DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-SC-06-002

In re: 1433 T St., N.W., 201-210 16th St., N.E., and 1840 & 1846 Vernon St., N.W.

Wards Two (2), Six (6), and One (1)

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT – RENTAL ACCOMMODATIONS DIVISION
Petitioner/Appellant

v.

1433 T STREET ASSOCIATES, LLC;
210 16TH STREET ASSOCIATES, LLC; and
1840 VERNON STREET ASSOCIATES, LLC
Housing Providers/Appellees

DECISION AND ORDER

May 21, 2015

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal from the District of Columbia (D.C.) Office of Administrative Hearings (OAH) to the Rental Housing Commission (Commission), based on an order issued by the Rental Accommodations and Conversion Division (RACD) of the 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 (2001), 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), and 14 DCMR §§ 3800-4399 (2004), govern these proceedings.

[1] OAH assumed jurisdiction over contested cases from the RACD pursuant to § 6(b-1)(1) of the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of the RACD were transferred to the Department of Housing and Community Development (DHCD), Rental Accommodations Division (RAD), by 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 March 27, 2006, Acting Rent Administrator Keith A. Anderson (Acting Rent Administrator) issued Order to Show Cause 06-002 (Order to Show Cause), regarding the housing accommodations at 1433 T St., N.W., 201-210 16th St., N.E., and 1840 & 1846 Vernon St., N.W. (collectively, Housing Accommodations), instructing 1433 T Street Associates, LLC, 210 16th Street Associates, LLC, and 1840 Vernon Street Associates, LLC (collectively, Housing Providers), the respective owners of the Housing Accommodations,[2] to appear at a show cause hearing on April 25, 2006. The Order to Show Cause alleges that the Housing Providers violated § 501(f) of the Act, D.C. OFFICIAL CODE § 42-3505.01(f) (2001), by engaging in "a pattern and practice of conduct that was intended to steer tenants from exercising their right to return to their rental units upon completion of the alteration and repairs[.]" Record (R.) at 5.[3]

Specifically, the Order to Show Cause alleges that:[4]

> 1. During the summer and fall of 1995 [sic], [the Housing Providers], through, [sic] counsel filed separate requests for approval to issue 120-day Notices to Vacate to the tenants of [the Housing Accommodations]. The

[2] The Acting Rent Administrator directed the Order to Show Cause to "Persius Realty," although the record does not clearly indicate what the relationship is between "Persius Realty" and the owners of the Housing Accommodations who are now named as the Housing Providers. *See* Housing Provider/Respondents' Reply to District of Columbia's Opposition to Motion to Dismiss as Moot at 1 ("Persius (*sic.*) Realty is not now, and has never been, the housing provider with respect to any of the referenced properties. Each of the properties are owned by a separate LLC[.]"); R. at 77; *see also* Motion to Withdraw as Counsel at 1 (June 20, 2014) (describing "Perseus Realty, LLC" as a "former member" of at least one of the limited liability companies, T Street Associates, LLC, named as the Housing Providers in this case). Based upon its review of the record, the Commission is satisfied that "Persius Realty" and "Perseus Realty" are the same entity. *See also infra* at n. 9.

[3] D.C. OFFICIAL CODE § 42-3505.01 (2001), *see infra* at 19-20 and n. 19, provides certain rights to a "tenant" of a housing accommodation. D.C. OFFICIAL CODE § 42-2501.03(36) (2001) defines "tenant," for the purposes of the Act, to include "a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." Although no tenant is a party to this particular case, the Commission assumes for the purposes of this appeal, because there is no evidence to the contrary in the record, that each reference by the RAD to a "tenant" is to an individual who meets the definition found in the Act.

[4] The Commission here uses the same language and terms as used by the Acting Rent Administrator in the Order to Show Cause, except that the Commission has numbered the Order to Show Cause's paragraphs for ease of reference. Additionally, the Commission has substituted the term "Housing Providers," as used in this Decision and Order, in place of the references to "Persius Realty" as the owner of the Housing Accommodations. *See supra* n. 2.

stated purpose for the 120 Day Notices to Vacate was for the immediate purpose of making alterations and renovations which cannot be safely or reasonably be [sic] accomplished while the rental units and/or common areas are occupied.

2. Following approval of the requests by the Rent Administrator, several tenants and their representatives, of the properties [sic] . . . complained to officials at DCRA in the summer and fall of 2005, about the conduct of agents of the [Housing Providers] in connection with the service of the 120 Day Notices to Vacate. The complainants alleged that the [Housing Providers] had improperly offered tenants money in exchange for their promise not to return to their rental units when the alterations and renovations were completed, in violation of, [sic] DC [Official] Code Sect. 42-3505.01(f) (2001).

3. Based on these complaints, the District of Columbia City Council [sic], Committee on the Department of [sic] Consumer and Regulatory Affairs, convened hearings on November 10, 2006, [sic] November 21, 2006 [sic] and December 21, 2006 [sic] regarding the circumstances surrounding the approval and issuance of the 120 Day Notices to Vacate.

4. Based upon the testimony provided at the hearings, the Rent Administrator determines that there are sufficient grounds to believe that a possible violation of DC Official Code Sect. 42-3505.01(f) has occurred whereby the [Housing Providers] [have] engaged in a pattern and practice of conduct that was intended to steer tenants from exercising their right to return to their rental units upon completion of the alterations and repairs, and suggests that the purpose the [sic] renovations and alterations was to vacate the subject for [sic] properties.

See Order to Show Cause at 1-2; R. at 5-6.

The hearing scheduled for April 25, 2006, was never held. *See* Hearing CD (OAH Mar. 8, 2007) at 1:16-1:18. As described *supra* at n. 1, after the Order to Show Cause was issued, the office of the Rent Administrator and the enforcement functions of the RACD were transferred to the RAD within DHCD, and the hearing functions of that office were transferred to OAH. Thus, on January 4, 2007, this matter was formally transferred to OAH by the Acting Rent Administrator and assigned to Principal Administrative Law Judge Jennifer Long (ALJ). R. at 20-21.

On January 16, 2007, the Housing Providers moved to dismiss the Order to Show Cause as moot (Motion to Dismiss as Moot). R. at 25. In their Motion to Dismiss as Moot, the Housing Providers argued that the matter was moot because the office of the Rent Administrator had rescinded the authorization to issue 120-day Notices to Vacate, the Housing Providers had withdrawn any Notices that had been issued, and the Housing Providers' reapplication to issue Notices had been denied. Motion to Dismiss as Moot at 1-2; R. at 22-23. In response, the RAD argued that the issue raised by the Order to Show Cause is not the status of the Notices to Vacate, but the conduct of the Housing Providers during 2005. Opposition to Motion to Dismiss as Moot at 1-4; R. at 66-70. With the consent of opposing counsel, the Housing Providers filed an additional memorandum on February 28, 2007, arguing that, other than the denial or revocation of authorization to issue 120-day Notices to Vacate, § 501(f) of the Act does not provide any specific remedy for violations and that the Order to Show Cause is defective on its face for failing to set forth any proposed corrective action. Reply to [RAD's] Opposition to Housing Provider[s'] Motion to Dismiss as Moot at 1-5; R. at 73-81.

A hearing was held on March 8, 2007, at which oral arguments were presented on the Motion to Dismiss as Moot. R. at 82, 134-35; Hearing CD (OAH Mar. 8, 2007) at 1:23-1:39. On June 15, 2007, the ALJ denied the Housing Providers' Motion to Dismiss as Moot, making the following determinations:[5]

> 1. Respondent asserts there is no provision of the [Act] that sets forth a specific remedy for violating D.C. Official Code § 42-3505.01(f). Such assertion is incorrect. D.C. Official Code § 42-3509.01(b)(3) states[,]

[5] The Commission here uses the same language and terms as used by the ALJ in the Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference. The ALJ did not specifically style her determinations as "conclusions of law" or make any specific "findings of fact." Rather, the ALJ viewed the factual allegations in the Order to Show Cause "in a light most favorable to the nonmoving party." In re 1433 T Street Assocs., LLC, RH-SC-06-002 (OAH June 15, 2007), at 4 (citing Jordan Keys & Jesemy, LLP v. St. Paul Fire and Marine Ins. Co., 870 A.2d 58, 61-62 (D.C. 2005)); R. at 132.

"any person who willfully . . . commits any other act in violation of any provision of this chapter . . . shall be subject to a civil fine of not more than $5,000 for each violation." [alterations original] Consequently, if this court were to find Respondent violated D.C. Official Code § 42-3505.01(f), Respondent would be liable for up to $5,000 per violation.

2. Respondent also asserts in its Notice of Additional Legal Authority that an agency is required to follow its own regulations, citing Cambridge Mgmt. Co. v. District of Columbia Rental Hous. Comm'n, 515 A.2d 721 (D.C. 1986); MacCauley v. District of Columbia Taxicab Comm'n, 623 A.2d 1207, 1209 (D.C. 1993). However, as Petitioner correctly asserts in its Response to Housing Provider's [sic] Notice of Additional Legal Authority, that "failure to do so will not lead to reversal where the petitioner has not been prejudiced by the deviation from required procedures." Braddock v. Smith, 711 A.2d 481, 490 (D.C. 1996). It is true that Petitioner did not set forth the proposed corrective action in its Order to Show Cause. However, it is also true that Respondent was in no way prejudiced by this technical error on the part of Petitioner, nor did Respondent argue it was harmed in any way by the omission of the fine provision (D.C. Official Code § 42-3509.01(b)(3)) in the Order to Show Cause. Consequently, the omission amounts to harmless error, which does not affect Petitioner's right to a show cause hearing.

3. Under the District of Columbia Municipal Regulations, "if an investigation by the Rent Administrator finds substantial grounds to believe that *possible* violations of the Act have occurred, a notice of a show cause hearing shall be prepared and served on the alleged violator." 14 DCMR [§] 4015.4 (emphasis added). Petitioner stated in its Order to Show Cause that several tenants had complained about the conduct of the housing providers in administering 120-day notices, and that the Owner has "engaged in a pattern and practice of conduct that was intended to steer tenants from exercising their right to return to their rental units upon completion of the alterations and repairs, and . . . that the purpose of the renovations and alteration was to vacate the subject for [sic] properties." (Order to Show Cause, at 2) [alterations original] [.] Petitioner's stated allegations are sufficient to go forward with the show cause hearing to determine whether a possible violation of D.C. Official Code § 42-3505.01(f) has occurred.

In re 1433 T Street Assocs., LLC, RH-SC-06-002 (OAH June 15, 2007) (Order Denying Dismissal as Moot); R. at 131-33.

On March 19, 2008, the Housing Providers filed a Renewed Motion to Dismiss the Order to Show Cause (Renewed Motion to Dismiss). In their Renewed Motion to Dismiss, the Housing Providers argued that "any effort to impose sanction on the Housing Providers for their alleged conduct . . . would be unconstitutional" because there was no notice that such conduct was unlawful and the RAD's interpretation of the Act would encroach upon the freedom to contract. Memorandum of Points and Authorities in Support of Renewed Motion to Dismiss at 2-4; R. at 187-89. A hearing was held on the Housing Providers' motion, *see* Hearing CD (OAH Apr. 29, 2008), and on April 14, 2009, the ALJ issued a Final Order, granting the Renewed Motion to Dismiss, in which she made the following findings of fact:[6]

1. The vast majority of the factual contentions underlying this matter are undisputed.

2. During the summer and fall of 2005, Respondents filed an application with the Rent Administrator requesting approval to issue 120-Day Notices to Vacate in order to make alterations or renovations in the subject properties pursuant to D.C. Official Code § 42-3505.01(f). The Rent Administrator approved the request in the fall of 2005.

3. The Housing Providers approached tenants in the three properties, informed them that they had the authority to issue the notices to vacate, and offered to pay tenants money if the tenants agreed to vacate in accordance with the terms of an agreement drafted by Respondents.

4. In November 2005, the Rent Administrator withdrew the approval to issue the notice to vacate. Respondents reapplied for the notices to vacate pursuant to § 501(f).

5. On March 27, 2006, Acting Rent Administrator Keith Anderson issued the Order to Show Cause.

6. On December 1, 2006, the Acting Rent Administrator denied the renewed request to issue notices to vacate.

[6] The statements of fact use the same language and terms as used in the findings of fact by the ALJ in the Final Order, except that the Commission has numbered the ALJ's findings as paragraphs for ease of reference.

In re 1433 T Street Assocs., LLC, RH-SC-06-002 (OAH Apr. 14, 2009), at 5-6 (Final Order); R. at 291-92.

In the Final Order, the ALJ made the following conclusions of law:[7]

1. It is well settled that, "[in] deciding a motion to dismiss, the court accepts as true all allegations in the Complaint and views them in a light most favorable to the nonmoving party. Dismissal is impermissible unless it appears beyond a doubt that the [Petitioner] can prove no set of facts in support of [its] claim, which would entitle [it] to relief." Jordan Keys & Jessamy, LLP v. St. Paul Fire and Marine Ins. Co., 870 A.2d 58, 62 (D.C. 2005) (citations omitted). [alterations original] Applying this standard to the Order to Show Cause, it is beyond cavil that the motion to dismiss must be granted.

2. The District alleges that Respondents "improperly offered the tenants money in exchange for their promise not to return to their rental units when the alterations and renovations were completed, in violation of D.C. Official Code § 42-3505.01(f)." However, § 501(f) does not prohibit housing providers from engaging in negotiations with tenants to vacate their rental units. During oral arguments on Respondents' Renewed Motion to Dismiss, the District acknowledged that there was no specific prohibition in the statute. In fact, the attorney representing the District stated that nothing in the Act or regulations prohibits Respondents from negotiating with tenants to vacate a building.

3. In the Order to Show Cause, the District attempted to label the [H]ousing [P]rovider's conduct as misconduct. However, the District has acknowledged that misconduct is not defined in § 501(f) and § 501(f) does not prohibit Respondents' conduct. Consequently, the District has improperly issued an Order to Show Cause involving conduct that is not prohibited by the statute.

4. The District's position also violates the Respondents' right to due process. "Central to constitutional notions of due process is the principle that a person will be given prior notice of that conduct which is proscribed and which could form the basis for governmental action against him." *Lewis v. District of Columbia Comm'n on Licensure to Practice the Healing Art*, 385 A.2d 1148, 1152 (D.C. 1978). In *Lewis*, the court held that the District violated the [p]etitioner's due process rights when he was sanctioned for conduct that violated a policy that was drafted, but was

[7] The conclusions of law use the same language and terms as used by the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

never formally adopted or promulgated. . . . The instant case is far more egregious than *Lewis* because the District has no basis upon which to lay a claim that Respondents' conduct constituted misconduct. There are no rules, statutes, or even a draft policy that could arguably constitute notice that Respondents' conduct constituted a violation of § 501(f) and could form the basis for this governmental action against them. *See id.* at 1152. Therefore, permitting the District to proceed with this matter would violate Respondents' right to due process. Consequently, this administrative court is compelled to dismiss this Show Cause proceeding.

5. Although this court is dismissing this matter because the District cannot demonstrate that D.C. Official Code § 42-3505.01(f) prohibits Respondents' conduct, and on the time honored principle of due process, "to hold otherwise would [also] . . . encroach upon the landlord's and tenant's 'basic freedom to contract as [they] will,' which . . . remains one of the 'rather basic rights incident to the ownership of property that ought not to be summarily dismissed as obsolete even under our modern statutory rental housing law." *Double H. Hous. Corp. v. David*, 947 A.2d 38, 42 (D.C. 2008) (quoting *Goodman v. District of Columbia Rental Hous. Comm'n*, 573 A.2d 1293, 1297 (D.C. 1990)). [alterations original]

6. In addition to the basic freedom to contract discussed in *Double H Hous. Corp.*, Respondents point to the [Rental Housing] Conversion and Sale Act, D.C. Official Code § 42-2301.01 et seq., as proof that there is statutory support for the premise that tenants have the right to negotiate their rights relative to their rental housing units. The Conversion and Sale Act contains a provision entitled, Exercise or Assignment of Rights. This provision, D.C. Official Code § 42-3404.06, provides:

> The tenant may exercise rights under this subchapter in conjunction with a third party or by assigning or selling those rights to any party, whether private or governmental. The exercise, assignment, or sale of tenant rights may be for *any consideration* which the tenant, in the tenants sole discretion, finds acceptable. Such an exercise, assignment, or sale may occur at any time in the process provided in this subchapter and may be structured in any way the tenant, in the tenant's sole discretion, finds acceptable. (emphasis added)

The court is mindful that this provision is taken from the Rental Housing Conversion and Sale Act, and not the Rental Housing Act of 1985. However, it stands as proof that tenants living in rental housing units in the District of Columbia have the right to contract freely, for any consideration that the tenant finds acceptable. In the absence of a

prohibition in § 501(f) or a provision prohibiting the waiver of rights[] pursuant to § 501(f), the District's position does fall on its own weight.

Final Order at 9-13; R. at 284-88.

The RAD filed a timely notice of appeal on April 29, 2009, (Notice of Appeal). In its Notice of Appeal, the RAD makes, in relevant part, the following assertions of error:[8]

1. The Office of Administrative Hearings (OAH) Administrative Law Judge (ALJ) erred in determining that it is beyond doubt that Appellant can prove no set of facts to support its claim, which entitles it to relief, . . . by dismissing the case prior to a hearing on the merits[.]

2. The OAH ALJ erred in determining that Appellant improperly issued the subject Order to Show Cause based on conduct that is not prohibited by statute because Appellees, in negotiating termination of tenancy agreements with the Tenants, among other things, willfully and deceptively presented to each Tenant a 120-Day Notice to Vacate that did not meet the requirements for a 120-Day Notice to Vacate for Unsafe Alterations and Repairs and was not approved by the Rent Administrator, as required under Sections 501 (a) and 501(f) of the Act.

3. The OAH ALJ erred in determining that no rules, statutes, or administrative policy exists that provide notice to the Appellee that its conduct violated Sect. 501(f)[.]

4. The OAH ALJ erred in dismissing this case solely based on a landlord's and tenant's right to contract because Appellants did not contend that Appellees did not have the right to negotiate with the Tenants. . . .

5. The OAH ALJ erred in dismissing this matter prior to a hearing because in doing so it deprived Appellant of its right to be heard under 14 DCMR § 4015.4 of the Housing Regulations, and D.C. Official Code § 2-510 of the District of Columbia Administrative Procedures Act[.]

6. The OAH ALJ erred in applying *Double H Hous. Corp., v. David,* 947 A.2d 38 (D.C. 2008) only for the proposition that the housing provider and tenants have the right to contract and the government cannot impinge upon that right. . . .

[8] The Commission recites the language and numbering used by the RAD in the Notice of Appeal, but has abridged each statement to state the general issue without additional legal argument.

7. The OAH ALJ erred by rejecting the fact that the Rent Administrator rescinded the authorization to issue legitimate 120-Day Notice to Vacate for Unsafe Alterations and Repairs on October 25, 2005. . . .

8. The OAH ALJ erred in failing to consider in lieu of dismissal that the statutory language in 501(f) is not precatory and therefore, the housing provider was required to adhere to the same. . . .

9. The OAH ALJ erred in the application of *Lewis v. District of Columbia on Licensure to Practice the Healing Arts, 385* A.2d 1148 (DC 1970), cited by Appellees, in which the District imposed discipline on a licensed physician for violating Agency policy that did not have the force of law. See *Lewis* at 1151. . . .

The RAD filed a Brief in Support of Appeal on June 12, 2009 (RAD Brief). The Housing Providers filed a responsive brief on June 19, 2009 (Housing Providers' Brief). The Commission held a hearing in this matter on July 14, 2009. However, on June 16, 2014, the Commission issued an Order on Rehearing in this matter because the Commission does not possess an audio recording of the July 14, 2009, hearing. Dep't of Hous. & Cmty. Dev. – Rental Accommodations Div. v. 1433 T St. Assocs., LLC, RH-SC-06-002 (RHC June 16, 2014) (Order on Rehearing); *see* 14 DCMR § 3820.[9] On January 15, 2015, the Commission issued a Notice of Scheduled Hearing, setting the date for re-hearing in this case.[10] The rescheduled hearing was held on March 24, 2015. *See* Hearing CD (RHC Mar. 24, 2015) at 11:07.

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[9] The Commission's rules, at 14 DCMR § 3820, provide:

> 3820 TAPE RECORDINGS
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> 3820.1 The entire proceedings of hearings on motions and appeals shall be recorded on tape, which shall remain in the custody of the Commission at all times.
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> 3820.2 At the request of a party to an appeal, the Commission shall make a duplicate tape which the party may hear without charge, or which the party may purchase at cost.

The Commission notes that, since the original promulgation of this rule on March 7, 1986, *see* 33 DCR 1336, the Commission has switched to a digital audio recording system, rather than analog tape.

[10] The Commission notes that, on June 20, 2014, the Commission received a Motion to Withdraw as Counsel from the law firm of Greenstein, Delorme, & Luchs, P.C. (Former Counsel), stating that it no longer represented the Housing Providers. On July 14, 2014, the Commission granted the Motion to Withdraw as Counsel and stayed the

II. ISSUES ON APPEAL[11]

1. Whether the ALJ erred in determining that the RAD can prove no set of facts which would entitle it to impose fines on the Housing Providers

2. Whether the ALJ erred in determining that no rule, statute, or administrative policy exists that provides notice to the Housing Providers that their conduct violated the Act

3. Whether the ALJ erred in the application of Lewis v. District of Columbia Commission on Licensure to Practice the Healing Art, 385 A.2d 1148 (D.C. 1978)

4. Whether the ALJ erred in failing to determine in lieu of dismissal that the statutory language in § 501(f) of the Act is not precatory

5. Whether the ALJ erred in applying Double H Hous. Corp. v. David, 947 A.2d 38 (D.C. 2008)

6. Whether the ALJ erred by rejecting the fact that the Rent Administrator rescinded the authorization to issue legitimate Notices to Vacate on October 25, 2005.

Order on Rehearing for forty-five (45) days to permit the Housing Providers to obtain new counsel, after which time the Commission would reissue the Order on Rehearing within ten (10) days. Dep't of Hous. & Cmty. Dev. – Rental Accommodations Div. v. 1433 T St. Assocs., LLC, RH-SC6-002 (RHC July 14, 2014) at 4 (Order on Motion to Withdraw as Counsel).

The Commission also notes that, on August 6, 2014, it received a notice of undeliverable mail in attempting to serve Mr. John W. Bolton, Jr. with the Order on Motion to Withdraw as Counsel, at his last known address provided by the Former Counsel. The Former Counsel represented that Mr. Bolton acted on behalf of Perseus Realty, which is "a former member of" at least one of the limited liability companies named as the Housing Providers in this matter. *See* Motion to Withdraw as Counsel; Order on Motion to Withdraw as Counsel at 1-2. The Commission further notes that the Former Counsel represented that Mr. Ellis J. Parker, through HEBDC, LLC, continues to have authority to act on behalf of the Housing Providers. *See* Motion to Withdraw as Counsel at 3 (certifying that Mr. Parker was advised by Debra F. Leege, Esq. of Former Counsel's intent to file the motion). Mr. Parker was served with the Order on Motion to Withdraw as Counsel by the Commission by first class mail, and the Commission has not received any notice that the mail was undeliverable. *See also supra* at n. 2.

The Commission finally notes that Andrew Glover, Esq., D.C. Office of the Attorney General, entered an appearance on behalf of the RAD at the rescheduled hearing.

[11] The Commission lists the issues as stated by the RAD in its Brief in Support of Appeal. The RAD enumerates nine (9) assertions of error in its Notice of Appeal, see supra at 9-10, but in its full brief merges the discussion of several of the issues into the six (6) separately numbered arguments recited here. In its reasonable discretion, the Commission rephrases the statement of the issues on appeal to appropriately summarize and clearly state the legal issues raised in the Notice of Appeal and the RAD's Brief. *See, e.g.*, Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Barac Co. v. Tenants of 809 Kennedy St., NW, VA 02-107 (RHC Sept. 27, 2013); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8.

III. DISCUSSION

1. **Whether the ALJ erred in determining that the RAD can prove no set of facts which would entitle it to impose fines on the Housing Providers**

2. **Whether the ALJ erred in determining that no rule, statute, or administrative policy exists that provides notice to the Housing Providers that their conduct violated the Act**

3. **Whether the ALJ erred in the application of Lewis v. District of Columbia Commission on Licensure to Practice the Healing Art, 385 A.2d 1148 (D.C. 1978)**

4. **Whether the ALJ erred in failing to determine in lieu of dismissal that the statutory language in § 501(f) of the Act is not precatory**

The Commission's standard of review of the Final Order is contained in 14 DCMR § 3807.1 (2004):

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

The Commission will sustain an ALJ's decision so long as it follows rationally from the facts and is supported by substantial evidence. *See* D.C. OFFICIAL CODE §§ 2-509(e), 42-3502.16(h); Majerle Mgmt. v. D.C. Rental Hous. Comm'n, 866 A.2d 41, 46 (D.C. 2004); Munchison v. D.C. Dept. of Pub. Works, 813 A.2d 203, 205 (D.C. 2002); Bower v. Chaselton Assocs., TP 27,838 (RHC March 27, 2014); Washington v. A&A Marbury, LLC/UIP Property Mgmt., RH-TP-06-30,151 (RHC Dec. 27, 2012); 1733 Lanier Pl. N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009). The Commission, nonetheless, will review legal questions raised by an ALJ's interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. *See* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous.

Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. of Md. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-103 (D.C. 2005)); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Carpenter v. Markswright, RH-TP-10-29,840 (RHC June 5, 2013).

The Commission's review of the record shows that the ALJ issued the Final Order, ruling on the Housing Provider's Renewed Motion to Dismiss, in reliance upon case law interpreting District of Columbia Superior Court Rule of Civil Procedure (Super. Ct. Civ. R.) 12(b)(6).[12] Final Order at 9; R. at 288. Because an ALJ may be guided by the Super. Ct. Civ. R. when no standard is expressly stated in the procedural rules of OAH, *see* 1 DCMR § 2801.1,[13] the Commission is satisfied that the ALJ's use of Super. Ct. Civ. R. 12(b)(6) and applicable precedent in consideration of the Renewed Motion to Dismiss was appropriate, where the OAH regulations contain no standard applicable to deciding a motion to dismiss. *See, e.g.,* Pinnacle Realty Mgmt. v. Doyle, TP 27,067 (RHC July 22, 2011) (Order on Motion to Intervene) (Commission, under similar provisions of 14 DCMR § 3828.1, has adopted "permissive intervention" standard); Hago v. Gewriz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC July 20,

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[12] Super. Ct. Civ. R. 12, "Defenses and Objections--When and How Presented--by Pleading or Motion--Motion for Judgment on the Pleadings," provides, in relevant part, as follows:

> (b) **How Presented**. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or 3rd-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted[.] . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

[13] 1 DCMR § 2801.1 provides:

> Where these Rules do not address a procedural issue, an Administrative Law Judge may be guided by the District of Columbia Superior Court Rules of Civil Procedure to decide the issue.

2011) (Sua Sponte Order Vacating Dismissal of Appeal with Prejudice) (following Super. Ct. R. Civ. P. 60(b) to grant relief from judgment); *cf.* Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Feb. 18, 2014) (Commission will not incorporate "excusable neglect" standards for late filing from court rules where enlargement of time to file appeal is specifically prohibited by 14 DCMR § 3816.6).

The ALJ determined, and the parties do not dispute on appeal, that, in deciding such a motion:

> The court accepts as true all allegations in the Complaint and views them in a light most favorable to the nonmoving party. Dismissal is impermissible unless it appears beyond a doubt that the [Petitioner] can prove no set of facts in support of [its] claim, which would entitled [it] to relief.

Final Order at 9 (quoting Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co., 870 A.2d 58, 62 (D.C. 2005)) (alterations original); R. at 288. Super. Ct. Civ. R. 12(b) further provides that a motion to dismiss for failure to state a claim, if relying on material outside the pleadings, "shall be treated as one for summary judgment and disposed of as provided in [Super. Ct. Civ. R. 56], and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Kitt v. Pathmakers, Inc., 672 A.2d 76, 79 (D.C. 1996); *see* Scoville St. Corp. v. Dist. TLC Trust, 1996, 857 A.2d 1071, 1074-75 (D.C. 2004).[14] Super.

[14] The RAD asserts that the ALJ erred by "pass[ing] over the 'reasonable opportunity' entitled to the non-moving party" to present evidence and materials relevant to a motion for summary judgment. RAD Brief at 9-12; *see* Super. Ct. Civ. R. 12(b), 56(c); Scoville St., 857 A.2d at 1074-75 (reasonable opportunity not denied where non-moving party attached "numerous exhibits to its opposition to [the motion to dismiss], including affidavits"); Kitt, 672 A.2d at 80 (error for trial court to "simply rule[] on the motion, relying on outside facts, even though Kitt had expressly objected to the inclusion of the factual material in Pathmakers' motion"). In light of the Commission's determination in this Decision and Order to remand this case, on the alternative legal grounds that the materials in the record upon which the ALJ relied did not establish that the Renewed Motion to Dismiss should have been granted, and because the relief granted herein would not be modified by a determination of this issue, the Commission is satisfied that is not required to address the question on appeal regarding what, if any, additional opportunity the RAD was entitled to for the introduction of evidence. *See, e.g.*, Knight-Bey v. Henderson, RH-TP-07-28,888 (RHC Jan. 8, 2013) (where tenant/petitioner fails to appear at hearing, failure to afford due process through proper notice of hearing to housing provider/respondent is moot); Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Jan. 29, 2012) (where case remanded to determine remedy for violation of registration provision of the Act,

Ct. Civ. R. 56 permits summary judgment where there is no genuine issue as to any material fact. Allen v. District of Columbia, 100 A.3d 63, 67 (D.C. 2014); Kitt, 672 A.2d at 79. Similarly, the rules governing OAH hearings permit an ALJ to grant a motion for summary adjudication that includes "sufficient evidence of undisputed facts[.]" 1 DCMR § 2819.1; *see also* Sindram v. Tenacity Group, RH-TP-07-29,094 (RHC Aug. 18, 2011) (ALJ's characterization of motion as one for summary judgment or to dismiss harmless where ultimate legal determination produces same result).

Accordingly, the Commission's *de novo* review of the ALJ's order views all factual allegations in the light most favorable to the RAD and will affirm the ALJ's dismissal of the Order to Show Cause only if the RAD could prove no set of facts in which the Housing Providers violated the Act and would be subject to fines under D.C. OFFICIAL CODE § 42-3509.01(b).[15] *See* Comer v. Wells Fargo Bank, N.A., 108 A.3d 364, 371 (D.C. 2015) (dismissal of complaint for failure to state a claim is reviewed *de novo*, applying the same standard as trial court); Oparaugo v. Watts, 884 A.2d 63, 79 (D.C. 2005) (factual allegations and reasonable inferences therefrom construed in favor of complaining party); *see also* Jordan Keys & Jessamy, 870 A.2d at 62.[16] Moreover, stating a claim for relief is not a high bar, and

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issue of notice to tenant of reduction in services was moot on appeal); Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005) ("[T]here is no further relief the Commission may grant after reversing the hearing examiner's determination that the housing accommodation was exempt from Title II of the Act, and directing the hearing examiner to decide all issues raised in the tenant petition."); Hiatt Place P'ship v. Hiatt Place Tenants Ass'n, TP 21,149 (RHC May 10, 1991) ("[Because] there will be a remand on the reduction in services issue, we need not pursue the treble damage question at this time. The question of treble damages can be considered if any damages are awarded after remand.").

[15] D.C. OFFICIAL CODE § 42-3509.01(b) provides:

> Any person who wilfully . . . (3) commits any [] act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation.

[16] The Commission notes that the Housing Providers devote a substantial portion of their brief on appeal to arguing that certain evidence relied on by the RAD in issuing the Order to Show Cause, namely, transcripts of hearings held

substantial D.C. Court of Appeals (DCCA) precedent "reject[s] the approach that pleading is a game of skill in which one misstep . . . may be decisive to the outcome and manifest[s] a preference for resolution of disputes on the merits, not on technicalities of pleading[.]" Grayson v. AT&T Corp., 15 A.3d 219, 228 (D.C. 2011) (internal quotations omitted) (quoting Clampitt v. American Univ., 957 A.2d 23, 29 (D.C. 2008), and Carter-Obayuwana v. Howard Univ., 764 A.2d 779, 787 (D.C. 2001)); *see also* Johnson v. Payless Shoe Source, Inc., 841 A.2d 1249, 1258 (D.C. 2004) (explaining Super. Ct. Civ. R.'s "general preference for trial on the merits").

The Commission's review of the record shows that the ALJ, in dismissing the Order to Show Cause under Super Ct. Civ. R. 12(b)(6), relied on the following allegations and undisputed statements of fact. The Housing Providers sought approval from the Rent Administrator to temporarily displace the tenants from the Housing Accommodations in order to undertake and conduct extensive renovations that would have been unsafe to conduct while the Housing Accommodations were occupied by the tenants, in light of the hazardous presence of lead-based paint and asbestos. Order to Show Cause at 1-2; R. at 5-6, *see also* Housing Providers' Brief at 7 (citing Exhibits 203, 207, and 208 (letters from Housing Providers' then-counsel to then-Rent Administrator Raenelle Zapata requesting authority to proceed under § 501(f))). Following the

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by the D.C. Council, would be inadmissible at an OAH evidentiary hearing. *See* Housing Providers' Brief at 2-7 (citing cases holding Congressional reports inadmissible in federal trials, Pearce v. E.F. Hutton Group, Inc., 653 F.Supp 810 (D.D.C. 1987), and Anderson v. City of New York, 657 F.Supp 1571 (S.D.N.Y 1987)). The Commission notes that this argument was the subject of a motion *in limine* at the time the ALJ issued the Final Order dismissing the case. *See* Housing Providers' Brief at 3 n.5. The Commission observes that the cases cited by the Housing Providers excluded the Congressional reports as hearsay which did not meet the "public records and reports" exception under the Federal Rules of Evidence (F.R. Evid.), but that hearsay evidence is generally admissible before OAH. *See* 1 DCMR § 2821.12; *cf.* F.R. Evid. 803(8). The Commission is satisfied that because the ALJ never ruled on this issue, no evidentiary hearing was held involving the D.C. Council hearing transcripts, the relief granted herein would not be modified by a determination of this issue, and the legal grounds upon which the ALJ dismissed the Order to Show Cause do not implicate, or depend in any way on, the merits of this contention, the Commission is not legally required to address the admissibility of the D.C. Council hearing transcripts in an OAH evidentiary hearing in reaching its determination of this appeal. *See, e.g.,* Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014) (denial of motion for partial summary judgment not an appealable final order).

Rent Administrator's authorization of the issuance of the 120-day Notices to Vacate, the Order to Show Cause alleges, and the parties do not dispute, that an agent of the Housing Providers approached the tenants to make buy-out offers. Order to Show Cause at 1-2; R. at 5-6. As the ALJ stated, "[The Housing Providers] acknowledge that after the Rent Administrator approved the request, they approached tenants in the three properties, informed them that they had the authority to issue the notices to vacate, and offered to pay tenants money if the tenants agreed to vacate in accordance with the terms of an agreement drafted by [the Housing Providers]." Final Order at 5-6; R. at 296-97; *see also* Housing Providers' Brief at 10-11; *see generally* Hearing CD (OAH Apr. 29, 2008).

The Housing Providers acknowledge that an agent of theirs presented a document to a number of tenants of the Housing Accommodations containing terms by which a tenant would receive $1,000 (purportedly as "relocation assistance") in consideration for his or her permanently vacating his or her rental unit. Hearing CD (OAH Apr. 29, 2008) at 11:50-55. The Commission attaches this document as Exhibit A to this Decision and Order.[17] Final Order at 2-6; R. at 291-95.

The Commission observes that Exhibit A, notwithstanding its apparent language and purposes as a "contract to vacate" or a "buyout agreement," contains relevant, unambiguous indicia of being a 120-Day Notice to Vacate issued pursuant to § 501 of the Act. Specifically, the document is titled "NOTICE TO VACATE" and states that "I am to receive relocation assistance of $1000." *See* Exhibit A (emphasis added); *see also* Hearing CD (OAH Apr. 29, 2008) at 11:59-12:04. The Housing Providers conceded before the ALJ that, although titled

[17] As part of the certified record of this case, the Notice to Vacate was submitted by the RAD to OAH as Exhibit 115. The RAD has also provided Exhibit A as an attachment to its brief on appeal. *See* RAD Brief at Exhibit B. The Commission notes that the Housing Provider does not dispute that the Notice to Vacate was used by the Housing Provider for the purposes stated, *supra*, at 19-20.

"Notice to Vacate," this "Notice to Vacate" in Exhibit A "looks nothing like" a standard Notice to Vacate, as approved by the Rent Administrator, from the content, to the number of pages, and down to the line spacing. OAH Hearing CD (April 29, 2008), at 11:54-11:56.

Based on these facts, the RAD determined in the Order to Show Cause that "there are sufficient grounds to believe that a possible violation of [D.C.] Official Code [§] 42-3505.01(f) has occurred whereby the [Housing Provider] has engaged in a pattern and practice of conduct that was intended to steer tenants from exercising their right to return to their rental units[.]" Order to Show Cause at 2 (emphasis added); R. at 5. In their Renewed Motion to Dismiss, the Housing Providers argued that "there were no regulations or established procedures beyond the statutory language [of § 501] which dictated how the Rent Administrator or a housing provider could or should undertake the task of notification to or negotiation with tenants who [sic] the Rent Administrator authorized to be required to vacate." Renewed Motion to Dismiss at 3; R. at 188. In the Final Order, the ALJ determined that § 501(f) of the Act does not contain any express prohibition against negotiations for the sale or waiver of tenants' rights against eviction. Final Order at 10-12; R. at 285-87; *see also* Hearing CD (OAH Apr. 29, 2008) at 11:56-58 (argument of counsel for RAD, acknowledging that negotiation itself is not prohibited).[18]

[18] The RAD asserts on appeal that the ALJ erred in determining, because "there are no rules, statutes, or even a draft policy that could arguably constitute notice" that the Housing Providers' conduct violated § 501(f) of the Act, that the imposition of liability on the Housing Providers would violate their constitutional due process rights to fair notice of that conduct which is proscribed. Final Order at 11 (citing Lewis v. D.C. Comm'n on Licensure to Practice the Healing Art, 385 A.2d 1148, 1152 (D.C. 1978)); R. at 286. In Lewis, the DCCA addressed the question of what administrative process and public notice are required when an agency acts to prohibit certain conduct. 385 A.2d at 1152. The Commission's review of the record indicates that the critical issue in this appeal is whether the ALJ erroneously dismissed to the Order to Show Cause solely on the grounds that § 501(f) of the Act does not prohibit negotiation with a tenant to permanently vacate his or her rental unit. Because, *inter alia*, the Commission in this Decision and Order is satisfied that the plain language of the statutory and regulatory requirements for a 120-day Notice to Vacate in § 501(f) of the Act and 14 DCMR § 4302 unambiguously regulate a housing provider's conduct in the issuance of such 120-day notices, and because the relief granted herein would not be modified by a determination of this issue, the Commission does not deem it necessary to inquire into the RAD's ancillary claims (citing Lewis, 385 A.2d at 1152) regarding the ALJ's error in determining a constitutional deficiency in public notice to the Housing Providers of their alleged violation of § 501(f) of the Act. *See, e.g.*, Knight-Bey, RH-TP-07-

Based on its review of the record, the Commission is persuaded that the ALJ erred in dismissing the Order to Show Cause because facts alleged by the RAD, and reasonable inferences from uncontested facts stated on the record, if taken as true, indicate that the Housing Providers may have violated the Act. As relevant to this appeal, the text of § 501(f) of the Act, D.C. OFFICIAL CODE § 42-3505.01(f), provides as follows:

> (f)(1) A housing provider may recover possession of a rental unit for the immediate purpose of making alterations or renovations to the rental unit which cannot safely or reasonably be accomplished while the rental unit is occupied, so long as the plans for the alterations or renovations have been previously filed with and approved by the Rent Administrator and the plans demonstrate that the proposed alterations or renovations cannot safely or reasonably be accomplished while the unit is occupied. The housing provider shall serve on the tenant a 120-day notice to vacate in advance of action to recover possession of the rental unit. The notice to vacate shall comply with and notify the tenant of the tenant's right to relocation assistance under the provisions of subchapter VII of this chapter.
>
> (2) Immediately upon completion of the proposed alterations or renovations, the tenant shall have the absolute right to re[-]rent the rental unit.
>
> (3) Where the renovations or alterations are necessary to bring the rental unit into substantial compliance with the housing regulations, the tenant may re[-]rent at the same rent and under the same obligations that were in effect at the time the tenant was dispossessed, if the renovations or alterations were not made necessary by the negligent or malicious conduct of the tenant.
>
> (4) Tenants displaced by actions under this subsection shall be entitled to receive relocation assistance as set forth in subchapter VII of this chapter, if the tenants meet the eligibility criteria of that subchapter.

28,888; Kuratu, RH-TP-07-28,985; Asher, TP 27,583; Hiatt Place, TP 21,149; *see also* Int'l Union of Elec., Salaried, Mach., & Furniture Workers v. Taylor, 669 A.2d 699, 700 (D.C. 1995) (noting that "if a case may be decided on either statutory or constitutional grounds, [the courts], for sound jurisprudential reasons, will inquire first into the statutory questions") (quoting Harris v. McRae, 448 U.S. 297, 306-307 (1980)).

D.C. OFFICIAL CODE § 42-3505.01(f) (2001) (emphasis added).[19] Any action to recover possession of a rental unit, other than as permitted by § 501 of the Act, is prohibited. *Id.* § 42-3505.01(a); *see, e.g.*, Hernandez v. Banks, 84 A.3d 543, 551-55 (D.C. 2014); Cormier v. McRae, 609 A.2d 676, 678 (D.C. 1991); Pena v. Woynarowsky, RH-TP-06-28,817 (RHC Feb. 3, 2012); Horne v. Edgewood Mgmt. Corp., TP 24,119 (RHC Mar. 5, 1997).

Furthermore, according to the regulations promulgated by the Commission to implement the Act, 14 DCMR § 4302, ten (10) discrete elements must be contained in a Notice to Vacate issued to tenants based on substantial rehabilitation, alteration, or renovations that would be unsafe to conduct while tenants are present:

1. "A statement detailing the factual basis on which the housing provider relies, including references to the specific provisions of Title V of the Act, on which the claim for eviction is grounded" (14 DCMR § 4302.1(a));

2. "The minimum time to vacate," *i.e.*, 120 days (14 DCMR § 4302.1(b));

3. "A statement that the housing accommodation is registered with the Rent Administrator, and the registration number, or a statement that the accommodation is exempt from registration, and the basis for the exemption" (14 DCMR § 4302.1(c));

4. "A statement that a copy of the notice to vacate is being furnished to the Rent Administrator including the address and telephone number of the RACD" (14 DCMR § 4302.1(d));

5. The statement, "The law requires me to pay relocation assistance of $ ___." (14 DCMR § 4302.2);

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[19] The Housing Providers' conduct at issue occurred prior to the enactment of the Tenant Evictions Reform Emergency Amendment Act of 2005, passed on an emergency basis December 22, 2005, D.C. Act 16-244, 53 DCR 268, the substantially similar temporary and emergency acts (D.C. Act 16-252 and D.C. Act 16-327, respectively), and the permanent Tenant Evictions Reform Amendment Act of 2006 (Eviction Reform Act), effective June 22, 2006, D.C. Law 16-140, 53 DCR 3686, which amended § 501(f) of the Act. The Commission bases this Decision and Order on the text of § 501(f) in effect prior to its amendment by the Eviction Reform Act. *See* D.C. OFFICIAL CODE § 42-3505.01(f) (2001 through 2005 Supp.). *See also* D.C. OFFICIAL CODE § 45-404(a) (2012 Repl.) (general savings provision); *see, e.g.*, Bank of Am., N.A. v. Griffin, 2 A.3d 1070, 1076 (D.C. 2010); Holzsager v. D.C. Alcoholic Bev. Control Bd., 979 A.2d 52, 57 (D.C. 2009) (presumption that a change in law is not retroactive where it would "impose new duties with respect to transactions already completed"); Redman v. Potomac Place Assocs., LLC, 972 A.2d 316, 319 n.4 (D.C. 2009).

6. The statement, "If you let me know at least ten (10) days before you move, you will receive the relocation assistance no later than one (1) day before you move. If not, you will receive the relocation assistance within thirty (30) days after you move." (14 DCMR § 4302.2);

7. The statement, "If you fail to pay rent between now and the end of the one hundred eighty (180) [one hundred twenty (120)] day period, you may be evicted in a shorter period or may lose all or a part of the relocation assistance." (14 DCMR § 4302.2);

8. The statement, "You have an absolute right to re-rent your unit immediately after the rehabilitation is completed. The rent will be $ _____ contingent upon approval by the Rent Administrator." (14 DCMR § 4202.3 (emphasis added));

9. "[A] signed certification by the housing provider or the housing provider's authorized agent that the RACD has approved the plans" (14 DCMR § 4302.5); and

10. "[A] notice to vacate shall be signed by the current housing provider or the housing provider's agent" (14 DCMR § 4302.11).

The Commission is satisfied, based on its review of the Act and the implementing regulations, that a housing provider who, as in this appeal, sought and obtained prior RACD and Rent Administrator approvals of a document incorporating the required terms of a 120-day Notice to Vacate pursuant to § 501(f) of the Act and 14 DCMR § 4302 is thereafter prohibited from presenting or issuing to a tenant any document entitled "Notice to Vacate" that does not notify the tenant of his or her right under the Act to notice of statutory relocation assistance or of the right to re-rent the rental unit or recite any other terms required and contained in the requested, approved 120-day Notice to Vacate. *See* D.C. OFFICIAL CODE § 42-3505.01(f); 14 DCMR § 4302. Despite the Housing Providers' arguments that the documents presented to the Tenants were merely proposed "buy-out contracts" with the title of "Notice to Vacate," *see* Housing Providers' Brief at 8 (arguing Order to Show Cause is moot because all signed contracts were withdrawn), and the ALJ's determination that the Act does not prohibit a housing provider and a tenant from entering such "buy-out contracts," *see* Final Order at 12-13; R. at 284-85, the

Commission determines that once a housing provider initiates the Rent Administrator's review of 120-day Notices to Vacate under § 501(f), that § 501(f) of the Act and 14 DCMR § 4302 prohibit a housing provider from thereafter titling any document as a "Notice to Vacate" by, regardless of the housing provider's intent to use the document as a buy-out contract. *Compare* D.C. OFFICIAL CODE § 42-3505.01(a) (general prohibition on evictions) *with* § 42-3505.01(f); *see* Horne, TP 24,119 ("The hearing examiner had the duty to make the proper findings of fact within the jurisdiction of the Rent Administrator under [§ 501(f)] on whether the housing provider gave proper notice of relocation assistance[.]").

The Commission's determination is heavily influenced by fact that the Housing Providers submitted, and the Rent Administrator approved, an entirely different document from Exhibit A that incorporated all of the requisite terms of a 120-day Notice to Vacate, in full compliance with § 501(f) and 14 DMCR § 4302. *See* Order to Show Cause at 1-2; Final Order at 5; R. at 292; Housing Providers' Brief at 7 (citing Exhibits 203, 207, and 208 (letters from Housing Providers' then-counsel to then-Rent Administrator Raenelle Zapata requesting authority to proceed under § 501(f), with attached, proposed Notices)). The Commission's review of the record in a light most favorable to the RAD's allegations seriously undermines any claims by the Housing Providers that they were unaware of the statutory requirements for the 120-day Notices to Vacate under § 501(f) and 14 DMCR § 4302,[20] or that they were not on notice that providing tenants with any other document titled "Notice to Vacate," like the "buy-out agreement" in this case, without the requisite terms under § 501(f) and 14 DMCR § 4302,

[20] *See* Final Order at 6 (describing Housing Providers' argument citing Lewis v. D.C. Comm'n on Licensure to Practice the Healing Art, 385 A.2d 1148 (D.C. 1978)); R. at 291.)

would violate the Act and the detailed regulatory provisions that implement the tenant relocation and re-rental process. *See* D.C. OFFICIAL CODE § 42-3505.01(f); 14 DCMR § 4302.[21]

The Commission's determination is also bolstered by the remedial purposes and character of the Act. *See* D.C. OFFICIAL CODE § 42-3501.02;[22] Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297-1300 (D.C. 1990) ("Our Rental Housing Act was designed, in substantial part, to protect low and moderate-income tenants from the erosion of their income from increased housing costs." (citations omitted)). As the DCCA has noted, in light of its remedial purposes, the Act should be construed in a manner which would discourage its circumvention. *Id.* at 1297 ("[i]t is appropriate for this court, in resolving procedural issues with respect to which reasonable people might differ, to keep in mind the remedial character of the statute.) *See also* Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Jan. 12, 2015) (Order after Remand); United Dominion Mgmt., RH-TP-06-28,728 (interpretation of statute of limitations in manner that expands tenant ability to challenge defective rent adjustments), *aff'd* United Dominion Mgmt. Co. v. D.C. Rental Housing Comm'n, 101 A.3d 426 (D.C. 2014); Carmel Partners, Inc. d/b/a Quarry II, LLC v. Levy, RH-TP-06-28,835 (RHC Apr. 18, 2012) (Order on

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[21] *See, e.g.*, McNeely v. United States, 874 A.2d 371, 381 & n. 13 (D.C. 2005) (notice of statutory prohibitions requires only "objective intelligibility of the law's content to a reasonable person rather than the claimant's subjective awareness and understanding[,]" citing Lyng v. Payne, 476 U.S. 926, 942, (1986) (holding that publication of legislative enactments presumptively satisfies procedural due process of law governing notice)).

[22] D.C. OFFICIAL CODE § 42-3501.02 states, in relevant part:

> In enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:
>
> (1) To protect low- and moderate-income tenants from the erosion of their income from increased housing costs; . . .
>
> (4) To protect the existing supply of rental housing from conversion to other uses; and
>
> (5) To prevent the erosion of moderately priced rental housing while providing housing providers and developers with a reasonable rate of return on their investments.

Reconsideration) (strict interpretation of tenant notice provision of registration requirement is clearly reasonable in light of remedial purposes of the Act and minimal additional burden on housing providers).

The Commission's determination of this issue is intended: (1) to prevent a housing provider's circumvention of the § 501(f) of the Act and 14 DCMR § 4302, *see* Goodman, 573 A.2d at 1297; (2) consequently, to further the remedial purposes of the Act by requiring a housing provider's compliance with unambiguous and indisputably important tenant notice provisions of the Act, *see e.g.*, Levy v. Carmel Partners Inc., RH-TP-06-28,830 & RH-TP-06-28,835 (RHC Mar. 19, 2012) (determining claimed exemption from Act void when housing provider failed to comply with notice provisions in 14 DCMR § 4101.6 (2004)); (3) to assure tenants the due process protections afforded by fair and accurate notice of statutory rights under the Act, *see, e.g.*, Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 542 (D.C. 2002) ("due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances, but rather it is flexible and calls for such procedural protections as the particular situation demands." quoting Matthews v. Eldridge, 424 U.S. 319, 334 (1976)); and (4) to promote the public interest in the proper and effective administration of the Act. Francis v. Peerless Props., TP 10,677 (RHC June 8, 1988); *see also* Andrews v. D.C. Police & Firefighters Ret. & Relief Bd., 991 A.2d 763, 768 (D.C. 2010).

In light of the Housing Providers' contentions in their brief to the Commission and the ALJ's legal grounds for entirely dismissing the Order to Show Cause in the Final Order, the Commission is aware that DCCA precedent has held that contracts to vacate a rental unit, signed in arms-length transactions separate from leases, are enforceable notwithstanding § 501 of the Act. *See* Moore v. Jones, 542 A.2d 1253, 1256 (D.C. 1988) (consent decree to purchase rental

unit or vacate enforceable by immediate eviction, notwithstanding § 501); *see also* Double H Hous. Corp. v. David, 947 A.2d 38, 41-42 (D.C. 2008) (§ 501 does not prohibit landlord from raising rent or negotiating new term-lease); Akassy v. William Penn Apts., L.P., 891 A.2d 291 (D.C. 2006) (following Moore, 542 A.2d at 1256); Suitland Parkway Overlook Tenants Ass'n v. Cooper, 616 A.2d 346 (D.C. 1992) (same). The Commission is satisfied, however, that such precedent is distinguishable from the undisputed, particular evidence presented in this case. In this case, the Commission's review of the record indicates that the Housing Providers chose to initiate and complete the approval process for a 120-day Notice to Vacate under § 501(f) of the Act and 14 DCMR § 4302, which reasonably suggested their deliberate intention to comply with all requisite notice provisions of the Act, including content requirements on any notices given to tenants about the nature and amount of relocation assistance and the tenants' right to re-rent (as distinct from any right to sell that right) their housing accommodation upon termination of any construction, renovation or rehabilitation of the housing accommodation. *See* D.C. OFFICIAL CODE § 42-3505.01(f); 14 DCMR § 4302; Horne, TP 24,119.[23]

[23] The Commission's review of the record shows that the RAD repeatedly argued before the ALJ that the Housing Providers were required to negotiate consistent with the duty of good faith and fair dealing. *See generally* Hearing CD (OAH Apr. 29, 2008). The Commission notes that the DCCA has stated:

> Under the common law, there is no general duty of good faith prior to the formation of a contract. *See* Restatement (Second) of Contracts § 205(c) ("Particular forms of bad faith in bargaining are the subjects of rules as to capacity to contract, mutual assent and consideration and of rules as to invalidating causes such as fraud and duress. . . . [R]emedies for bad faith in the absence of agreement are found in the law of torts or restitution.") (internal citations omitted); *see also* Parr v. Ebrahimian, 774 F. Supp. 2d 234, 244 (D.D.C. 2011) ("Such misrepresentations, however, are alleged to have occurred prior to the formation of the sale contract, and so would constitute, if anything, bad faith in negotiation, which is not a violation of the implied contractual duty of good faith and fair dealing.") (internal citation omitted). Such a duty may arise only in particular circumstances — as when parties request reassurances or agree to a letter of intent. *See, e.g.*, A/S Apothekernes Laboratorium for Specialpraeparater v. I.M.C. Chem. Grp., Inc., 873 F.2d 155, 158-60 (7th Cir. 1989) (citing cases from multiple jurisdictions where letter of intent bound parties to negotiate in good faith).

As stated, the Commission reviews *de novo* the ALJ's application of the Act and Super. Ct. Civ. R. 12(b)(6) to the Order to Show Cause, viewing the allegations in the Order to Show Cause and the factual matters in the record in the light most favorable to the RAD. Comer, 108 A.3d at 371; Grayson, 15 A.3d at 228; Oparaugo, 884 A.2d at 79; *see also* 1 DCMR § 2819.1; Allen, 100 A.3d at 67. Viewed in the light most favorable to the RAD, the Commission is satisfied that the Order to Show Cause, the supporting documentation, and the undisputed factual matters presented to the ALJ support a reasonable inference that the Housing Providers may have violated the Act by issuing documents to tenants that did not comply with the provisions of § 501(f) of the Act and 14 DCMR § 4302, after initiating, completing, and complying with the approval provisions of § 501(f) of the Act and 14 DCMR § 4302, as demonstrated by the receipt of approval of their proposed tenant notice from the Rent Administrator. *See* Comer, 108 A.3d at 371; Grayson, 15 A.3d at 228; Oparaugo, 884 A.2d at 79; *see supra* at 20-21. Therefore, the Commission determines that the ALJ erred in failing to proceed with an evidentiary hearing regarding the circumstances surrounding the issuance of the document attached here as Exhibit A and whether the Housing Providers willfully violated the requirements for a 120-Day Notice to Vacate in § 501(f) of the Act and 14 DCMR § 4302. *See* Horne, TP 24,119; D.C. OFFICIAL CODE § 42-3509.01(b).

The Commission accordingly remands the Order to Show Cause to OAH for an evidentiary hearing, allowing the RAD to present admissible testimony or other evidence regarding the Housing Providers' compliance with § 501(f) of the Act and 14 DCMR § 4302 as discussed *supra* at 21-22, upon which the ALJ can make findings of fact and conclusions of law.

The Commission, accordingly, does not rest its determination upon this particular argument of the RAD. *See also* RAD Brief at 11 (describing buy-out agreement as "unconscionable"). The Commission reaches its determination entirely on the language and purposes of the Act and its implementing rules.

See 14 DCMR § 3807.1. Because the remedy requested by the Order to Show Cause is the imposition of fines not to exceed $5,000 per violation under D.C. OFFICIAL CODE § 42-3509.01(b), *see* Order Denying Dismissal as Moot at 3-4; R. at 132-33; *see also* Hearing CD (RHC Mar. 24, 2015) at 11:22-11:24, 11:41-42, the ALJ is instructed on remand to specifically make findings of fact and conclusions of law addressing whether the Housing Providers willfully violated § 501(f) of the Act and 14 DCMR § 4302 by providing the Tenants with a document entitled "Notice to Vacate" that did not contain the requisite terms. *See* D.C. OFFICIAL CODE § 42-3509.01(b); Miller v. D.C. Rental Hous. Comm'n, 870 A.2d 556, 558-59 (D.C. 2005); Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 505 A.2d 73, 75-76 n.6 (D.C. 1986); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Mar. 11, 2015); Ahmed, Inc. v. Torres, RH-TP-07-29,064 (RHC Oct. 28, 2014).

5. Whether the ALJ erred in applying Double H Hous. Corp. v. David, 947 A.2d 38 (D.C. 2008)

6. Whether the ALJ erred by rejecting the fact that the Rent Administrator rescinded the authorization to issue legitimate Notices to Vacate on October 25, 2005

The RAD's asserts that the ALJ erred in determining, as an additional reason for granting the Renewed Motion to Dismiss, that:

> To hold otherwise would [also] encroach upon the landlord's and tenant's "basic freedom to contract as [they] will," which . . . remains one of the "rather basic rights incident to the ownership of property that ought not to be summarily dismissed as obsolete" even under our modern statutory rental housing law.

Final Order at 12 (quoting Double H, 947 A.2d at 42 (in turn quoting Goodman, 573 A.2d at 1297 n.8)) (alterations original); R. at 285. The Housing Providers argued below, and do so again in their brief to the Commission, that the Order to Show Cause is an unconstitutional encroachment on their right to negotiate buy-out contracts with tenants. Renewed Motion to Dismiss at 2; R. at 189; *see also* Housing Providers' Brief at 12. The RAD's Brief in Support of

Appeal also asserts that the ALJ erred in failing to consider the "undisputed [fact[24]] that [the Housing Providers] continued to offer contracts titled 'Notice to Vacate' to tenants to permanently vacate the [Housing Accommodations]" after the Rent Administrator rescinded the § 501(f) authorization. RAD Brief at 21.

Because the Commission has determined on other, independent statutory and procedural grounds that ALJ erred in dismissing the Order to Show Cause, the Commission has granted the RAD all requested relief and will thus not address this issue on appeal. Kuratu, RH-TP-07-28,985 (where case remanded to determine remedy for violation of registration provision of the Act, issue of notice to tenant of reduction in services was moot on appeal); Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005) ("[T]here is no further relief the Commission may grant after reversing the hearing examiner's determination that the housing accommodation was exempt from Title II of the Act, and directing the hearing examiner to decide all issues raised in the tenant petition."); Hiatt Place P'ship v. Hiatt Place Tenants Ass'n, TP 21,149 (RHC May 10, 1991) ("[Because] there will be a remand on the reduction in services issue, we need not pursue the treble damage question at this time. The question of treble damages can be considered if any damages are awarded after remand."); *see also* Int'l Union of Elec., Salaried, Mach., & Furniture Workers v. Taylor, 669 A.2d 699, 700 (D.C. 1995) (noting that "if a case may be decided on either statutory or constitutional grounds, [the courts], for sound jurisprudential reasons, will inquire first into the statutory questions") (quoting Harris v. McRae, 448 U.S. 297, 306-307 (1980)).[25]

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[24] The Commission's review of the record does not reveal the factual basis for the RAD's assertion that this fact is undisputed.

[25] Nonetheless, the Commission notes that it is satisfied that neither the DCCA in Double H nor the ALJ in this case held that "the basic freedom to contract" is a fundamental right subject to heightened constitutional scrutiny. *See* Double H, 947 A.2d at 42; Final Order at 12; R. at 285. *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483

Accordingly, the Commission dismisses these issues on appeal without prejudice.

IV. CONCLUSION

For the foregoing reasons, and as discussed *supra* at 12-27, the Commission vacates the ALJ's determination that the RAD could prove no set of facts in a show cause hearing that would establish that the Housing Providers violated § 501 of the Act or the implementing rules at 14 DCMR § 4302. The Commission remands this issue to OAH for an evidentiary hearing consistent with the Commission's interpretation of § 501(f) of the Act and 14 DCMR § 4302 in this appeal and the Commission's instructions on remand stated *supra* at 26-27.[26] All other issues are moot for the purposes of this appeal and dismissed *without prejudice*.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, 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,

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(1955) (legislative restrictions on economic activity need only rationally relate to a legitimate state interest). Rather, the Commission's review of the Double H opinion shows that the DCCA merely declined to construe § 501 of the Act expansively against the common law rights incident to property ownership. 947 A.2d at 42; *see also* Twyman v. Johnson, 655 A.2d 850, 856-58 (D.C. 1995) (declining to imply a private cause of action in the Act where none is expressed or existed at common law); Moore, 541 A.2d at 1256 (contract to vacate rental unit, separate from lease, is not subject requirements of § 501). In Double H, the DCCA held that, while § 501 of the Act does afford holdover tenants the opportunity to rent on a month-to-month basis, it does not prohibit a landlord from raising the rent or negotiating for a new term-lease at a substantially higher rent. *Id.* at 41-42. The Commission is therefore not persuaded that the DCCA's holding in Double H imposes any constitutional limitation on § 501 of the Act.

[26] The Commission notes that, since the withdrawal of the Housing Providers' former counsel, the Commission has received no communication from the individual to whom it was directed as an agent of the limited liability company with an ownership interest in each of the Housing Providers. *See supra* at n. 10. The OAH and the RAD are therefore instructed to make all reasonable efforts to assure the Housing Providers are notified of the proceedings, consistent with their due process rights.

"[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-SC-06-002 was mailed, postage prepaid, by first class U.S. mail on this 21st **day** of **May, 2015,** to:

Andrew Glover, Esq.
Office of the Attorney General
441 4th St. N.W., 1010S
Washington, DC 20001

Keith A. Anderson, Esq.
Acting Rent Administrator
Department of Housing and Community Development – Rental Accommodations Division
1800 Martin Luther King, Jr. Ave., S.E.
2nd Floor
Washington, DC 20018

Ellis J. Parker
HEBDC, LLC
9920 Cranford Dr.
Potomac, MD 20854

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

EXHIBIT A

NOTICE TO VACATE

I hereby tender my Notice to Vacate the premises known as Unit ____, _____ 16th Street NE, Washington, D.C. no later than February 28, 2006. I understand that I shall remain liable for all obligations of my tenancy, including, but not limited to, the payment of rent through the end of my tenancy.

In consideration of this Notice to Vacate, I am to receive relocation assistance of $1000, of which $500 is hereby acknowledged as received, with the balance to be paid on the day which the last of the current tenants vacates the Property.

I further agree that if I fail to vacate by February 28, 2006, the owner/landlord at that time has permission to take all legal action to enter the unit and gain complete possession. Further, I shall return the above-referenced relocation assistance immediately.

Additionally, I further understand that if I fail to vacate the premises by February 28, 2006, I will be subject to provisions of D.C. Code Section 42-3207 which provides that I will be liable to the owner/landlord for rent at double the rent I currently pay for my unit.

I have read this Notice to Vacate and freely and knowingly execute this Agreement after careful consideration.

I acknowledge that this Agreement is for the benefit of 210 16th Street Associates, LLC. I further certify that the below signed individual(s) are all of the tenants for the unit hereinbefore indicated.

WITNESS:_____

_____ _____

Tenant Name _____ Tenant Name _____

Date _____ Date _____

EXHIBIT
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