulations” as the “absence of any substantial housing violations.” 14 DCMR § 4216.2; *see Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 5-6 (citing *Hutchinson v. Home Realty, Inc.*, TP 20,523 (RHC Sept. 5, 1989)). The regulations enumerate, without limitation, twenty (20) specific violations of the housing code that the Commission has determined are substantial *per se*. 14 DCMR § 4216.2(a) - (t); *see Drell*, TP 27,344 (listed violations “are considered to be, in and of themselves, substantial”) (quoting *Covington v. Foley Props., Inc.*, TP 27,985 (RHC June 21, 2006)). The regulations further provide that a “[l]arge 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,” may also prevent a housing provider from increasing rents. 14 DCMR § 4216.2(u).³³ The Commission has held that the crucial inquiry for claims such as these “is whether . . . [the] alleged substantial housing code violation exists at the time the rent increase is taken.” Lizama, RH-TP-07-29,063; Hamlin v. Daniel, TP 27,626 (RHC June 10, 2005); Hutchinson, TP 20,523. Furthermore, in order to establish a claim of a violation of the housing code regulations, tenants “must first prove that the Housing Provider was put on notice of the existing conditions within the unit.” Beckford, TP 28,895 (citing William Calomiris Inv. Corp. v. Milam, TP 20,144 (RHC Apr. 26, 1989); *see also* Gavin v. Fred A. Smith Co., TP 21,918 (RHC Nov. 18, 1992).

In order to establish that a rental unit or common area of a housing accommodation was not in substantial compliance, the Tenants are required to prove each element of their claim by a preponderance of the evidence on the record. D.C. OFFICIAL CODE § 2-509(b); Stancil, 806 A.2d 622; Hutchinson, TP 20,523. As noted, D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A) provides that “[e]vidence of substantial noncompliance shall be limited to housing regulations violation notices issued by the District of Columbia Department of Consumer and Regulatory Affairs (DCRA) and other offers of proof the Rental Housing Commission shall consider acceptable through its rulemaking procedures.” *See* Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013) (Campbell II). By rulemaking, the Commission has provided that evidence

³³ The Commission notes that the Tenants’ Brief does not argue that any specific violation of the housing code by the Housing Provider that is not included in § 4216.2(a) - (t) nonetheless “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) (definition of “substantial violation”); *see, e.g.*, 14 DCMR § 1205.1 (“The owner of any apartment building or a house consisting of five (5) or more floors which contains one (1) or more elevators shall maintain the elevators in good working order.”); Final Order at 123-25 (summarizing testimony related to elevator outages); R. at 120-22. The Tenants argue only that the number of housing code violations, in the aggregate, amounts to substantial noncompliance. *See* Tenants Brief at 19-21.

“may be presented to [an ALJ] by the testimony of parties,” which “may be supported by photographs or other documentary evidence.” 14 DCMR § 4216.5, .6. Where evidence of housing code violations is presented by tenant testimony, it must be “as detailed as necessary so that the [ALJ] can make findings of fact that will identify the specific violation(s), their location and duration, and whether they have been abated.” 14 DCMR § 4216.7; *see Williams v. Thomas*, TP 28,530 (RHC Sept. 27, 2013); *H.G. Smithy Co. v. Alston*, TP 25,033 (RHC Sept. 30, 2003).

The ALJ found, and the Commission’s review of the record indicates substantial evidence to support the ALJ’s determination, that no DCRA notices of housing code violations during the time period at issue were offered as evidence by the Tenants. Final Order at 108, 128; R. at 1137, 1117. Under the Act, regulations, and case precedent, the Tenants were required to prove the existence of housing code violations by detailed testimony. *See* D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A); 14 DCMR § 4216.5-.7; *Williams*, TP 28,530; *Alston*, TP 25,033.

At the hearing, twenty (20) Tenants testified, describing conditions relevant to the categories of conditions the Commission has deemed substantial housing violations through rulemaking. *See* Final Order at 108; R. at 1137. With regard to all of the violations alleged by the Tenants, the ALJ found that the Tenants’ testimony:

[F]ailed to establish firm dates when offending conditions existed in their rental units and common areas[:] Tenants . . . testified that conditions existed intermittently; over a period of time; during the summer of a given year; or during the statute of limitations period. But, without more, there was no basis for concluding that an offending condition existed on the date a particular rent increase was taken.

Final Order at 129 (emphasis added); R. at 1116. For example, twelve (12) Tenants testified about electrical or heating failures in November 2005 and intermittently for some time after. *See*

Final Order at 113-14; R. at 1121-22. However, the ALJ found that the Tenants presented no evidence that the Housing Provider increased rents charged at that time. *See id.* For further example, four (4) Tenants testified that they had seen roaches in either a common area or their rental units, but only one testified that the Housing Provider was ever notified of the existence of the roaches, which were promptly abated. *See* Final Order at 119; R. at 1126.

On appeal, the Tenants acknowledge in their brief that, in order to succeed on their claims, they must show that substantial housing code violations existed during the period at issue in these consolidated cases³⁴ and submit proof of the “dates and duration of those violations.” *See* Tenants Brief at 21. The Tenants also acknowledge that they must “present evidence to show that the Housing Provider was on notice of the violations.” *Id.* at 19-20. However, the Tenants’ Brief does not identify any evidence on the record that, contrary to the ALJ’s findings, could establish the dates and duration of any violations or at what point in time the Housing Provider may have been put on notice of the violations. *See* Tenants’ Brief at 20-21.

For example, in the Tenants’ Brief, the Tenants list the dates and exhibit numbers of several rent increases submitted into evidence and argue that, because these notices were issued while there were “a [l]arge number of housing code violations, . . . the aggregate of which is substantial, because of the number of violations,” (quoting 14 DCMR § 4216.2(u)), all rent charged increases must therefore be reversed and the overcharges refunded to Tenants. Tenants’ Brief at 21. Specifically, the Tenants’ Brief states:

³⁴ The Commission observes that the Tenants’ Brief states that the evidence needed to “cover[] the period of May 16, 2005 through May 16[,] 2008.” Tenants’ Brief at 20. As noted *supra* at n. 26, Tenant Chaney and the Association filed a separate petition against the Housing Provider on May 16, 2008. *See Am. Rental Mgmt. Co. v. Chaney*, RH-TP-08-29,302 (RHC May 8, 2014) (Order Dismissing Appeal) (granting motion of Housing Provider to withdraw its appeal).

The totality of these violations spans the entire period considered by the [ALJ], with the first of these violations reported as early as March 2003 and the last one reported on March 2006, as recognized in the [Final Order] at 113-127. Therefore, these violations cover all the dates on which an increase was taken by the housing provider. It follows that, each one of the increases in question must be reversed and a refund ordered to the petitioners.

Id.

Based upon its review of the record and case precedent, the Commission determines that the Tenants' contention regarding the evidentiary requirements for housing code violations under the Act and case precedent do not have merit and do not support a claim of error by the ALJ in her determination of this issue. *See* D.C. OFFICIAL CODE § 42-3502.08(a)(1); 14 DCMR § 4216.2(u); Lizama, RH-TP-07-29,063; Beckford, TP 28,895; Hamlin, TP 27,626; Hutchinson, TP 20,523. The Tenants are required to show that substantial housing code violations, or a large number of violations, aggregating to substantial noncompliance with the housing code, existed on the date of a specific, challenged rent increase, and that the Housing Provider had notice of the violations at the time. 14 DCMR § 4216.2(u); Lizama, RH-TP-07-29,063; Hamlin, TP 27,626; Hutchinson, TP 20,523.

To the contrary, the Tenants do not identify on appeal, nor does the Commission's review of the record reveal, any substantial evidence on the record to suggest that the ALJ erred in finding that the Tenants failed to prove the dates on which any of the alleged housing code violations existed or on which the Housing Provider was notified of the violations. 14 DCMR § 3807.1; *see* Lizama, RH-TP-07-29,063; Beckford, TP 28,895. Because the Tenants did not prove the duration or notice of the individual housing code violations alleged, it is irrelevant whether those violations would be, in the aggregate, substantial. *See* 14 DCMR § 4216.2(u). Therefore, the Commission is satisfied that the ALJ did not err in finding that the Tenants failed to produce substantial evidence on the record to support a finding that the Housing Provider

unlawfully increased rents while the rental units or the Housing Accommodation were not in substantial compliance with the housing regulations. D.C. OFFICIAL CODE § 42-3502.08(a)(1); 14 DCMR § 3807.1; Stancil, 806 A.2d 622; Hutchinson, TP 20,523.

Accordingly, the ALJ's determination on this issue is affirmed.

V. DISCUSSION OF HOUSING PROVIDERS ISSUES

- 1. Whether the ALJ erred in awarding damages barred by the statute of limitations**
- 2. Whether the ALJ erred in awarding damages based on the alleged failure to timely file Certificates of Election and/or Amended Registration forms**
- 3. Whether the ALJ erred in awarding damages based on the allegation that the rents charged exceeded the rent ceilings**

On each of these three issues, the Housing Provider, in its brief, refers the Commission to its arguments regarding the Tenants' first issue on appeal, *i.e.*, whether certain rent ceiling adjustments of general applicability taken between 2000 and 2006 were perfected within thirty (30) days of first eligibility and whether certain of those challenges were barred by the Act's statute of limitations, D.C. OFFICIAL CODE § 42-3502.06(e). Housing Provider's Brief at 18, 20; *see also id.* at 11-12. The Housing Provider further argues that the statute of limitations bars the Tenants from obtaining relief from any rent charged increases that implemented improperly perfected rent ceiling adjustments taken outside of the statutory period. Housing Provider's Brief at 12-17.

The Commission notes that its analysis, *supra* at 31-40 & n.20, supports the Housing Provider's contentions in part, as follows. As to the rent ceiling adjustments filed between 2000 and 2006, the Commission's review of the record indicates that the Tenants are barred from directly challenging the validity of the rent ceilings established by filings made before July 1,

2002, in RH-TP-06-28,366 and March 26, 2003, in RH-TP-06-28,577. *See* D.C. OFFICIAL CODE § 42-3502.06(e). The Commission further determines that substantial evidence in the record supports the ALJ’s determination of the appropriate dates after the date the Housing Provider was “first eligible” to file its Certificates of Election. *See* D.C. OFFICIAL CODE § 42-3502.06(b); 14 DCMR §§ 4204.10, 4206.3; Sawyer, 877 A.2d at 104 n.5.

The Commission observes that the Housing Provider’s remaining contention – namely, that the statute of limitations bars investigation of rent ceiling adjustments filed outside the statutory period, but implemented as rent charged adjustments within the Act’s time limit – relates to a number of rent increases that the ALJ found to be invalid in Table 28 of the Amended Final Order. *See* Amended Final Order part VI.B.2 (“Housing Provider Implemented Improper Rent Increases Complaint – Conclusions of Law – Improper Rent Increases Based on CPI-W Adjustments”); R. at 1268-73. The Commission’s review of the record indicates that the ALJ determined that numerous rent charged increases that were filed after March 26, 2003, were invalid, and that most of those increases sought to implement prior, preserved rent ceiling adjustments of general applicability (*i.e.*, CPI-W increases) taken outside the statutory period. *See id.*

The Commission will reverse decisions of an ALJ that are not supported by substantial evidence on the record or are not in accordance with the Act. 14 DCMR § 3807.1. The Act’s statute of limitations is found in D.C. OFFICIAL CODE § 42-3502.06(e) and provides as follows:

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

The Housing Provider contends that the statute of limitations “bars any investigation of the validity of rent levels, or of adjustments in either the rent levels or rent ceilings, in place

more than three years prior to the filing of a tenant petition.” Housing Provider’s Brief at 13 (citing Kennedy v. D.C. Rental Hous. Comm’n, 709 A.2d 94 (D.C. 1998), and Majerle Mgmt., Inc. v. D.C. Rental Hous. Comm’n, 866 A.2d 41 (D.C. 2004)). However, the Commission determined in Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Feb. 24, 2006), and Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Mar. 30, 2006) (Order Denying Motion for Reconsideration), that, where a housing provider fails to properly take and perfect an adjustment in a unit’s rent ceiling, the housing provider cannot thereafter use the unperfected adjustment in rent ceiling as the basis for a corresponding adjustment in rent charged, regardless of when the adjustment in rent ceiling was claimed. *See* Gelman Mgmt., TP 27,995 (Reconsideration) (citing Sawyer, 877 A.2d 96).

The Commission observes that the Housing Provider’s arguments in this appeal, that the Tenants’ challenges to rent ceiling increases are barred because they were filed outside of the Act’s three-year statute of limitations in D.C. OFFICIAL CODE § 42-3502.06(e), are substantially identical to the arguments the Commission rejected in United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013). In Hinman, RH-TP-06-28,728, the Commission thoroughly reviewed the plain language, statutory and regulatory context, and legislative history of D.C. OFFICIAL CODE § 42-3502.06(e), the underlying purposes of the Act, and prior interpretations of D.C. OFFICIAL CODE § 42-3502.06(e) by the DCCA and the Commission, including Kennedy, 709 A.2d 94, Majerle Mgmt., 866 A.2d 41, and Gelman Mgmt., TP 27,995. *See also* Gelman Mgmt. v. Grant, TP 27, 995 (RHC Aug. 18, 2014) (Decision and Order Following Remand); Smith Property Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013); Coleman, RH-TP-06-28; United Dominion Mgmt. Co. v. Kelly, RH-TP-

06-28,707 (RHC Aug. 15, 2013). The DCCA affirmed the Commission’s reasonable interpretation of the statute of limitations that, in a factual scenario such as this:

[T]he effective date of the improperly perfected rent ceiling adjustment is not . . . the date [a] landlord files the amended registration form belatedly claiming the rent ceiling adjustment, but instead, the date on which a landlord issues a notice to the tenant that it is increasing the rent charged based on the earlier improperly perfected rent ceiling adjustment so long as the tenant files his petition challenging the increase within three years of that notice.

United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm’n, Nos. 13-AA-613, 13-AA-959, & 13-AA-960, slip op. at 12, 2014 D.C. App. LEXIS 433 (D.C. Oct. 16, 2014). The DCCA held that the Commission had reasonably distinguished Kennedy, 709 A.2d 94, and Majerle Mgmt., 866 A.2d 41, “because they did not address a factually analogous scenario.” *Id.* at 17.

Accordingly, the ALJ’s determinations on these issues are affirmed.

4. Whether the ALJ erred in awarding damages to Tenants who did not appear at the hearing

The Housing Provider states in its brief that, “[o]f the sixty-seven individuals identified as parties in this case, only twenty testified during the evidentiary hearing.” Housing Provider’s Brief at 18. Accordingly, the Housing Provider asserts, the other forty-seven (47) tenants “should [not] be heard to complain because they were clearly on notice of their obligation to appear in person[,] and[,] as such, those petitioners who failed to appear and testify at the evidentiary hearing should be dismissed with prejudice.” *Id.* at 19.

The Commission observes, as an initial matter, that the Housing Provider’s Brief comingles its argument that all of the Tenants were required to appear and testify in person at the evidentiary hearing with an additional assertion that, “[a]s to many of the Tenants, no notice of rent increase or evidence of rent actually charged to those tenants was provided,” and several

assertions of error regarding the sufficiency of evidence on the record to support the ALJ's determinations as to four specific Tenants. *See* Housing Provider's Brief on Appeal at 18-19.³⁵

The Commission's rules provide that our review "shall be limited to the issues raised in the notice of appeal." 14 DCMR § 3807.4. Moreover, the Commission will not review an appeal that does not provide "a clear and concise statement of the alleged error(s)." 14 DCMR § 3802.5(b) (2004); *see, e.g.,* Bohn Corp., RH-TP-08-29,328; Coleman, RH-TP-06-28,833; Stone, TP 27,033; Marbury Plaza, LLC, CI 20,753 & CI 20,754; Pinson, TP 20,177.

The Notice of Appeal, regarding the appearance of Tenants, refers only to the failure of some, unspecified Tenants to appear at the hearing, and not to any specific evidentiary issues. *See* Housing Provider's Notice of Appeal at 2. Additionally, although the Housing Provider's Brief argues that evidence of rents charged is absent with regard to "many of the Tenants," it fails to identify those Tenants or to note whether they appeared before OAH. *See* Housing Provider's Brief on Appeal at 18-19. Moreover, although parties before OAH have a right to testify and to call witnesses to testify, *see* 1 DCMR § 2821.5(a),³⁶ the Commission's review of the OAH's rules does not support an interpretation that expressly requires an individual party to personally testify in order to present evidence in his or her case. *See also* 1 DCMR § 2821.12

³⁵ The Housing Provider specifically asserts errors regarding the following Tenants: Viola Brown (Unit 229); Donald Amos (Unit 118); John Huscha (Unit 122); and Anita Ylli (Unit 123). The Commission notes that none of these four Tenants testified at the evidentiary hearing. *See* Final Order at 7; R. at 1237.

The Commission additionally observes that its review of the Act and its provisions supports the ALJ's determination that, as the ALJ stated at a preliminary stage of these proceedings, it is improper to confuse the representation of a tenant or member of a tenant association with actual witness testimony. *See* Order (OAH Oct. 3, 2007) (denying Tenants' motion *in limine*), at 6; R. at 433. At that time, the ALJ denied the Tenants' request to limit live testimony on conditions in the Housing Accommodation, and ruled instead that the Association could "present the cases of the tenant petitioners it represents in the manner it deems appropriate. This administrative court will evaluate the testimony presented in accordance with the rules of evidence applicable in this [OAH] forum." *Id.*, at 6-7; R. at 433-34.

³⁶ 14 DCMR § 2821.5(a) provides, in relevant part: "Parties shall have the following rights at a hearing: (a) To testify and to have other witnesses testify for them[.]"

(right to present case by hearsay evidence).³⁷ Accordingly, the Commission determines that the sufficiency of the evidence in the record with regard to the claims by those Tenants who did not personally appear and testify at the OAH evidentiary hearing is a separate issue that the Housing Provider has not properly raised on appeal. *See id*; 14 DCMR §§ 3802.5(b), 3807.4.

With regard to the issue properly raised on appeal by the Housing Provider, that is, whether the non-appearance of certain Tenants bars their recovery of damages, OAH's rule at 1 DCMR § 2833.1 provides that "[a]n attorney may represent any party before OAH." Moreover, the DCAPA grants to every party in a contested case the right to appear and prosecute his case in person or by counsel. D.C. OFFICIAL CODE § 2-509(b). The Commission is satisfied that the plain meaning of these two provisions is that a represented party need not personally appear, provided that an attorney or authorized representative does appear on the party's behalf. *See* D.C. OFFICIAL CODE § 2-509(b); 1 DCMR § 2833.1. The Commission's interpretation of relevant provisions of the Act and the regulations, as applied to the substantial evidence in the record of this case, does not support the Housing Provider's claim that a represented party seeking relief under the Act must appear in person. *See* 14 DCMR § 3807.1.

The Housing Provider notes that the DCCA and the Commission have consistently held that "a party who fails to appear at an evidentiary hearing . . . generally lacks standing to appeal from the decision which flows from that hearing." Housing Provider's Brief at 19; *see Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n*, 642 A.2d 1282, 1288 (D.C. 1994) (where no tenant

³⁷ 14 DCMR § 2821.12 provides as follows:

Hearsay evidence (generally, a statement by a person not present in the courtroom) is admissible. When hearsay evidence is admitted, the Administrative Law Judge shall assess the reliability of the evidence to determine the weight it should be assigned. An Administrative Law Judge shall consider the speaker's absence in evaluating the evidence.

association was formed and only one tenant filed appeal, other tenants lacked standing before DCCA); Borger Mgmt., RH-TP-06-28,854 (where ALJ's determination of identity and number of tenants represented by tenant association was unsupported by substantial evidence, only tenants who appeared and testified had standing on appeal); Knight-Bey v. Henderson, RH-TP-07-28,888 (RHC Jan. 8, 2013) (quoting Sellers v. Lawson, RH-TP-08-29,437 (RHC Nov. 16, 2012)); Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012); Syndor v. Johnson, TP 26,123 (RHC Nov. 1, 2002)). Moreover, the Commission notes that OAH's rules provide that:

[W]here counsel, an authorized representative, or an unrepresented party fails, without good cause, to appear at a hearing, or a pretrial, settlement or status conference, the presiding Administrative Law Judge may dismiss the case or enter an order of default[.]

1 DCMR § 2818.3.³⁸

The Commission observes that, under similar circumstances to those in Borger Mgmt., RH-TP-06-28,854, the ALJ in this case found that the Association was not formed with the support of a majority of the Housing Accommodation's tenants, and therefore determined that it was not a proper party to the case. *See supra* at 43-50; E&J Props., LLC, HP 20,812; Dorchester House, RH-SF-09-20,098; Borger Mgmt., RH-TP-06-28,854. However, as described *supra* at 43-50, the ALJ found that sixty seven (67) Tenants have authorized the Association or its counsel to appear before OAH on their behalves, based on signed documents stating: "The

³⁸ All references herein to 1 DMCR § 2813.3 are to its language as applicable at the time of the evidentiary hearing, in 2009. *See* 52 DCR 5675 (June 17, 2005). The Commission notes that, as amended, OAH's rules currently provide that:

If an attorney, representative, or unrepresented party fails, without good cause, to appear at a hearing, the Administrative Law Judge may dismiss the case, enter an order of default, decide the case on the merits, or impose other sanctions.

1 DCMR § 2818.3; 57 DCR 12541 (December 31, 2010).

Tenants signed below are members of the tenants association and *want [the Association] (and/or its legal counsel) to represent them on all matters concerning T/P #28,577, including but not limited to hearings.*” See Collected Signatures (emphasis added); R. at 322-28 (repeated).

Based on its review of the record, the Commission is satisfied that substantial evidence supports the ALJ’s determination that the sixty-seven (67) Tenants described herein authorized the Association to represent them and that they are properly parties to RH-TP-06-28,577. See 1 DCMR § 2813.3; Borger Mgmt., RH-TP-06-28,854; Amended OAH Rule 2924 Order; R. at 337. Because the Commission’s interpretation of OAH’s rules and the DCAPA support the conclusion that a party may present its arguments through counsel, the Commission determines that these Tenants did not “fail to appear at an evidentiary hearing,” even if they did not all personally sit in the hearing room or testify. See D.C. OFFICIAL CODE § 2-509(b); 1 DCMR § 2833.1; *cf.* 1 DCMR § 2813.3; Lenkin Co. Mgmt., 642 A.2d at 1288; Borger Mgmt., RH-TP-06-28,854.

Accordingly, the Housing Provider’s appeal of this issue is denied.

5. Whether the ALJ erred in awarding damages to an unknown Tenant

The Housing Provider objects on appeal to the ALJ’s award of damages for an improper rent increase in unit “H104.”³⁹ Housing Provider’s Brief at 20. The Housing Provider alleges that the award is erroneous because the ALJ failed to identify the tenant living in unit “H104,” and because “the identity of that resident [is] unknown, an award cannot be granted.” *Id.*; Notice of Appeal at 2. The Commission’s review of the record shows that the ALJ failed to list any name for the tenant of unit “H104” in the Final Order, Amended Final Order, or Order on Reconsideration, instead awarding damages to “Illegible.” Order on Reconsideration at 65; R. at

³⁹ The Commission notes that the award for unit “H104” was \$1,165.61. See Order on Reconsideration at 65; R. at 1299.

1299; Amended Final Order at 9; R. at 1268; Final Order at 104, 159-63, 276-78; R. at 968-70, 1083-87, 1141.⁴⁰

As stated, the Commission “shall reverse final decisions of [an ALJ] which the Commission finds to be . . . unsupported by substantial evidence on the record of the proceeding.” 14 DCMR § 3807.1; *see also* D.C. OFFICIAL CODE § 2-509(e) (“[f]indings of fact and conclusions of law shall be supported by and in accordance with the reliable, protective, and substantial evidence.”); Fort Chaplin Park Assocs., 649 A.2d at 1079 n. 10 (substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”); Washington Cmtys. v. Joyner, TP 28,151 (RHC July 22, 2008).

While the Commission will generally reverse or remand final orders that are unsupported by substantial evidence on the record, “the Commission has applied ‘plain error’ to correct technical errors of calculation, apparent mistakes in dates or numbers, [and] minor procedural or administrative errors that are generally not subject to dispute.” Munonye v. Hercules Real Estate Servs., RH-TP-07-29,164 (RHC July 7, 2011) at 8 (citing Noori v. Whitten, TP 27,045 & TP 27,046 (RHC Sept. 13, 2002)); *see* 14 DCMR § 3807.4. Additionally, the Commission has corrected plain error in case captions and in damage and interest calculations. *See* Bastin v. Fivel, TP 25,077 (RHC July 20, 2004); Rittenhouse, LLC v. Campbell, TP 25,093 (RHC Dec. 17, 2002). Likewise, in Zucker v. NWJ Mgmt., TP 27,690 (RHC May 16, 2005), based on plain error, the Commission corrected the rent ceiling amount in a hearing examiner’s findings of fact and conclusions of law. Zucker, TP 27,690; *see also* Recap-Gillian v. Powell, TP 27,042 (RHC

⁴⁰ The Commission observes that Attachment C of the Final Order provides two lists of the Tenants who are parties to the case: (1) ordering the tenants by their unit numbers, and (2) ordering the tenants alphabetically. Final Order at 161-63; R. at 1083-85. Unit “H104” and “Illegible” are only included in the alphabetized list. *Id.*

Dec. 19, 2002) (finding plain error and remanding to the hearing examiner for the proper calculation of interest for each month of rent overcharge).

The Commission observes that it has not addressed the issue of an ALJ failing to identify a tenant by name, as presented in this case, but it has addressed whether or not a particular, named individual is a tenant.⁴¹ In Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012), “[t]he Commission [was] satisfied that the ALJ properly determined that testimonial evidence of the [t]enant’s witnesses corroborated [the tenant’s] claims that he paid rent and provided other . . . services with respect to the [h]ousing [a]ccommodation . . . in exchange for his exclusive occupancy of . . . the [h]ousing [a]ccommodation.” *Id.* at 29. In light of the record evidence in that case, the Commission was persuaded “that the ALJ’s legal conclusion that the [t]enant was a ‘tenant’ under the Rental Housing Act flow[ed] rationally from this evidence.” *Id.* at 31; *see also* 1773 Lanier Place, N.W. Tenants’ Ass’n, TP 27,344. In Dias v. Perry, TP 24,379 (RHC Apr. 20, 2001), the Commission was satisfied that the tenant was a “tenant” of unit 301, even though the lease she entered into was for unit 104. Moreover, because the tenant in that case made monthly payments to the housing provider, which the housing provider accepted as rent, she was considered a “tenant” under the Act. Perry, TP 24,379.

Based on its review of the record, the Commission is unable to locate any explanation in the record for the ALJ’s failure to identify this Tenant by name. However, the Commission’s review of the record reveals numerous documents listing “Ellenie Tsige” as a Tenant in unit “104:” specifically, as described *supra* at 46-48 and 61, the record includes handwritten names,

⁴¹ The Act defines a “tenant” as “includ[ing] a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person.” D.C. OFFICIAL CODE § 42-3501.03(36).

unit numbers, and signatures of Tenants, indicating their consent to be represented by the Association, *see* Collected Signatures; R. at 326 (repeated), as well as typed lists of purported Association members, submitted at the various dates, *see, e.g.*, April 20 Roster; R. at 330 (repeated); October 2 Roster; R. at 423.

The Commission's review of the record reveals the following: (1) these lists of purported Association members consistently include the name "Ellenie Tsige" alongside the unit number "104," *see, e.g.*, April 20 Roster; R. at 330 (repeated); October 2 Roster; R. at 423; (2) the Collected Signatures include one signature that appears to read, in part, "Tsige", *see* Collected Signatures; R. at 326 (repeated); (3) although there is no printed name with that signature, a hand-written notation "E. Tsige" appears in the margin next to that line (without identifying the source of that notation), *see id.*; (4) in the column labeled "Apt #," a notation that appears to be "H 104" appears on that same line, *id.*; and (5) on the various pages in the Collected Signatures, some Tenants have written their unit numbers with a leading "#" symbol, while some others have not. *See generally* Collected Signatures; R. at 322 -28 (repeated).

Moreover, the Commission's review of the record reveals numerous documents and forms filed by the Housing Provider with the RACD, and submitted by the Housing Provider as exhibits before OAH, that denote Ellenie Tsige as the Tenant in unit 104. *See, e.g.*, RX 248(a) (Lease Agreement Signature Pages and Declaration Pages); R. at 2501-03; RX 248(c) (Payment History Report and Resident Ledger); R. at 2509-16; RX 269(I) (Affidavit of Service of Notice of Rent Adjustment); R. at 3025-28. The Commission's review of the voluminous administrative filings by the Housing Provider in the record does not reveal any units in the Housing Accommodation that are identified with a combination of letters and numbers, such as

“H104.” *See, e.g.*, RX 269(I); R. at 3025-28; PX 106 (2004 Certificate of Election); R. at 1632-38.

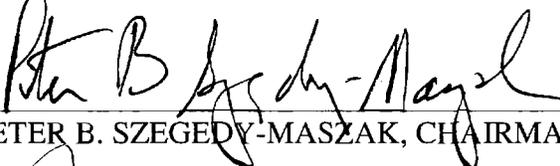
Accordingly, the Commission’s review of the substantial evidence in the record supports a determination that the marking, which the ALJ took to be an “H” is, in fact, an incomplete “#” symbol, and further supports a determination that the identity of the “illegible” tenant in that unit of the Housing Accommodation, to whom damages were awarded as determined by the ALJ, is Ellenie Tsigie. *See* Collected Signatures; R. at 326; October 2 Roster; R. at 423; RX 248(a) (Lease Agreement Signature Pages and Declaration Pages); R. at 2501-03. Therefore, the Commission corrects the plain error in the Final Order, Amended Final Order, and Order on Reconsideration. 14 DCMR § 3807.4; Munonye, RH-TP-07-29,164 at 8; Noori, TP 27,045 & TP 27,046; Bastin, TP 25,077; Rittenhouse, LLC, TP 25,093; Zucker, TP 27,690.

Accordingly, the Housing Provider’s appeal of this issue is dismissed as moot.

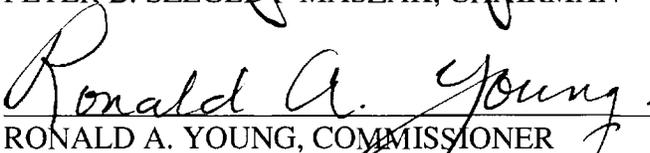
VI. CONCLUSION

The Commission affirms the decisions of the ALJ found in the Final Order, as modified by the Amended Final Order and the Order on Reconsideration, and as corrected for plain error in this Decision and Order, in the consolidated cases RH-TP-06-28,366 and RH-TP-06-28,577.

SO ORDERED



PETER B. SZEGEDY-MASZAK, CHAIRMAN



RONALD A. YOUNG, COMMISSIONER



CLAUDIA L. MCKOIN, 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 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission...may seek judicial review of the decision...by filing a petition for review in the District of Columbia Court of Appeals. Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-06-28,366 and RH-TP-06-577 was mailed, postage prepaid, by first class U.S. mail on this **12th day of December, 2014**, to:

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A handwritten signature in black ink, appearing to read "LaTonya Miles". The signature is written in a cursive style with a large initial "L" and "M".

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