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

ORDER ON MOTION FOR RECONSIDERATION

January 20, 2015

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 (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), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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[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) (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.

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* (Motion in Limine) to preclude the consideration of claims or damages arising after March 27, 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 Jul. 12, 2012) (Final Order); R. at 966-1243. 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. On August 30, 2012, the ALJ issued an Order Granting Motion for Reconsideration (OAH Order on Reconsideration), granting in part a motion by the Housing Provider and amending the Final Order accordingly. OAH Order on Reconsideration at 1; R. at 1364.

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). 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).

On December 12, 2014, the Commission issued its Decision and Order: Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014) (Decision and Order). The Commission therein affirmed the determination of the ALJ, with one correction for plain error. *See* Decision and Order at 67. On December 19, 2014, Tenant Chaney, the sole Tenant/Petitioner in RH-TP-06-28,366 and the president of the Association, which represents sixty-seven (67) tenants, including Ms. Chaney, in RH-TP-06-28,577 (collectively, Tenants), filed Tenants/Appellees/Cross-appellants' Motion for Reconsideration (Motion for Reconsideration).

The Motion for Reconsideration lists the following issues in these consolidated cases as errors:

1. Tenants were not granted monetary compensation for the 15 years that the Housing Provider did not timely file its certificate[s] of elections, [sic] or rent document[s].

2. The Housing Provider was able to increase [the] tenants' rents during the 15 years during [sic] which times the certificate[s] of elections [sic] or rent documents were not timely submitted.

3. The tenants' rents were not fully or adequately rolled back.

4. The Tenants were not fully compensated based on their extensive evidentiary court submitted documents and oral testimonies regarding the lack of services.

5. The Tenants were not compensated for the documented retaliation experienced by the Housing Provider [sic].

6. Clear calculations were not provided to the Tenants in this case.

Motion for Reconsideration at 1-2. The Commission observes that the Motion for Reconsideration further argues that: (7) the ALJ improperly granted the Housing Provider's Motion in Limine, *see id.* at 6-8; and (8) the Association was improperly denied status as a party to Tenant Petition RH-TP-06-28,577, *see id.* at 8-10.

II. DISCUSSION OF THE ISSUES

In deciding this Motion for Reconsideration, filed *pro se* by Tenant Chaney,[2] the Commission is mindful of the important role that lay litigants play in the Act's enforcement.

[2] Tenant Chaney states that the Motion for Reconsideration is filed by her as the president of the Association on behalf of the sixty-seven (67) individual Tenants who are parties to these consolidated cases. Motion for Reconsideration at 1. The Commission notes that counsel for the Tenants, Jamil Zouaoui, Esq., was denied, without prejudice, leave to withdraw and remains the attorney of record for the Tenants. Order on Motion to Withdraw as Counsel (RHC Sept. 2, 2014). Several Tenants, purportedly a majority of the board of the Association, asserted to the Commission by letter received September 19, 2014, that neither Mr. Zouaoui nor Tenant Chaney is authorized to represent the Tenants in this matter. Nonetheless, Tenant Chaney filed a notice of appearance as a lay representative of the Association on behalf of the individual Tenants on October 22, 2014. *See* Notice of Appearance at 1; *see also*

Goodman v. D.C. Rental Hous. Comm'n, 575 A.2d 1293, 1298-99 (D.C. 1990); *see also* Cohen v. D.C. Rental Hous. Comm'n, 496 A.2d 603, 605 (D.C. 1985); Tenants of 4021 9th St., N.W. v. E & J Props., LLC, HP 20,812 (RHC June 11, 2014); Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013). Nonetheless, "while it is true that a court must construe *pro se* pleadings liberally . . . the court may not act as counsel for either litigant." Flax v. Schertler, 935 A.2d 1091, 1107 n. 14 (D.C. 2007) (quoting In re Webb, 212 B.R. 320, 321 (Bankr. Fed. App. 1997)); *see* E & J Props., LLC, HP 20,812; Jackson, RH-TP-12-28,898. As the District of Columbia Court of Appeals (DCCA) has stated, a *pro se* litigant "cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision

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14 DCMR § 3812.1(d). As a courtesy, the Commission directed that all filings and orders were to be served on Mr. Zouaoui, Tenant Chaney, and the three members of the Association's board. *See* Notice of Ex Parte Communication (RHC Sept. 30, 2014).

The Commission is satisfied that, because it has issued a final decision disposing of these consolidated cases on their (previously argued) merits, because no other individual Tenant or purported representative of the Tenants or the Association has sought reconsideration of the Decision and Order, and because it denies herein Tenant Chaney's Motion for Reconsideration on its merits, the Commission does not need to fully resolve the status of the Tenants' representation. *Cf.* 14 DCMR § 3812.3 ("Any person appearing before or transacting business with the Commission in a representative capacity may be required to establish authority to act in that capacity."). In light of the conflicting statements made to the Commission while this appeal was pending, however, the Commission will regard the Motion for Reconsideration as having been filed by Tenant Chaney on her own behalf as the sole petitioner in RH-TP-06-28,366 and as one individual petitioner in RH-TP-06-28,577. *See* 14 DCMR § 3812.1(a). Because the Act, the DCAPA, and Commission's rules do not require a party to file a motion for reconsideration in order to seek judicial review of a final decision of the Commission, the Commission is satisfied that nothing in this Order will prejudice any further rights of appeal on any issues, which were raised and argued prior to the Decision and Order and the Motion for Reconsideration, by any other Tenant. *See* D.C. OFFICIAL CODE §§ 2-510, 42-3502.19; 14 DCMR § 3823.1 ("Any party adversely affected by a decision of the Commission issued to dispose of the appeal *may* file a motion for reconsideration[.]" (emphasis added)); *cf.* Sawyer Prop. Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 105 (D.C. 2005) ("contentions not urged at the administrative level may not form the basis for overturning the decision on review."); Totz v. D.C. Rental Hous. Comm'n, 474 A.2d 827, 828 (D.C. 1984) (holding that District of Columbia Court of Appeals (DCCA) lacks jurisdiction to hear an appeal from a denial of reconsideration, but that it will treat an appeal from the denial of a motion for reconsideration as having been taken from the underlying final order).

The Tenants are strongly encouraged to secure legal representation if any party seeks judicial review of the Commission's Decision by the DCCA pursuant to D.C. OFFICIAL CODE § 42-3502.19. *See* D.C. App. R. 42(c) ("Any right to proceed pro se [before the DCCA] does not include the right to represent other parties to the same proceeding.").

to forego expert assistance." Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d 977, 979 (D.C. 1999) (quoting Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1993)).

Accordingly, the Commission, in exercise of its discretion, interprets the enumerated issues and narrative presentation of supporting arguments in the Motion for Reconsideration to complain of the following distinct legal issues:[3]

1. The Housing Provider filed invalid Certificates of Election for rent ceiling adjustments between 1991 and 2005;

2. The Tenants are entitled to rent refunds based on housing code violations;

3. The Tenants are entitled to awards of damages for the Housing Provider's retaliatory action;

4. The Housing Provider's Motion in Limine was granted without legal basis; and

5. The ALJ erred in denying the Association standing as a party.

The Commission's regulations require that a motion for reconsideration "shall set forth the specific grounds on which the applicant considers the decision and order to be erroneous or unlawful." 14 DCMR § 3823.2. Although the Commission, as stated, may liberally construe a *pro se* filing, the Commission cannot relieve the Tenant of her burden under 14 DCMR § 3823.2 to identify errors in the *Commission's Decision and Order itself* and to persuasively argue the legal issues, rather than to simply reiterate their position in the case. *See, e.g.,* Dorchester House

[3] *See, e.g.*, Bratcher v. Johnson, RH-TP-08-29,478 (RHC Mar. 25, 2014) (despite Tenant's narrative presentation in the notice of appeal, Commission identified cognizable issues); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013) (Commission has discretion to interpret narrative statements to raise clear issues); King v. McKinney, TP 27,264 (RHC June 17, 2005) (Commission "extracted" issues from a pleading that "contained two groups of numbered paragraphs and several narrative paragraphs wherein the housing provider alleged errors, made observations, and expressed dissatisfaction with the agency, the hearing examiner, and the Commission.") (citing Dixon v. Majeed, TP 20,658 (RHC Oct. 4, 1989) (noting the importance of carefully reviewing the pleadings of parties who are not represented by counsel)); Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) at n. 17 (recasting statement of issues on appeal); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) 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).

Assocs., LLC v. Tenants of 2480 16th Street, N.W., RH-SF-09-20,098 (RHC Jan. 3, 2014) (Order on Motion to Reconsider Denial of Motion) (noting that, under the Commission's rules, the denial of a motion for reconsideration "will result from a party's failure to set forth such specific grounds of error or illegality in the Commission's decision."); Watkis v. Farmer, RH-TP-07-29,045 (RHC Sept. 11, 2013) (Order on Motion for Reconsideration) (denying housing provider's reconsideration motion that "fails to contest or challenge the specific legal grounds that the Commission used to dismiss the issue in his appeal."); Stone v. Keller, TP 27,033 (Mar. 24, 2009) (Order on Motion for Reconsideration) ("tenant fails to contest or challenge the specific legal grounds that the Commission used to dismiss [four] (4) of the six (6) issues in her appeal"); Byrd v. Reaves, TP 26,195 (RHC Aug. 8, 2002) (Order on Motion for Reconsideration) (tenant did not specifically identify an error or unlawful basis upon which the Commission made its decision); *see also* D.C. OFFICIAL CODE § 2-509(b) ("In contested cases, . . . the proponent of a rule or order shall have the burden of proof.").

Accordingly, the Commission dismisses each of the Tenant's issues stated in the Motion for Reconsideration for the reasons that follow.

1. The Housing Provider filed invalid Certificates of Election for rent ceiling adjustments between 1991 and 2005.

In the Motion for Reconsideration, the Tenant claims that the Housing Provider illegally increased rents by not filing timely Certificates of Election of Adjustments of General Applicability (Certificates of Election) to increase rent ceilings in the Tenants' units over a fifteen (15) year period and that the Tenants were not granted full monetary compensation for the fifteen (15) year period of illegal rent increases. *See* Motion for Reconsideration at 1-2, 11-14.

The Tenant does not state the amounts of allegedly illegal rent increases that should be refunded or to which Tenants. *See id.*

The Commission notes that the Tenant's claim, on request for reconsideration, that the Housing Provider filed untimely Certificates of Election over a fifteen (15) year period differs from the issue argued by the Tenants in the course of their cross appeal: "[T]he Housing Provider's last certificate of election filed by the . . . deadline was in the year 2000 . . . . [A]ll the certificates of election forms for the years 2001 through 2006 are late-filed." Tenants' Brief at 7-8. The Commission's rules provide that "Review by the Commission shall be limited to the issues raised in the notice of appeal[.]" 14 DCMR § 3807.4. Further, the Commission has held that a motion for reconsideration is inappropriate for raising an issue or argument for the first time. *See, e.g.*, Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) (citing Long v. Howard University, 512 F.Supp.2d 1, 2 (D.D.C. 2007) (stating that a motion for reconsideration under Fed. R. Civ. P. 59(e) is not "a vehicle for presenting theories or arguments that could have been advanced earlier"); United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC July 3, 2013) (Order on Motion for Reconsideration) at n.3 (issue of post-judgment interest was neither raised in notice of appeal nor addressed by the Commission). Therefore, the Commission is satisfied that the Tenant's argument is not properly within the scope of the Motion for Reconsideration, with regard to Certificates of Election before the year 2001. *See* 14 DCMR § 3823.2; Watkis, RH-TP-07-29,045 (Order on Motion for Reconsideration); Hinman, RH-TP-06-28,728 (Order on Motion for Reconsideration) at n.3; Stone, TP 27,033 (Order on Motion for Reconsideration).

Moreover, the Act provides, in relevant part:

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

D.C. OFFICIAL CODE § 42-3502.06(e).[4] The Commission has held, as the Tenant notes in the Motion for Reconsideration, that this statute of limitations does not bar a tenant from challenging a rent ceiling adjustment that has been preserved for more than three (3) years *if such an adjustment is implemented as a rent charged increase within the statutory period.* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 427-28 (D.C. 2014); Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Feb. 24, 2006); Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Mar. 30, 2006) (Order Denying Motion for Reconsideration). However, as the Commission noted in the Decision and Order:

> The Tenants' Brief misinterprets the Commission's decisions in [Gelman Mgmt. Co., TP 27,995,] 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. . . . To the extent that the Housing Provider preserved, and later implemented within the statutory period, the above-listed [Certificates of Election] 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[.] 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.

Decision and Order at 36 n.20. The Commission went on to affirm the ALJ's award of rent refunds and rent rollbacks for unlawful increases in rents charged, many of which implemented

[4] The statute of limitations period for Tenant Chaney, in RH-TP-06-28,366, runs to July 1, 2002, and for the Tenants represented by the Association, in RH-TP-06-28,577, to March 26, 2003, three (3) years before the respective filing dates of the Tenant Petitions.

rent ceiling adjustments improperly taken and perfected more than three (3) years before the Tenant Petitions were filed. *Id.* at 56-59.[5]

The Tenant does not argue that the Decision and Order was erroneous in this regard. *See* Motion for Reconsideration at 11-14; 14 DCMR § 3823.2. Rather, although the Tenant does not identify specific increases in rents charged that allegedly implemented unlawful rent ceiling adjustments, the Tenant broadly attack fifteen (15) years of rent ceiling adjustments on the grounds that, in Sawyer Prop. Mgmt. of Md., Inc.. v. D.C. Rental Hous. Comm'n, 877 A.2d 96 (D.C. 2005), the DCCA held that "the housing provider MUST FILE [Consumer Price Index (CPI)] rent ceiling adjustments by June 1 of each year, or loses [sic] the right to take that increase." Motion for Reconsideration at 11.

The Commission has consistently published the annual 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). A housing provider is required to file a Certificate of Election within thirty (30) days of when it is "first eligible" to take the adjustment of general applicability. 14 DCMR § 4204.10; *see* Sawyer, 877 A.2d at 104. As the Commission explained in its Decision and Order, although the DCCA held that the housing provider in Sawyer was required to file a certificate of Election before June 1 of the year in question, the Court further observed, in a footnote, that a housing provider may not necessarily be required to file a Certificate of Election before June 1 of each year in which it seeks to take a

[5] The Commission notes that the Tenants claim that clear calculations were not provided to the Tenants in these consolidated cases. *See* Motion for Reconsideration at 1-2. The ALJ's calculations are provided in the numerous charts included in and appended to the Final Order, R. at 966-1243, the Amended Final Order, R. at 1244-76, and the OAH Order on Reconsideration; R. at 1297-1364. The Commission is unable to identify a claim by the Tenants that any specific calculations are unclear, erroneous, or unlawful. *See* 14 DCMR § 3823.2.

CPI-based adjustment. Decision and Order at 32-34; *see* Sawyer, 877 A.2d at 104 & n.5. The Commission determined in its Decision and Order that this correctly applies the plain meaning of the statutory and regulatory requirement that a housing provider may not file a Certificate of Election until twelve (12) months since its previous filing, and then must file within thirty (30) days of when it is "first eligible" to do so. Decision and Order at 32-34; *see* D.C. OFFICIAL CODE § 42-3502.06(b); 14 DCMR §§ 4204.10, 4206.3. The Commission is therefore satisfied that the Motion for Reconsideration merely repeats the Tenants' prior argument and does not identify any way in which the Commission's Decision and Order on this issue was in violation of the Act or the implementing regulations or otherwise unlawful. *See* 14 DCMR § 3823.2; Dorchester House, RH-SF-09-20,098 (Order on Motion to Reconsider Denial of Motion); Watkis, RH-TP-07-29,045 (Order on Motion for Reconsideration); Stone ,TP 27,033 (Order on Motion for Reconsideration); Byrd, TP 26,195 (Order on Motion for Reconsideration).

Accordingly, the Commission denies the Tenant's Motion for Reconsideration on this issue.

2. The Tenants are entitled to rent refunds based on housing code violations.

In the Motion for Reconsideration, the Tenant asserts that evidence on the record establishes the existence of housing code violations in the Housing Accommodation. *See* Motion for Reconsideration at 2, 8. The Commission's review of the record shows that the only issue related to housing code violations argued by the Tenants at the evidentiary hearing was that rent increases were implemented while the housing accommodation and/or the Tenants' rental units were not in substantial compliance with the housing code. *See* Final Order at 6; R. at 1238; Joint Statement of Issues at 1-2; R. at 302-03; Decision and Order at 50-56; *see also* D.C. OFFICIAL

CODE § 42-3502.08(a)(1) ("the rent for any rental unit shall not be increased above the base rent unless . . . the rental unit and the common elements are in substantial compliance with the housing regulations").[6]

In determining whether a rental unit or housing accommodation is not in substantial compliance with the housing code, the Commission has held that the crucial inquiry "is whether . . . [the] alleged substantial housing code violation exists at the time the rent increase is taken." Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013); Hamlin v. Daniel, TP 27,626 (RHC June 10, 2005); Hutchinson v. Home Realty, Inc., TP 20,523 (RHC Sept. 5, 1989). Furthermore, in order to establish a claim of a violation of the housing code, 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 its Decision and Order, the Commission affirmed the ALJ's determination that the Tenants failed to prove, by a preponderance of the evidence, the dates on which the Housing Provider was put on notice of any of the housing code violations alleged. *See* Decision and Order at 54-56; *see also* 14 DCMR § 4216; Lizama, RH-TP-07-29,063; Hamlin, TP 27,626; Hutchinson, TP 20,523. The Tenant's Motion for Reconsideration does not specifically identify any error in the Commission's Decision and Order with regard to notice to the housing provider

[6] The Commission notes that, in addition to the prohibition on rent increases, under the Act, the failure to provide services required by the housing code may constitute a reduction in services, for which a corresponding reduction in rent is required. *See* Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013); Kuratu v. Ahmed, Inc., TP 28,895 (RHC Dec. 27, 2012); Cascade Park Apts. v. Walker, TP 26,197 (RHC Jan. 14, 2005); Hemby v. Residential Rescue, Inc., TP 27,887 (RHC Apr. 16, 2004). The Commission observes that, despite several references to a lack of services in the Motion for Reconsideration, *see* Motion for Reconsideration at 1, 2, 3, 5, the tenants did not pursue this claim before OAH. *See* Final Order at 6; R. at 1238; Joint Statement of Issues at 1-2; R. at 302-03.

of the alleged violations. *See* 14 DCMR § 3823.2; Dorchester House, RH-SF-09-20,098 (Order on Motion to Reconsider Denial of Motion); Watkis, RH-TP-07-29,045 (Order on Motion for Reconsideration); Stone, TP 27,033 (Order on Motion for Reconsideration); Byrd, TP 26,195 (Order on Motion for Reconsideration). Rather, the Tenant reiterates the "dire conditions in the building," Motion for Reconsideration at 3-5, and refer generally to the quantity of evidence of housing code violations submitted as exhibits or admitted on the record at the OAH hearing, *see id.* at 2, 8.

The Tenant additionally points to housing inspections coordinated in 2006, by the DCRA Ward Six (6) Supervisor James Gray and Michael Brown of the District of Columbia Department of Health. Motion for Reconsideration at 8. The Commission's review of the record shows that the exhibits submitted by the Tenants to OAH, the notices of violation resulting from such inspections, were issued after March 27, 2006, and were therefore outside the scope of evidence admitted in these consolidated cases. Petitioners' Exhibits (PXs) 100CJ – 100CL; R. at 1483-88; PX 101; R. at 1515-85; *see* Motion in Limine; R. at 668-72; Hearing CD (OAH Nov. 7, 2008) at 10:40 - 10:54 (granting Motion in Limine); *see also* OAH Order on Reconsideration at 3 ("Here, the record contains evidence of violations that occurred up to the date the petition was filed – March 27, 2006."); R. at 1361. These notices of violation therefore relate to claims not raised before OAH and constitute new evidence on appeal. See 14 DCMR § 3807.5 ("The Commission shall not receive new evidence on appeal."); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013); Hawkins v. Jackson, RH-TP-08-29,201 (RHC Aug. 31, 2009) at n.9 (noting that the Commission cannot consider factual allegations that were not raised below, were not part of the record on appeal, and constituted inadmissible new evidence); Reid v. Weinstein, TP 28,010 (RHC Apr. 3, 2008). Therefore, the Commission is satisfied that the

Motion for Reconsideration does not state any basis on which its Decision and Order was erroneous or unlawful under the Act or regulations. *See* 14 DCMR § 3823.2; Dorchester House, RH-SF-09-20,098 (Order on Motion to Reconsider Denial of Motion); Watkis, RH-TP-07-29,045 (Order on Motion for Reconsideration); Stone, TP 27,033 (Order on Motion for Reconsideration); Byrd, TP 26,195 (Order on Motion for Reconsideration).

Accordingly, the Commission denies the Tenant's Motion for Reconsideration on this issue.

3. The Tenants are entitled to awards of damages for the Housing Provider's retaliatory action.

In the Final Order, the ALJ dismissed the Tenants' complaint that the Housing Provider took retaliatory action against them in violation of the Act. Final Order at 133-37; *see also* D.C. OFFICIAL CODE § 42-3505.02. The Tenants raised the issue of retaliation, without any supporting argument, in their Notice of Cross-appeal. *See* Notice of Cross-appeal at 2 (stating that the Final Order "[i]gnores evidence in the record and misapplies the law regarding retaliation"). However, the Tenants did not argue the issue in their brief or at the Commission's oral hearing. *See* Tenants' Brief at 1 n.1; *see generally* Hearing CD (RHC May 7, 2013). Accordingly, in its Decision and Order, the Commission dismissed this Tenants' appeal of this issue for failure to meet their burden to present the substance of their case. Decision and Order at 26-29; *see also* D.C. OFFICIAL CODE § 2-509(b); Stancil v. D.C. Rental Hous. Comm'n, 806 A.2d 622 (D.C. 2002); 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 clearer statement of the issue, the Commission cannot accept the housing provider's argument").

The Motion for Reconsideration does not address the Commission's determination that the Tenants failed to argue this issue on appeal. *See* 14 DCMR § 3823.2; Watkis, RH-TP-07-29,045 (Order on Motion for Reconsideration) (denying housing provider's reconsideration motion that "fails to contest or challenge the specific legal grounds that the Commission used to dismiss the issue in his appeal."); Stone, TP 27,033 (Order on Motion for Reconsideration) ("tenant fails to contest or challenge the specific legal grounds that the Commission used to dismiss [four] (4) of the six (6) issues in her appeal"). Moreover, neither the Act nor the implementing regulations provide for an independent claim for damages based on retaliatory action. Twyman v. Johnson, 655 A.2d 850, 854-58 (D.C. 1995); *cf.* Turner v. Tscharner, TP 27,014 (RHC June 13, 2002) (stating that, although fines may be imposed for any violation of the Act in the course of tenant petition, the Act "does not provide that litigants are entitled to fines as a remedy for retaliation"). Therefore, the Commission is satisfied that the Tenant does not present a basis for reconsideration of the Decision and Order's dismissal of issue of retaliation. *See* 14 DCMR § 3823.2; Dorchester House, RH-SF-09-20,098 (Order on Motion to Reconsider Denial of Motion); Watkis, RH-TP-07-29,045 (Order on Motion for Reconsideration); Stone, TP 27,033 (Order on Motion for Reconsideration); Byrd, TP 26,195 (Order on Motion for Reconsideration).

Accordingly, the Commission denies the Tenant's Motion for Reconsideration on this issue.

4. The Housing Provider's Motion in Limine was granted without legal basis.

The Tenant argues that the approval of the Housing Provider's Motion in Limine by the ALJ limited their ability to present their case and the amount of financial awards granted. *See*

Motion for Reconsideration at 6-8. By granting the Motion in Limine, the ALJ precluded all evidence of damages incurred or claims that arose after March 27, 2006, the date Tenant Petition RH-TP-06-28,577 was filed. *See* Motion in Limine; R. at 668-72; Hearing CD (OAH Nov. 7, 2008) at 10:40 - 10:54 (granting Motion in Limine); *see also* OAH Order on Reconsideration at 3; R. at 1361. As a result, the Tenants were "forced to file multiple petitions in order to ensure that their claims over the entire period during which violations occurred are heard." Motion for Reconsideration at 8; *see also* Am. Rental Mgmt. Co. v. Chaney, RH-TP-08-29,302 (RHC May 8, 2014) (Order Dismissing Appeal) (separate petition filed by Tenant Chaney and the Association in which petitioners prevailed on some claims). The Commission has consistently held that refunds can be awarded up to the final date of an evidentiary hearing, *i.e.*, the date the record closes, on a petition under the Act. *See, e.g.*, Carmel Partners, Inc. v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC May 16, 2014); Chamorro v. Panza, RH-TP-07-29,127 (RHC Feb. 5, 2009); Mann Family Trust v. Johnson, TP 26, 191 (RHC Nov. 21, 2005); Jenkins v. Johnson, TP 23, 410 (RHC Jan. 4, 1995); *see also* Majerle Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 866 A.2d 41, 43-44 (D.C. 2004) (affirming Commission decision awarding damages through final date of hearing). Nonetheless, all awards of refunds must be supported by substantial evidence in the record. 14 DCMR § 3807.1; *see* Diaz v. Perry, TP 24,379 (RHC July 30, 2004) ("The documents, which were dated April 1996 through the winter of 1997, did not establish that the tenant occupied the rental unit or that the housing providers demanded rent until March 2000.").

The Commission's rules provide that our review "shall be limited to the issues raised in the notice of appeal." 14 DCMR § 3807.4; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014); Hinman, RH-TP-06-28,728 (Order on Motion for Reconsideration); Johnson v.

Dorchester House Assocs., LLC, RH-TP-07-29,007 (RHC July 31, 2012) (Order on Motion for Reconsideration). Although the Commission's review of the record shows that the Tenants did oppose the Housing Provider's Motion in Limine before OAH, *see* Petitioners' Opposition to Respondent's Motion in Limine; R. at 690-92, the Tenants' Notice of Cross-appeal makes no reference to the ALJ's ruling on the motion. *See* Notice of Cross-appeal at 2 (enumerating six (6) distinct issues on appeal). Therefore, the Commission determines that the order *in limine* is not properly raised on appeal. 14 DCMR § 3807.4; Hinman, RH-TP-06-28,728 (Order on Motion for Reconsideration); Burkhardt, RH-TP-06-28,708; Johnson, RH-TP-07-29,007.

Accordingly, the Commission denies the Tenant's Motion for Reconsideration on this issue.

5. The ALJ erred in denying the Association standing as a party.

In the Motion for Reconsideration the Tenant makes several allegations of error by the ALJ in listing the members of the Association, as determined in the OAH Rule 2924 Order (OAH Sept. 19, 2007); R. at 390-97, and Amended OAH Rule 2924 Order (OAH Nov. 7, 2007); R. at 530-37, including the elimination of over half of the members through typographical errors by the ALJ. Motion for Reconsideration at 8-9. The Tenant claims that these errors "stifle[d] the identification of the correct tenants" and to "misinterpret[ed] the rules of majority in an association to be majority in a housing accommodation, and [inflated] the number of apartment units for the Housing Provider from 288 to 488, and [ruled] accordingly for a majority on the enlarged number." Motion for Reconsideration at 9; *but see* Amended OAH Rule 2924 Order (correcting number of units to 288); R. at 530-37.

In its Decision and Order, the Commission thoroughly reviewed the documents submitted by the Tenants to the ALJ that purported to establish the membership of the Association. *See*

Decision and Order at 43-50. The Commission was satisfied, based on its review of substantial evidence in the record, that the ALJ did not err in determining that the Association's membership was less than half of the total number of tenants in the Housing Accommodation. *Id.*; *see also* 1 DCMR § 2924.3;[7] E & J Props., LLC, HP 20,812 at n.22; Tenants of 2480 16th St. N.W. v. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Feb. 6, 2014) (Order); Borger Mgmt., Inc. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009). In the Motion for Reconsideration, the Tenant does not identify any specific individuals or rental units that were erroneously excluded from participation in the Tenant Petition by typographical error or otherwise. *See* Motion for Reconsideration at 8-10. The Commission, therefore, has no basis on which to reconsider its Decision and Order. *See* 14 DCMR § 3823.2; Dorchester House, RH-SF-09-20,098 (Order on Motion to Reconsider Denial of Motion); Watkis, RH-TP-07-29,045 (Order on Motion for Reconsideration); Stone, TP 27,033 (Order on Motion for Reconsideration); Byrd, TP 26,195 (Order on Motion for Reconsideration).

The Tenant does assert, however, that the ALJ erred in interpreting the "majority" requirement of 1 DCMR § 2924.3. *See* Motion for Reconsideration at 9-10. At all times relevant in this case, OAH's rules governing tenant associations provided, in relevant part:

> 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.

[7] 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.

14 DCMR § 2924. The Tenant argues that the phrase "a majority of tenants" does not refer to "the majority of tenants in a housing accommodation." Motion for Reconsideration at 9-10. Reading the Tenant's *pro se* motion liberally, the Tenant's argument is, essentially, that an association shall be a party to a petition if a majority of the petitioners are members of or represented by the association. *See id.* The Commission's review of case precedent reveals that OAH's rules, and the substantially identical, predecessor rules of the RACD, 14 DCMR § 3904.3,[8] have consistently been interpreted as the ALJ applied them, *i.e.*, to require a majority of the tenants in a housing accommodation. *See, e.g.*, E & J Props., LLC, HP 20,812 at n.22; Dorchester House, RH-SF-09-20,098 (Order); Borger Mgmt., RH-TP-06-28,854; In re: Tenants of 800 4th St., S.W., CI 20,711 (RHC Apr. 1, 1999); Hampton House Tenants Ass'n v. Shapiro, CI 20,677 (RHC Sept. 15, 1995) ("no evidence existed in the record showing that the tenants' associations represented the 'majority' of the tenants in each housing accommodation, as required by 14 DCMR 3904.3"); Higuera v. Hope, TP 21,883 (RHC July 23, 1993) at n.2. Therefore, the Commission remains satisfied that the ALJ did not err in denying the Association party status. *See* 1 DCMR § 2924.3; Borger Mgmt., RH-TP-06-28,854.

Accordingly, the Commission denies the Tenant's Motion for Reconsideration on this issue.

III. CONCLUSION

For the above stated reasons the Commission denies the Motion for Reconsideration of the Commission's Decision and Order.

SO ORDERED

[8] The Commission herein relies on the language of the RACD rules as published at 33 DCR 1336, 1354 (March 7, 1986), prior to their amendment by the Tenant Organization Petition Standing Amendment Act of 2010, effective September 24, 2010, D.C. Law 18-226; 57 DCR 6920.

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

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 **ORDER ON MOTION FOR RECONSIDERATION** in RH-TP-06-28,366 and RH-TP-06-28,577 was mailed, postage prepaid, by first class U.S. mail on this **20th day** of **January, 2015,** to:

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