DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-07-28,907

In re: 3003 Van Ness Street, NW, Unit S1006

Ward Three (3)

DAVID G. WILSON
Tenant/Appellant

v.

ARCHSTONE-SMITH COMMUNITIES, LLC and
SMITH PROPERTY HOLDINGS VAN NESS
Housing Providers/Appellees

DECISION AND ORDER

September 25, 2015

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 Housing Regulation Administration (HRA) of the District of Columbia Department of 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 the Rental Accommodations and Conversion Division (RACD) on October 1, 2006, pursuant to § 6(b-1)(1) of the OAH Establishment Act, D.C. Law 16-83, D.C. OFFICIAL CODE § 2-1831.03(b-l)(l) (2012 Repl.). The functions and duties of RACD were transferred to DHCD by § 2003 of the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.).

I. PROCEDURAL HISTORY[2]

On March 6, 2007, Tenant/Appellant David Wilson (Tenant), resident of 3003 Van Ness Street, unit S1006 (Housing Accommodation) filed Tenant Petition RH-TP-07-28,907 (Tenant Petition) with RAD, against Archstone-Smith Communities, LLC and Smith Property Holdings Van Ness (collectively, Housing Provider). *See* Tenant Petition; Record for RH-TP-07-28,907 (R.) at 1-22. The 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. A proper thirty (30) day notice of rent increase was not provided before the rent increase became effective.

3. Services and/or facilities provided in connection with the rental of my/our unit(s) have been permanently eliminated.

4. Retaliatory action has been directed against me/us by my/our Housing Provider, manager or other agent for exercising our rights in violation of section 502 of the Rental Housing Emergency Act of 1985.

Tenant Petition at 3-5; R. at 18-20.

By agreement of the parties, no evidentiary hearing was held in this matter, and Administrative Law Judge Margaret Mangan (ALJ) issued a Final Order, based solely on the written record, on January 7, 2011: Wilson v. Archstone-Smith Communities, LLC, RH-TP-07-28,907 (OAH Jan. 7, 2011) (Final Order); R. at 193-99. The ALJ dismissed the Tenant Petition in its entirety, concluding as follows:

> The August 4, 2004, lease options letter sent to Tenant by Housing Provider was not a demand for rent; it was a proposal of alternative lease arrangements allowed under the Rental Housing Act at the time. Tenant chose an option that did not raise his rent, in return for a 12-month lease. Housing Providers can choose not to

[2] The Commission notes that a complete procedural history of this case prior to the Tenant's June 29, 2015 Notice of Appeal is set forth in the Commission's Decision and Order entered in this case on March 10, 2015: Wilson v. Smith Prop. Holdings Van Ness, RH-TP-07-28,907 (RHC Mar. 10, 2015). The Commission, in its discretion, sets forth herein only those facts relevant to the instant decision and order.

raise rent under the Rental Housing Act, and can do so in return for a lease to which they might not otherwise be entitled.

Id. at 6; R. at 194.

On January 20, 2011 the Tenant filed a timely notice of appeal of the Final Order with the Commission (First Notice of Appeal). *See* First Notice of Appeal at 1. On March 10, 2015, the Commission issued its initial Decision and Order, Wilson v. Smith Property Holdings Van Ness, RH-TP-07-28,907 (RHC Mar. 10, 2015) (Initial Decision and Order). The Commission affirmed the ALJ in part, determining that there was no legal merit under the Act to the Tenant's claim that the selection of a twelve-month lease term with no corresponding rent increase, constituted a rent increase under the Act, and therefore the Housing Provider was not required to comply with the notice and filing requirements under the Act for taking a rent increase. *Id.* at 10-17.

However, the Commission's review of the Final Order revealed that the ALJ failed to make factual findings and provide conclusions of law with respect to the legal requirements of the Tenant's claim of retaliation under the Act. *Id.* at 17-22. The Commission remanded to the ALJ to provide findings of fact and conclusions of law on the Tenant's claim of retaliation. *Id.* at 21-22.

On June 18, 2015, the ALJ issued a Final Order After Remand: Wilson v. Archstone-Smith Properties, 2007-DHCD-TP 28,907 (OAH June 18, 2015) (Final Order After Remand). The ALJ made the following findings of fact in the Final Order After Remand: [3]

1. On August 4, 2004, Housing Provider sent a letter [(Lease Option Letter)] to Tenant that stated:

> With our flexible lease options and competitive pricing, you can turn your current month-to-month lease into a term lease that best suits your needs . . . . Take a look at the options below, then call or stop by the

[3] The findings of fact are recited here using the language of the ALJ in the Final Order After Remand.

management office to discuss your renewal, or just circle your lease and pricing option, sign your name and drop it off at our front desk.

2. The letter then gave Tenant twelve pricing options based on the number of months Tenant wished to lease with inversely proportional pricing – the longer the term of the lease, the lower the monthly rent.

3. When Tenant received the letter, Tenant was leasing his unit on a month-to-month basis. According to the letter, if Tenant chose to continue to lease the unit month-to-month, his rent would increase from $1,303 to $1,755 per month.

4. The letter also stated "If we don't hear from you by **8/24/2004** your lease will convert to month-to-month status effective the first day of the month following expiration. The monthly rate indicated in the month-to-month option will apply. The official letter you receive from the Department of Consumer and Regulatory Affairs will reflect that month-to-month rate." (Emphasis in Original).

5. Tenant chose the twelve month lease option, which did not increase his rent.

Final Order After Remand at 2-3; R. at 275-76. The Final Order After Remand contained the following conclusions of law:[4]

1. The Rental Housing Commission remanded this case for a decision on the question of retaliation. The Commission identified the issues as: (1) whether Housing Provider engaged in prohibited conduct under the Act. D.C. Official Code § 42-3505.02(a); (2) whether Tenant raised a presumption of retaliation by engaging in one of the six protected acts enumerated in D.C. Official Code § 42-350[5.0]2(b); and (3) whether Housing Provider rebutted the presumption of retaliation by clear and convincing evidence as required by D.C. Official Code § 42-350[5.0]2(b). *Wilson v. Archstone-Smith Cmtys.*, LLC [sic], RH-TP-07-28[,]907, at 22.

2. "'Retaliatory action,' is action intentionally taken against a tenant by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 [D.C. Official Code § 42-3505.02] of the Act." 14 DCMR § 4303.1. The determination of retaliatory action requires a two-step analysis, which is outlined in the provisions of the Act. First, it must be determined whether the housing provider committed an act that is considered retaliatory under D.C. Official Code § 42-3505.02(a) . . . .[5]

[4] The conclusions of law are recited here using the language of the ALJ in the Final Order After Remand.

[5] The Commission omits the ALJ's recitation of D.C. OFFICIAL CODE § 42-3505.02(a). *See* Final Order After Remand at 3; R. at 275. The full text of this provision of the Act is recited *infra* at 10-11.

3. Second, it must be determined that the housing provider's action was in response to a tenant activity. Tenant is entitled to a presumption of retaliation if it is established that the Housing Provider's conduct occurred within six months of one of the following six protected Tenant acts . . . .[6]

4. If retaliation is presumed, the burden shifts to the housing provider to provide clear and convincing evidence that housing provider's actions were not retaliatory. *See Youssef v. United Mgmt. Co., Inc.*, 683 A.2d 152, 155 (D.C. 1996). In the absence of a presumption of retaliation, Tenant must prove, by a preponderance of the evidence, that retaliation occurred.

5. Tenant argues that Housing Provider coerced him to sign a lease, which he contends is retaliatory action under D.C. Official Code § 42-3505.02(a). Arguably, Tenant's challenge to the Lease Option Letter and filing of the [T]enant [P]etition were efforts to secure a tenant right under section (5) ("Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider") and (6) ("Brought legal action against the housing provider"), of § 42-3505.02(b).

6. For Tenant to benefit from a presumption that a housing provider's action was retaliatory, however, it must come within six months after—and in response to—protected tenant activity. Here, the alleged coercive Housing Provider activity—the lease options—came before the alleged protected tenant activity, his challenge to the lease options. The record contains no evidence of protected tenant activity that preceded the Lease Option Letter. Hence, Tenant does not benefit from the presumption of retaliation and must prove, by a preponderance of the evidence, that retaliation occurred.

7. The final question for decision, then, is whether Tenant proved by a preponderance of the evidence that Housing Provider took actions to get back at Tenant for any Tenant action, statutorily protected or not. The record includes only one Tenant action that preceded the Lease Option Letter—Mr. Wilson paid rent on a month-to-month basis. Was Housing Provider "getting back at" him by coercing him into signing a lease with the Lease Option Letter? The record does not support any connection between Tenant's actions and the Lease Option Letter. Offering a lease option was a decision Housing Provider made independent of any action on part of Tenant Wilson or any tenant. It was not retaliatory. Further, when no presumption applies, the retaliation statute is applicable only where a landlord takes an action not "otherwise permitted my [sic] law." *Wahl v. Watkis*, 491 A.2d 477, 480 (D.C. 1985); *De Szunyogh v. William C. Smith & Co.*, 604 A.2d 1, 4 (D.C. 1992).

---

[6] The Commission omits the ALJ's recitation of D.C. OFFICIAL CODE § 42-3505.02(b)(1)-(6). *See* Final Order After Remand at 3-4; R. at 274-75. The full text of this provision of the Act is recited *infra* at 11.

As affirmed by the Rental Housing Commission in this case, the Lease Option [L]etter was permitted by law.

Final Order at 3-5; R. at 273-5.

The Tenant filed a second notice of appeal with the Commission on June 29, 2015 (Second Notice of Appeal), raising the following issues:[7]

1. The Final Order after Remand disobeys the Commission's clear directives on remand by again failing to address the extensive facts that Wilson had previously presented and the Commission expressly referenced, to support his claim of coercion constituting retaliatory action. Indeed, Judge Mangan appears to take pride in noting that her Findings of Fact "are identical to the Findings of Facts in the January 7, 2011, Final Order, except for numbering" that the Commission has already rejected as insufficient. Final Order after Remand, 2 n.1.

2. The Final Order after Remand erroneously fails to analyze the facts presented by Wilson pursuant to the standards set forth by the Court of Appeals in *Double H Housing Corp. v. David*, 947 A.2d 38, 42 (D.C. 2008) to determine whether "the 'choice' presented by the landlord conflicts with [the tenant's legal rights], because it denies the tenant a meaningful opportunity to remain as a month-to-month tenant." In particular, Judge Mangan refuses to address the issue of whether "the disparity between (i) the monthly rent charged to a tenant who continues residence as a month-to-month tenant and (ii) the monthly rent charged upon execution of a new lease . . . is so large that the tenant is effectively forced to sign a new lease." *Id.*

3. The Final Order after Remand regurgitates the same errors as the January 7, 2011, Final Order by again failing to find that Wilson was coerced into abandoning his month-to-month lease when the only option he was offered for continuing that lease (i) would have raised his rent by $452 a month, a 35% increase above the rent he was charged when he had moved into the housing accommodation just two years before the threatened increase, and (ii) would have forced Wilson to pay a level of rent far in excess of the market-constrained rents charged to all other tenants in his building for comparable units.

4. Just as Judge Mangan abused her discretion by denying Wilson the opportunity for discovery on the coercion issue before she issued her January 7, 2011, Final Order, on remand she abused her discretion by refusing to hold an evidentiary hearing to allow Wilson formally to introduce the evidence which supports his claim of retaliatory action.

[7] The issues on appeal are recited here using the language of the Tenant in the Second Notice of Appeal.

5. Having failed to perform the proper factual analysis, the legal conclusions of the Final Order after Remand fail to support the denial of the claim of retaliation because they are conclusory and circular. Paragraph 7 of the Conclusions of Law erroneously finds that "[t]he record does not support any connection between Tenant's actions and the Lease Options Letter" and therefore concludes "[i]t was not retaliatory." *Double H Housing*, however, clearly establishes that a housing provider, by offering a choice of leases based on different durations, can coerce a tenant into forfeiting his legal right to continue on a month-to-month lease. Judge Mangan errs by failing to determine, as the Commission obviously intended, whether the choices offered to Wilson were coercive and thus fall within the definition of retaliatory action. Similarly, Judge Mangan erroneously concludes that "the Lease Option [L]etter was permitted by law" because the Commission affirmed certain of her findings in its March 10, 2015 Decision and Order. She errs by ignoring that the remand was expressly ordered to allow the Commission to rule on whether the letter is coercive and hence unlawful. Final Order after Remand, 5.

Second Notice of Appeal at 1-3. The Tenant filed a brief in support of the Second Notice of Appeal on July 23, 2015 (Tenant's Brief). The Housing Provider filed a responsive brief on August 10, 2015 (Housing Provider's Brief). The Commission held a hearing in this matter on August 26, 2015.

II. ISSUES ON APPEAL[8]

A. The Final Order after Remand disobeys the Commission's clear directives on remand by again failing to address the extensive facts that Wilson had previously presented and the Commission expressly referenced, to support his claim of coercion constituting retaliatory action. Indeed, Judge Mangan appears to take pride in noting that her Findings of Fact "are identical to the Findings of Facts in the January 7, 2011, Final Order, except for numbering" that the Commission has already rejected as insufficient. Final Order after Remand, 2 n.1.

B. Just as Judge Mangan abused her discretion by denying Wilson the opportunity for discovery on the coercion issue before she issued her January

[8] The Commission, in its discretion, has reordered the issues on appeal for ease of discussion and to group together issues that involve the application and analysis of common facts and legal principles. *See, e.g.*, Tenants of 2300 & 2330 Good Hope Rd., S.E. v. Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015) at n.15; Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 28, 2014); Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014) at n.10. Issues A, B, C, D, and E herein, correspond to issues 1, 4, 2, 3, and 5, respectively, in the Second Notice of Appeal.

7, 2011, Final Order, on remand she abused her discretion by refusing to hold an evidentiary hearing to allow Wilson formally to introduce the evidence which supports his claim of retaliatory action.

C. The Final Order after Remand erroneously fails to analyze the facts presented by Wilson pursuant to the standards set forth by the Court of Appeals in *Double H Housing Corp. v. David*, 947 A.2d 38, 42 (D.C. 2008) to determine whether "the 'choice' presented by the landlord conflicts with [the tenant's legal rights], because it denies the tenant a meaningful opportunity to remain as a month-to-month tenant." In particular, Judge Mangan refuses to address the issue of whether "the disparity between (i) the monthly rent charged to a tenant who continues residence as a month-to-month tenant and (ii) the monthly rent charged upon execution of a new lease . . . is so large that the tenant is effectively forced to sign a new lease." *Id.*

D. The Final Order after Remand regurgitates the same errors as the January 7, 2011, Final Order by again failing to find that Wilson was coerced into abandoning his month-to-month lease when the only option he was offered for continuing that lease (i) would have raised his rent by $452 a month, a 35% increase above the rent he was charged when he had moved into the housing accommodation just two years before the threatened increase, and (ii) would have forced Wilson to pay a level of rent far in excess of the market-constrained rents charged to all other tenants in his building for comparable units.

E. Having failed to perform the proper factual analysis, the legal conclusions of the Final Order after Remand fail to support the denial of the claim of retaliation because they are conclusory and circular. Paragraph 7 of the Conclusions of Law erroneously finds that "[t]he record does not support any connection between Tenant's actions and the Lease Options Letter" and therefore concludes "[i]t was not retaliatory." *Double H Housing*, however, clearly establishes that a housing provider, by offering a choice of leases based on different durations, can coerce a tenant into forfeiting his legal right to continue on a month-to-month lease. Judge Mangan errs by failing to determine, as the Commission obviously intended, whether the choices offered to Wilson were coercive and thus fall within the definition of retaliatory action. Similarly, Judge Mangan erroneously concludes that "the Lease Option [L]etter was permitted by law" because the Commission affirmed certain of her findings in its March 10, 2015 Decision and Order. She errs by ignoring that the remand was expressly ordered to allow the Commission to rule on whether the letter is coercive and hence unlawful. Final Order after Remand, 5.

III. DISCUSSION

A. The Final Order after Remand disobeys the Commission's clear directives on remand by again failing to address the extensive facts that Wilson had previously presented and the Commission expressly referenced, to support his claim of coercion constituting retaliatory action. Indeed, Judge Mangan appears to take pride in noting that her Findings of Fact "are identical to the Findings of Facts in the January 7, 2011, Final Order, except for numbering" that the Commission has already rejected as insufficient. Final Order after Remand, 2 n.1.

The Tenant asserts on appeal that the ALJ erred in finding that he had failed to prove his claim of retaliation. Second Notice of Appeal at 1-3. The Tenant primarily asserts that the ALJ erred by failing to determine whether the choices presented to the Tenant in a letter from the Housing Provider dated August 4, 2004 (Lease Option Letter)[9] were coercive and thus fell within the definition of retaliation action. Tenant's Brief at 8.

As the Commission stated in its Initial Decision and Order, the section of the Act addressing retaliatory action is contained in D.C. OFFICIAL CODE § 42-3505.02 (2001), which provides as follows:

> (a) No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter, by any rule or order issued pursuant to this chapter, or by any other provision of law. Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant,

---

[9] The Commission's review of the record reveals that the Housing Provider sent the Lease Option Letter, which contained several different rent increases amounts corresponding with an optional length of a new lease agreement, as follows:

Lease Option	Monthly Rent	Lease Option	Monthly Rent
12 – Month Lease	$1,303.00	6 – Month Lease	$1,505.00
11 – Month Lease	$1,540.00	5 – Month Lease	$1,605.00
10 – Month Lease	$1,555.00	4 – Month Lease	$1,655.00
9 – Month Lease	$1,495.00	3 – Month Lease	$1,665.00
8 – Month Lease	$1,535.00	2 – Month Lease	$1,665.00
7 – Month Lease	$1,545.00	Month-to-Month	$1,755.00

RX 3; R. at 208. *See* Final Order at 2; R. at 198.

or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

(b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:

(1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;

(2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;

(3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;

(4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;

(5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or

(6) Brought legal action against the housing provider.

D.C. OFFICIAL CODE § 42-3505.02; *see, e.g.*, Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-29,149 (RHC Mar. 10, 2015); Karpinski v. Evolve Prop. Mgmt., RH-TP-09-29,590 (RHC Aug. 19, 2014); Smith v. Joshua, RH-TP-07-28,961 (RHC Feb. 3, 2012).

The regulations further clarify what constitutes retaliatory action, providing as follows: "[f]or purposes of this section, 'Retaliatory action,' is action intentionally taken against a tenant

by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 of the Act." 14 DCMR § 4303.1 (2004). (emphasis added)

In the Final Order After Remand, the ALJ noted that the alleged retaliatory action was the mailing of the Lease Option Letter. Final Order After Remand at 4; R. at 274. The ALJ next determined that the Tenant had not raised a presumption of retaliation, under D.C. OFFICIAL CODE § 42-3505.02(b), because he had not produced any evidence that he had engaged in any protected activity within the six months prior to the Lease Option Letter. *Id.*

Finally, the ALJ determined that the Tenant had failed to prove that the mailing of the Lease Option Letter was in response to any action by the Tenant, or that the Lease Option Letter was an action "not otherwise permitted by law." *Id.* at 5; R. at 273. The ALJ explained as follows:

> The record includes only one Tenant action that preceded the Lease Option Letter—Mr. Wilson paid rent on a month-to-month basis . . . . The record does not support any connection between Tenant's actions and the Lease Option Letter. Offering a lease option was a decision Housing Provider made independent of any action on part of Tenant Wilson or any tenant. It was not retaliatory. Further, when no presumption applies, the retaliation statute is applicable only where a landlord takes an action not "otherwise permitted my [sic] law." As affirmed by the Rental Housing Commission in this case, the Lease Option [L]etter was permitted by law.

Id. (citations omitted).

The Commission's standard of review of the ALJ's Final Order After Remand is contained at 14 DCMR § 3807.1, and provides as follows:

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

The Commission has consistently held that where substantial evidence exists to support an ALJ'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 [ALJ].'" Lutsko, RH-TP-08-29,149 (quoting Hago v. Gewirz, RH-TP-08-11-552 & RH-TP-08-12,085 (RHC Feb. 15, 2012)); *see* Boyd v. Warren, RH-TP-10-29,819 (RHC June 5, 2013); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012).

The Commission observes that at its hearing, the Tenant conceded that the ALJ had not erred by determining that he was not entitled to a presumption of retaliation, under D.C. OFFICIAL CODE § 42-3505.02(b). Hearing CD (RHC Aug. 26, 2015) at 11:10. Accordingly, in light of the Tenant's voluntary concession, the Commission will not address the legal merits of the ALJ's findings regarding the presumption of retaliation. Nonetheless, as the ALJ stated in the Final Order After Remand, when a tenant is not entitled to the presumption of retaliation under D.C. OFFICIAL CODE § 42-3505.02(b), he or she must demonstrate by a preponderance of the evidence that retaliation occurred under D.C. OFFICIAL CODE § 42-3505.02(a). *See* D.C. OFFICIAL CODE § 2-509(b);[10] Sheikh v. Smith Prop. Holdings Three (DC) LP, RH-TP-12-30,279 (RHC July 29, 2015); Lutsko, RH-TP-08-29,149 at n.25; Burkhardt, RH-TP-06-28,708; *see also* Final Order After Remand at 4-5; R. at 273-74.

As the Commission explained *supra* at 9-11, in order to prevail on a claim of retaliation under the Act, the Tenant must prove that the Housing Provider committed a retaliatory action as set forth in D.C. OFFICIAL CODE § 42-3505.02(a), that was intended to "injure or get back at" the Tenant for exercising a right protected by law. D.C. OFFICIAL CODE § 42-3505.02; 14 DCMR § 4303.1; *see, e.g.,* Lutsko, RH-TP-08-29,149; Karpinski, RH-TP-09-29,590; Smith, RH-TP-07-

[10] D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, as follows: "In contested cases . . . the proponent of a rule or order shall have the burden of proof."

28,961. In this case, the Tenant's claim of retaliation is that the Housing Provider mailed the Lease Option Letter in response to the Tenant's exercise of his month-to-month tenancy. Hearing CD (OAH May 4, 2015) at 13:44-13:46.

Even assuming, *arguendo*, and without deciding, that the Lease Option Letter constituted coercion (and therefore an act "not otherwise permitted by law"), and that the Tenant's month-to-month tenancy was a right "conferred under the Act, its regulations, or any other provision of law," the Commission in its review nonetheless determines that there is not substantial evidence in the record to undermine, or otherwise contradict, the ALJ's determination that the Tenant failed to present substantial evidence connecting the two actions. *See* D.C. OFFICIAL CODE § 42-3505.02(a); 14 DCMR §§ 3807.1 & 4303.1; Lutsko, RH-TP-08-29,149; Karpinski, RH-TP-09-29,590; Smith, RH-TP-07-28,961. In short, the record does not reveal substantial evidence to support the Tenant's contention that the Housing Provider's action in presenting the Tenant with the Lease Option Letter was intended to injure or get back at the Tenant for his exercise of a right, namely, the continued exercise of his month-to-month tenancy. D.C. OFFICIAL CODE § 42-3505.02(a); 14 DCMR §§ 3807.1 & 4303.1; Lutsko, RH-TP-08-29,149; Karpinski, RH-TP-09-29,590; Smith, RH-TP-07-28,961; *see* Final Order After Remand at 5; R. at 273.[11]

Therefore, the Commission is satisfied that the ALJ's conclusion that the Tenant failed to prove his claim of retaliatory action under the Act was in accordance with the relevant provisions of the Act, and supported by substantial record evidence. D.C. OFFICIAL CODE § 42-3505.02(a);

[11] For example, the absence of any, even arguable, temporal connection between the two actions is reflected in the "Statement of Facts" attached to the Tenant Petition, in which the Tenant provides that the two actions were separated by more than thirteen months—his initial lease with the Housing Provider converted to a month-to-month tenancy on July 1, 2003, and the Housing Provider sent the Lease Option Letter on August 4, 2004. Tenant Petition, Statement of Facts at 1; R. at 14.

14 DCMR §§ 3807.1 & 4303.1; Lutsko, RH-TP-08-29,149; Boyd, RH-TP-10-29,819; Marguerite Corsetti Trust, RH-TP-06-28,207.

For the foregoing reasons, the Commission affirms the ALJ on issue A.[12] D.C. OFFICIAL CODE § 42-3505.02(a); 14 DCMR §§ 3807.1 & 4303.1; Lutsko, RH-TP-08-29,149; Karpinski, RH-TP-09-29,590; Boyd, RH-TP-10-29,819; Marguerite Corsetti Trust, RH-TP-06-28,207; Smith, RH-TP-07-28,961.

B. Just as Judge Mangan abused her discretion by denying Wilson the opportunity for discovery on the coercion issue before she issued her January 7, 2011, Final Order, on remand she abused her discretion by refusing to hold an evidentiary hearing to allow Wilson formally to introduce the evidence which supports his claim of retaliatory action.

In its Initial Decision and Order, the Commission remanded this case to the ALJ for further findings of fact and conclusions of law on the issue of retaliation. *See* Initial Decision and Order at 21. The Commission instructed that the ALJ "in her discretion, may determine that the record needs to be supplemented through additional proceedings, including an evidentiary hearing, to assist her in her determination of the retaliation claim." *Id.* On remand, the ALJ determined that further evidentiary proceedings were not necessary because she found, based on the parties' representations at the May 4, 2015, OAH status hearing, that "the facts in the case

[12] To the extent that the Tenant is asserting that he is entitled to relief based solely on the claim that he was coerced into signing a twelve-month lease—a claim that is separate and distinct from a claim of retaliation under D.C. OFFICIAL CODE § 42-3505.02—the Commission notes that a claim of coercion by itself does not constitute a distinct, legally cognizable cause of action under the Act, and therefore the ALJ and the Commission lack jurisdiction over the issue. D.C. OFFICIAL CODE §§ 2-1831.03(b-1)(1), 42-3502.02(a)(2) & 42-3502.04(c); *see, e.g.*, Doyle v. Pinnacle Realty Mgmt., TP 27,067 (RHC Mar. 10, 2015) (determining that the Commission lacked jurisdiction over a claim for sanctions against the housing provider); Palmer v. Clay, 2013-DHCD-TP-30,431 (RHC Jan. 29, 2015) (determining that Commission lacked authority under the Act to compel the housing provider to pay a sum of money that was subject to a pending appeal); Carpenter v. Markswright Co., Inc., RH-TP-10-29,840 (RHC June 5, 2013) (determining that the Commission could not afford relief based on a provision of the D.C. OFFICIAL CODE that was not contained in the Act).

had not changed." Final Order After Remand at 2; R. at 276; *see* Hearing CD (OAH May 4, 2015).

The Commission has consistently held that an issue that is not raised before the ALJ cannot be raised for the first time before the Commission. *See, e.g.,* Marguerite Corsetti Trust, RH-TP-06-28,207 (dismissing the housing provider's claims regarding modification of a rent refund because they were not sufficiently raised and developed before the ALJ); Tillman v. Reed, RH-TP-08-29,136 (RHC Sept. 18, 2012) (stating that housing provider's excuse for his absence from the OAH hearing was never raised or presented to the ALJ, and thus did not constitute a cognizable claim on appeal); Stone v. Keller, TP 27,033 (RHC Feb. 26, 2009) (dismissing issued raised by the tenant for the first time on appeal).

The Commission's review of the record in this case, and particularly the record of the status hearing on May 4, 2015, reveals that the Tenant failed to request a hearing on remand, and failed to object when the ALJ indicated that she was not inclined to hold a hearing on remand. Hearing CD (OAH May 4, 2015). In fact, the Commission notes that the Tenant stated that he would be willing to proceed on remand without a hearing. *Id.* at 13:38. (emphasis added). The Tenant explained that he did not believe that the facts were in dispute, and that so long as the Housing Provider did not contest his information submitted regarding the rent levels in units at the Housing Accommodation that were allegedly comparable to his own, he saw no need for a hearing.[13] *Id.* at 13:38-13:44.

Moreover, the Commission notes that, in light of its disposition of issue A, *supra* at 9-14,

[13] The Commission's review of the record does not reveal any evidence that the Housing Provider contested the information submitted by the Tenant regarding the rent levels for units at the Housing Accommodation that were similar to the Tenant's unit.

the Tenant's request for discovery is rendered moot. *See* BLACK'S LAW DICTIONARY at 1029-30 (8th ed. 2004) (defining "moot" as "[h]aving no practical significance; hypothetical or academic"); *see also* Kuratu v. Ahmed. Inc., RH-TP-07-28,985 (RHC Jan. 29, 2012) (where case remanded to determine remedy for violation of registration provision of the Act, issue of notice to tenant of reduction in services was moot on appeal); Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005) (dismissing issue as moot where there was no further relief the Commission could grant). In the statement of issue B recited *supra*, the Tenant asserts that he requested discovery only on the issue of coercion. Second Notice of Appeal at 2. As the Commission addressed *supra* at 9-14, even if the Tenant had proven that the Lease Option Letter were coercive through the introduction of evidence at a formal evidentiary hearing or otherwise, the Tenant's retaliation claim would still fail because the Tenant did not prove that the Housing Provider's action in presenting the Tenant with the Lease Option Letter was intended to injure or get back at (i.e., retaliate against) the Tenant for his exercise of a right, i.e., the month-to-month tenancy. D.C. OFFICIAL CODE § 42-3505.02(a); 14 DCMR §§ 3807.1 & 4303.1; Lutsko, RH-TP-08-29,149; Karpinski, RH-TP-09-29,590; Smith, RH-TP-07-28,961; *see* Final Order After Remand at 5; R. at 273.

Accordingly, where the Commission's review of the record reveals that (1) the Tenant failed to timely request a hearing before the ALJ, and effectively waived his right to a hearing during the May 4, 2015 status conference, and (2) a discovery request solely with respect to "coercion" would not by itself serve to prove the Tenant's claim of retaliation in this case under D.C. OFFICIAL CODE § 42-3505.02(a)-(b), the Commission dismisses this issue on appeal. *See, e.g.,* Marguerite Corsetti Trust, RH-TP-06-28,207; Tillman, RH-TP-08-29,136; Stone, TP 27,033.

C. The Final Order after Remand erroneously fails to analyze the facts presented by Wilson pursuant to the standards set forth by the Court of Appeals in Double H Housing Corp. v. David, 947 A.2d 38, 42 (D.C. 2008) to determine whether "the 'choice' presented by the landlord conflicts with [the tenant's legal rights], because it denies the tenant a meaningful opportunity to remain as a month-to-month tenant." In particular, Judge Mangan refuses to address the issue of whether "the disparity between (i) the monthly rent charged to a tenant who continues residence as a month-to-month tenant and (ii) the monthly rent charged upon execution of a new lease . . . is so large that the tenant is effectively forced to sign a new lease." *Id.*

D. The Final Order after Remand regurgitates the same errors as the January 7, 2011, Final Order by again failing to find that Wilson was coerced into abandoning his month-to-month lease when the only option he was offered for continuing that lease (i) would have raised his rent by $452 a month, a 35% increase above the rent he was charged when he had moved into the housing accommodation just two years before the threatened increase, and (ii) would have forced Wilson to pay a level of rent far in excess of the market-constrained rents charged to all other tenants in his building for comparable units.

E. Having failed to perform the proper factual analysis, the legal conclusions of the Final Order after Remand fail to support the denial of the claim of retaliation because they are conclusory and circular. Paragraph 7 of the Conclusions of Law erroneously finds that "[t]he record does not support any connection between Tenant's actions and the Lease Options Letter" and therefore concludes "[i]t was not retaliatory." *Double H Housing*, however, clearly establishes that a housing provider, by offering a choice of leases based on different durations, can coerce a tenant into forfeiting his legal right to continue on a month-to-month lease. Judge Mangan errs by failing to determine, as the Commission obviously intended, whether the choices offered to Wilson were coercive and thus fall within the definition of retaliatory action. Similarly, Judge Mangan erroneously concludes that "the Lease Option [L]etter was permitted by law" because the Commission affirmed certain of her findings in its March 10, 2015 Decision and Order. She errs by ignoring that the remand was expressly ordered to allow the Commission to rule on whether the letter is coercive and hence unlawful. Final Order after Remand, 5.[14]

---

[14] The Commission, in its discretion, combines its discussion of issues C, D and E because it observes that these issues raise a substantially similar contention—namely, whether the Lease Option Letter provided by the Housing Provider to the Tenant constituted coercion on the Tenant to accept a new annual lease rather than continue a proposed month-to-month lease at a substantially higher rent in violation of the Act under the authority of Double H Housing Corp. v. David, 947 A.2d 38 (D.C. 2008). *See, e.g.*, Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014); Barac Co. v. Tenants of 809 Kennedy St., VA 02-107 (RHC Sept. 27, 2013); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8.

The Tenant asserts that the ALJ erred by failing to determine that the Lease Option Letter coerced him into signing a twelve-month lease and abandoning his month-to-month lease, and that the ALJ failed to comply with the legal standards for coercion established by the DCCA in Double H, in that he was denied a meaningful opportunity to remain as a month-to-month tenant. Second Notice of Appeal at 1-2 (citing Double H, 947 A.2d at 42). The Tenant similarly maintains that the continuation of his month-to-month tenancy would have required him to pay an increase in rent of 35% over his rent at the time of the Lease Option Letter and that such a substantial increase in proposed month-to-month rent constituted improper coercion to accept an annual lease under Double H. *Id.* (citing Double H, 947 A.2d at 42).[15]

The Commission observes that the Tenant's reliance on Double H in support of his retaliation claim is misplaced. 947 A.2d at 38-42.[16] Tenant's Brief at 4-8; Notice of Appeal at 1-2. Significantly, the Commission notes that, unlike the Housing Accommodation in this case, which was subject to the rent stabilization provisions of the Act, the housing accommodation at issue in Double H was exempt from the rent stabilization provisions of the Act. Double H, 947

---

[15] The Commission's conclusion that the ALJ did not err in her determination that the Tenant failed to prove his claim of retaliatory action by the Housing Provider may, at least arguably, be deemed to render issues C, D and E moot, especially in light of the Tenant's admission at the Commission's hearing that he was not entitled to a presumption of retaliation under D.C. OFFICIAL CODE § 42-3505.02(b). *See supra* at 9-14. Nonetheless, in its discretion, the Commission has determined to address the Tenant's claims regarding the relevance of the DCCA decision in Double H, 947 A.2d at 42, to the Commission's determination of retaliation in this appeal.

[16] The Commission notes that the Tenant had cited Double H, in his First Notice of Appeal and brief to support a contention that the ALJ erred in the Final Order by relying on Double H, on the grounds that the housing accommodation in Double H was an exempt property, and thus the Housing Provider was not required to comply with the Act's notice provisions in order to implement a rent increase. 947 A.2d at 38; *see* Initial Decision and Order at n.13 (citing Double H, 947 A.2d at 38). The Commission concluded that, contrary to the Tenant's assertion, the ALJ did not interpret the legal standards articulated in Double H, 947 A.2d at 38, in the context of requisite notices to tenants of rent increases for non-exempt properties or the legal grounds for determining a rent increase under the Act. *Id.* Rather, the ALJ cited the case as precedent for the permissibility of rent discounts by housing providers as an inducement for a month-to-month tenant's agreement to a term lease so long as the tenant cannot reasonably be determined to have been coerced by a housing provider to accept such inducement. *Id.*

A.2d at 39 n. 1. In Double H, the DCCA merely speculated as follows in dicta:

> We can imagine a disparity between (i) the monthly rent charged to a tenant who continues residence as a month-to-month tenant and (ii) the monthly rent charged upon execution of a new lease, that is so large that the tenant is effectively forced to sign a new lease. In such a case, we might well hold that the 'choice' presented by the landlord conflicts with section 42-3505.01, because it denies the tenant a meaningful opportunity to remain as a month-to-month tenant.

Id. at 42.

As suggested above by the DCCA, the Commission recognizes that, for a rental unit exempt from the Act's requirements for rent stabilization in rent increases like that in Double H, a substantial disparity between the amount of existing rent and the amount of proposed rent for a month-to-month tenancy may legitimately serve as a critical factor in determining coercion to sign a new annual lease. *Id.* at 39 n.1 & 41-42.

Nonetheless, for the Housing Accommodation in this appeal, subject to the Housing Provider's compliance with the Act's procedural and substantive requirements for rent increases, the Commission's review of the record does not reveal, nor does the Tenant assert that the record contains, substantial evidence demonstrating any of the following: (1) that any of the rent increases proposed by the Housing Provider in the Lease Option Letter (including the alleged 35% increase) violated the rent ceiling provisions of the Act in effect at the time of the issuance of the Lease Option Letter,[17] *see* D.C. OFFICIAL CODE §§ 42-3502.06-.07; 14 DCMR

[17] The Commission notes that the Tenant Petition was filed on March 6, 2007. Tenant Petition at 1; R. at 22; *see supra* at 2. The Lease Option Letter at issue in the Tenant Petition and in this appeal was sent to the Tenant by the Housing Provider on August 4, 2004, within the three year statute of limitations period for the Tenant Petition under the Act. *See* D.C. OFFICIAL CODE § 42-3502.06(e); *see supra* at 2-4. On August 5, 2006, the "Rent Control Reform Amendment Act of 2006," D.C. Law 16-145 (Aug. 5, 2006) (Rent Control Reform Act) amended the Act by abolishing "rent ceilings" and by replacing the term "rent ceiling" in the Act with the term "rent charged." *See* D.C. OFFICIAL CODE § 42-3502.06(a) (2008 Supp.). *See,* D.C. Law 16-145, §§ 2(a) & (c), 53 D.C. Reg. at 4889, 4890 (2006). Because the Lease Option Letter was sent before the enactment of the Rent Control Reform Act, it is subject to the applicable rent ceiling provisions of the Act that were in effect on August 4, 2004 with respect to all rent adjustments and increases at issue in this appeal. *See* D.C. OFFICIAL CODE § 42-3502.06(e).

§§ 4200 *et seq.*; (2) that any of the rent increases proposed in the Lease Option Letter were otherwise based upon rent ceiling adjustments that were not appropriately taken, perfected or implemented under the Act's provisions for rent stabilization; or (3) that any of the rent increases proposed in the Lease Option Letter exceeded the existing rent ceiling for the Housing Accommodation. *See* Tenant's Brief; Second Notice of Appeal; First Notice of Appeal; *see also, e.g.,* D.C. OFFICIAL CODE § 42-3509.01(a);[18] Barron, TP 28,510, TP 28,521, & TP 28,526 (determining that hearing examiner erred by awarding rent refunds where the rent charged did not exceed the rent ceiling); Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) (affirming ALJ's determination that damages were not warranted where the rent charged did not exceed the rent ceiling).

In short, the Commission's review of the record failed to reveal substantial evidence that any of the proposed rent increases for the Tenant's rental unit contained in the Lease Option Letter were not authorized by the Act, despite the amount of the proposed rent increase. *See e.g.,* D.C. OFFICIAL CODE § 42-3509.01(a); Barron, TP 28,510, TP 28,521, & TP 28,526; Notsch, RH-TP-06-28,690. For the foregoing reasons, the Commission is not persuaded based on Double H to change its decision affirming the ALJ on the issue of retaliation, *see supra* at 9-14, and thus the Commission affirms the ALJ on issues C, D, and E.

IV. CONCLUSION

Based on the foregoing, the Commission affirms the ALJ's determination that the Tenant failed to prove his claim of retaliation. D.C. OFFICIAL CODE § 42-3505.02(a); 14 DCMR

[18] D.C. OFFICIAL CODE § 42-3509.01(a) 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 . . . for the amount by which the rent exceeds the applicable rent ceiling[.]"

§§ 3807.1 & 4303.1; Lutsko, RH-TP-08-29,149; Karpinski, RH-TP-09-29,590; Boyd, RH-TP-10-29,819; Marguerite Corsetti Trust, RH-TP-06-28,207; Smith, RH-TP-07-28,961.

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, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in RH-TP-07-28,907 was served by first-class mail, postage prepaid, this **25th day of September, 2015**, to:

Copies to:

David G. Wilson
3003 Van Ness Street, N.W.
Apartment S1006
Washington, D.C. 20008

Roger D. Luchs
Greenstein, DeLorme, & Luchs, P.C.
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036

LaTonya Miles
Clerk of Court
(202) 442-8949