DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,690

In re: 1833 Summit Place, NW, Unit 101

Ward One (1)

LORNA NOTSCH
Tenant/Appellant

v.

CARMEL PARTNERS, LLC
Housing Provider/Appellee

DECISION AND ORDER

May 16, 2014

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission ("Commission") from a decision and order issued by the 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.

[1] OAH assumed jurisdiction over tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2005 Supp.). The functions and duties of RACD in DCRA were transferred to the Department of Housing and Community Development (DHCD) by the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (codified at D.C. OFFICIAL CODE § 42-3502.03a (2008 Supp.)).

I. PROCEDURAL HISTORY

On July 5, 2006, Tenant/Appellant Lorna Notsch (Tenant), a resident of 1833 Summit Place, NW, Unit 101 (Housing Accommodation) filed Tenant Petition RH-TP-06-28,690 (Tenant Petition) with DCRA, against Housing Provider/Appellee Carmel Partners, LLC (Housing Provider). Tenant Petition at 1-4; Record for RH-TP-06-28,690 (R.) at 13-16. On February 9, 2007, Administrative Law Judge (ALJ) Nicholas Cobbs entered an Order granting the Tenant's motion to amend the Tenant Petition. *See* Notsch v. Carmel Partners, RH-TP-06-28,690 (OAH Feb. 9, 2007); R. at 111. The Amended Tenant Petition raised the following claims against the Housing Provider:

1. The rent increase was larger than the amount of increase which was allowed by any applicable provision of the Rental Housing Emergency Act of 1985.
2. One Hundred Eighty (180) days have not passed since the last rent increase.
3. A proper thirty (30) day notice of rent increase was not provided before the rent increase became effective.
4. The Housing Provider failed to file the proper rent increase forms with the Rental Accommodations and Conversion Division.
5. The rent ceiling filed with the Rental Accommodations and Conversion Division for my/our unit(s) is improper.
6. A rent increase was taken while my/our unit(s) were not in substantial compliance with the D.C. Housing Regulations.
7. Services and/or facilities provided in connection with the rental of my/our unit(s) have been permanently eliminated.
8. Services and/or facilities provided in connection with the rental of my/our unit(s) have been substantially reduced.

Amended Tenant Petition at 2-5; R. at 81-84. A hearing was held in this matter on March 21, 2007, and a Final Order was issued on March 24, 2008, Notsch v. Carmel Partners, RH-TP-06-28,690 (OAH Mar. 24, 2008) (Final Order). *See* R. at 219-46.

The ALJ made the following findings of fact in the Final Order: [2]

A. Rent and Rent Ceiling Increases

1. Tenant, Lorna Notsch, leased the rental unit, Apartment 101, at 1833 Summit Place, N.W., on June 19, 2003. The lease, effective from July 1, 2003 through June 30, 2004, set a rent of $1,000 per month and stated that the rent ceiling was $1,352.00. Petitioner's Exhibit ("PX") 101.

2. The rent ceiling stated in the lease was based on an Amended Registration filed with the Rent Administrator on March 31, 2003, implementing a rent ceiling increase of $726 from $626 to $1,352. PX 131. The effective date of the rent ceiling adjustment was March 1, 2003. *Id.* The rent ceiling increase derived from a vacancy increase under Section 213 of the Rental Housing Act, D.C. Official Code § 42-3502.13(a)(2) (2001). The comparable unit used for the vacancy increase was No. 103 at 1821 Summit Place, N.W. *Id.* This unit was in a different building, but purportedly had the same dimensions and layout as Tenant's apartment. PX 140.

3. On August 28, 2003, Housing Provider filed a Certificate of Election of Adjustment of General Applicability with the Rent Administrator that misstated the rent applicable to Tenant's unit. The Certificate listed Tenant's previous and present rent as $596. PXs 130, 139. This was the rent that Housing Provider had charged to the prior tenant in the apartment. PX 128. The Certificate documented an increase of $26 in Tenant's rent ceiling from $1,352 to $1,378, implementing the annual adjustment of general applicability.

4. Housing Provider corrected the mistake concerning Tenant's rent in a Certificate of Election of Adjustment of General Applicability filed with the Rent Administrator on August 31, 2004, which stated the prior and present rent for the apartment to be $1,000. The August 2004 Certificate implemented an increase in Tenant's rent ceiling of $37, from $1,378 to $1,415. PX 148.

5. On October 28, 2004, Housing Provider served a Notice of Increase in Rent Charged on Tenant, announcing an increase in Tenant's rent from $1,000 to $1,029 per month, effective December 1, 2004. The Notice implemented a portion of the $37 rent ceiling increase documented in the August 31, 2004, filing and attributable to the 2004 annual adjustment of general applicability. PX 112.

[2] The findings of fact are recited here using the language of the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

6. In July, 2005, Housing Provider again increased Tenant's rent ceiling. On July 27, 2005, Housing Provider served Tenant with a Notice of Increase in Rent Ceiling, increasing the rent ceiling by $36 based on the 2.7% annual adjustment of general applicability for 2005. PX 113. On July 28, 2005, Housing Provider filed a Certificate of Election of Adjustment of General Applicability with the Rent Administrator documenting the rent ceiling increase, effective August 1, 2005.

7. On September 30, 2005, and again on October 27, 2005, Housing Provider filed Amended Registrations with the Rent Administrator to document an increase of $162 in Tenant's rent ceiling from $1,451 to $1,613. PXs 137, 138. The rent ceiling increase was attributed to a vacancy increase under Section 213(a)(2) of the Act, D.C. Official Code § 42-3502.13(a)(2). Tenant occupied the unit throughout 2005. Housing Provider did not offer any explanation for taking a vacancy rent ceiling increase at a time when the unit was occupied.

8. On December 27, 2005, Housing Provider implemented a $50 rent increase, effective February 1, 2006 (the "February 2006 Rent Increase"), using a portion of the March 2003 rent ceiling increase of $726. PX 114. The Notice of Increase in Rent Charged served on Tenant stated that Tenant's rent ceiling on the date of the rent increase was $1,451. The Rent Administrator's record of filings, PX 120, reflect[s] that an affidavit of service was filed with the Rent Administrator on January 30, 2006, although the affidavit itself was not offered into evidence. PX 120. The Rent Administrator's record contains no entry of an amended registration by Housing Provider to record the rent increase. PX 120. Accordingly, I find that Housing Provider did not file an amended registration to document the February 2006 Rent Increase.

9. On June 6, 2006, Housing Provider implemented a $272 rent increase, effective August 1, 2006 (the "August 2006 Rent Increase"), using a further portion of the March 2003 rent ceiling increase of $726. The Notice of Increase in Rent Charged served on Tenant stated that Tenant's rent ceiling on the date of the rent increase was $1,508. The Rent Administrator's record of filings, PX 120, reflects that an affidavit of service was filed with the Rent Administrator on June 29, 2006, although the affidavit itself was not offered into evidence. The Rent Administrator's record contains no entry of an amended registration by Housing Provider to record the rent increase. PX 120. Accordingly, I find that Housing Provider did not file an amended registration to document the August 2006 [R]ent [I]ncrease.

10. Tenant refused to pay the August 2006 rent increase. Housing Provider did not withdraw its demand for increased rent but also did not take legal action to enforce the rent increase.

11. On December 28, 2006, Housing Provider implemented a $67 rent increase, effective February 1, 2007, based on the adjustment of general applicability for 2006. The Notice of Increase in Rent Charged stated that the "current rent charged" was $1,079, and the "new rent charged" was $1,146. The Rent Administrator's records show no filing of a Certification of Election of Adjustment of General Applicability to document this rent increase. In addition, as of January 31, 2007, Housing Provider had not filed with the Rent Administrator a sample copy of the notice or an affidavit of service, as required by the Rental Housing Regulations. 14 District of Columbia Municipal Regulations ("DCMR") [§] 4105.4(d) [(2004)]. PX 120.

B. Maintenance and Repair Complaints

12. The [T]enant [P]etition asserted that Housing Provider implemented a rent increase at a time when the rental unit was not in substantial compliance with the D.C. Housing Regulations and that the Housing Provider substantially reduced the services and/or facilities provided in connection with the rental unit. At the hearing, Ms. Notsch testified that she experienced continuing maintenance and repair problems in her unit. She supplemented her own testimony with the testimony of two inspectors from the Department of Consumer and Regulatory Affairs and maintenance documents that were introduced into evidence.

13. Ms. Notsch described a number of problems with her apartment, including lack of heat, a kitchen sink that periodically backed up and overflowed, a leak in the ceiling that caused paint to peel and plaster to flake in her bathroom and kitchen, and a defective stove. Although she stated that she complained of these problems, she was unable to provide the dates or details of specific complaints or the names of the persons with whom she lodged the complaints. However, many of the problems were documented in emails and maintenance records that Tenant introduced into evidence. PXs 111, 145.

14. In November, 2004, Tenant complained that her kitchen sink did not drain properly and the paint in the bathroom was peeling, among other issues. PX 145 (11/29/04 Work Order). Housing Provider made repairs, but the bathroom paint continued to peel. Work orders, emails, and memos record problems with paint peeling in the bathroom on January 6, 2005 (PX 145), May 2, 2005 (PX 145), June 6, 2005 (PX 145), and August 11, 2005 (PX 149). Housing Provider made repairs and painted the bathroom in August 2005.

15. The paint and plaster problems extended to the bedroom as well as the bathroom. But the problems in the bedroom were neither as prolonged nor as well-documented as those in the bathroom. Tenant observed bubbling in the bedroom ceiling in the late spring of 2006. She was told by one of the building employees that the roof had been improperly installed and that she would have to wait until it dried out. Photographs that she took in June of 2006 showed peeling paint. PX 109. Housing Provider repaired the damage in late September 2006, although photographs taken following the repairs indicated either that the repairs were sloppy or the problem was not entirely fixed. PX 110.

16. Tenant also complained of ongoing problems with her kitchen sink. Work requests on November 29, 2004, and January 10, 2005, reported the kitchen sink clogged. On March 3, 2006, the sink backed up and overflowed, covering Tenant's kitchen floor with a noisome residue that required many hours of work to clean up. PX 111. Housing Provider's maintenance superintendent proposed to clean the drainage line, but never followed through with the project. PX 111. The sink continued to back up periodically and regurgitate ooze. As a consequence, Ms. Notsch avoids using the sink whenever it threatens a backup and will wash dishes in the bathroom. But she acknowledged that she has not reported any problems with the sink to the building management since the January 2005 incident.

17. Ms. Notsch complained of continuing problems with her stove and that her oven did not work. The documents in evidence include a single work order of May 2, 2005, noting that "the stove does not work." The work order reflects that the job was completed on the same day. PX 145. There are no other references to the stove or oven in the documents in evidence. Inspector Butler testified that he did not recall any complaint about the stove.

18. Tenant also testified that the radiator in her living room did not work and that periodically there would be no heat at all in her apartment. A work order and call center service request document a single complaint about this condition on February 1, 2006. The call center request indicates that repairs were "completed." Ms. Notsch testified that the radiator worked for one week but did not work after that.

19. In addition to these problems, work orders in evidence reflect problems with the alignment of the door, a clogged toilet, defective blinds in the living room and bedroom, outlets, and flickering lights. The work orders indicate that these conditions were repaired or resolved.

20. In August of 2006, after the initial tenant petition was filed, Ms. Notsch's apartment was inspected by Ronald Butler, a DCRA building inspector, and Thomas Smoot, a DCRA fire inspector. Inspector Butler observed peeling paint in the bedroom and cracks in the ceiling. The front door did not close firmly and the window in the living room was difficult to open. He cited the Housing Provider for certain violations that he described as "minor in nature." No notice of violations was [sic] introduced into evidence. Work orders reflect repairs of these defects on September 22 and September 26, 2006. PXs 140, 145. Inspector Smoot testified that he did not remember finding any fire code violations, although he recalled that one of the windows opened with difficulty.

21. In addition to the problems in her apartment, Ms. Notsch described problems in the common areas of the building. She submitted photographs showing the trash room filled with junk and old furniture, a condition that arose once or twice a month according to her testimony. PX 106. But she admitted that she never complained of the problem to management. Tiles on the floor of the laundry room were missing. PX 107. Ms. Notsch testified that the security code for the building had not been changed in years.

22. Housing Provider's property manager, Shelton Gordon, acknowledged these conditions, but did not believe they were serious or dangerous. He testified that the trash room would fill up whenever tenants moved out but that Housing Provider would arrange for a bulk trash pickup and the bulk items would be removed within a few days. Although the security code had not been changed for more than a year, it was changed periodically and the only breaches of security that he was aware of arose from prying the back door with a crowbar. The laundry room was refurbished in August, 2006.

Final Order at 3-10; R. at 237-44 (footnotes omitted). The ALJ made the following conclusions of law relevant to this appeal in the Final Order: [3]

. . .

B. Tenant's Claims Involving Rent and Rent Ceiling Increases

2. Five of Tenant's claims involve the propriety of rent increases, rent ceiling increases, or the documentation of those increases with the Rent Administrator. Boxes checked in the [T]enant [P]etition assert that: (1) the rent increase was larger than the amount of increase which was

[3] The conclusions of law are recited here using the language of the ALJ in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

allowed by any applicable provision of the Rental Housing Act; (2) 180 days had not passed since the last rent increase; (3) a proper 30 day notice of rent increase was not provided before Tenant's rent increase became effective; (4) Housing Provider failed to file the proper rent increase forms with the RACD; and (5) the rent ceiling filed with the RACD for the unit is improper. Tenant challenged all Housing Provider's rent increases within three years of the filing of her [T]enant [P]etition, [t]wo of these rent increases, the February 2006 and August 2006 Rent Increases, implemented portions of the $726 vacancy rent ceiling increase that Housing Provider took in March 2003. I will begin with an analysis of these two rent increases and the rent ceiling adjustment on which they are based.

3. Tenant filed her initial [T]enant [P]etition on July 5, 2006, one month prior to the effective date of the 2006 amendments to the Rental Housing Act that abolished rent ceilings. *See* 53 D.C. Reg. 6688 (Aug. 18, 2006). Housing Provider's acts prior to August 5, 2006, are covered by the prior Act, under which "the principal protections for tenants are the imposition of a rent ceiling and the prohibition against upward adjustment of that ceiling except on specifically enumerated grounds." *Winchester Van Buren Tenants Ass'n v. D.C. Rental Hous. Comm'n*, 550 A.2d 51, 55 (D.C. 1988), quoted in *Sawyer Prop. Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 103 (D.C. 2005).

4. The March 2003 rent ceiling adjustment was based on a vacancy adjustment that increased the rent ceiling to that of "a substantially identical rental unit in the same housing accommodation" under Section 213 of the Rental Housing Act, D.C. Official Code § 42-3502.13(a)(2) (2001). Here, the comparable unit was No. 103, at 1821 Summit Place, a different building that was part of the same apartment complex. This was permissible under the Rental Housing Act. *See Marshall v. D.C. Rental Hous. Comm'n*, 533 A.2d 1271, 1277 (D.C. 1987) (holding that a rental unit in a different building in the same housing complex may be a comparable unit for purposes of a vacancy increase). Because the vacancy increase took place more than three years before the tenant petition was filed, Tenant is barred from challenging the validity of the rent ceiling adjustment itself. *Kennedy v. D.C. Rental Hous. Comm'n*, 703 A.2d 94, 97 (D.C. 1998) (holding that the Rental Housing Act's statute of limitations, D.C. Official Code §42-3502.06(e) "bars any investigation of the validity of . . . adjustment in either the rent levels or rent ceiling, in place more than three years prior to the date of the filing of the tenant petition"). But even if the rent ceiling adjustment arose more than three years before the tenant petition was filed, it must have been properly taken and perfected in order to support a rent increase that is challenged within the limitations period. *Grant v. Gelman Mgmt. Co.*, TP-27,995 (RHC Mar. 30, 2006) at 10.

5. A housing provider is allowed to take a vacancy rent ceiling adjustment without approval of the Rent Administrator, provided the housing provider files an amended registration form to document the increase and gives notice to the tenant. 14 DCMR [§] 4204.9 [(2004)]. To perfect the vacancy rent ceiling adjustment, the amended registration form must be filed within 30 days of when the rental unit becomes vacant. *Sawyer*, 877 A.2d at 109.

6. In light of these requirements, I conclude that Housing Provider's March 2003 rent ceiling adjustment was properly taken and perfected. Housing Provider filed an Amended Registration Form on March 31, 2003, certifying a "date of change" of March 1, 2003. PX 131. The form complied with the regulatory requirements of 14 DCMR [§§] 4204.9, 4204.10, and 4207.5. It identified the unit, set forth the amount of the adjustment and the prior and new rent ceilings, and was filed within 30 days of when Housing Provider was first eligible to take the adjustment. Tenant was given notice of the new rent ceiling in the lease, which stated the rent ceiling to be $1352.

7. It does not follow, though, that Housing Provider properly implemented the rent increases in February 2006 and August 2006 that derived from the 2003 vacancy rent ceiling adjustment. In both cases Housing Provider complied with the Rental Housing Regulations by serving Tenant with a Notice of Increase in Rent Charged more than 30 days before the prospective rent increase. 14 DCMR [§] 4205.4(a). The Notices of Increase in Rent Charged states [sic] the amount of the rent adjustment, the amount of the adjusted rent, the date of the rent increase, the date and authorization of the rent ceiling adjustment from which the rent adjustment was derived, and a certificate that the rental unit was in substantial compliance with the Housing Regulations. 14 DCMR [§] 4205.4. PXs 114, 115. Housing Provider filed affidavits of service with the Rent Administrator documenting service of the notices. 14 DCMR [§] 4205.4(d). But Housing Provider did not file an Amended Registration with the Rent Administrator to document the implementation of either the February 2006 or the August 2006 rent increases.

8. The Housing Regulations require a housing provider to file an Amended Registration whenever a rent increase arising from a vacancy is implemented. 14 DCMR [§] 4103.1 provides:

> Each housing provider of a rental unit or units covered by the Act shall file an amendment to the Registration/Claim of Exemption form provided by the Rent Administrator in the following circumstances:

* * * [sic]

(e) Within thirty (30) days after the implementation of any vacant accommodation rent increase pursuant to § 213 of the Act.

Housing Provider did not comply with this directive. For reasons I discuss below in my analysis of remedies, I conclude that Tenant is entitled to a rent refund and roll back to compensate for Housing Provider's demand of these illegal rent increases.

9. For similar reasons, I conclude that Housing Provider's $67 increase in February 2007 is also illegal. Housing Provider's Notice of Increase in Rent Charged states that the rent increase was attributable to the adjustment of general applicability for the 2006 – 2007 rent control year. PX 116. But the Rent Administrator records show that Housing Provider failed to file a Certificate of Election of Adjustment of General Applicability to document the rent increase, as required by the Rental Housing Regulations. PX 120; 14 DCMR [§] 4204.10. Housing Provider also failed to file a sample copy of the Notice of Increase in Rent Charged and an affidavit of service of the Notice. 14 DCMR [§] 4205.4(d). It follows that Housing Provider's February 2007 Rent Increase is illegal because Housing Provider failed to take and perfect the adjustment in accord [sic] with the regulations. *See Sawyer Prop. Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d at 104.

10. The Notice of Increase in Rent Charged for the February 2007 Rent Increase stated that Tenant's current rent charged was only $1,079, the amount of Tenant's rent prior to implementation of the August 2006 Rent Increase. PX 116. This statement bears on the issue of whether Housing Provider ever withdrew its demand for the August 2006 Rent Increase. Ms. Notsch testified, without contradiction, that Housing Provider never withdrew its demand, although Tenant did not pay the rent increase and Housing Provider did not take legal action to enforce the rent increase. But, because the Notice of Increase in Rent Charged for the February 2007 Rent Increase is a legal document that is binding on Housing Provider, I conclude that Housing Provider withdrew its demand on December 28, 2006, by acknowledging Tenant's proper rent to be $1,079. As I discuss below, Housing Provider's withdrawal of its demand has a significant effect on Tenant's award.

11. The remaining rent increase challenged in the [T]enant [P]etition involved an adjustment of general applicability. The $29 rent increase effective on December 1, 2004, was implemented through service of a Notice of Increase in Rent charged, served more than 30 days before the rent increase took effect, and containing the information required by the

Housing Regulations. 14 DCMR [§] 4204.4; PX 112. It was based on an adjustment of general applicability documented with the Rent Administrator by filing a Certificate of Election of Adjustment of General Applicability within 30 days of the effective date of the adjustment. PX 147. Housing Provider documented service of the Notice of Increase in Rent Charged by filing an affidavit of service with the Rent Administrator within 30 days of service of the Notice. 14 DCMR [§] 4205.4(d); 14 DCMR [§] 4204.10. PX 120 ¶ 59. Accordingly, I conclude that the December 2004 rent increase was appropriate and legal.

12. Housing Provider's Amended Registration Statements of September 30, 2005, and October 27, 2005, which purported to implement rent ceiling vacancy adjustments, were clearly illegal because Tenant's apartment had not been vacant. PXs 137, 138. But Housing Provider corrected this mistake in its Notice of Increase in Rent Charged for the February 2006 Rent Increase, which stated Tenant's rent ceiling to be $1,451, the ceiling in place before the Amended Registrations were filed. PX 114. Because Housing Provider never sought to implement these illegal rent ceiling adjustments, I conclude that they have no bearing on the issues in Tenant's petition.

13. Based on this analysis, I make the following Conclusions of Law with respect to Tenant's claims concerning rent increases: (1) Tenant has proved that Housing Provider imposed three rent increases, in February 2006, August 2006, and February 2007, that were larger than the amount of increase allowed under the Rental Housing Act because they were illegal. (2) Tenant failed to prove that 180 days had not passed since the last rent increase. The February 2006 rent increase took effect 181 days before the August 2006 Rent Increase was to take effect. Housing Provider then rescinded the August 2006 Rent Increase before it sought to impose the February 2007 Rent Increase. (3) Tenant failed to prove that a proper 30 day notice of rent increase was not provided before any of the rent increases became effective. Housing Provider served Tenant a proper notice more than 30 days before each of the rent increase[s] took effect. PXs 112, 114, 115, 116. (4) Tenant proved that Housing Provider failed to file the proper rent increase forms with the Rent Administrator. Housing Provider failed to file Amended Registrations to document the February 2006 and August 2006 rent increases, and failed to file a Certificate of Election of Adjustment of General Applicability and an affidavit of service to document the February 2007 Rent Increase. (5) Tenant failed to prove that the rent ceiling filed with the Rent Administrator is improper. Housing Provider's rent ceiling adjustment of March 2003 was properly taken and perfected. The defect was in the implementation of the rent increase that arose out of the rent ceiling adjustment.

C. Tenant's Claims Involving Services and Facilities

14. Tenant's remaining claims involve the quality of services and facilities in her apartment. Tenant asserts that Housing Provider imposed rent increases while her unit was not in substantial compliance with the Housing Regulations, and that services and facilities provided in connection with her rental unit were permanently eliminated or substantially reduced.

15. To establish that a rent increase was implemented while the rental unit was not in substantial compliance with the housing code Tenant must show the existence of violations and that they were substantial. Certain violations are presumed to be substantial under the Rental Housing Regulations, including frequent lack of hot water, defective drains, accumulation of garbage or rubbish in common areas, and plaster falling or in immediate danger of falling, 14 DCMR [§] 4215.2.

16. The rent increases that are involved in this [T]enant [P]etition were effective in December 2004, February 2006, August 2006, and February 2007. Although Tenant experienced various problems with the plaster and paint in her bedroom and bathroom through September 2006, when Housing Provider made repairs, there is no evidence to suggest that any of these problems amounted to a substantial housing code violation. Indeed, Inspector Butler testified that, in his opinion, the violations that he observed in August, 2006 were minor in nature. Inspector Smoot testified that he observed no violations of the fire code.

17. The other problems that Tenant experienced were either episodic or insubstantial. Although Ms. Notsch testified that the radiator in her living room did not work, she only complained about it once, and she acknowledged that it worked for a period of time after Housing Provider repaired it. Similarly, she only lodged a single complaint about the problem with her oven, which was fixed according to Housing Provider['s] maintenance records. PX 145. Although Ms. Notsch testified that she had continuing problems with her kitchen sink and was reluctant to use it on occasion, the problem was intermittent and Housing Provider responded to Tenant's complaints when the sink backed up. PXs 111, 145. Ms. Notsch testified about intermittent clutter in the trash room but she admitted that she did not complain to management about the problem. There was no evidence that any of these conditions existed at the time any of the rent increases was [sic] implemented. I conclude, therefore, that Tenant failed to prove that Housing Provider implemented a rent increase while the building was not in substantial compliance with the Housing Regulations.

18. Evaluating Tenant's claims for substantial reduction in services and facilities is problematic. To establish a claim for reduction in services and facilities, Tenant "must present competent evidence of the existence, duration, and severity of the reduced services." *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 11 (citations omitted). "Further, if the reduced service is within the tenant's unit she must show that she notified the housing provider that service was required." *Id.* (citation omitted). *Accord, Hudley v. McNair*, TP 24,040 (RHC June 30, 1999) at 11. It is clear that Tenant experienced continuing problems with peeling paint and plaster throughout 2005 and 2006. But it is hard to quantify these problems or to establish the dates during which they existed. The work requests relating to Tenant's apartment confirm the existence of peeling paint in the bathroom as early as November 29, 2004. PX 145. The problem was not resolved until August 11, 2005. PX 149. Based on Tenant's testimony, and work requests on November 29, 2004, January 6, 2005, May 2, 2005, and June 6, 2005, that make reference to [a] need to paint the bathroom, I conclude that the resulting reduction in facilities was substantial and existed for nine months from December 2004 through August 2005.

19. Evidence of the existence, duration, and severity of a reduction in services and facilities is competent evidence upon which an Administrative Law Judge can find the dollar value of a reduction in rent ceiling or rent roll back. Expert or other direct testimony is not required. *Norman Bernstein Mgmt., Inc. v. Plotkin*, TP 21,282 (RHC May 10, 1989). I find the dollar value of the reduction in facilities attributable to the paint problems in Tenant's bathroom to be $50 per month.

20. I conclude that Tenant has not sustained her burden of proof to establish that other problems in her apartment constituted a substantial reduction in services and facilities. Although Tenant's sink clogged on multiple occasions, the work requests and e-mail correspondence indicate that Housing Provider responded to Tenant's complaints and cleared the sink each time. PXs 111, 145. Tenant testified that, after the flooding incident in March 2006, she stopped complaining about the sink. Housing Provider also responded when Tenant complained of problems with the radiator in her living room, and her stove. PX 145. The first record of any problem with the paint in Tenant's bedroom is a work order of September 26, 2006, prepared in response to Inspector Butler's report following his inspection in August. PX 145. After being apprised of the problem, Housing provider plastered and painted the affected areas. In sum, Tenant has not proved that Housing Provider was given proper notice of these problems or presented sufficient proof of their existence, duration, and severity to form a basis for an award.

D. Remedies

21. Prior to its amendment in August 2006, the Rental Housing Act provided for [an] award of a rent refund "for the amount by which the rent exceeds the applicable rent ceiling . . . and/or for a roll back of the rent to the amount the [Administrative Law Judge] determines." D.C. Official Code § 42-3509.01(a) (2001). The Rental Housing Commission has consistently interpreted the statute to limit the remedy for reduced services and facilities to a reduction in the rent ceiling, limiting rent reductions to cases in which the rent charged exceeded the reduced rent ceiling. *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 14; *Kemp v. Marshall Heights Cmty. Dev.*, TP 24,786 (RHC Aug. 1, 2000) at 8; *Hiatt Place P'ship v. Hiatt Place Tenants' Ass'n*, TP 21,249 (RHC May 1, 1991) at 26.

22. By contrast, the Commission has held that rent refunds are appropriate to compensate Tenants for illegal rent increases imposed when the Housing Provider is not properly registered, irrespective of the rent ceiling. *See Grayson v. Welch*, TP 10,878 (RHC June 30, 1989) at 13 ("if the rent charged was increased at a time when landlord was not properly registered, each such increase can be held to be illegal, whether or not the increase brought the rent charged above the rent ceiling"); *McCulloch v. D.C. Rental Hous. Comm'n*, 449 A.2d 1072, 1073 (D.C. 1982) (affirming hearing examiner's award of rent refund under the 1977 Rental Accommodations Act where the landlord failed to file amended registrations to document rent increases). *Cf. Sawyer v. D.C. Rental Hous. Comm'n*, 877 A.2d at 111, n. 15 [sic] (holding that the housing provider's failure to file a timely amended registration statement to document a vacancy rent ceiling adjustment invalidated a subsequent rent increase based on that adjustment). I therefore hold that Tenant is entitled to a refund of the February 2006 and February 2007 rent increases demanded by and paid to Housing Provider. The refund includes all demands and/or payments through the date of the hearing. *See Mann Family Trust v. Johnson*, TP 26,191 (RHC Nov. 21, 2005) at 16; *Jenkins v. Johnson*, TP 23,410 (RHC Jan. 4, 1995) at 9. *See also Majerle Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 866 A.2d 41, 43 (D.C. 2004) (affirming Rental Housing Commission['s] award of rent refund damages through date of hearing).

23. It is well-established that a tenant is entitled to a rent refund in circumstances where the Housing Provider demands rent illegally, notwithstanding that the rent is not paid. *See* D.C. Official Code § 42-3501.03 (28) (defining "rent" as money "demanded" by a housing provider[)]; *Kapusta v. D.C. Rental Hous. Comm'n*, 704 A.2d 286, 287 (D.C. 1997) (affirming award of rent refund where rent was demanded but not paid); *Schauer v. Assalaam*, TP 27,084 (RHC Dec. 31, 2002) at 6. [sic] (holding that tenant's rent refund was based on the amount demanded

rather than the amount paid under a court protective order). Thus, Tenant is also entitled to a refund of the August 2006 rent increase that Housing Provider demanded, even though Tenant did not pay this rent increase. But the refund for the August 2006 rent increase demand will be limited to the five months between August 2006, and December 2006, when Housing Provider's Notice of Increase in Rent Charged gave notice that Housing Provider no longer demanded the previous rent increase. PX 116.

24. The available remedies do not justify a refund to Tenant on account of her reduction in facilities. Because Housing Provider properly took and perfected the rent ceiling increases of March 2003 (PX 131), August 2003 (PX 130), [and] August 2004 (PX 147), the rent ceiling between December 2004 and August 2005, during which Tenant's facilities were reduced, was $1,415. I have reduced this rent ceiling by $50 per month during that period on account of the peeling paint and plaster in the bathroom. But the reduced rent ceiling of $1,365 is still substantially higher than the $1,029 rent that Tenant was paying at the time. Therefore Tenant will not receive any rent refund on this account.

25. The record also provides no basis for an award of treble damages for bad faith or a fine against Housing Provider for a willful violation of the Rental Housing Act. A finding of bad faith requires proof that Housing Provider acted out of "some interested or sinister motive" involving "the conscious doing of a wrong because of dishonest motive or moral obliquity." *Third Jones Corp. v. Young*, TP 20,300 (RHC Mar. 22, 1990) at 9. Fines, for a willful violation of the Rental Housing Act, require a determination that the Housing Provider intended to violate the law and possessed a culpable mental state. *Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 505 A.2d 73, 76, n. 6 [sic] (D.C. 1986). Moreover, the Rental Housing Commission has held that a fine may not be imposed as a remedy for a claim of reduction in services. A rent refund is the only remedy permitted by the statute. *Schauer v. Assalaam*, TP 27,084 at 14-15 (RHC Dec. 31, 2002) (citing D.C. Official Code § 42-3509.01(a) (2001)[)].

26. The acts that justify a rent refund in this case are Housing Provider's failure to file Amended Registration statements to document the rent increases it imposed in February and August 2006, and its failure to file a Certificate of Election of Adjustment of General Applicability and affidavit of service to document the February 2007 Rent Increase. There is no evidence that these acts and omissions were provoked by any dishonest motive or were intentional. Housing Provider employed an outside consultant, Mr. Santomartino, because his firm specialized in complying with the filing requirements of the Act. Housing Provider had no reason to believe that its rent increases were inappropriate.

Final Order at 10-232; 225-37 (footnotes omitted).

On April 7, 2008, Tenant filed a Notice of Appeal ("Notice of Appeal") with the Commission raising the following issues on appeal:[4]

1. Whether OAH erred in concluding the permissibility of a rent increase from $596 to $1000, effective upon Appellant's July 1, 2003 lease agreement where it was not perfected by a corresponding filing and where the Certificate of General Applicability filed August 28, 2003 denoted the rent charge as $596 and not $1000.

2. Whether the OAH erred in concluding the only remedy for a reduction and/or elimination of services and/or facilities is a reduction in a tenant's rent ceiling.

3. Whether the OAH erred when it failed to draw inferences most favorable to the Appellant based on missing evidence that should have been produced pursuant to OAH subpoenas for housing inspection reports and Appellee's maintenance requests and reports.

4. Whether the OAH erred in concluding that there was no basis to award treble damages.

Notice of Appeal at 1-2. The Tenant filed a brief on August 20, 2008 (Tenant's Brief),[5] and the Housing Provider filed its brief on September 12, 2008 (Housing Provider's Brief). The Commission held its hearing in this matter on September 18, 2008.[6]

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[4] The Tenant's issues on appeal are recited herein using the Tenant's language from the Notice of Appeal.

[5] The Commission observes that the Tenant's Brief includes two (2) issues that were not raised in the Notice of Appeal: namely, "[w]hether the OAH erred in concluding that the August 28, 2008 [sic] Certificate of Election, was permissible when it was implemented during the Appellee's lease term;" and "[w]hether the OAH erred in concluding the rent charge listed on the August 28, 2003 [sic] was an 'error' 'corrected' by the August 31, 2004 Certificate of Election." *See* Tenant's Brief at 1-5. The Commission has consistently held that it may not address issues that were not raised in a timely-filed notice of appeal. 14 DCMR § 3807.4 (2004). *See, e.g.* Florio v. Wyck, TP 27,878 (RHC July 22, 2005) (stating that the Commission may not consider issues raised for the first time in the tenant's brief). Thus, the Commission will not address the additional issues that were raised for the first time in the Tenant's Brief.

[6] The Commission notes that on October 6, 2008, the Housing Provider filed a "Motion for Leave to File Supplemental Points and Authorities in Support of Housing Provider's Brief on Appeal" (Motion for Supp. Points and Authorities) seeking to provide additional legal support for the argument raised in its brief that the ALJ committed "plain error." *See* Motion for Supp. Points and Authorities at 1-4. The Tenant filed an opposition to the Housing Provider's motion on October 16, 2008. The Commission observes that based on its decision herein, *see*

II. ISSUES ON APPEAL

1. Whether the ALJ erred in concluding the permissibility of a rent increase from $596 to $1000, effective upon Appellant's July 1, 2003 lease agreement.

2. Whether the ALJ erred in concluding the only remedy for a reduction and/or elimination of services and/or facilities is a reduction in a tenant's rent ceiling.

3. Whether the ALJ erred when he failed to draw inferences most favorable to the Tenant based on missing evidence that should have been produced pursuant to OAH subpoenas for housing inspection reports and Housing Provider's maintenance requests and reports.

4. Whether the ALJ erred in concluding that there was no basis to award treble damages.

III. PRELIMINARY ISSUE

The Housing Provider did not file a notice of appeal in this case.[7] Nevertheless, the Commission notes that in its brief, the Housing Provider raises the following issue of "plain error:" the ALJ's ruling in favor of the Tenant on the issue of illegal rent increases "manifests

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infra at 17-21, the Housing Provider's motion has been rendered moot, and thus the Commission will not address the merits of the motion herein.

[7] The Commission observes that the Housing Provider stated the following at the Commission's hearing regarding its reasons for not filing a timely notice of appeal:

> Now . . . I will tell you exactly . . . why the landlord didn't file a notice of appeal. The award was $2,000. Now, you say, so what, but keep in mind, there was no cross-appeal here like there is in the Court of Appeals. Both sides have to file a notice of appeal on the same date. In the Court of Appeals, if one side files, the other side has five or ten days to file their own appeal. So the landlord said, for $2,000, I'm not going to note an appeal, and about, I guess about four days before the appeals period, time ran out, the Tenant filed their notice of appeal. So, I mean, you can say, you know, tough luck to the landlord, but given the amount involved and given the fact that on every issue raised at the hearing below, and in the notice of appeal to the extent it dealt with the issues below . . . we won, it's deemed appropriate, at that point, because we didn't get their notice of appeal until relatively late, maybe not in time to note our own appeal, to bring this up at this point . . . .

Hearing CD (RHC Sept. 18, 2008) at 2:45-47.

plain legal error" because it was based on requirements that do not exist under the Act or its regulations.[8] *See* Housing Provider's Brief at 3.

The Commission's regulation at 14 DCMR § 3807.4 (2004) provides the following: "[r]eview by the Commission shall be limited to the issues raised in the notice of appeal; provided, that the Commission may correct plain error." The Commission notes that the section of the Housing Provider's Brief addressing "plain error" is indistinguishable from a notice of appeal, and in its discretion the Commission will treat it as such herein. *See* Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) (treating tenant's "Petition to Correct Plain Error" as a notice of appeal). *See also* United Dominion Mgmt. v. Hinman, RH-TP-06-28,782 (RHC June 5, 2013) (citing Sawyer Prop. Mgmt. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-103 (D.C. 2005)) ("[t]he DCCA has provided the Commission with considerable deference and discretion in its interpretation of the Act"); Dreyfuss Mgmt. v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013).

Pursuant to 14 DCMR § 3802.2, the Housing Provider had thirteen business days to appeal the ALJ's March 24, 2008 Final Order, a period that ended on April 16, 2008. *See* 14 DCMR §§ 3802.2, 3816.1-3, -.5.[9] The Commission observes that the Housing Provider's Brief

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[8] The Commission notes that, in response to the Housing Provider's "plain error" argument, the Tenant filed a motion to strike the Housing Provider's Brief on the basis that the Housing Provider failed to file a notice of appeal, and that the Commission's power to correct plain error under 14 DCMR § 3807.4 is discretionary. *See* Tenant's Motion to Strike at 1. The Commission observes that the Tenant's Motion to Strike is rendered moot by its decision herein, and thus will not address the merits of the Tenant's Motion to Strike.

[9] 14 DCMR § 3802.2 provides as follows: "A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed.

14 DCMR § 3816.1 provides as follows: "In computing any period of time prescribed or allowed under this chapter, the day of the act, event, or default from which the designated period begins to run shall not be included."

in this case was filed on September 12, 2008, nearly five (5) months after the time period for filing an appeal of the Final Order had expired. *See* 14 DCMR § 3802.2; Housing Provider's Brief at 1.

Insofar as the Housing Provider is attempting to circumvent the mandatory filing deadline of 14 DCMR § 3802.2 for filing a notice of appeal by styling their issue on appeal as an issue of "plain error," the Commission notes that it has consistently interpreted the plain error standard contained in 14 DCMR § 3807.4 as intended for, and solely applicable to, issues on appeal that neither party has raised in its respective notice of appeal. 14 DCMR § 3807.4. *See* Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984) (holding that the Commission, under its rules, is permitted, though not required, to consider issues not raised in a notice of appeal insofar as they reveal "plain error"). *See also* Dreyfuss Mgmt., RH-TP-07-28,895 (addressing two (2) issues of plain error identified by the Commission in the ALJ's calculation of damages that were not raised by either party in a notice of appeal); Williams v. Thomas, TP 28,530 (RHC Sept. 27, 2013) (addressing issues of plain error identified by the Commission in the hearing examiner's calculations of damages, interest, and treble damages, where neither party raised such issues in a notice of appeal).

Accordingly, the Commission is satisfied that the Housing Provider failed to timely file a notice of appeal with the Commission. *See* 14 DCMR §§ 3802.2, 3816.1-3, -.5. Furthermore, the Commission's interpretation of 14 DCMR § 3807.4 requires that the raising and application

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14 DCMR § 3816.2 provides as follows: "The last day of the period so computed shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, Sunday or a legal holiday."

14 DCMR § 3816.3 provides as follows: "When the time period prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

14 DCMR § 3816.5 provides as follows: "If a party is required to serve papers within a prescribed period and does so by mail, three (3) days shall be added to the prescribed period to permit reasonable time for mail delivery."

of the plain error standard is left solely to the discretion of the Commission, and not, as here, to either of the parties. *See* 14 DCMR § 3807.4; Proctor, 484 A.2d at 550; Morris, RH-TP-06-28,794; Dreyfuss Mgmt., RH-TP-07-28,895; Williams, TP 28,530. The Commission therefore dismisses these issues for consideration in this appeal.

III. DISCUSSION OF THE ISSUES ON APPEAL

1. Whether the ALJ erred in concluding the permissibility of a rent increase from $596 to $1000, effective upon Appellant's July 1, 2003 lease agreement.

The Tenant asserts that the ALJ erred by failing to conclude that a rent increase from $596 to $1,000 per month, effective on July 1, 2003 – the start date of the Tenant's lease agreement – was improper, because the record contains no evidence that the Housing Provider satisfied the regulatory requirements for taking the increase. *See id.* at 3-4 (citing 14 DCMR § 4205.4).

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

> The Commission shall reverse final decisions of the Rent Administrator 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.

See, e.g. Atchole v. Royal, RH-TP-10-29,891 (RHC Mar. 27, 2014); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Morris, RH-TP-06-28,794.

Although the Commission observes that the ALJ states in the Final Order that the Tenant's lease agreement indicated that her rent charged was $1,000 per month, the Commission's review of the Final Order reveals that the ALJ did not make any findings of fact or conclusions of law regarding the propriety of a rent increase from $596 to $1,000, effective

July 1, 2003, upon which the lease agreement commenced. *See* Final Order at 3-6, 10-17; R. at 230-37, 241-44.

The Commission notes that the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) (2001) provides the following:

> 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 of any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment . . . .

The Commission has consistently held that an increase in rent charged must be challenged within three (3) years of the effective date of the adjustment in rent charged. *See, e.g.* Hinman, RH-TP-06-28,728; Canales v. Martinez, TP 27,535 (RHC June 29, 2005); Greene v. Urquilla, TP 27,604 (RHC Jan. 14, 2005).

The Commission notes that the ALJ found that the Tenant entered into her lease on July 1, 2003. *See* Final Order at 3; R. at 244. The Commission's review of the record reveals substantial evidence to support the ALJ's finding, including the Tenant's testimony at the OAH hearing that her lease agreement was effective on July 1, 2003, and Tenant's Exhibit 101 (a copy of the parties lease agreement) which states that the term of the lease begins on July 1, 2003. Hearing CD (OAH Mar. 21, 2007) at 3:22; Tenant's Exhibit 101 at 1; R. at 423.

The Commission also notes that the Final Order states that the Tenant Petition was filed on July 5, 2006. *See* Final Order at 1; R. at 246. The Commission's review of the record reveals that this determination is supported by substantial evidence in the record, including, the Tenant Petition that is dated July 5, 2006. *See* Tenant Petition at 1; R. at 16.

Based on its review of the record, the Commission determines that the rent increase in the Tenant's lease agreement that became effective on July 1, 2003, occurred more than three years prior to the filing of the Tenant Petition on July 5, 2006, and thus any challenge to the propriety

of the rent increase was barred by the Act's statute of limitations. *See* D.C. OFFICIAL CODE § 42-3502.06(e); Tenant Petition at 1; R. at 16. Therefore, the Commission determines that substantial evidence in the record supports the ALJ's determination not only that the rent charged adjustment occurred beyond the three-year statute of limitations period in the Act, but also that the ALJ did not err in not considering the propriety of the amount of rent charged as contained in the lease agreement. *See* D.C. OFFICIAL CODE § 42-3502.06(e); Hinman, RH-TP-06-28,728; Canales, TP 27,535; Greene, TP 27,604; Final Order at 1-6; R. at 241-46. The Commission thus affirms the ALJ on this issue.

2. Whether the ALJ erred in concluding the only remedy for a reduction and/or elimination of services and/or facilities is a reduction in a tenant's rent ceiling.

The Tenant asserts in the Notice of Appeal that the ALJ erred in determining that the appropriate remedy for a reduction in services and/or facilities was a corresponding reduction in the Tenant's rent ceiling. *See* Tenant's Brief at 9. The Tenant contends that amendments to the Act in 2006 altered the remedy for a reduction in services and/or facilities to a reduction in the rent charged. *See id.* at 10.

In the Final Order, the ALJ determined that the Tenant had proved a reduction in facilities resulting from peeling paint in her bathroom from December 2004 through August 2005, and valued the reduction at $50 per month. *See* Final Order at 18-19; R. at 228-29. The ALJ explained that, under the Act, the remedy for the reduction in facilities was a reduction in the Tenant's rent ceiling by $50 per month, and that if the rent charged exceeded the reduced rent ceiling, the Tenant would be entitled to a rent refund. *See id.* at 20-21; R. at 226-27 (citing D.C. OFFICIAL CODE § 42-3509.01(a); Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005) at 14; Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000) at 8; Hiatt

Place P'ship v. Hiatt Place Tenants' Ass'n, TP 21,249 (RHC May 1, 1991) at 26). The ALJ determined that the Tenant's rent ceiling between December 2004 and August 2005 was $1,415, and that the Tenant's rent charged during this time period was $1,029 per month. *See id.* at 21-22; R. at 225-26. The ALJ concluded that, after reducing the $1,415 rent ceiling by $50 per month, the Tenant's reduced rent ceiling of $1,365 exceeded her rent charged of $1,029, and thus the Tenant was not entitled to any rent refund as a result of the reduction in facilities. *See id.*

The Commission will uphold decisions of the ALJ when they are in accordance with the applicable provisions of the Act, and supported by substantial evidence in the record. 14 DCMR § 3807.1. *See* Atchole, RH-TP-10-29,891; Campbell, RH-TP-09-29,715; Morris, RH-TP-06-28,794. *See also, supra* at 20.

Based on its review of the record, the Commission is satisfied that the ALJ's determination on this issue was in accordance with the applicable provisions of the Act. 14 DCMR § 3807.1. *See* Final Order at 20-22; R. at 225-27. The Commission observes that the time period at issue for the reduction in facilities – December 2004 through August 2005 – terminated approximately one (1) year prior to the amendment of the Act in August 2006.[10] Consequently, the Commission determines that the ALJ correctly applied the specific provision of the Act in effect for the contested time period of December 2004 through August 2005.[11] *See* Final Order at 20-21; R. at 226-27. The Commission is also satisfied that prior to the amendment of the Act on August 5, 2006, the appropriate remedy for a reduction in services

[10] The Commission notes that the Act was amended, effective August 5, 2006 by the "Rent Control Reform Amendment Act of 2006," D.C. Law 16-145 (Aug. 5, 2006), which amended the Act by eliminating the term "rent ceiling," and in its place, substituting the term "rent charged." *See* D.C. OFFICIAL CODE § 42-3502.06(a) (Supp. 2008). *See* D.C. Law 16-145 §§ 2(a) & (c), 53 D.C. Reg. at 4889, 4890 (2006).

[11] The Commission's review of the Tenant's Notice of Appeal and the Tenant's Brief reveal that the Tenant has not cited to any statute, regulation, or relevant case law precedent that would support a determination that the Act's 2006 amendments may be applied retrospectively. *See* Notice of Appeal; Tenant's Brief at 9-10.

and/or facilities under the Act was an increase or decrease in the rent ceiling rather than the rent charged, and that a tenant was entitled to recovery for a reduction in services and/or facilities only if the rent charged exceeded the reduced rent ceiling. *See* D.C. OFFICIAL CODE §§ 42-3502.11, 3509.01(a);[12] Morris, RH-TP-06-28,794; Dreyfuss Mgmt., LLC, RH-TP-07-28,895.

Moreover, the Commission is satisfied that substantial evidence in the record supported the ALJ's determination that the Tenant's rent charged did not exceed the rent ceiling, after the rent ceiling was reduced by the $50 per month value of the reduction in facilities. For example, Tenant's Exhibit 147, a Certificate of Election of Adjustment of General Applicability dated August 31, 2004, shows that, as of August 1, 2004, the Tenant's rent ceiling was $1,415. *See* Tenant's Exhibit 147 at 2; R. at 611. Furthermore, Tenant's Exhibit 112, a Notice of Increase in Rent Charged dated October 28, 2004, stated that the Tenant's rent charged would be $1,029 as of December 1, 2004. *See* Tenant's Exhibit 112; R. at 465.

Therefore, based on its review of the record, the Commission determines that substantial evidence in the record supports the ALJ's conclusion that the Tenant was not entitled to a refund or damages based on a reduction in facilities, because her rent charged did not exceed the reduced rent ceiling under applicable provisions of the Act. 14 DCMR § 3807.1. *See* D.C. OFFICIAL CODE § 42-3502.11, 3509.01(a); Morris, RH-TP-06-28,794; Dreyfuss Mgmt., LLC, RH-TP-07-28,895.

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

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

For the text of D.C. OFFICIAL CODE § 42-3509.01(a), *see infra* at 28-9.

3. Whether the ALJ erred when he failed to draw inferences most favorable to the Tenant based on missing evidence that should have been produced pursuant to OAH subpoenas for housing inspection reports and Housing Provider's maintenance requests and reports.

The Tenant maintains on appeal that in response to subpoenas issued by OAH, "very few records, if any, were actually produced." *See* Tenant's Brief at 7. Specifically, the Tenant asserts that Housing Inspector Butler and Fire Inspector Smoot both failed to produce a report of their findings after their respective inspections of the Tenant's unit. *See id.* at 8. Additionally, the Tenant states that the Housing Provider failed to produce inspection files, reports and maintenance logs. *See id.* at 7. The Tenant does not identify, in either the Notice of Appeal or her Brief, those claims, if any, in the Tenant Petition that should have been decided differently by the ALJ based on the unproduced documents. *See* Notice of Appeal; Tenant's Brief.

The only legal authority cited by the Tenant in support of this issue on appeal is Standardized Civil Jury Instructions for the District of Columbia, No. 3.04. *See* Tenant's Brief at 8. The Tenant does not cite any statute, regulation or relevant case law precedent that supports her assertion that the ALJ is required to draw inferences in her favor where witnesses failed to produce documents pursuant to subpoenas. *See id.* The Commission notes that, while the regulations state that both OAH and the Commission may rely upon the D.C. Superior Court Rules of Civil Procedure, there is no such provision providing that either OAH or the Commission may apply the Standardized Civil Jury Instructions, as advocated by the Tenant. *See* 1 DCMR § 2801.2; 14 DCMR § 3828.1.[13]

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[13] 1 DCMR § 2801.2 provides the following: "Where a procedural issue coming before this administrative court is not specifically addressed in these Rules, this administrative court may rely upon the District of Columbia Superior Court Rules of Civil Procedure as persuasive authority."

14 DCMR § 3828.1 provides the following: "When these rules are silent on a procedural issue before the Commission, that issue shall be decided by using as guidance the current rules of civil procedure published and

As stated *supra* at 20, the Commission will uphold the decision of the ALJ where it is in accordance with the provisions of the Act, and supported by substantial evidence. *See* 14 DCMR § 3807.1. The Commission observes that the ALJ did not address the Tenant's subpoenas, or any of the witness's failure to comply with the Tenant's subpoenas, in the Final Order. *See* Final Order at 1-25; R. at 222-46.

The Commission has consistently held that it may not review issues that are raised for the first time on appeal. *See, e.g.* Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) at n.13; Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013).

Based on its review of the record, the Commission initially notes that the Tenant failed to raise any issue or objection in the OAH proceedings that the Act or other applicable law required the ALJ to draw inferences favorable to the Tenant based on evidence that was not produced pursuant to subpoenas. *See* Hearing CD (OAH Mar. 21, 2007). While the Commission's review of the record reflects that the Tenant made a general objection at the start of the OAH proceeding regarding the failure of the Housing Provider to comply with issued subpoenas,[14] the Commission notes that the Tenant did not specify in her objection which documents had not been produced, or the alleged nature and extent of any prejudice to the Tenant based on the missing documents. *See* Hearing CD (OAH Mar. 21, 2007) at 10:13. Furthermore, the Commission observes that the Tenant did not make any other objections during the OAH hearing

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followed by the Superior Court of the District of Columbia and the rules of the District of Columbia Court of Appeals."

[14] The Commission notes that counsel for the Tenant stated the following at the outset of the OAH hearing: ". . . I just want to put on the record that my subpoenas were not complied with in this case, and the Tenant/Petitioner is going to have to object to that on the record." Hearing CD (OAH Mar. 21, 2007) at 10:13.

on the basis of the subpoenas, nor did she request any relief from the ALJ based on any failure to comply with subpoenas. *See id.*

For example, although the Tenant questioned DCRA Housing Inspector Butler about his failure to produce a copy of an inspection report he completed in connection with the Tenant's unit, the Tenant did not make any objections nor did she request any relief from the ALJ in the entire course of his testimony (e.g., a continuance). *See id.* at 10:19-10:25.

Furthermore, the Commission notes that DCRA Fire Inspector Smoot testified that a copy of the report detailing his inspection of the Tenant's unit had been misplaced, but that he may be able to provide it at a later date. *See id.* at 10:30. The Commission observes that the Tenant did not make an objection throughout the course of Mr. Smoot's testimony regarding his failure to produce a copy of his inspection report pursuant to a subpoena. *See id.* at 10:28-34. Counsel for the Tenant requested that the ALJ hold the record open after the conclusion of the hearing to allow for the submission of Mr. Smoot's inspection report at a later date, and the ALJ agreed. *See id.* at 10:30. However, the Commission's review of the record reveals that the Tenant did not submit a copy of Mr. Smoot's report at any time after the conclusion of the OAH hearing. *See* R. at 196-419.

The Commission's review of the substantial record evidence reveals that the Tenant was given the opportunity to examine and question each of the inspectors at the OAH hearing regarding the contents of their respective reports, and was not prevented in any way by the ALJ from presenting rebuttal testimony and other rebuttal evidence, and was not otherwise restricted or prevented from contesting the testimony of Inspector Butler or Inspector Smoot. *See* Hearing CD (OAH Mar. 21, 2007).

Furthermore, the Commission notes that, despite the Tenant's general objection at the outset of the OAH hearing, substantial evidence in the record reveals that the Tenant failed to object to any specific failure by the witnesses or the Housing Provider to produce documents pursuant to subpoenas, failed to request any appropriate relief from the ALJ for the failure to produce documents pursuant to subpoenas, and failed to avail herself of the opportunity presented by the ALJ to submit a copy of the fire inspector's report after the OAH hearing. *See* Hearing CD (OAH Mar. 21, 2007).

Accordingly, based upon the Commission's review of the record, because substantial evidence indicates that the Tenant failed to directly raise this issue before the ALJ during the OAH proceedings, the Commission is prohibited from reviewing this issue for the first time on appeal. *See* Lenkin Co. Mgmt., 642 A.2d at 1286; Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) at n.13; Barac Co., VA 02-107.

4. Whether the ALJ erred in concluding that there was no basis to award treble damages.

The Tenant asserts on appeal that the ALJ erred in determining that an award of treble damages was not appropriate in this case under D.C. OFFICIAL CODE § 42-3509.01(a). *See* Notice of Appeal at 2. *See also infra* at 28-9. The Tenant contends that treble damages were warranted because the evidence in the record showed that the Housing Provider knew, or "should have known" of violations of the Act, including improper rent increases and housing code violations. *See* Tenant's Brief at 13-14. The Housing Provider responded that the record contained no evidence of bad faith that would support an award of treble damages. *See* Housing Provider's Brief at 6-7.

In the Final Order, the ALJ determined that the record did not provide a basis for an award of treble damages, because the ALJ found no evidence to support a finding that the

Housing Provider's actions were "provoked by any dishonest motive or were intentional . . . Housing Provider had no reason to believe that its rent increases were inappropriate." Final Order at 22 (citing Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 505 A.2d 73, 76 n.6 (D.C. 1986); Schauer v. Assalaam, TP 27,084 (RHC Dec. 31, 2002) at 14-15; Third Jones Corp. v. Young, TP 20,300 (RHC Mar. 22, 1990) at 9).

As stated *supra* at 20, the Commission will uphold the ALJ's decision so long as it is in accordance with the provisions of the Act and supported by substantial evidence. *See* 14 DCMR § 3807.1. "Substantial evidence" has been defined as such relevant evidence as a reasonable mind might accept as able to support a conclusion. *See* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 (D.C. 1994); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012); Hago v. Gewirz, RH-TP-08-1,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011). The Commission has consistently stated that "[w]here substantial evidence exists to support the hearing examiner's findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [hearing] examiner.'" *See* Boyd v. Warren, RH-TP-10-29,816 (RHC June 5, 2013) (quoting Hago, RH-TP-08-12,085 at 6); Loney v. Tenants of 710 Jefferson St., N.W., SR 20,089 (RHC Jan. 29, 2013) at n.13; Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012); Marguerite Corsetti Trust, RH-TP-06-28,207.

The Commission's role is not to "weigh the testimony and substitute ourselves for the trier of fact who heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony." *See* Fort Chaplin Park Assocs., 649 A.2d at 1079; Commc'n Workers of Am. v. D.C. Comm'n on Human Rights, 367 A.2d 149, 152 (D.C. 1976); Atchole, RH-TP-10-29,891; Marguerite Corsetti Trust, RH-TP-06-28,207; Turner v.

Tscharner, TP 27,014 (RHC June 13, 2001) at 11; Gray v. Davis, TP 23,081 (RHC Dec. 7, 1993) at 5.

The penalties provision of the Act provides, in relevant part, the following:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of the subchapter II of this chapter . . . shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) . . . .

D.C. OFFICIAL CODE § 42-3509.01(a) (emphasis added).[15] In determining whether a housing provider is liable for treble damages, the Commission has established the following two-prong test: first, there must be a determination that the housing provider acted knowingly; and second, the housing provider's conduct must be "sufficiently egregious" to warrant a finding of bad faith. Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013) (quoting Cascade Park Apartments v. Walker, TP 26,197 (RHC Jan. 14, 2005)). *See also, e.g.* 1773 Lanier Place, N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009); Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005). In finding that a housing provider has acted in bad faith, the evidence must demonstrate that the conduct was "'egregious, display[ed] a deliberate refusal to perform without a reasonable excuse and/or manifest[ed] dishonest intent, sinister motive, or heedless disregard of duty.'" Drell, TP 27,233 (quoting Vicente v. Jackson, TP 27,614 (RHC Sept. 19, 2005)); Aker v. Peterson, TP 27,987 (RHC July 1, 2005); Third Jones Corp., TP 20,300. Furthermore, as a matter of law, the Commission has held that a finding of bad faith for purposes of treble

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[15] The Commission notes that the Act was amended, effective August 5, 2006, and the amended provision of D.C. OFFICIAL CODE § 42-3509.01(a) (Supp. 2007) provides, in relevant part, as follows:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter . . . shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent charged or for treble that amount (in the event of bad faith) . . . .

damages must be based upon specific findings of fact that demonstrate a "higher level of culpability." Drell, TP 27,233 (quoting Velrey Props. v. Wallace, TP 20,431 (RHC Sept. 11, 1989)); Cascade Park Apartments, TP 26,197.

The Commission's review of the record in this case reveals that the ALJ correctly stated the standard for the imposition of treble damages under D.C. OFFICIAL CODE § 42-3509.01(a). *See* Final Order at 22; R. at 225. Additionally, the Commission observes that the ALJ cited the following evidence in the record in support of his determination that the Housing Provider's conduct was not provoked by any dishonest motive: "[the] Housing Provider employed an outside consultant . . . because his firm specialized in complying with the filing requirements of the Act. Housing Provider had no reason to believe that its rent increases were inappropriate." *Id.* Moreover, the Commission is satisfied, based on its review of the record that the ALJ's findings on this issue were supported by substantial record evidence, including the testimony of Gene Santomartino, the President of Rent Control Consultants, a firm hired by the Housing Provider to ensure that rent increases at the Housing Accommodation comply with the Act's requirements. *See* Hearing CD (OAH Mar. 21, 2007) at 11:56-12:47.

The Tenant maintains on appeal that the Housing Provider's employment of the firm of Rent Control Consultants constitutes evidence that the Housing Provider "should have known" that it was implementing rent increases in violation of the Act. *See* Tenant's Brief at 13. The Tenant does not provide any legal grounds, standards or other support indicating that a housing provider's alleged constructive knowledge of violations of the Act constitutes an element of a determination of "bad faith" under D.C. OFFICIAL CODE § 42-3509.01(a). *See id. Cf.* Drell, TP 27,233; Aker, TP 27,987; Third Jones Corp., TP 20,300. The Commission's review of the record also does not indicate that the ALJ in any way restricted, or otherwise impaired, the Tenant in

introducing evidence to support the claim that the Housing Provider's expert's alleged constructive knowledge of violations constituted "bad faith" under D.C. OFFICIAL CODE § 42-3509.01(a). *See* Hearing CD (OAH Mar. 21, 2007). In this regard, the Tenant fails to identify any substantial record evidence from the OAH hearing record to support a claim that the Housing Provider "should have known" that it was implementing rent increases in violation of the Act. *See* Notice of Appeal at 2; Tenant's Brief at 12-14. Finally, in concluding that there was no evidence to support a determination that the Housing Provider's action were motivated by bad faith, the ALJ credited the testimony of Gene Santomartino as President of Rent Control Consultants that the Housing Provider took every effort to ensure that rent increases complied with the Act. *See* Final Order at 22; R. at 225; Hearing CD (OAH Mar. 21, 2007) at 11:56. As noted, the Commission has consistently stated that credibility determinations are "committed to the sole and sound discretion of the ALJ." *See* Fort Chaplin Park Assocs., 649 A.2d at 1079; Marguerite Corsetti Trust, RH-TP-06-28,207 (citing In re M.A.C., 761 A.2d 32, 42 (D.C. 2000)). *See* Eilers v. Bureau of Motor Vehicles Servs., 583 A.2d 677, 684 (D.C. 1990); Smith Prop. Holdings Three D.C. Ltd. P'ship v. Tenants of 2601 Woodley Place, N.W., CI 20,736 (RHC June 30, 1999); Ford v. Dudley, TP 23,973 (RHC June 3, 1999).

The Tenant also asserts that the Housing Provider demonstrated "bad faith" under D.C. OFFICIAL CODE § 42-3509.01(a) by making a "written admission" of alleged wrongdoing in an August 28, 2003 Certificate of Election of Adjustment of General Applicability (Certificate of Election), indicating that the Tenant's rent was $596, in contrast to the Tenant's lease agreement that stated the Tenant's rent was $1,000. *See id.* at 13-14. The Commission's review of the record does not indicate that the ALJ in any way restricted, or otherwise impaired, the Tenant in introducing evidence to support the claim that the Housing Provider's alleged mistaken amount

of rent in the Certificate of Election constituted "bad faith" under D.C. OFFICIAL CODE § 42-3509.01(a). However, the Commission's review of the record does not reveal any evidence introduced by the Tenant that the Housing Provider's allegedly mistaken amount of the rent charged in the Certificate of Election constitutes "bad faith" under D.C. OFFICIAL CODE § 42-3509.01(a) as a manifestation of "a deliberate refusal to perform without a reasonable excuse and/or . . . dishonest intent, sinister motive, or heedless disregard of duty." *See* Drell, TP 27,233; Aker, TP 27,987; Third Jones Corp., TP 20,300.

The Commission's review of the record reveals that the Tenant was not prevented in any way by the ALJ at the hearing from introducing testimony and other evidence in support of the contention that the Housing Provider's conduct was "egregious, display[ed] a deliberate refusal to perform without a reasonable excuse and/or manifest[ed] dishonest intent, sinister motive, or heedless disregard of duty."[16] *See* D.C. OFFICIAL CODE § 42-3509.01(a); Drell, TP 27,233; Aker, TP 27,987; Third Jones Corp., TP 20,300. *See also* Hearing CD (OAH Mar. 21, 2007). Furthermore, as the Commission explained *supra* at 29, the Commission may not substitute its own judgment for that of the ALJ, and where substantial evidence in the record exists to support the ALJ's findings, even the existence of substantial evidence to the contrary does not justify the Commission reversing the ALJ. *See* Boyd, RH-TP-10-29,816; Loney, SR 20,089 at n.13; Ahmed, Inc., RH-TP-28,799; Marguerite Corsetti Trust, RH-TP-06-28,207.

Having determined that substantial evidence supports the ALJ's determination that the Housing Provider did not act in bad faith, *see supra* at 30-31, the Commission affirms the ALJ's decision to not impose treble damages. *See* D.C. OFFICIAL CODE § 42-3509.01(a); 14 DCMR

[16] The Commission notes that, in accordance with D.C. OFFICIAL CODE § 2-509(b), "the proponent of a rule or order shall have the burden of proof," and thus it was the Tenant's burden in this case to submit substantial evidence into the record at the OAH hearing to support a finding of bad faith.

§ 3807.1; Caesar Arms, LLC, RH-TP-07-29,063; Drell, TP 27,344 (RHC Aug. 31, 2009); Smith, TP 27,661.

IV. CONCLUSION

Based on the foregoing, the ALJ's Final Order is affirmed.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

CLAUDIA McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

Pursuant to DC OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission. . . may seek judicial review of the decision . . . by filing a petition for review in the District of Columbia Court of Appeals. Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-06-28,690 was mailed, postage prepaid, by first class U.S. mail on this **16th day** of **May, 2014** to:

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