DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,794

In re: 4501 Connecticut Avenue, N.W., Unit 809

Ward Three (3)

SMITH PROPERTY HOLDINGS FIVE (D.C.) L.P.
Housing Provider/Appellant

v.

KAREN MORRIS AND DAVID POWER
Tenants/Appellees

DECISION AND ORDER FOLLOWING REMAND

July 2, 2014

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 Accommodations and Conversions Division (RACD).[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- 2-510 (2001 Supp. 2008), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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[1] OAH assumed jurisdiction over tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (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 (Supp. 2008)).

I. PROCEDURAL HISTORY[2]

On September 20, 2006, Tenants/Appellees Karen Morris and David Power (Tenants), residing in Unit 809 of 4501 Connecticut Avenue, N.W. (Housing Accommodation), filed Tenant Petition RH-TP-06-28,794 (Tenant Petition) with DCRA, against Housing Provider/Appellant, Smith Property Holdings Five (D.C.) L.P. (Housing Provider). Tenant Petition at 1-5; Record for RH-TP-06-28,794 (R.) at 105-109. On October 21, 2008, the ALJ issued a final order, Morris v. Smith Property Holdings Five (D.C.) L.P., RH-TP-06-28,794 (OAH Oct. 21, 2008) (Final Order). R. at 51-65.

On October 28, 2008, the Housing Provider filed an appeal (First Notice of Appeal) with the Commission, in which it raised the following issues:[3]

1. The ALJ interprets the RHC's decision in Grant v. Gelman Management [sic] Co., TP 27,995 (RHC Feb. 24, 2006; [M]ar. 30, 2006) as authorizing challenges to rent ceiling increases taken over 10 years prior to the filing of the tenant petition. This reading is in error and is contrary to the holding of Kennedy v. D.C. Rental Housing [sic] Commission [sic], 709 A.2d 94 (D.C. 1998). His decision also misinterprets Sawyer Property [sic] Management [sic], Inc. v. D.C. Rental Housing [sic] Commission [sic], 877 A.2d 96 (D.C. 2005).

2. The ALJ erred in reducing the Tenants [sic] by $25 per month commencing August 1, 2006, because rent ceilings were not eliminated by the 2006 amendments of the Rental Housing Act until August 4, 2006, when those amendments took effect, nor was there proof that security was impacted in any way by the ill-fitting door.

3. OAH has no authority to award interest on its decisions, only the Superior Court, [sic] is authorized to award interest, and then only upon the entry of judgment.

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[2] A detailed factual background prior to this appeal after remand is set forth in the Commission's Decision and Order in Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013). The Commission sets forth in this decision only the facts relevant to the issues that arise from the Housing Provider's appeal filed on March 28, 2014.

[3] The Commission recites the issues here using the language of the Housing Provider in the First Notice of Appeal.

First Notice of Appeal at 1. On December 23, 2013, the Commission issued a Decision and Order (Decision and Order) affirming the ALJ's Final Order in part, and remanding for the ALJ to adjust his calculation of the Tenants' rent refund for the period of August 1, 2006 through August 4, 2006 to reflect the pre-August 5 provision of D.C. OFFICIAL CODE § 42-3502.11 that was in effect during that period. *See* Decision and Order at 20-31.

On March 18, 2014, the ALJ issued a Final Order on Remand, Morris v. Smith Prop. Holdings Five (D.C.) L.P., RH-TP-14-28,794 (OAH Mar. 18, 2014) (Final Order on Remand), recalculating the Tenant's rent refund and interest, in accordance with the Commission's Decision and Order. *See* Final Order on Remand at 2-3; R at 404-5.

On March 28, 2014, the Housing Provider filed a notice of appeal (Second Notice of Appeal), alleging that the ALJ made the following errors in the Final Order on Remand:[4]

1. The Final Order is erroneous as a matter of law in that [the Tenants'] claim was barred by the nonclaims provision at D.C. Code 42-3502.06(e) [(2001)] (the "nonclaim provision"). The Rent Administrator, therefore, lacked jurisdiction to accept [the Tenants'] petition and OAH lacked jurisdiction to adjudicate [their] claim challenging the May 1, 2006 rent increase based on an allegedly late 1996 filing.

2. The RHC Decision and Order in Grant v. Gelman Management Co., TP 27,995 (RHC Feb. 24, 2006, Mar. 20, 2006) upon which the RHC relied herein, and the RHC's December 23, 2013 remand order entered herein, as reissued on January 17, 2014, failed to adhere to the D.C. Court of Appeals and RHC's own prior construction of the nonclaims provision, which was and remains binding authority.

3. The RHC's reliance on Grant in this case violates Smith Five's right to due process and equal protection of the law, because from 1985 through March 30, 2006, when the RHC denied the Housing Provider's motion for reconsideration in Grant, the Court of Appeals, relying on the RHC's own construction of the nonclaims provision, treated the provision as a statute of repose rather than an ordinary statute of limitations. Housing Providers [sic]

[4] The Housing Provider's issues on appeal are stated herein using the language from the Second Notice of Appeal.

have relied on that construction, which relieved them [sic] of retaining rent and related records and files indefinitely, as was necessitated by prior law. The RHC offered no reasoned explanation of its rejection of Court of Appeals precedent directly on point, thus rendering its ruling herein arbitrary, capricious, and an abuse of discretion.

4. Notice of the rent increase invalidated here was sent to [the Tenants] on March 29, 2006, one day before the RHC's denial of the Housing Provider's motion for reconsideration in Grant. Thus, under any scenario, the Grant ruling was improperly applied in this case because prior to its issuance, the law was construed so as to bar claims such as [the Tenants']. Moreover, to this date, there is no appealable final decision in Grant and, as such, there is no legally precedential binding decision in Grant.

5. Because the RHC's decision in Grant has not been published in an official reporter, there being no official reporter for RHC decisions, it cannot be treated as binding precedent. Absent a published regulation or other official, published notice announcing a change in construction of the nonclaim provision, neither housing providers nor tenants may be bound by the RHC's change in the law announced in Grant. The only official construction of the nonclaims provision is the published decision of Kennedy v. D.C. Rental Housing [sic] Commission [sic], 709 A.2d 94 (D.C. 1998) and its progeny. In addition, [the Tenants] filed this Petition after the 2006 revisions to the Act went into effect, even though [their] challenge was based on events which occurred before the 2006 revisions took effect, [the Tenants were] required to petition for relief on or before August 4, 2006, the date the prior law expired.

6. In Grant, the RHC adopted the reading of the Act set out in McCullough [sic] v. D.C. Rental Accommodations Commision [sic], 449 A.2d 1073 [sic] (D.C. 1982). Thus, the ALJ erred in awarding any relief for any period after the filing date of this petition, because in McCullough [sic], the Court ruled that a new cause of action is created each month an unlawful rent charge is collected. New causes of action may not be added to a pending action (here, a tenant petition), but must be brought through a new complaint. See Tatum v. Townsend, 61 A.2d 478 (D.C. 1948), Werber v. Atkinson, 84 A.2d 111 (D.C. 1951).

7. Because the RHC has intentionally and as a matter of policy and practice elected to disregard the longstanding, established reading of the nonclaims provision of the Act, and the City Council's intention in enacting that provision, it has denied Smith Five's due process and equal protection rights entitled [sic] Smith Five to relief under 42 U.S.C. § 1983.

8. The "refund" award to [the Tenants] violates the Eighth Amendment to [the] U.S. Constitution's prohibition of excessive fines because [the Tenants] never paid the increase, thereby rendering the award a penalty rather than restitution.

> The award is, therefore, disproportionate to any harm to [the Tenants] attributable to the purportedly unlawful increase, even exceeding fines authorized for willful violations of the Act. In addition, because the D.C. Court of Appeals and the RHC precedent on the construction of the nonclaim provision barred [the Tenants] from filing [their] claim, no penalty may be imposed, because the notice of increase was lawful when given.

Second Notice of Appeal at 2-4. The Housing Provider filed its brief on June 3, 2014 (Housing Provider's Brief);[5] the Tenants filed a brief on June 16, 2014. The Commission held a hearing on June 17, 2014.

II. HOUSING PROVIDER'S ISSUES ON APPEAL[6]

A. The Final Order is erroneous as a matter of law in that [the Tenants'] claim was barred by the nonclaims provision at D.C. Code 42-3502.06(e) [(2001)] (the "nonclaim provision"). The Rent Administrator, therefore, lacked jurisdiction to accept [the Tenants'] petition and OAH lacked jurisdiction to adjudicate [their] claim challenging the May 1, 2006 rent increase based on an allegedly late 1996 filing.

B. The RHC Decision and Order in Grant v. Gelman Management Co., TP 27,995 (RHC Feb. 24, 2006, Mar. 20, 2006) upon which the RHC relied herein, and the RHC's December 23, 2013 remand order entered herein, as reissued on January 17, 2014, failed to adhere to the D.C. Court of Appeals and RHC's own prior construction of the nonclaims provision, which was and remains binding authority.

C. The RHC's reliance on Grant in this case violates Smith Five's right to due process and equal protection of the law, because from 1985 through March 30, 2006, when the RHC denied the Housing Provider's motion for reconsideration in Grant, the Court of Appeals, relying on the RHC's own construction of the nonclaims provision, treated the provision as a statute of repose rather than an ordinary statute of limitations. Housing Providers [sic] have relied on that construction, which relieved them [sic] of retaining rent and related records and files indefinitely, as was necessitated by prior law.

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[5] The Commission notes that the Housing Provider addresses only one (1) out of the eight (8) claims raised in the Second Notice of Appeal in its brief: claim number eight (8) related to an alleged violation of the Eighth Amendment of the Constitution. *See* Housing Provider's Brief at 1-9.

[6] The Commission, in its discretion, has reordered the Housing Provider's issues on appeal for ease of discussion, and to group together claims that involve overlapping legal issues and the application of common legal principles. *See, e.g.*, Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.11; Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8; Levy v. Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835 (RHC Mar. 19, 2012) at n.9

The RHC offered no reasoned explanation of its rejection of Court of Appeals precedent directly on point, thus rendering its ruling herein arbitrary, capricious, and an abuse of discretion.

D. Because the RHC has intentionally and as a matter of policy and practice elected to disregard the longstanding, established reading of the nonclaims provision of the Act, and the City Council's intention in enacting that provision, it has denied Smith Five's due process and equal protection rights entitled [sic] Smith Five to relief under 42 U.S.C. § 1983.

E. Notice of the rent increase invalidated here was sent to [the Tenants] on March 29, 2006, one day before the RHC's denial of the Housing Provider's motion for reconsideration in Grant. Thus, under any scenario, the Grant ruling was improperly applied in this case because prior to its issuance, the law was construed so as to bar claims such as [the Tenants']. Moreover, to this date, there is no appealable final decision in Grant and, as such, there is no legally precedential binding decision in Grant.

F. Because the RHC's decision in Grant has not been published in an official reporter, there being no official reporter for RHC decisions, it cannot be treated as binding precedent. Absent a published regulation or other official, published notice announcing a change in construction of the nonclaim provision, neither housing providers nor tenants may be bound by the RHC's change in the law announced in Grant. The only official construction of the nonclaims provision is the published decision of Kennedy v. D.C. Rental Housing [sic] Commission [sic], 709 A.2d 94 (D.C. 1998) and its progeny. In addition, [the Tenants] filed this Petition after the 2006 revisions to the Act went into effect, even though [their] challenge was based on events which occurred before the 2006 revisions took effect, [the Tenants were] required to petition for relief on or before August 4, 2006, the date the prior law expired.

G. In Grant, the RHC adopted the reading of the Act set out in McCullough [sic] v. D.C. Rental Accommodations Commision [sic], 449 A.2d 1073 [sic] (D.C. 1982). Thus, the ALJ erred in awarding any relief for any period after the filing date of this petition, because in McCullough [sic], the Court ruled that a new cause of action is created each month an unlawful rent charge is collected. New causes of action may not be added to a pending action (here, a tenant petition), but must be brought through a new complaint. See Tatum v. Townsend, 61 A.2d 478 (D.C. 1948), Werber v. Atkinson, 84 A.2d 111 (D.C. 1951).

H. The "refund" award to [the Tenants] violates the Eighth Amendment to [the] U.S. Constitution's prohibition of excessive fines because [the Tenants] never paid the increase, thereby rendering the award a penalty rather than restitution. The award is, therefore, disproportionate to any harm to [the Tenants] attributable to the purportedly unlawful increase, even exceeding fines

authorized for willful violations of the Act. In addition, because the D.C. Court of Appeals and the RHC precedent on the construction of the nonclaim provision barred [the Tenants] from filing [their] claim, no penalty may be imposed, because the notice of increase was lawful when given.

IV. DISCUSSION OF THE HOUSING PROVIDER'S ISSUES ON APPEAL

A. The Final Order is erroneous as a matter of law in that [the Tenants'] claim was barred by the nonclaims provision at D.C. Code 42-3502.06(e) [(2001)] (the "nonclaim provision"). The Rent Administrator, therefore, lacked jurisdiction to accept [the Tenants'] petition and OAH lacked jurisdiction to adjudicate [their] claim challenging the May 1, 2006 rent increase based on an allegedly late 1996 filing.

B. The RHC Decision and Order in Grant v. Gelman Management Co., TP 27,995 (RHC Feb. 24, 2006, Mar. 20, 2006) upon which the RHC relied herein, and the RHC's December 23, 2013 remand order entered herein, as reissued on January 17, 2014, failed to adhere to the D.C. Court of Appeals and RHC's own prior construction of the nonclaims provision, which was and remains binding authority.

C. The RHC's reliance on Grant in this case violates Smith Five's right to due process and equal protection of the law, because from 1985 through March 30, 2006, when the RHC denied the Housing Provider's motion for reconsideration in Grant, the Court of Appeals, relying on the RHC's own construction of the nonclaims provision, treated the provision as a statute of repose rather than an ordinary statute of limitations. Housing Providers [sic] have relied on that construction, which relieved them [sic] of retaining rent and related records and files indefinitely, as was necessitated by prior law. The RHC offered no reasoned explanation of its rejection of Court of Appeals precedent directly on point, thus rendering its ruling herein arbitrary, capricious, and an abuse of discretion.

D. Because the RHC has intentionally and as a matter of policy and practice elected to disregard the longstanding, established reading of the nonclaims provision of the Act, and the City Council's intention in enacting that provision, it has denied Smith Five's due process and equal protection rights entitled [sic] Smith Five to relief under 42 U.S.C. § 1983.

E. Notice of the rent increase invalidated here was sent to [the Tenants] on March 29, 2006, one day before the RHC's denial of the Housing Provider's motion for reconsideration in Grant. Thus, under any scenario, the Grant ruling was improperly applied in this case because prior to its issuance, the law was construed so as to bar claims such as

[the Tenants']. Moreover, to this date, there is no appealable final decision in Grant and, as such, there is no legally precedential binding decision in Grant.

F. Because the RHC's decision in Grant has not been published in an official reporter, there being no official reporter for RHC decisions, it cannot be treated as binding precedent. Absent a published regulation or other official, published notice announcing a change in construction of the nonclaim provision, neither housing providers nor tenants may be bound by the RHC's change in the law announced in Grant. The only official construction of the nonclaims provision is the published decision of Kennedy v. D.C. Rental Housing [sic] Commission [sic], 709 A.2d 94 (D.C. 1998) and its progeny. In addition, [the Tenants] filed this Petition after the 2006 revisions to the Act went into effect, even though [their] challenge was based on events which occurred before the 2006 revisions took effect, [the Tenants were] required to petition for relief on or before August 4, 2006, the date the prior law expired.

The Commission observes that the Housing Provider's issues A though F on appeal, recited above, all relate to the underlying issues of whether the Tenants' claims were barred by the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) (2001),[7] and were resolved by the Commission in the initial appeal of this matter. *See* Decision and Order. The Commission determines that the law of the case doctrine, which prohibits the Commission from reopening and reconsidering an issue that the Commission resolved in an earlier appeal, applies to these issues.[8] *See, e.g.,* Carmel Partners, Inc. v. Levy, RH-TP-06-28,830; RH-TP-06-28,835

[7] D.C. OFFICIAL CODE § 42-3502.06(e) 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.

[8] The Commission notes that at its hearing in this matter, counsel for the Housing Provider cited two District of Columbia Court of Appeals (DCCA) cases, Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293 (D.C. 1990) and Blacknall v. D.C. Rental Hous. Comm'n, 544 A.2d 710 (D.C. 1988), in support of his contention that the "law of the case" doctrine does not apply to the Commission's consideration of this appeal after remand because the composition of the Commission has changed in the time since the Commission issued its Decision and Order. *See* Hearing CD (RHC June 17, 2014). The Commission finds no merit in Counsel's assertion based on either Goodman

(RHC May 16, 2014); King v. McKinney, TP 27,264 (RHC June 17, 2005) (citing Lynn v. Lynn, 617 A.2d 963 (D.C. 1992)) ("The law of the case doctrine prohibits the Commission from reopening issues that the Commission resolved in an earlier appeal"); Dias v. Perry, TP 24,349 (RHC July 30, 2004) (refusing to reconsider Ms. Perry's status as a tenant, when the Commission had previously made a definitive ruling on the issue); Goff v. Edward Tiffey Co., TP 24,855 (RHC Dec. 29, 2000) (stating that where the housing provider did not appeal the hearing examiner's finding of housing code violations, the finding became the law of the case).

In its Decision and Order, entered in response to the initial appeal in this case, the Commission affirmed the ALJ's determination that the Act's three-year statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) did not bar the Tenants' claim that a May 1, 2006 rent increase was illegal, where it was based on an improper rent ceiling adjustment from 1996. *See* Decision and Order at 20-23. The Commission also affirmed the ALJ's reliance on Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Feb. 24, 2006) and Grant, TP 27,995 (RHC Mar. 30, 2006) (Order on Reconsideration), as controlling legal precedent.[9] *See id.* The Commission explained as follows, based on the precedent set forth in Hinman, RH-TP-06-28,728:

> . . . 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

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or Blacknall. For example, in Goodman, 573 A.2d at 1295-96, the DCCA stated that the Commission declined to follow its previous decision in the case, "citing intervening changes in the law." The Commission notes that the Housing Provider cites no such "intervening changes in the law" since the Decision and Order was issued that would justify a change in the Commission's interpretation of D.C. OFFICIAL CODE § 42-3502.06(e). Furthermore, in Blacknall, 544 A.2d at 712, the DCCA remarked that Commission reversed its own decision when presented with a motion for reconsideration. The Commission notes that the DCCA did not discuss the "law of the case" doctrine in Blacknall, 544 A.2d at 710. Moreover, the Commission observes that the Housing Provider in this case did not seek a reconsideration of the Commission's Decision and Order, which may have differed from the Decision and Order as occurred in Blacknall, 544 A.2d at 712.

[9] As the Commission stated in United Dominion Mgmt. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013), the decisions in Grant, TP 27,995 and Grant, TP 27,995 (Order on Reconsideration), are not themselves the subject of appeal; the Commission will only address the ALJ's application of Grant, TP 27,995 and Grant, TP 27,995 (Order on Reconsideration) to this issues in this case. *See* Hinman, RH-TP-06-28,728 at 6 n.5.

> form by a housing provider pursuant to 14 DCMR §§ 4204.9-.10 (2004) . . . . [W]hen 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).

See Decision and Order at 23 (citations omitted).

The Commission observes that the entire basis of the Housing Provider's issues A though F on appeal is merely a reiteration of issues that the Commission previously addressed and resolved in its Decision and Order – namely, whether the Tenants' claim regarding the May 2006 rent increase was barred by the Act's statute of limitations. *See* Second Notice of Appeal at 2. Accordingly, under the law of the case doctrine, the Commission is prohibited from reconsidering the issue of the application of the statute of limitations in this Decision and Order Following Remand. *See* Levy, RH-TP-06-28,830; RH-TP-06-28,835; King, TP 27,264; Dias, TP 24,349; Goff, TP 24,855.

The Commission notes that its Decision and Order contained a statement of the parties' rights regarding motions for reconsideration, as well as obtaining judicial review of the Decision and Order before the DCCA. *See* Decision and Order at 31. The Commission's review of the record reveals no evidence that the Housing Provider filed a motion for reconsideration of the Decision and Order, or availed itself of the opportunity to obtain DCCA review of the Decision and Order regarding the applicability of the statute of limitations. The Commission observes that if the Housing Provider disagreed with the Decision and Order, the appropriate remedy was to

seek judicial review with the DCCA, pursuant to D.C. OFFICIAL CODE § 42-3502.19,[10] and within the timelines governed by DCCA's rules.

For the foregoing reasons, The Commission finds no merit in issues A though F as raised by the Housing Provider in this appeal.

> **G. In Grant, the RHC adopted the reading of the Act set out in McCullough [sic] v. D.C. Rental Accommodations Commision [sic], 449 A.2d 1073 [sic] (D.C. 1982). Thus, the ALJ erred in awarding any relief for any period after the filing date of this petition, because in McCullough [sic], the Court ruled that a new cause of action is created each month an unlawful rent charge is collected. New causes of action may not be added to a pending action (here, a tenant petition), but must be brought through a new complaint. See Tatum v. Townsend, 61 A.2d 478 (D.C. 1948), Werber v. Atkinson, 84 A.2d 111 (D.C. 1951).**

The Commission is satisfied that McCulloch v. D.C. Rental Accommodations Comm'n, 449 A.2d 1072 (D.C. 1982), was not cited, referenced or otherwise relied upon by the Commission in reaching its decision in either Grant, TP 27,995 or Grant, TP 27,995 (Order on Reconsideration), and thus this issue on appeal has no merit. *See* Grant, TP 27,995; Grant, TP 27,995 (Order on Reconsideration).

Moreover, the Commission observes that the cause of action in McCulloch v. D.C. Rental Accommodations Comm'n, 449 A.2d 1072 (D.C. 1982), arose under a prior version of the Act, the Rental Accommodations Act of 1975. *See* McCulloch, 449 A.2d at 1073. The DCCA expressly overruled McCulloch, 449 A.2d 1073, in the case of Kennedy v. D.C. Rental Hous. Comm'n, 709 A.2d 94, 96-97 (D.C. 1998), adopting the reasoning of the Commission as follows:

> . . . the very purpose of the new statute of limitations provision in § 45-2516(e) was to overrule *McCulloch* and prohibit petitions against rent levels put in place more than three years prior to the petitions' filing. In *Chin Kim v. Woodley*, TP 23,260 (RHC Sept. 13, 1994), the Commission read § 45-2516(e) to lessen the

[10] D.C. OFFICIAL CODE § 42-3502.19 provides the following, in relevant part: "Any person or class of persons 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."

> "administrative quagmire for both the agency and relevant parties" stemming from the need under *McCulloch*, in response to a tenant petition claiming illegal rent ceilings and rents, to conduct "a rent ceiling analysis of all prior years to arrive at the present ceiling." *Id.* at 10. "The new statute avoided having to reanalyze every prior rent ceiling adjustment all the way back to the base rent each time an increase in the ceiling occurred." *Id.* at 10-11.

The Commission bases its decision in this case on the DCCA's precedent in Kennedy, 709 A.2d at 96-97, overruling its prior decision in McCulloch, 449 A.2d 1073. *See also* Majerle Mgmt. v. D.C. Rental Hous. Comm'n, 866 A.2d 41, 47 (D.C. 2004) (explaining that the enactment of the Act (the Rental Housing Act of 1985) overturned the language in McCulloch, 449 A.2d at 1073 providing that each new rental payment creates a new cause of action).

Moreover, the Commission notes that it has consistently held that damages may be awarded up to, and including, the date of the final evidentiary hearing. *See, e.g.*, Levy, RH-TP-06-28,830; RH-TP-06-28,835 (upholding ALJ's award of damages through the date of the final evidentiary hearing); Linen v. Lanford, TP 27,150 (RHC Sept. 29, 2003) (affirming hearing examiner's refusal to award damages through the date of the decision and order, because the record closed after the evidentiary hearing).

Finally, 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); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013); Stone v. Keller, TP 27,033 (RHC Mar. 24, 2009); Ford v. Dudley, TP 23,973 (RHC June 3, 1999); Terrell v. Estrada, TP 22,007 (RHC May 30, 1991). Based on its review of the substantial record evidence, the Commission determines that the issue raised in Housing Provider's issue G, recited above, was not raised before the ALJ either in the initial OAH proceedings, in a motion for reconsideration, or in the proceedings following remand. *See* Final Order After Remand; Final Order; Hearing CD (OAH Aug. 13, 2007). Furthermore, the

Commission notes that the Housing Provider did not raise this issue in its First Notice of Appeal to the Commission, or in a motion for reconsideration of the Commission's Decision and Order. *See* Decision and Order; First Notice of Appeal.

For the foregoing reasons, the Commission dismisses this issue on appeal. *See* Majerle Mgmt., 866 A.2d at 47; Kennedy, 709 A.2d at 97; Lenkin Co. Mgmt., 642 A.2d at 1286; Barac Co., VA 02-107; Stone, TP 27,033; Ford, TP 23,973; Terrell, TP 22,007.

> **H. The "refund" award to [the Tenants] violates the Eighth Amendment to [the] U.S. Constitution's prohibition of excessive fines because [the Tenants] never paid the increase, thereby rendering the award a penalty rather than restitution. The award is, therefore, disproportionate to any harm to [the Tenants] attributable to the purportedly unlawful increase, even exceeding fines authorized for willful violations of the Act. In addition, because the D.C. Court of Appeals and the RHC precedent on the construction of the nonclaim provision barred [the Tenants] from filing [their] claim, no penalty may be imposed, because the notice of increase was lawful when given.**

As stated previously, 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., 642 A.2d at 1286; Barac Co., VA 02-107; Stone, TP 27,033; Ford, TP 23,973; Terrell, TP 22,007. Based on its review of the substantial record evidence, the Commission determines that the issues raised in Housing Provider's issue H, recited above, were not raised before the ALJ or the Commission prior to the Second Notice of Appeal. *See* Decision and Order; Final Order After Remand; Final Order; First Notice of Appeal; Hearing CD (OAH Aug. 13, 2007).

However, assuming *arguendo*, that the Housing Provider had properly raised an Eighth Amendment violation before the ALJ, the Commission is satisfied that this issue has no merit. First, the Commission notes that it has consistently upheld, and the DCCA has affirmed in Kapusta v. D.C. Rental Hous. Comm'n, 704 A.2d 286 (D.C. 1997), an ALJ's ability to award a

rent refund based on rent that was demanded by a housing provider, but never paid by a tenant, under D.C. OFFICIAL CODE § 42-3509.01(a)(1).[11] *See, e.g.*, Kapusta, 704 A.2d 286 (upholding the Commission's interpretation of "rent refund" to include rent demanded but never received); Barac Co., VA 02-107 ("a housing provider's mere demand for rent in excess of the maximum allowable rent under the Act, without the requirement or proof of receipt or collection of payment triggers the award of damages to tenants"); Hamlin v. Daniel, TP 27,626 (RHC June 10, 2005) (reversing hearing examiner for denying the tenant a refund of rent demanded, but never collected).

Furthermore, the Commission is not satisfied that the Housing Provider has shown that the rent refund awarded in this case constitutes the type of "excessive fine" that is prohibited by the Eighth Amendment. The Eighth Amendment of the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. CONST. amend. VIII. The Supreme Court has defined the proceedings that are subject to the Eighth Amendment as follows:

> Whatever the outer confines of the [Excessive Fines] Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purposes and concerns of the Amendment, as illuminated by its history.

Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 263-64 (1989) (emphasis added). *See also, e.g.*, Exxon Shipping Co. v. Baker, 554 U.S. 471, 505 n.18 (2008) (explaining that the Court's holding in Browning-Ferris, 492 U.S. at 275, "rested entirely upon

[11] D.C. OFFICIAL CODE § 42-3509.01(a)(1) 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 . . . 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 . . . .

our conviction that 'the concerns that animate the Eighth Amendment' were about 'plac[ing] limits on the steps a government may take against an individual . . .'" (emphasis added)); Marshall v. Honeywell Tech. Solutions, Inc., 536 F. Supp. 2d 59, 66 (D.D.C. 2008) ("[i]t is among the most basic tenets of constitutional law that the Bill of Rights protects individuals from governmental interference with enumerated rights and does not apply to disputes between private parties." (emphasis added)).[12]

The Commission notes that in the Final Order, the ALJ ordered that the Housing Provider pay the rent refund to the Tenants. *See* Final Order at 32; R. at 369. In contrast to the Act's penalties provision that specifically allows for the imposition of fines payable to the government, D.C. OFFICIAL CODE § 42-3509.01(b),[13] the damages awarded in this case are payable by a private party, the Housing Provider, to a private party, the Tenants. *See* D.C. OFFICIAL CODE § 42-3509.01(a). The government neither "prosecuted" the Tenant Petition, nor has any "right to receive a share of the damages awarded." Browning-Ferris, 492 U.S. at 263-64.

For the foregoing reasons, the Commission finds no merit in this claim by the Housing Provider in this appeal. *See* Browning-Ferris, 492 U.S. 257; Exxon Shipping Co., 554 U.S. 471; Marshall, 536 F. Supp. 2d 59; Kapusta, 704 A.2d 286, Lenkin Co. Mgmt., 642 A.2d at

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[12] The Commission observes that each of the cases cited in the Housing Provider's Brief regarding the definition of "fines" under the Eighth Amendment, are cases where the federal government was a party, and are thus not applicable to a determination of whether a rent refund paid to a private party under the Act is unlawful. *See* Housing Provider's Brief at (citing United States v. Bakajian, 524 U.S. 321 (1998) (defendant attempted to leave the United States without reporting that he was transporting more than $10,000 in currency, in violation of 18 U.S.C. § 1001, and 31 U.S.C. §§ 5316(a)(1)(A), 5322(a)); United States v. Bourseau, 531 F.3d 1159 (9th Cir. 2008) (defendants were found in violation of the False Claims Act, 31 U.S.C. §§ 3729-3733)).

[13] D.C. OFFICIAL CODE § 42-3509.01(b) provides, in relevant part:

> Any person who willfully (1) collects a rent increase after it has been disapproved under this chapter . . . , (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter . . . , or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation.

1286; Barac Co., VA 02-107; Stone, TP 27,033; Hamlin, TP 27,626; Ford, TP 23,973; Terrell, TP 22,007.

VII. CONCLUSION

For the foregoing reasons, the Commission finds no merit in, or otherwise dismisses, the issues raised by the Housing Provider in this appeal. The Final Order on Remand is hereby affirmed.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

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

D.C. Court of Appeals
Office of the Clerk
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 FOLLOWING REMAND** in RH-TP-06-28,794 was mailed, postage prepaid, by first class U.S. mail on this **2nd day** of **July, 2014** to:

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