DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,749

In re: 907 6th Street, S.W., Unit 804-C

Ward Six (6)

UNITED DOMINION MANAGEMENT COMPANY AND NELL SOWERS[1]
Housing Provider/Appellants/Cross-Appellees

v.

TRESA RICE
Tenant/Appellee/Cross-Appellant

DECISION AND ORDER

August 15, 2013

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the District of Columbia (D.C.) Department of Consumer & Regulatory Affairs (DCRA), Housing Regulation Administration (HRA), Rental

[1] The Commission notes that, while the Tenant Petition identified Nell Sowers as the Housing Provider in this case, the pleadings filed by the Housing Provider throughout this case indicate that United Dominion Management Company is also a Housing Provider. For example: Housing Provider's notice of appeal is styled as "Notice of Appeal of Housing Provider/Appellants United Dominion Management Company and Nell Sowers" (hereinafter "Notice of Appeal"); the brief submitted on behalf of the Housing Provider (hereinafter "Housing Provider's Brief") identified the Housing Provider/Appellant as "United Dominion Management Company," and lists only United Dominion Management Company as the Housing Provider/Appellant in the case caption; and the Housing Provider/Respondent's List of Documents and Witnesses filed on February 7, 2007 with OAH list only United Dominion Management Company as the housing provider in the case caption. *See* Notice of Appeal; Housing Provider's Brief; Housing Provider/Respondent's List of Documents and Witnesses; Record (R.) at 53.

The Commission is satisfied that these statements in the Housing Provider's pleadings indicate United Dominion Management Company's consent to be included as a Housing Provider in this case. Accordingly, the Commission will amend the caption of this case to include United Dominion Management Company as a Housing Provider/Appellant. *See* 14 DCMR § 3809.3 (2004) ("If it appears to the Commission that the identity of the parties has been incorrectly determined by the Rent Administrator, the Commission may substitute or add the correct parties on its own motion.").

Accommodations and Conversions Division (RACD).[2] 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 D.C. Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501- 2-510 (2001 Supp. 2008), and the D.C. Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

On August 7, 2006, Tenant/Appellee/Cross-Appellant Tresa Rice (Tenant), residing in Unit 804-C of 907 6th Street, S.W. (Housing Accommodation), filed Tenant Petition RH-TP-06-28,749 (Tenant Petition) with the RACD, claiming that the Housing Provider/Appellants/Cross-Appellees, United Dominion Management Company and Nell Sowers (hereinafter, collectively "Housing Provider"), violated the Act as follows: "[t]he rent ceiling filed with the Rental Accommodations and Conversion Division for my/our unit(s) is improper." Tenant Petition at 1-3; R. at 22-24.

On January 11, 2007, Administrative Law Judge Wanda R. Tucker (ALJ) issued a Case Management Order (CMO) that set a hearing date for February 13, 2007. CMO at 1; R. at 34. A hearing was held in this matter on February 13, 2007 at which both the Tenant and the Housing Provider appeared. R. at 59. On May 23, 2008, the ALJ issued a final order, Rice v. Sowers, RH-TP-06-28,749 (OAH May 23, 2008) (Final Order). R. at 66-76. The ALJ made the following findings of fact: [3]

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[2] OAH assumed jurisdiction over tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01, -1831.03(b-1)(1) (2001 Supp. 2005). The functions and duties of the RACD were transferred to the Department of Housing and Community Development (DHCD) by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (September 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (2001 Supp. 2008).

[3] The ALJ's findings of fact appear in this decision using the language contained in the Final Order.

1. The housing accommodation at issue is located at 907 6th Street, SW, Unit 804C.

2. On August 29, 2000, Housing Provider filed an *Amended Registration Form* with RACD showing a $317 rent ceiling adjustment from $1015 to $1332 for Tenant's Unit 804, based on the rent ceiling for comparable unit 204. The date of vacancy and change in the rent ceiling reflected on the Form is July 1, 2000. PX 101.

3. By *Notice of Increase in Rent Charged*, dated June 28, 2006, Housing Provider notified Tenant that effective August 1, 2006, her monthly rent would be increased by $210, from $1019 to $1229. RX 200.

4. The *Notice of Increase in Rent Charged* attributed the $210 rent increase to a $317 "Vacancy High Comp." rent ceiling adjustment, pursuant to section 213(a)(2) of the Rental Housing Act.

Final Order at 5; R. at 72.

The ALJ made the following conclusions of law in the Final Order:[4]

1. This matter is governed by the Rental Housing Act of 1985 (D.C. OFFICIAL CODE §§ 42-3501.01 *et seq.* [(2001)]) (Rental Housing Act); substantive rules implementing the Rental Housing Act at 14 DCMR [§§] 4100-4399 [(2004)]; the Office of Administrative Hearings Establishment Act of 2001 at D.C. OFFICIAL CODE § 2-1831.03(b-1) [(2001)], which authorizes OAH to adjudicate rental housing cases; and OAH procedural rules at 1 DCMR [§§] 2800 *et seq.* ([2004]) and 1 DCMR [§§] 2920 *et seq.* [(2004)].

2. The Rental Housing Act provides that:

> When a tenant vacates a rental unit on the tenant's own initiative or as a result of a notice to vacate for nonpayment of rent, violation of an obligation of the tenant's tenancy, or use of the rental unit for illegal purpose or purposes as determined by a court of competent jurisdiction, the rent ceiling may, at the election of the housing provider, be adjusted to . . . . [t]he rent ceiling of a substantially identical rental unit in the same housing accommodation.

Housing Provider has introduced into the record an *Amended Registration Form*, which shows Housing Provider's intent to adjust the rent ceiling for Tenant's unit by $317 in August 2000 pursuant to this provision of the Act.

3. Substantive rules implementing the Rental Housing Act at 14 DCMR [§] 4207.5 [(2004)] provide that a "[h]ousing Provider who so elects, shall take and perfect a

[4] The ALJ's conclusions of law appear in this decision using the language contained in the Final Order, except that the Commission has numbered the conclusions of law for ease of reference.

vacancy rent ceiling adjustment in the manner set forth in [14 DCMR] § 4204.10." This provision explicitly addresses perfection of rent ceiling adjustments of general applicability and, in pertinent part, requires a housing provider to file a *Certificate of Election of General Applicability*, as evidence of the election to adjust the rent ceiling for this purpose, within 30 days of the date the housing provider is eligible to do so.

4. In Sawyer, the District of Columbia Court of Appeals upheld the Rental Housing Commission's (Commission's) determination that the reference in 14 DCMR [§] 4207.5 [(2004)] to 14 DCMR [§] 4204.10 [(2004)], requires a housing provider to perfect a vacancy rent ceiling adjustment by filing an *Amended Registration Form*, as evidence of the election to take the adjustment, within 30 days following the vacancy. The record is clear, and Housing Provider does not dispute, that the *Amended Registration Form* was not filed within 30 days of the vacancy. Based on the analysis in Sawyer, the vacancy rent ceiling adjustment was not properly perfected, as it was not filed timely.

5. Rules implementing the Rental Housing Act permit a housing provider to increase the rent for a rental unit to an amount equal to a vacancy rent ceiling adjustment. The *Notice of Increase* at issue shows Housing Provider's intent to increase the rent for Tenant's unit by $210, a portion of the improperly perfected August 2000 vacancy rent ceiling adjustment.

6. Housing Provider argues that the improper perfection of the rent ceiling adjustment is of no consequence in this case. Housing Provider argues that, for purposes of the statute of limitations, the critical date is the date the rent ceiling adjustment was filed. Since that date is six years before TP 28[,]749 was filed, any examination of the circumstances attendant to that filing is time barred. Thus, the rent increase is valid. Tenant argues that the complaint is not time barred, as the statute begins to run from the date of the rent increase. Tenant argues further that a rent ceiling adjustment tied directly to a rent increase may be examined and, if the adjustment is not properly perfected, the resulting rent increase is invalid. The statute and case law supports Tenant's position.

7. The Rental Housing Act provides that:

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

8. In Kim, the housing provider filed an *Amended Registration Form* with the Rent Administrator in November 1974, which showed a $100 rent ceiling for the rental unit at issue. The housing provider increased the rent for the unit to $350 in October 1983 and to $420 in February 1987. In February 1993, more than nine

years after the first increase and six years after the second increase, the tenant filed a petition complaining that the rent exceeded the rent ceiling. The Commission held that although the rent ceiling for the unit was $100, the tenant's complaint was time barred because it was not filed within three years of any rent increase at issue. The rent ceiling adjustment date was not determinative. The Commission's decision was based solely on the timeliness of the tenant petition in relation to the rent increases. Thus, Kim is consistent with Tenant's position that the statute begins to run from the date of a rent increase.

9. In Kennedy the tenants filed a petition in April 1994, challenging rents paid between April 1991 and April 1994. The tenants stipulated that there were no challengeable violations of the Rental Housing Act between April 1991 and April 1994, but argued that the rents were invalid because they included amounts derived from an improperly calculated rent ceiling adjustment filed in June 1986. The court rejected this line of reasoning, concluding that the tenants were attempting to do indirectly, what they could not do directly - challenge a six year old rent ceiling adjustment. Accordingly, the court upheld the Commission's determination that the tenants' claims were time barred.

10. However, in reaching its decision, the court upheld the Commission's determination that "rent ceilings by themselves are not an adjustment in rent; however, after the rent ceilings are implemented on a specific effective date, the three year statute of limitations in the Act begins to run." Moreover, the court reasoned that "the contention that one may challenge *a particular rent amount* . . . not an adjustment which led to it . . . strains the plain meaning of the statute." Thus, Kennedy supports the Tenant's position that the statute of limitations begins to run from the date of a rent increase and that a rent ceiling adjustment tied directly to the rent increase may be challenged. Moreover, Kennedy is consistent with Sawyer, wherein the court upheld the Commission's determination that an improperly perfected rent ceiling adjustment cannot support a subsequent rent increase.

11. Here, Tenant is challenging a rent increase implemented six days prior to the date of the tenant petition. The rent increase amount is tied directly to an improperly perfected rent ceiling adjustment. The amount was first passed on as rent just six days prior to the date the petition was filed. Sawyer, Kennedy, and Kim, make clear that the statute of limitations begins to run from the first effective date of a rent increase. Tenant's claim is not time barred. Sawyer and Kennedy make clear that a rent ceiling adjustment tied directly to a rent increase may be challenged. Sawyer makes clear that the rent increase is invalid because the rent ceiling adjustment tied directly to the rent increase was not properly perfected.

12. When a housing provider demands rent for a rental unit in excess of the maximum allowable rent for the unit, this administrative court is authorized to roll the rent back to an amount determined by this administrative court. There is evidence in the record to show that Housing Provider demanded monthly rent in the amount

of $1229 for Tenant's unit, beginning August 1, 2006, through February 2007. The record also shows that $210 of the $1229 demanded exceeds the maximum allowable rent for the rental unit, as it is based on an improperly perfected rent ceiling adjustment. Therefore, Tenant's monthly rent is rolled back to $1019, effective August 1, 2006.

13. This administrative court also is authorized to refund amounts demanded in excess of the maximum allowable rent, plus interest on the refund amount through the date of this Order. Therefore, Housing Provider must refund to tenant $1470, which represents $210 for each month, beginning August 1, 2006, through February 2007; and pay Tenant $91.68, which represents interest on the refunded amount from August 1, 2006, through the date of this Order.

Final Order at 5-10; R. at 67-72 (citations omitted) (emphasis in original).

On June 2, 2008, the Housing Provider filed its Notice of Appeal with the Commission, in which it raises the following issue:[5]

1. The Final Order is erroneous as a matter of law in that the Tenant Petitioner's claim is barred by the statute of limitations in D.C. [OFFICIAL] CODE [§] 42-3502.06(e).

Notice of Appeal at 1. On June 5, 2008, the Tenant filed a cross-appeal (hereinafter "Notice of Cross-Appeal"), in which she raises the following issue:[6]

1. The ALJ erred in establishing the period from which the Tenant should have been awarded relief for the actual period of time Tenant paid the disputed increase in rent.

Notice of Cross-Appeal at 1.

The Tenant filed a Response to Housing Provider's Appeal on June 16, 2008, and the Housing Provider's Brief was filed on June 27, 2008. Thereafter the Housing Provider filed a

[5] The Commission recites the issue here using the language of the Housing Provider in the Notice of Appeal.

[6] The Commission recites the issue on cross-appeal here using the language of the Tenant in the Notice of Cross-Appeal.

response to the Tenant's Notice of Appeal (hereinafter "Housing Provider's Response to Cross-Appeal") on July 7, 2008.[7] The Commission held a hearing in this matter on July 22, 2008.

II. HOUSING PROVIDER'S ISSUE ON APPEAL

1. Whether the Final Order is erroneous as a matter of law in that the Tenant Petitioner's claim is barred by the statute of limitations in D.C. OFFICIAL CODE § 42-3502.06(e).[8]

III. TENANT'S ISSUE ON CROSS-APPEAL

1. Whether the ALJ erred in establishing the period from which the Tenant should have been awarded relief.

IV. DISCUSSION OF HOUSING PROVIDER'S ISSUE ON APPEAL

1. Whether the Final Order is erroneous as a matter of law in that the Tenant Petitioner's claim is barred by the statute of limitations in D.C. OFFICIAL CODE § 42-3502.06(e).

In the Final Order, the ALJ determined that the Tenant's claim was not barred because § 42-3502.06(e) "begins to run from the first effective date of a rent increase" and therefore "a rent ceiling adjustment tied directly to a rent increase may be challenged." Final Order at 9-10; R. at 67-68 (citing Sawyer v. D.C. Rental Hous. Comm'n, 877 A.2d 96 (D.C. 2005); Kennedy v.

[7] The Commission notes that its regulations at 14 DCMR § 3802.6 (2004) ("[a]ny party upon whom a notice of appeal has been served may file an answer with the Commission within ten (10) days of services....") require that an answer to the Tenant's Notice of Cross-Appeal be filed with the Commission within ten (10) days of service of the Tenant's Notice of Cross-Appeal, or ten (10) days after June 2, 2008. 14 DCMR § 3802.6 (2004). *See* Tenant's Notice of Cross-Appeal at 5. The Commission's review of the record reveals that the period of time for filing a response to the Tenant's Notice of Cross-Appeal ended on June 19, 2008, more than two (2) weeks prior to the filing of the Housing Provider's Response to Cross-Appeal on July 7, 2008. Accordingly, the Commission will not consider the Housing Provider's Response to Cross-Appeal in its determination of the issue raised in the Tenant's Cross-Appeal. 14 DCMR § 3802.6 (2004)

[8] D.C. OFFICIAL CODE § 42-3502.06(e) (2001) shall be referred to herein as "D.C. OFFICIAL CODE § 42-3502.06(e)" or as "§ 42-3502.06(e)," and 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 to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

(emphasis added).

D.C. Rental Hous. Comm'n, 709 A.2d 94 (D.C. 1998); Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Feb. 24, 2006); Kim v. Woodley, TP 23,260 (RHC Sept. 13, 1994)). In reaching this conclusion, the ALJ relied on the District of Columbia Court of Appeals' (DCCA) opinion in Sawyer, 877 A.2d 96, for the proposition that "an improperly perfected rent ceiling adjustment cannot support a subsequent rent increase," and reasoned that the DCCA's opinion in Kennedy, 709 A.2d at 99, supported the Tenant's contention that "the statute of limitations beings to run from the date of a rent increase and . . . a rent ceiling adjustment tied directly to the rent increase may be challenged." *See* Final Order at 9; R. at 68.

The Commission observes that the factual context in this case is identical to that in United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013).[9] In each case, a tenant is contesting an increase in rent charged which has occurred within three years of the date of filing of the respective tenant petition at issue, thereby within the limitations period of § 42-3502.06(e). *See* Final Order at 2; R. at 75; Hinman, RH-TP-06-28,728 at 3. In each case, the tenant's legal challenge is based upon the failure of the housing provider to comply with the Act's requirements for taking and perfecting an adjustment in the rent ceiling upon which the corresponding, contested increase in rent charged is based. *See* Final Order at 2-3; R. at 74-75; Hinman, RH-TP-06-28,728 at 3. In each case, the contested rent ceiling adjustment occurred more than three years before the filing of the respective tenant petition at issue, thereby beyond the limitations period of § 42-3502.06(e). *See* Final Order at 3; R. at 74; Hinman, RH-TP-06-28,728 at 3. In each case, the housing provider claimed that, because the contested rent ceiling adjustment occurred beyond the three-year limitations period of § 42-3502.06(e), the tenant's claim of an illegal increase in the corresponding rent charged was barred by § 42-3502.06(e),

[9] The Commission observes that all factual references in its decision and order in Hinman, RH-TP-06-28,728, were adopted and affirmed from the OAH's findings of fact and conclusions of law in that case.

even though the allegedly improper adjustment in rent charged occurred within the limitations period of § 42-3502.06(e). *See* Final Order at 4; R. at 73; Hinman, RH-TP-06-28,728 at 4.

Specifically, in this case, the Tenant is challenging a 2006 adjustment in rent charged that implements a 2000 adjustment in rent ceiling that was not properly taken and perfected in violation of 14 DCMR § 4204.10 (2004).[10] *See* Final Order at 6-7; R. at 70-71. In Hinman, RH-TP-06-28,728, the tenant challenged a 2006 adjustment in rent charged that implemented a 2001 adjustment in rent ceiling that was not properly taken and perfected in violation of 14 DCMR §§ 4204.9, -.10 (2004). *See* Hinman, RH-TP-06-28,728 at 7-8.

Having noted an identical factual context in this case and Hinman, RH-TP-06-28,728, the Commission also observes that the over-arching legal issue raised in this case is identical to the issue addressed and determined by the Commission in Hinman, RH-TP-06-28,728: whether § 42-3502.06(e), as a matter of law, bars a tenant's claim of an improper adjustment in rent charged that occurs within the three-year limitations period of § 42-3502.06(e), when the allegedly improper corresponding adjustment in rent ceiling upon which the tenant's claim is based occurred beyond the three-year limitations period of § 42-3502.06(e). *See* Notice of Appeal at 1; Hinman, RH-TP-06-28,728 at 4.[11]

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[10] The Commission observes that previous, identical versions of the regulations governing the taking and perfecting of adjustments in rent ceilings, 14 DCMR §§ 4204.9, -.10 (2004), were in effect at the time of the 2000 adjustment in rent ceiling at issue in this case – 14 DCMR §§ 4204.9, -.10 (1991). For the language of these regulations, *see infra* at n.12.

[11] The Commission notes that, in addition to the issue raised on appeal in this case, the housing provider in Hinman (RHC) raised six (6) additional issues on appeal, as follows:

1. The Final Order is erroneous as a matter of law in that the invalidation of the August 2006 rent increase is barred by the statute of limitations in D.C. [OFFICIAL] CODE [§] 42-3502.06(e).

2. The Final Order is erroneous as a matter of law in that the invalidation of the March 1, 2001 vacancy rent ceiling adjustment was barred by the statute of limitations in D.C. [OFFICIAL] CODE [§] 42-3502.06(e).

Finally, the Commission observes that the additional legal issues identified in the Housing Provider's Brief in this case are nearly identical to those raised in the housing provider's brief in Hinman, RH-TP-06-28,728, and that these issues were also addressed (and determined) by the Commission in its decision in Hinman, RH-TP-06-28,728. *Compare* Housing Provider's Brief at 4-19, *with* Hinman, RH-TP-06-28,728 at 7-9, 17-18, 45-46. For example, the Housing Provider in this case, makes the following assertions in its brief: (1) the Act's statute of limitations at § 42-3502.06(e) applies to rent ceilings as well as rents charged, *see* Housing Provider's Brief at 4-5 (citing Kennedy v. D.C. Rental Hous. Comm'n, 709 A.2d 94, 97-100 (D.C. 1998); Borger Mgmt. v. Godfrey, TP 20,116 (RHC Sept. 4, 1989)); (2) the effective date of an adjustment in rent ceiling for purposes of calculating the limitations period in § 42-3502.06(e) is the date when it is "taken and perfected" through the filing of an amended registration form by a housing provider pursuant to 14 DCMR §§ 4204.9-.10 (2004),[12] not the

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3. This Commission's Decision and Order in Grant v. Gelman Management Co., TP 27,995 (RHC Feb[.] 4 [sic], 2006), and its application in the Final Order in this case, is contrary to the statute of limitations in D.C. [OFFICIAL] CODE [§] 42-3502.06(e), and precedents of the District of Columbia Court of Appeals, and must be overruled.

4. This Commission's Decision and Order in Grant v. Gelman Management Co., TP 27,995 (RHC Feb[.] 4 [sic], 2006), and its application in the Final Order in this case, is contrary to the Constitution of the United States, including, without limitation, U.S. Const., Amend 5, as interpreted by the Supreme Court of the United States in inter alia, William Danzer & Company, Inc. v. Gulf & Ship Island Railroad Company, 268 U.S. 633 (1925) and precedents of the District of Columbia Court of Appeals and this Commission interpreting the statute of limitations in D.C. [OFFICIAL] CODE [§] 42-3502.06(e).

5. The Final Order and its unconstitutional application of Grant v. Gelman Management Co., TP 27,995 (RHC Feb[.] 4 [sic], 2006) violates the Civil Rights of Appellant to due process of law and violates 42 U.S.C. [§] 1983 [(2006)].

6. The Final Order is erroneous as a matter of law in that it retroactively applies the Decision and Order in Grant v. Gelman Management Co., TP 27,995 (RHC Feb[.] 4 [sic], 2006) to the March 1, 2001 rent ceiling adjustment at issue in this proceeding.

See Hinman, RH-TP-06-28,728 at 4-5.

[12] 14 DCMR § 4204.9 states the following:

date of implementation, *see* Housing Provider's Brief at 5-11 (citing Majerle Mgmt. v. D.C. Rental Hous. Comm'n, 866 A.2d 41 (D.C. 2004); Kennedy, 709 A.2d at 99; Williams v. Alvin L. Aubinoe, Inc., TPs 22,821 & 22,814 (RHC Aug. 12, 1992); Ayers v. Landow, TP 21,273 (RHC Oct. 4, 1990) at 17-18)); and (3) the ALJ's Final Order violates the Due Process Clause of the Constitution. *See* Housing Provider's Brief at 11-19 (citing Stogner v. California, 539 U.S. 607 (2003); William Danzer & Co., Inc. v. Gulf & Ship Island R.R. Co., 268 U.S. 633 (1925); Amoco Prod. Co. v. Newton Sheep Co., 83 F.3d 1464, 1474 (10th Cir. 1996); Kennedy, 709 A.2d at 99).

The housing provider's brief in Hinman, RH-TP-06-28,728, made the following, nearly identical, contentions: (1) the term "rent adjustment" in § 42-3502.06(e) has been interpreted to apply to adjustments in rent ceiling as well as adjustments in rent charged, *see* Hinman, RH-TP-06-28,728 at 8 (citing Kennedy, 709 A.2d at 97-100; Godfrey, TP 20,116); (2) the effective date of an adjustment in rent ceiling for purposes of § 42-3502.06(e) is the date it is "taken and perfected" pursuant to 14 DCMR §§ 4204.9-.10 (2004), *see* Hinman, RH-TP-06-28,728 at 8

> Except as provided in § 4204.10, any rent ceiling adjustment authorized by the Act and this chapter shall be taken and perfected within the time provided in this chapter, and shall be considered taken and perfected only if the housing provider has filed with the Rent Administrator a properly executed amended Registration/Claim of Exemption Form as required by § 4103.1, and met the notice requirements of § 4101.6.

14 DCMR § 4204.10 provides as follows:

> Notwithstanding § 4204.9, a housing provider shall take and perfect a rent ceiling increase authorized by § 206(b) of the Act (an adjustment of general applicability) by filing with the Rent Administrator and serving on the affected tenant or tenants in the manner prescribed in § 4101.6 a Certificate of Election of Adjustment of General Applicability, which shall:
>
> (a) Identify each rental unit to which the election applies;
>
> (b) Set forth the amount of the adjustment elected to be taken, and the prior and new rent ceiling for each unit; and
>
> (c) Be filed and served within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.

(citing Majerle Mgmt., 866 A.2d 41; Williams, TPs 22,821 & 22,814; Ayers, TP 21,273); and (3) an interpretation of § 42-3502.06(e) that allows a tenant to challenge an adjustment in rent ceiling that occurred more than three years prior to the filing of the tenant petition, even where the adjustment in rent ceiling was implemented through a corresponding adjustment in rent charged that occurred within the three years prior to the filing of the tenant petition, is unconstitutional and violates the Due Process Clause of the Constitution. *See* Hinman, RH-TP-06-28,728 at 45 (citing Danzer, 268 U.S. 633; Amoco Prod. Co., 83 F.3d at 1474; Kennedy, 709 A.2d at 99).[13]

Based upon its foregoing analysis, the Commission is satisfied that the relevant factual contexts in this case and in Hinman, RH-TP-06-28,728, are substantially similar, if not identical, s*ee supra* at 8-9, and that the major legal issues raised in this appeal and in Hinman, RH-TP-06-28,728, regarding the interpretation and application of § 42-3502.06(e) with respect to such similar factual contexts, are also substantially similar, if not identical. *See supra* at 9-12. Due to the similarity of factual contexts and legal issues regarding the interpretation and application of § 42-3502.06(e) in this case and in Hinman, RH-TP-06-28,728, the Commission determines that its decision in Hinman, RH-TP-06-28,728, serves as appropriate and controlling legal precedent for its decision and order in this case. The Commission thus affirms the Final Order on the same legal authority, grounds, and analysis as contained and elaborated in detail in its decision and order in Hinman, RH-TP-06-28,728, and will apply the legal standards established in Hinman,

[13] In observing the similarities between the notices of appeal and the briefs on appeal submitted by the Housing Provider in this case and the housing provider in Hinman, RH-TP-06-28,728, the Commission notes further that the housing accommodation is the same in both cases (907 6th St., S.W.), the housing provider is the same in both cases (United Dominion Management Company), and counsel for the housing provider is the same in both cases (Richard Luchs and Vincent Policy of the law firm Greenstein, DeLorme & Luchs, P.C.). Hinman, RH-TP-06-28,728. *See* Notice of Appeal; Housing Provider's Brief. The primary difference between these two cases appears to be merely the identity of the tenant.

RH-TP-06-28,728, to the issues raised in this appeal which, as noted *supra* at 9-12, are substantially similar to the issues raised in Hinman, RH-TP-06-28,728.

(a) Whether the term "rent adjustment' as contained in § 42-3502.06(e) refers to both rent ceilings and rents charged

The Commission determined in Hinman, RH-TP-06-28,728, that, while both the Act and its regulations indisputably incorporate and utilize separate and distinct definitions for "rent [charged]" and "rent ceiling," thereby undermining the housing provider's assertion that the term "rent adjustment" in § 42-3502.06(e) applies to both adjustments in rent ceiling and adjustments in rent charged, the applicable language and text of the Act (especially in the absence of clarifying legislative history) do not by themselves conclusively determine this issue. *See* Hinman, RH-TP-06-28,728 at 11-15 (citing D.C. OFFICIAL CODE §§ 42-3501.03 (28)-(29) (2001); 14 DCMR §§ 4200.5, -.7 (2004)). The Commission is not persuaded by the legal contentions of the Housing Provider on this issue to disturb our decision in Hinman, RH-TP-06-28,728. *See* Hinman, RH-TP-06-28,728 at 14-15. *See also* Housing Provider's Brief at 4-5.

(b) Whether the effective date of an adjustment in rent ceiling for purposes of calculating the limitations period in § 42-3502.06(e) is the date when it is "taken and perfected" through the filing of an amended registration form by a housing provider pursuant to 14 DCMR §§ 4204.9-.10 (2004), not the date of implementation through an adjustment in rent charged

In Hinman, RH-TP-06-28,728, the Commission rejected the contention by the housing provider, also made in this appeal, that an uninterrupted line of cases, including Majerle Mgmt., 866 A.2d 41, Kennedy, 709 A.2d at 99, Williams, TPs 22,821 & 22,814, and Ayers, TP 21,273 at 17-18, serve as clear, conclusive precedent that the "effective date" for an adjustment in rent ceiling under § 42-3502.06(e) is the date when an adjustment in rent ceiling is "filed" or "taken and perfected" under 14 DCMR §§ 4204.9-.10 (2004), and not the date when it is implemented through a corresponding adjustment in rent charged. *See* Hinman, RH-TP-06-28,728 at 38-39.

To the contrary, the Commission determined that the "effective date" of an adjustment in rent ceiling is the date that it is implemented through a corresponding adjustment in rent charged, and not the date when it is "taken and perfected" through the filing of an amended registration form by a housing provider pursuant to 14 DCMR §§ 4204.9-.10 (2004). *See* Hinman (RHC) at 23-24.

In Hinman, RH-TP-06-28,728, addressing the same cases cited by the Housing Provider in this appeal to support its interpretation of the term "effective date" in § 42-3502.06(e), the Commission noted that the "effective date" of the contested adjustments in rent ceiling in those cases, *see* Majerle, 866 A.2d at 43-44, Kennedy, 709 A.2d at 98-99, Williams, TPs 22,821 & 22,814 at 7-9, Ayers, TP 21,273 at 15-19, occurred beyond the limitations period of § 42-3502.06(e) regardless of whether the term "effective date" had been interpreted as the date when an adjustment in rent ceiling was taken and perfected under 14 DCMR §§ 4204.9-.10 (2004), or as the date of its implementation through a corresponding adjustment in rent charged. *See* Hinman, RH-TP-06-28,728 at 28-39. *See also* Majerle, 866 A.2d at 43-44; Kennedy, 709 A.2d at 98-99; Williams, TPs 22,821 & 22,814 at 7-9; Ayers, TP 21,273 at 15-19. The Commission thus concluded that the outcome of the cases cited by the housing provider, including Majerle, 866 A.2d at 43-44, and Kennedy, 709 A.2d at 98-99, failed to support any assertion that the ALJ in Hinman, RH-TP-06-28,728, like the ALJ in this case, erred in determining that, under § 42-3502.06(e), the "effective date" of a rent ceiling adjustment is the date of its implementation through a corresponding adjustment in rent charged. *See* Hinman, RH-TP-06-28,728 at 28-39.

The Commission further concluded that, just as in this case, when a contested adjustment in rent ceiling is beyond the three-year limitations period in § 42-3502.06(e), but the date of its implementation through a corresponding adjustment in rent charged is within the limitations

period, any claims under the Act regarding an alleged impropriety in either the adjustment in rent charged or the adjustment in rent ceiling are not barred by § 42-3502.06(e).[14] *See* Hinman, RH-TP-06-28,728 at 23-24.

For the same reasons that the Commission rejected the housing provider's contentions regarding this issue in Hinman, RH-TP-06-28,728, we are not persuaded by the equivalent legal contentions made by the Housing Provider in this case to disturb our decision in Hinman, RH-TP-06-28,728, on the meaning of the term "effective date" in § 42-3502.06(e). *See* Hinman, RH-TP-06-28,728 at 16-44. *See also* Housing Provider's Brief at 5-11.

(c) Whether the ALJ's Final Order violates the Due Process Clause of the Constitution, U.S. Const. amend. V

The Commission in Hinman, RH-TP-06-28,728, rejected the same assertion as made by the Housing Provider in this appeal, that the ALJ's interpretation of § 42-3502.06(e) violates the Due Process Clause of the Fifth Amendment of the Constitution, U.S. Const. amend. V ("[n]o

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[14] Consistent with its interpretation of the meaning of the term "effective date" in § 42-3502.06(e) in Hinman, RH-TP-06-28,728, the Commission made the following observations regarding the applicability of § 42-3502.06(e) in various factual scenarios:

> When, as in Kennedy, [709 A.2d at 97-99,] the "effective date" of a contested adjustment in rent ceiling is beyond the limitations period in § 42-3502.06(e) – because the date of its implementation through a corresponding, contested adjustment in rent charged is also beyond the limitations period – the Commission is satisfied that any claims under the Act regarding either adjustment are barred by § 42-3502.06(e) . . . .
>
> [W]hen the "effective date" of a contested adjustment in rent ceiling is within the limitations period in § 42-3502.06(e) – and its corresponding, contested adjustment in rent charged also occurs within the limitations period – the Commission observes that any claims under the Act regarding either adjustment are not barred by the limitations period of § 42-3502.06(e).
>
> Finally . . . when a contested adjustment in rent ceiling is beyond the limitations period in § 42-3502.06(e) – but the date of its implementation through a corresponding, contested adjustment in rent charged is within the limitations period – the "effective date" of the contested adjustment in rent ceiling under § 42-3502.06(e) remains as the date of its implementation through the corresponding adjustment in rent charged, and any claims under the Act regarding either adjustment are permitted under § 42-3502.06(e).

See Hinman, RH-TP-06-28,728 at 23-24 (citing Kennedy, 709 A.2d at 97-9; Grant Order on Reconsideration at 10-11; Grant, TP 27,995 (Feb. 24, 2006)) (emphasis in original).

person shall...be deprived of life, liberty, or property, without due process of law.") *See* Hinman, RH-TP-06-28,728 at 45; Housing Provider's Brief at 11-19. The Commission found no merit in the housing provider's contention, also made in this appeal, that the DCCA in Kennedy, 709 A.2d at 99,[15] determined that § 42-3502.06(e) is a "statute of repose" which completely extinguishes a cause of action after the expiration of the three year limitations period contained therein. *See* Hinman, RH-TP-06-28,728 at 45-50; Housing Provider's Brief at 16-25. The Commission observed that, "[w]hile the DCCA in Kennedy did assert that § 42-3502.06(e) placed a limitation on a tenant's right to recover and right to a remedy, the Commission does not agree that the DCCA made any specific conclusion in Kennedy, as claimed by the [h]ousing [p]rovider, that § 42-3502.06(e) constituted a 'statute of repose' equivalent in nature and effect to the statute of limitations at issue in Danzer, 268 U.S. 633."[16] *See* Hinman, RH-TP-06-28,728 at 49.

The Commission in Hinman, RH-TP-06-28,728, dismissed a claim also made in this appeal by the Housing Provider, that an uninterrupted line of cases in this jurisdiction, including Kennedy, 709 A.2d at 99, Estate of Huang v. D'Albora, 644 A.2d 1, 3-4 (D.C. 1994), and Scholz P'ship v. Rental Accommodations Comm'n, 427 A.2d 905, 914-15 (D.C. 1981), served as clear

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[15] The Housing Provider in this appeal, like the housing provider in Hinman, RH-TP-06-28,728, maintains that the following characterization of § 42-3502.06(e) from Kennedy, 702 A.2d at 99, properly serves as the basis of its constitutional challenge to the ALJ's interpretation of § 42-3502.06(e) herein: "[T]he statute of limitations in the Act [§ 42-3502.06(e)] places a limitation on the tenants' right to recover, as well as, the right to a remedy (refunds)." *See* Housing Provider's Brief at 12; Hinman, RH-TP-06-28,728 at 46.

[16] As noted in Hinman, RH-TP-06-28,728 at 47 (citations omitted):

> In Danzer, . . . the Interstate Commerce Commission had interpreted the Transportation Act of 1920 to allow the revival of a plaintiff's claim for damages that was otherwise barred under a state's statute of limitations. The Supreme Court determined that the company's "lapse of time" in filing its claim for damages "not only barred the remedy but also destroyed the liability of defendant to plaintiff." The Court observed that it would be a violation of the Due Process Clause of the Fifth Amendment to interpret a law to create liability that had otherwise been properly barred under a state's statute of limitations.

precedent for interpreting § 42-3502.06(e) as an absolute bar to the Tenant's claim. *See* Hinman (RHC) at 47-50; Housing Provider's Brief at 17-19. The Commission determined in Hinman, RH-TP-06-28,728, that the cases cited by the Housing Provider in support of its constitutional challenge in this appeal, such as Danzer, 268 U.S. 633, Stogner, 539 U.S. 607, and Amoco Prod. Co., 83 F.3d at 1474, were factually distinguishable, raised different legal issues, or were otherwise substantively inapposite, to serve as appropriate precedent supporting a claim that the ALJ's interpretation of § 42-3502.06(e) violated the Due Process Clause of Fifth Amendment. U.S. Const. amend. V. *See* Hinman, RH-TP-06-28,728 at 45-54 & nn.42 & 46.

With respect to the constitutional issues raised in this appeal regarding the ALJ's interpretation of § 42-3502.06(e), which are substantially similar to the constitutional issues that were raised in Hinman, RH-TP-06-28,728, the Commission concluded as follows:

> The Commission is further satisfied that the ALJ's interpretation of § 42-3502.06(e) in the Final Order is rationally related to the purposes of the Act, and is consistent with the due process requirements of the Fifth Amendment of the Constitution. The ALJ's interpretation of the term "effective date" in § 42-502.06(e) in this case does not alter the limitations period contained in § 42-3502.06(e).

Hinman, RH-TP-06-28,728 at 58 (citations omitted). The Commission is similarly not persuaded by the legal contentions of the Housing Provider in this appeal regarding this issue to disturb its decision in Hinman, RH-TP-06-28,728, as described *supra*. *See* Hinman, RH-TP-06-28,728 at 44-59. *See also* Housing Provider's Brief at 11-19.

For the foregoing reasons, and on the basis of the legal standards and holdings on the same issues addressed by the Commission in Hinman, RH-TP-06-28,728, the Commission determines that the Final Order is not erroneous as a matter of law, and that the Tenant's claim that the Housing Provider implemented an adjustment in rent charged in violation of the Act is not barred by the statute of limitations in D.C. OFFICIAL CODE § 42-3502.06(e). *See* Hinman,

RH-TP-06-28,728 at 7-44. Accordingly, the Commission affirms the Final Order on this issue. *See* Hinman, RH-TP-06-28,728.

V. DISCUSSION OF TENANT'S ISSUE ON CROSS-APPEAL

1. Whether the ALJ erred in establishing the period from which the Tenant should have been awarded relief.

The Tenant contends in the Notice of Cross-Appeal that the ALJ erred by awarding the rent refund through the date of the hearing, February 13, 2007, rather than through the date of the Final Order, May 23, 2008. *See* Tenant's Notice of Cross-Appeal at 1-2. The Tenant asserts that she continued to pay her rent based on the contested rent increase amount through the issuance of the Final Order. *See id.* at 2.

In the Final Order, the ALJ awarded the Tenant a rent refund in the amount of $210 per month, from August 1, 2006 through February, 2007, for a total refund of $1,470, in accordance with D.C. OFFICIAL CODE § 3509.01(a) (2001) and 14 DCMR § 4217.1 (2004).[17] *See* Final Order at 10; R. at 67. As stated previously, the Commission's standard of review is contained at 14 DCMR § 3807.1 (2004).

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[17] D.C. OFFICIAL CODE § 3509.01(a) (2001) 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 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....

14 DCMR § 4217.1 (2004) provides the following:

> Where it has been determined that a housing provider knowingly demanded or received rent above the rent ceiling for a particular rental unit, or has substantially reduced or eliminated services previously provided, the Rent Administrator of the Commission shall invoke any or all of the following types of relief:
>
> (a) A rent refund; and
>
> (b) Treble the amount of the rent refund ordered paid; or
>
> (c) A rent rollback for a specific period or until specific conditions are complied with.

The Commission's cases have consistently determined that an ALJ only has jurisdiction to award a rent refund up to (and including) the date of the evidentiary hearing. *See* 1773 Lanier Place, N.W., Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009) (remanding final order for calculation of damages only to date of final evidentiary hearing in case involving multiple evidentiary hearing dates); Canales v. Martinez, TP 27,535 (RHC June 29, 2005) (determining that the hearing examiner erred when he awarded a refund to the tenant after the date of the evidentiary hearing); Zucker v. NWJ Mgmt., TP 27,690 (RHC May 16, 2005) (explaining that the refund of an improper rent adjustment may go up to the date of the hearing); Jenkins v. Johnson, TP 26,191 (RHC Nov. 21, 2005) (observing that "[t]he hearing examiner can award damages up to the date of the hearing for continuing violations.").

The Commission's review of the record reveals that the ALJ's award of a rent refund through the date of the February 13, 2007 evidentiary hearing is supported by substantial record evidence,[18] and is in accordance with the provisions of the Act, including D.C. OFFICIAL CODE

[CONTINUED ON THE FOLLOWING PAGE]

[18] For example, in finding of fact numbered three (3), *see supra* at 3, the ALJ stated: "By *Notice of Increase in Rent Charged*, dated June 28, 2006, Housing Provider notified Tenant that effective August 1, 2006, her monthly rent would be increased by $210, from $1019 to $1229. RX 200." Final Order at 5; R. at 72.

§ 3509.01(a) (2001) and 14 DCMR § 4217.1 (2004). *See* 14 DCMR § 3807.1 (2004); Drell, TP 27,344; Canales, TP 27,535; Zucker, TP 27,690; Jenkins, TP 26,191. Accordingly, the Commission affirms the ALJ on this issue. *See id.*

VI. CONCLUSION

For the reasons stated herein, the Commission affirms the Final Order.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD YOUNG, COMMISSIONER

MARTA W. BERKLEY, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

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

D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
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** was mailed, postage prepaid, by first class U.S. mail on this **15th day** of **August, 2013** to:

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