DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-07-29,040

In re: 3636 16th Street, N.W., Unit A868

Ward One (1)

THE WOODNER APARTMENTS
Housing Provider/Appellant/Cross-Appellee

v.

GLORIA TAYLOR
Tenant/Appellee/Cross-Appellant

DECISION AND ORDER

September 1, 2015

PER CURIAM. 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 Rental Accommodations and Conversion Division (RACD), Housing Regulation Administration (HRA), of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA).[1] The applicable provisions of the Rental Housing Act of 1985 (Rental Housing Act), D.C. LAW 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-42-3509.07 (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] The OAH assumed jurisdiction over tenant petitions from the DCRA and RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2001 Supp. 2005). The functions and duties of DCRA, RACD were transferred to the Department of Housing and Community Development (DHCD), Rental Accommodations Division (RAD) 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 § 42-3502.04b (2012 Repl.)).

I. PROCEDURAL HISTORY

On August 10, 2007, Tenant/Appellee/Cross-Appellant, Gloria Taylor (Tenant), residing in Unit A868 of 3636 16th Street, N.W. (Housing Accommodation), filed Tenant Petition (TP) 29,040 with the RACD, claiming that the Housing Provider/Appellant/Cross-Appellee, The Woodner Apartments (Housing Provider), violated the Act as follows: (1) the rent increase was larger than the amount of the increase which was allowed by any applicable provision of the Rental Housing Act of 1985; (2) the rent ceiling filed with the Rental Accommodations and Conversion Division is improper; (3) a rent increase was taken while the unit was not in substantial compliance with the D.C. Housing Regulations; (4) services and/or facilities provided in connection with the rental of the unit have been substantially reduced; and (5) retaliatory action has been directed against me by the Housing Provider, manager or other agent for exercising our rights in violation of Section 502 of the Rental Housing Act of 1985. TP at 1-12; Record for TP 29,040 (R.) at 19-30.

On January 8, 2008, Administrative Law Judge Erika L. Pierson (ALJ) held a hearing on this matter. See Hearing CD (OAH Jan. 8, 2008). On September 16, 2008, the ALJ issued a final order: Taylor v. Woodner Apartments, RH-TP-07-29,040 (OAH Sept. 16, 2008) (Final Order). R. at 137-192. The ALJ made the following findings of fact in the Final Order:[2]

A. Housing Provider's Motion and Tenant's Status

1. Tenant, Gloria Taylor, is 73 years old and has resided in unit A868 at 3636 16th Street, N.W. ("The Woodner Apartments"), since November 1, 2005. The lease for the apartment was signed by Tenant's adult son, David Taylor, on November 1, 2005. PX 101. David Taylor never resided at the apartment but rented the apartment for his mother and adult disabled brother, Timothy Taylor, to reside in.

[2] The Commission has numbered the paragraphs in the ALJ's Final Order for ease of reference.

2. Within the first 30 days that Ms. Taylor occupied the apartment she expressed concerns about conditions in the apartment to the building account manager, Livia Hall. At that time, Ms. Hall was not aware that the apartment was occupied by someone other than David Taylor. Ms. Hall contacted David Taylor and told him that there were unauthorized occupants in the apartment which had to be added to the lease. Soon thereafter, Gloria Taylor received a letter, addressed to her son David, stating that there were undocumented persons living in the apartment, that information was needed about the occupants, and that Housing Provider needed to gain access to the apartment for an inspection regarding Ms. Taylor's complaint. David Taylor faxed Ms. Hall notice that his mother and brother were authorized occupants of the apartment. On December 30, 2005, Ms. Hall sent Gloria Taylor a letter requesting the she provide picture identification for herself and Timothy Taylor so that the building would have their information on file. PX 102. Ms. Taylor complied and provided copies of identification for herself and Timothy.

3. During Gloria Taylor's first year in the apartment, David Taylor was supplementing her rent. Ms. Taylor would send David Taylor $800 each month and David Taylor would send a check to Housing Provider for the full amount of the rent. Beginning in December 2006, Ms. Taylor began to pay the rent directly to Housing Provider by cashier's check rather than through her son. PX 103. Housing Provider was aware that Ms. Taylor and her son Timothy were occupying the apartment since at least November 30, 2005, and accepted rent payments from Ms. Taylor on a monthly basis.

B. Rent and Rent Increases

4. The certified records of the RACD reflect that on June 30, 2004, prior to Ms. Taylor's occupancy, Housing Provider filed a Certificate of Election of Adjustment of General Applicability increasing the rent ceiling for Tenant's unit (#A868) from $1,808 to $1,860. PX 104, 104A. The rent ceiling increase derived from the 2003 CPI-W increase of 2.9%. The effective date of the rent ceiling increase was August 1, 2004. *Id.* On June 30, 2004, the rent charged for unit A868 was $865. *Id.*

5. One month later, on July 30, 2004, Housing Provider filed with the RACD, another Certificate of Election of Adjustment of General Applicability based on the 2003 CPI-W increase of 2.9.%, increasing the rent charged for Tenant's unit from $865 to $890, effective September 1, 2004. PX 105, 105A.

6. On May 2, 2005, Housing Provider filed with the RACD, a Certificate of Election of Adjustment of General Applicability, increasing the rent ceiling for unit A868 from $1,860 to $1,910, effective July 1, 2005. PX106A. The rent ceiling increase was derived from the 2005 CPI-W increase of 2.7%. Id.

7. The May 2, 2005, Certificate of Election of Adjustment of General Applicability, PX 106A, is a 29 page document. Pages 2-13 of Exhibit 106A are a list of affected units, reflecting on page 8 that the rent ceiling for unit A868 was increased from $1,860 to $1,910, effective July 1, 2005. Page 14 is a sample "Notice of Change in Rent Ceiling." Page 15 is an "Affidavit of Service of Notice of Rent Adjustment," reflecting "See Attached." The attached pages 16-26 are a list of affected units reflecting the date of service and an effective date of July 1, 2005.

8. On August 2, 2005, Housing Provider filed with the RACD an "Affidavit of Service of Notice of Rent Adjustment", increasing the rent charged for unit A868 from $890 to $914, effective September 1, 2005. PX 122. Attached to the Affidavit is a list of affected units and a sample "Notice of Increase in Rent Charged." *Id.* The sample Notice of Increase in Rent Charged reflects that the increase was attributable to the May 2005 CPI-W increase of 2.7%. Id.

9. Prior to Ms. Taylor residing in the unit, the documented rent level for the previous tenant was $914/month and the rent ceiling filed with the RACD was $1,910. PX 106, 122. At the time David Taylor signed the lease for Tenant's apartment on November 1, 2005, the rent was set at $1,070 per month and the rent ceiling was $1,910. PX 101. There are no documents on file with the RACD reflecting authorization for an increase in rent charged from $914 to $1,070.

10. On or about September 28, 2006, Ms. Taylor received a notice of rent increase, effective November 1, 2006, increasing her rent from $1,070 to $1,136. PX 108. The notice stated that the rent increase was authorized under section 208(h)(2) of the Rental Housing Act, based on a 4.2% CPI-W increase for the rent control year May 2006 through April 2007 ("2006 CPI-W"). *Id.* The notice of rent increase was addressed to David Taylor. *Id.* On October 16, 2006, Housing Provider filed with the RACD, a Certificate of Notice of Increase in Rent Charged which reflected that Tenant's rent was increased from $1,070 to $1,136, effective November 1, 2006. PX 109, 109A.

11. On November 28, 2006, Ms. Taylor filed an application with the RACD for elderly status for herself and disabled status for her son, Timothy. PX 110. The application was approved by the RACD on the same day. *Id.* Ms. Taylor immediately gave copies of the approved application to Housing Provider. On December 11, 2006, Ms. Taylor hand delivered and mailed a letter to Housing Provider requesting they revoke the proposed rent increase based on the approval of her application for elderly status. PX 111. Ms. Taylor did not receive a response from Housing Provider and beginning on November 6, 2006, she paid the increased rent amount of $1,136/month directly to Housing Provider.

12. When Ms. Hall received Ms. Taylor's application for elderly status, she contacted Ms. Taylor's son, David Taylor, and told him that he did not qualify for elderly status. Because David Taylor is the lease holder for the apartment, Housing Provider determined that they would not reduce the rent based on Gloria. Taylor's elderly status because she was not a signatory on the lease. Ms. Hall has been the account manager for the Woodner Apartments for three to four years and is familiar with the elderly exception provided for in the Rental Housing Act.

13. On May 18, 2007, Ms. Taylor received (addressed to "David Taylor"), a Notice of Increase in Rent Charged, increasing her rent from $1,136 to $1,198.48, based on the 2007 CPI-W increase of 3.5%. PX 112. The rent increase was effective July 1, 2007, and reflected an increase of 5.5% (3.5% CPI-W plus 2%). *Id.* Ms. Taylor paid the increased rent amount beginning July 1, 2007. Ms. Hall is aware that Housing Providers are only permitted to increase a tenants rent once every 12 months and she provided no explanation for the July 1, 2007, rent increase.

C. Tenant's Allegations Regarding Services and Facilities & Housing Code Violations

14. Ms. Taylor first complained about problems with her apartment on November 11, 2005. At that time, Tenant's son, David, submitted a written work request complaining about insufficient heat and water pressure, a leak in the bathroom sink, an inoperable oven pilot light, and roaches. PX 113.

15. In May 2006, Housing Provider placed a notice under Ms. Taylor's door informing her of an annual inspection of her unit to take place on May 15, 2006, to check the physical condition of her apartment. PX 114. Ms. Taylor was present when Earl Jones inspected her unit on May 15, 2006. Following the inspection, Ms. Taylor prepared a list of problems with her apartment and sent it to Housing Provider by mail and in person. Ms. Taylor listed the following problems with her apartment:

    1. Faulty commode which fails to operate every four or five days from the inception of occupancy through May 12, 2006.

    2. Mice and roaches in unit.

    3. Insufficient heat in living and sleeping areas all through the winter months; the bathroom is unheated.

    4. Insufficient lighting in kitchen and sleeping areas; no light in closets and pantry.

    5. The oven simply does not work.

PX 115. In addition to the May 15, 2006, inspection by Housing Provider, the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") inspected Ms. Taylor's apartment on three occasions: August 1, 2006, December 5, 2006, and January 27, 2007.

16. Between November 2005 and August 2008, Ms. Taylor has complained to Housing Provider and DCRA about the following problems in her unit: (1) intermittent inoperable toilet; (2) inoperable exhaust fan in the bathroom; (3) inoperable oven; (4) insufficient hot water; (5) inadequate heat; and (6) mice, roach, and bed bug infestations.

(1) Inoperable Toilet

17. Between November 14, 2005 and November 12, 2007, Ms. Taylor submitted at least 83 written work requests regarding the toilet being clogged or out of order. PX 118. Each time, maintenance repaired the toilet, usually within 3-4 hours of the request. On January 29, 2007, Housing Provider replaced the flush valve and flapper ball in Tenant's toilet and replaced the wax sealant. Tenant continued to have problems with the toilet clogging after the January 29, 2007 repair, and Housing Provider continued to respond to each complaint of a clogged toilet. Ms. Taylor complained to DCRA about the toilet in January 2007, and no notice of violation was issued after an inspection.

(2) Exhaust Fan

18. Ms. Taylor complained on at least two occasions, to Housing Provider and DCRA, that the bathroom either has no exhaust fan or the exhaust fan is inoperable. There are no fans in the individual apartment units; rather, the building has a fan on the roof that connects to the bathroom vents which pulls heat out of the bathrooms. Ms. Taylor's complaint regarding the exhaust fan was investigated by DCRA on January 27, 2007. No notice of violation was issued.

(3) Inoperable Oven

19. Ms. Taylor testified that the oven in her apartment has never worked since she moved in. Ms. Hall inspected the oven in Ms. Taylor's apartment on two occasions: during the building-wide inspection in May 2006 and once with DCRA inspector Turner on January 27, 2007. On both occasions, the pilot light was on, the boiler heated and the oven was hot. No notice of violation was ever issued by DCRA for the oven being inoperable. No repairs were ever made by Housing Provider.

(4) Insufficient Hot Water

20. Ms. Taylor complained that, prior to February 2007, the water in her apartment was often lukewarm or cold. All tenants in the building draw hot

water from one of two boilers. Housing Provider has not received any complaints regarding insufficient hot water from the units above or below Ms. Taylor's apartment. Ms. Taylor reported that the problem with the hot water was corrected on February 27, 2007; however, Housing Provider did not make any repairs to the building heaters. No notice of violation regarding lack of hot water was ever issued by DCRA.

(5) Inadequate Heat

21. Ms. Taylor complained that until the Fall of 2006, the heat in her apartment was inadequate. In the Fall of 2006, Housing Provider changed the filters in the convectors, which is done at the change of every season. No other repairs were made to the heating units. In January2007, Ms. Taylor filed a complaint with DCRA regarding inadequate heat and inoperable toilet, exhaust fan, and oven. On January 27, 2007, DCRA inspected Ms. Taylor's apartment, accompanied by Ms. Hall. Upon inspection, Ms. Hall found the apartment to be very hot and the oven, which Ms. Taylor had reported as inoperable, was turned on to help heat the apartment. No notice of violation for inadequate heat was issued by DCRA.

(6) Mice, Roach, and Bed Bug Infestation

22. Ms. Taylor has made numerous complaints regarding the presence of mice and roaches in her apartment since November 2005. Ms. Taylor provided photographs, taken in late 2006 and early 2007, of dead mice in her apartment. PX 100A-100G. Housing Provider has a contractor who exterminates the premises on a regular basis and exterminates individual tenants' apartments by request. Between December 2005 and November 2007, Ms. Taylor submitted at least 15 work requests for pest control services. PX 118A. Ms. Taylor was provided with traps for mice on numerous occasions as well as extermination for roaches. As of the date of the hearing, Ms. Taylor continues to have a problem with mice and roach infestation.

23. Ms. Taylor also experienced a problem with bed bugs in her apartment in March 2007. Ms. Taylor and her son had multiple bites on their bodies from bed bugs and Ms. Taylor suffered an allergic reaction and a rash for which she sought medical attention. At Ms. Taylor's request, Housing Provider treated the beds in the apartment and the adjacent areas for bed bugs which resolved the problem.

D. Tenant's Claim of Retaliation

24. In April 2006, the tenants of the Woodner Apartments formed a tenant's association and held a meeting with inspectors from DCRA, representatives of the Mayor's Office, and the Metropolitan Police Department.

25. DCRA inspectors conducted building-wide inspections on June 27, 2006, August 1, 2006, December 5, 2006, and January 27, 2007. Notices were posted informing residents of the inspection dates. PX 116, 116A, 116B. Ms. Taylor's apartment was inspected by DCRA on August 1, 2006, December 5, 2006, and January 27, 2007. On January 25, 2007, Ms. Taylor mailed DCRA Inspector, Warren Turner, a memo identifying the following problems in her apartment [PX 117]:

    1. Defective commode, does not flush; reported to DCRA 12/5/06.

    2. Insufficient hot water, early am and early pm.

    3. Insufficient heat in living area, sleeping room; tenant use[s] a portable [heater] in winter months. Cold air comes through windows.

    4. No heat in bathroom.

    5. Insufficient lighting in kitchen and sleeping area; no lights in pantry, and closets.

    6. The oven simply does not work; reported to DCRA 12/5/06.

    7. There are mice and roaches in the unit and premises.

    [PX 117]. Ms. Taylor also hand delivered a copy of the letter to Housing Provider. Ms. Hall was present in Tenant's apartment for the inspection on January 27, 2007. No notices of violation were issued by DCRA.

Final Order at 2-11; R. at 182-191.

The ALJ provided the following legal analysis of the factual findings in the Final Order:

B. Housing Provider's Motion and Tenant's Status

1. At the hearing, Housing Provider argued that the case should be dismissed because Gloria Taylor was not a "Tenant" who had rights under the Rental Housing Act. Housing Provider argued that because the lease for Ms. Taylor's apartment was signed by David Taylor, Gloria Taylor's son, he is the rightful tenant of the unit and any relief would be owed only to David Taylor.

2. As an initial matter, I reject any argument on behalf of Housing Provider that tenancy is established solely by who signs the lease or pays the rent or that no rent increase was demanded of Ms. Taylor where the notices for rent increases were addressed to David Taylor. The Rental Housing Act states that a "tenant" includes a "tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." D.C. Official Code § 42-3502(36).

3. Ms. Hall testified that in November 2005, when she learned that the apartment was occupied by Ms. Taylor and Timothy, she contacted David Taylor to have him submit authorization for Ms. Taylor and Timothy to reside in the apartment. She further requested that Ms. Taylor and Timothy provide picture identification for Housing Provider's files because they were occupying the unit. As such, Housing Provider permitted Ms. Taylor to occupy the apartment and Ms. Taylor is the rightful tenant entitled to occupancy and any relief stemming from violations of the Rental Housing Act, would be owed to Ms. Taylor. I further reject Housing Provider's argument that Ms. Taylor was a sub-lessee of David Taylor and therefore David Taylor was Gloria Taylor's landlord where at all relevant times, rent was paid to Housing Provider.

4. Housing Provider's suggestion that a tenancy under the Act may only be created by a written contract is misplaced. Any person who occupies a rental unit by agreement with the housing provider for payment of rent, is a tenant, even though there is no written lease. *See Nicholas v. Howard,* 458 A.2d 1039, 1040 (D.C. 1983). The District of Columbia Court of Appeals has held that a landlord-tenant relationship may arise by an express or implied contractual agreement. *Id.* Although Gloria Taylor did not sign the lease, Housing Provider was aware of and authorized Ms. Taylor and her son, Timothy, to occupy the apartment and knowingly accepted rent payments from Ms. Taylor and responded to complaints submitted by Ms. Taylor. The evidence of record is clear that while Ms. Taylor did not have a lease, she was entitled to possession and occupancy of the rental unit because of the implied contract with the housing provider and rent payments made. *Dias v. Perry,* TP-24,379 (RHC April 20, 2001) at 9-10.

5. Housing Provider further argued that David Taylor should be joined to this matter as a "necessary" or "indispensable" party. A necessary party is one whose interest will be affected by the suit or without whom complete relief cannot be granted. *See* Sup. Ct. Civ. R. 19(a) [footnote omitted]; *Multi-Family Mgmt. v. Hancock,* 664 A.2d 1210, 1214 (D.C. 1995). Although David Taylor *may* be an *interested party*, he is not a necessary party. Joining David Taylor is not required to afford complete relief between Housing Provider and Tenant. Because I have determined that Gloria Taylor is the rightful tenant and therefore the proper party to this matter and she has represented that her son, David Taylor, is aware of the proceedings and has no interest in being joined, I find that he is not a necessary or indispensable party to this proceeding. Counsel for Housing Provider was given the opportunity to submit further argument and any legal support to his oral motion and chose not to do so.

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

6. Tenant's petition alleges that her rent was increased by an amount larger than allowed by the Rental Housing Act and that the rent ceiling filed with the RACD is improper. Tenant filed her petition on August 8, 2007, after the

Rental Housing Act was amended and rent ceilings were abolished. Housing Provider's actions prior to August 5, 2006, are covered by the prior Act, under which "the principal protections for tenants are the imposition of a rent ceiling and the prohibition against upward adjustment of that ceiling except on specifically enumerated grounds." *Winchester Van Buren Tenants Ass'n v. D.C. Rental Hous. Comm'n*, 550 A.2d 51, 55 (D.C. 1988), quoted in *Sawyer Prop. Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 103 (D.C. 2005).

7. The Petition challenges five increases in the rent charged and/or rent ceiling for Ms. Taylor's unit: (1) an increase in the rent ceiling, effective July 1, 2005, prior to Ms. Taylor occupying the unit; (2) an increase in the rent charged, effective September 1, 2005, prior to Ms. Taylor occupying the unit; (3) the validity of the rent charged on November 1, 2005, when Ms. Taylor occupied the unit; (4) an increase in rent charged, effective November 1, 2006; and (5) an increase in rent charged, effective July 1, 2007.

8. Counsel for Tenant in this case introduced a number of certified documents from the RACD concerning increases in the rent ceiling and rent charged for Tenant's unit from June 30, 2004, to July 1, 2007. No specific testimony was offered on the relevance of each document, although counsel for Tenant argued their relevance in her post-hearing brief. Housing Provider offered no testimony either in support of or in opposition to the issues of improper rent levels and increases.

   The rent increases were as follows:

		Rent Ceiling		Rent Charged			
Exhibit	RACD Filing Date	Prev Ceiling	New Ceiling	Prev Rent	New Rent	Effective Date	Basis
104	6/30/2004	$1,808	$1,860	$865	$865	8/1/2004	2003 CPI-W
105A	7/30/2004	$1,860	$1,860	$865	$890	9/1/2004	2003 CPI-W
106A	5/2/2005	$1,860	$1,910	$890	$890	7/1/2005	2005 CPI-W
122	8/2/2005	$1,910	$1,910	$890	$914	9/1/2005	2005 CPI-W
November 1, 2005, Ms. Taylor moves into apartment, Rent is $1,070							
108,10 9,109A	10/16/2006			$1,070	$1,136	11/1/2006	2006 CPI-W
112	Unknown			$1,136	$1,198	7/1/2007	2007 CPI-W

1. The 2005 CPI-W Increase and the July 1, 2005, Rent Ceiling Increase

9. Tenant has advanced three arguments regarding rent adjustments based on the 2005 CPI-W: 1) Housing Provider improperly perfected the 2005 CPI-W rent ceiling increase (from 1860 to 1910) on May 2, 2005, because it was filed with the RACD in less than 12 months after June 30, 2004, of a rent ceiling increase; 2) the September 1, 2005, increase in rent charged from $890 to $914 was invalid because it implemented the improperly perfected 2005 CPI-W increase; and 3) because the September 1, 2005, , rent increase was invalid, Tenant's rent when she moved into the apartment on November 1, 2005, should have been $890 and not the $1,070 set forth in the lease.

10. Tenant filed her petition on August 10, 2007, and therefore may challenge any increases in rent that occurred between August 10, 2004, and August 10, 2007. The documents reflect that on May 2, 2005, Housing Provider attempted to take and perfect the 2005 CPI-W increase of 2.7% by filing a Certificate of Election of Adjustment of General Applicability, increasing the rent ceiling for Tenant's unit from $1,860 to $1,910, effective July 1, 2005. PX106A. The rent ceiling was previously increased when Housing Provider filed a Certificate of Election of Adjustment of General Applicability on June 30, 2004 [footnote omitted], increasing the rent ceiling from $1,808 to $1,860 (based on the 2003 CPI-W increase), effective August 1, 2004. PX 104, 104A:

Date Rent Ceiling Increase Perfected	**Date Rent Ceiling Increase Effective**	**Date Corresponding Rent Increase Implemented**
6/30/2004 ($1,808 to $1,860)	8/01/2004	9/01/2004 ($865 to $890)
5/02/2005 ($1,860 to $1,910)	7/01/2005	9/01/2005 ($890 to $914)
11 months between dates of perfection	11 months between effective dates	12 months between rent increase implementation dates

The applicable statute and regulations provide:

> A housing provider may not implement an adjustment of general applicability . . . for a rental unit within 12 months of the effective date of the previous adjustment of general applicability.

D.C. Official Code § 42-3502.06(c)(2005).

> A housing provider may take and perfect a rent ceiling adjustment of general applicability only once in a twelve (12) month period, and a housing provider who elects to perfect a rent ceiling adjustment for a rental unit under § 206(b) of the Act shall not be eligible to take and perfect another such adjustment during the (12) month period immediately following the date of perfection of the prior adjustment of general applicability.

14 DCMR 4206.3 (emphasis added).

11. In order to "take and perfect" a rent ceiling adjustment of general applicability, a housing provider must file with the RACD and serve on affected tenants a "Certificate of Election of Adjustment of General Applicability." *See* 14 DCMR 4204.10; *Sawyer Prop. Mgmt. Inc. v. D.C. Rental Hous. Comm'n,* 877 A.2d 96, 104 (D.C. 2005). The Certificate of Election must be filed within 30 days following the date when the housing provider is first eligible the take the adjustment. 14 DCMR 4204.10. In most circumstances, a housing provider is "first eligible" to take the adjustment on the date the adjustment became effective, i.e. May 1 of each year. *See Sawyer*, 877 A.2d at 104. However, as the District of Columbia Court of Appeals noted in *Sawyer,* there may be circumstances under which a housing provider will not be eligible to take an adjustment of general applicability until some time after the published effective date of the adjustment:

> "For example, a housing provider may take and perfect a rent ceiling adjustment of general applicability only once every twelve months [citations omitted]. If the first adjustment is perfected on May 31, for instance, the twelve month rule renders the provider ineligible to take the second adjustment until May 31 of the following year, thirty days later than the published effective date of that adjustment."

Sawyer, 877 A.2d at 104, FN 5. In addition, other conditions such as a vacancy increase or a hardship increase, could affect the date on which a housing provider is eligible to take an increase.

12. Based on the effective date of the 2005 CPI-W, May 1, 2005, it appears that the June 30, 2004, rent ceiling increase may not have been properly perfected; however, there is no evidence to establish whether it was properly perfected. Neither Tenant nor Housing Provider presented any evidence on this issue. Absent evidence to the contrary, I will treat the June 30, 2004, rent ceiling increase as taken and perfected on June 30, 2004. *See* 14 DCMR 4206.4. Accordingly, the July 1, 2005, rent ceiling increase, which was taken and perfected May 2, 2005, was invalid because it was perfected less than 12 months after the previous rent ceiling increase was perfected on June 30, 2004.

13. Housing Provider's perfection of consecutive adjustments of general applicability within less than 12 months violates that Rental Housing Act. 14 DCMR 4206.3. A housing provider who fails to perfect an adjustment in the rent ceiling through an appropriate timely filing with the Rent Administrator forfeits the right to the adjustment. *Sawyer,* 877 A.2d at 100. The Commission has consistently held that that last legally established rent ceiling remains the rent ceiling unless it is properly adjusted. *Redmond v. Marjerle Mgmt, Inc.,* TP 23,146 (RHC TP 23,146) at 25, *aff'd Marjerle Mgmt, Inc., v. D.C. Rental Hous. Comm'n, 866 A.2d 41 (D.C. 2004).* Consequently, the correct rent ceiling for Tenant's unit remained $1,860. However, as Ms. Taylor's rent has always been less than the $1,860 rent ceiling, no rent refund is warranted. [footnote omitted] *See* 14 DCMR 4217.1 ("Where it has been determined that a housing provider knowingly demanded or received rent above the rent ceiling . . . the [Administrative Law Judge] shall invoke . . . a rent refund . . ..").

2. The September 1, 2005, Increase in Rent Charged

14. Tenant challenges the September 1, 2005, increase in rent charged from $890 to $914. Tenant's claim that the September 1, 2005, rent increase was improper is based on Tenant's assertions that (1) the July 1, 2005, rent ceiling increase (based on the 2005 CPI-W), was not properly perfected and (2) that Housing Provider subsequently implemented the 2005 CPI-W increase, by increasing the previous tenant's rent on September 1, 2005, from $890 to $914.

15. As previously discussed, Housing Provider failed to properly perfect the July 1, 2005, increase of general applicability based on the 2005 CPI-W. A housing provider who fails to perfect an adjustment in the rent ceiling through an appropriate timely filing with the Rent Administrator forfeits the right to the adjustment. *Sawyer,* 877 A.2d at 100. Because Housing Provider failed to perfect the 2005 CPI-W increase in rent ceiling, he is barred from implementing that increase in a subsequent increase to the rent charged. Housing Provider did not offer any testimony or documentary evidence to refute that the September 1, 2005, rent increase was implementing the 2005 CPI-W, as stated in the sample notice of increase in rent charged. PX 122; 14 DCMR 4205.4.

16. Accordingly, because Housing Provider did not properly perfect the July 1, 2005, rent ceiling increase based on the 2005 CPI-W, he is barred from implementing that increase in a future increase to the rent charged. *See Sawyer Prop. Mgmt.,* 877 A.2d at 10. However, because Ms. Taylor did not reside in the unit during the time that the rent was increased from $890 to $914, Housing Provider never received or demanded the increased rent from Ms. Taylor and therefore, no rent refund is warranted.

3. The November 1, 2005, Rent Level

17. When Ms. Taylor moved into the apartment on November 1, 2005, her rent was set at $1,070. Tenant argues that because the September 1, 2005, rent increase

from $890 to $914, was invalid and there are no documents on file with the RACD authorizing the rent to be increased from $914 (the rent level for the previous tenant), to $1,070, Ms. Taylor's rent when she occupied the apartment on November 1, 2005, should have been $890/month. Tenant's Post-Hearing Brief at 9.

18. This case raises the question whether the Act permits a housing provider to increase the rent charged after a unit is vacated to an amount within the authorized rent ceiling without expressly implementing a perfected, but unimplemented rent ceiling adjustment. At the hearing, Housing Provider failed to address the rent level either through testimony, documents, or argument. Housing Provider did not refute that the last documented rent charged for Tenant's unit was $914. Having found that the September 1, 2005, rent increase from $890 to $914 was invalid, the last authorized rent for Tenant's unit was $890.

19. *The Unitary Rent Ceiling Adjustment Act*, D.C. Official Code § 42-3501.08(h)(1)(2001), controls the rent increases permissible under a given rent ceiling and provides that a housing provider can only raise the rent under one rent ceiling at a time:

"[E]ach adjustment in rent charged permitted by this section may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment. If the difference between the rent ceiling and the rent charged for the rent unit consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference."

D.C. Official Code § 42-3502.08(h)(1). To that end, a housing provider is required to document the date and authorization of the rent ceiling adjustment on which a rent increase is based in order to give the tenant notice of which rent ceiling adjustment is being implemented. 14 DCMR 4205.4(a)(4). The rational (sic) for requiring the documentation of increases in rent is so tenants would know when each ceiling had been exhausted, and that the rent was not being impermissibly increased based on multiple authorized adjustments (i.e. inflation or capital improvement). *See Parreco v. D.C. Rental Housing Comm'n*, 885 A.2d 327, 332, n. 7 (D.C. 2005).

20. In interpreting *the Unitary Rent Ceiling Adjustment Act*, the Rental Housing Commission has held:

> "The Unitary Act has the words, 'implement,' 'rent ceiling,' and 'rent charged,' in it, because the three concepts are intertwined. 'An increase in actual rent charged a tenant is never directly authorized by the Act, but rather is authorized only by a prior or concurrent rent ceiling increase properly taken under the Act.' *Borger Mgmt., Inc. v. Godfrey,* TP 20,116 (RHC Sept. 4, 1987) at 9 *citing Guerra v. Shannon & Luchs,* TP 10,939 (RHC Apr. 2, 1986) n.2 (emphasis added). The commission in *Borger* interpreted the words 'may not implement' to mean may not 'raise the rent

charged.' *Id.* at 10. Similarly, the Unitary Act provides a housing provider 'may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment.' . . . Thus, the Commission interprets those words to mean that the Housing Provider may not increase the rent charged beyond the amount of one authorized rent ceiling adjustment or portion of a rent ceiling adjustment."

Sawyer Prop. Mgmt., Inc. v. Mitchell, TP 24, 991 (RHC, *Order on Motion for Reconsideration,* October 31, 2002) at 16; *aff'd, Sawyer Prop. Mgmt. Inc. v. D.C. Rental Hous. Comm'n, 877 A.2d 96 (D.C. 2005).*

The Rental Housing Commission has further held:

> "An increase in rent charged is never directly authorized by the Act, but rather is authorized only by a prior or concurrent rent ceiling increase properly taken under the Act. This may appear to be splitting hairs, but the record-keeping necessary for proper administration of the rent stabilization program requires that this distinction be recognized and observed."

Redmond v. Marjerle Mgmt, Inc., TP 23,146 (RHC Mar. 26, 2002) *citing Guerra v. Shannon & Luchs,* TP 10,939 (RHC Apr. 2, 1986) at 2 n.2, *aff'd, Marjerle Mgm, Inc. v. D.C. Rental Hous. Comm'n,* 866 A.2d 41 (D.C. 2004). Therefore, in order for Housing Provider to increase the rent charged for Tenant's unit from $914 (the last documented rent charged) to $1,070 (an increase of $156), Housing Provider was required to implement all or a portion of a previously perfected but unimplemented rent ceiling adjustment or take and perfect a vacancy adjustment, and document the increase by filing an amended registration with the RACD. [footnote omitted] *See The Rittenhouse, LLC v. Campbell,* TP 25,093 (RHC December 17, 2002).

21. The instant case is analogous to the *Rittenhouse* case in many aspects. In *Rittenhouse*, the housing provider increased the tenant's rent by $95, an amount higher than would have been permitted under the CPI-W at the time of the increase. The Rental Housing Commission rejected the housing provider's argument that it could increase the tenant's rent by the full amount of the difference between the rent ceiling and the rent charged. The Commission held that any increase in rent charged was limited to a previously perfected but unimplemented rent ceiling adjustment. The tenant presented oral and documentary evidence to demonstrate that the agency's records did not contain any rent ceiling filings that would permit the housing provider to increase the tenant's rent by $95. The Commission held that in order to overcome the tenant's proof, the housing provider had to introduce evidence of a previously perfected, but unimplemented rent ceiling adjustment that authorized the housing provider to increase the rent ceiling by at least $95. *Id.* at 10-11. The housing provider's failure to introduce evidence of a previously perfected but unimplemented rent ceiling adjustment made the increase invalid. *Id.*

22. Also similar to the case at hand, in *Sawyer,* 877 A.2d at 96, the tenant signed a lease with a rent of $625. The housing provider subsequently increased the tenant's rent to $750. The last documented rent charged on file with the RACD was $553 for the previous tenant. The housing provider failed to properly perfect two vacancy adjustments that would have, if perfected, accounted for the rent increases. The District of Columbia Court of Appeals found that there were no documents in the RACD file justifying a current rent of $625 or an increase to $750. *Sawyer,* 877 A.2d at 101.

23. For the foregoing reason, in this case, there was no evidence presented that Housing Provider was authorized to increase the rent charged to $1,070. In addition, the last documented rent charged of $910 was invalid and therefore, the last authorized rent for Tenant's apartment was $890. Therefore, I will rollback Tenant's rent to $890 and order a rent refund as calculated herein at IV.G.

4. The November 1, 2006, Rent Increase and Tenant's Elderly Status

24. On October 16, 2006, Housing Provider filed with the RACD a Certificate of Notice of Increase in Rent Charged increasing the rent for Tenant's unit from $1,070 to $1,136, effective November 1, 2006. PX 109, 109A. Tenant received proper notice of the rent increase on September 28, 2006. The notice of rent increase attributed the increase to the 2006 CPI-W increase of 4.2%. Tenant challenges this rent increase on two grounds: (1) Housing Provider failed to apply the elderly exception in calculating the amount of the rent increase; and (2) the increase was taken while the unit was not in substantial compliance with the District of Columbia Housing Code (discussed herein at subsection D). The Rental Housing Act, as amended, provides:

> "[A]n increase in the amount of rent charged while the unit is occupied shall not exceed, taken as a percentage of the current allowable amount of rent charged for the unit, 2% plus the adjustment of general applicability; provided that the total increase shall not exceed 10%; provided further that the amount of any such increase in rent charged for a unit occupied by an elderly or disabled tenant without regard to income but otherwise as defined in 42-3502.06(f) shall not exceed the lesser of 5% or the adjustment of general applicability."

D.C. Official Code § 42-3502.08(h)(2)(2006)(emphasis added). The Act further defines an "elderly tenant" as "a person who is 60 years of age or older." D.C. Official Code § 42-3501.03(12)(2006).

25. It is undisputed that on November 28, 2006, Ms. Taylor, who is 73 years old, applied and was approved for elderly status. Ms. Taylor promptly notified Housing Provider the same day. Ms. Hall testified that Housing Provider did not consider Ms. Taylor to be a tenant eligible for the elderly discount because she was not the individual who signed the lease. I previously explained in this Order that Ms. Taylor was the rightful tenant under the Act and is therefore entitled to

all benefits of the rental unit and protections under the Act. A question remains however, as to whether Ms. Taylor was entitled to an elderly discount on the November 1, 2006, rent increase when she was not approved for elderly status until November 28, 2006.

26. The applicable regulations implementing the Rental Housing Act make clear that a tenant does not qualify for elderly status "unless found to be elderly by the Rent Administrator." 14 DCMR 4210.49. Moreover, the use of the future tense ("the Rent Administrator *shall determine whether to grant the exemption")* implies that the determination is prospective and not retroactive. When Ms. Taylor was approved for elderly status on November 28, 2006, Housing Provider had already implemented the November 1, 2006, rent increase from $1,070 to $1,136.

27. The November 1, 2006, rent increase represents an increase of 6.2% based on the 2006 CPI-W of 4.2%, plus 2%, which was the permissible amount for a tenant who does not fall within the elderly or disabled exception. *See* D.C. Official Code § 42-3502.08(h)(2)(2006). If the elderly exception applied to the November 1, 2006, rent increase, Housing Provider would have only been able to increase the rent to $1,114.95 (4.2% of the current rent charged). *See id.* However, because Ms. Taylor was not approved for elderly status until November 28, 2006, the November 1, 2006, 6.2% rent increase was permissible and applied to Ms. Taylor. Ms. Taylor is however, entitled to the elderly exception for any rent increase Housing Provider may implement after November 28, 2006. Accordingly, Tenant has failed to prove that the November 1, 2006, rent increase was improper based on Housing Provider's failure to apply the elderly exception. However, as discussed in subsection D, the November 1, 2006, rent increase was invalid because it was taken when the unit was not in substantial compliance with the D.C. housing regulations.

5. The July 1, 2007, Rent Increase

28. On May 18, 2007, Ms. Taylor received a Notice of Increase in Rent Charged, increasing her rent from $1,136 to $1,198.48, based on the 2007 CPI-W increase of 3.5%. PX 112. The rent increase was effective July 1, 2007, and reflects an increase of 5.5% (3.5% CPI-W plus 2%). *Id.* Tenant challenges this rent increase on three grounds: (1) the increase was too high because it did not take into account Tenant's elderly status; (2) the increase was invalid having been implemented within less than 12 months after the November 1, 2006, rent increase; and (3) the rent was increased while Tenant's unit was not in substantial compliance with the D.C. Housing Code (discussed herein at Section D).

29. As discussed above, Ms. Taylor was eligible for elderly status as of November 28, 2006, and therefore Housing Provider may only increase Ms. Taylor's rent by the lesser of 5% or the applicable CPI-W. *See* D.C. Official Code § 42-3502.08(h)(2)(2006). At the time of the July 1, 2007, increase, Ms. Taylor's rent was $1,136. Therefore, Housing Provider was authorized to increase Tenant's

rent only by 3.5% (the 2007 CPI-W), to $1,175.76. Housing Provider's increase to $1,198.48, was therefore too high.

30. Moreover, Housing Provider improperly increased Ms. Taylor's rent, effective July 1, 2007, which was less than 12 months after it increased Tenant's rent on November 1, 2006. The Rental Housing Act, as amended, provides, "The amount of rent charged for any rental unit subject to this title shall not be increased until a full 12 months have elapsed since any prior increase." D.C. Official Code § 42-3502.08(g)(2006). Therefore, the earliest date which Housing Provider could have permissibly increased Tenant's rent was November 1, 2007. Accordingly, the July 1, 2007, rent increase was invalid and I will award Tenant a rent refund, as calculated herein . . . plus interest . . . .

D. Tenant's Claims of Housing Code Violations and Substantial Reductions in Services and/or Facilities.

31. Tenant asserts that Housing Provider implemented both the November 1, 2006, and July 1, 2007, rent increases when her rental unit was not in substantial compliance with the D.C. Housing Regulations and that Housing Provider substantially reduced services and/or facilities in connection with the unit. The Rental Housing Act prohibits a housing provider from increasing the rent if the apartment is not in substantial compliance with the housing regulations. D.C. Official Code § 42-3502.08(a)(1)(A); 14 DCMR 4216.1.

32. Prior to August 5, 2006, the services and facilities provision of the Rental Housing Act provided:

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

D.C. Official Code § 42-3502.11(2005). On August 5, 2006, the Act was amended to allow for a decrease in the rent charged when services and facilities are substantially decreased. D.C. Official Code § 42-3502.11(2006).

33. The Act defines services as "services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse." D.C. Official Code § 42-3501.03(27). The reduction of services provision of the Act "was drafted to ensure that housing providers provide services required by [the] D.C. Housing Code." *Cascade Park Apts. v. Walker*, TP-26,197 (RHC January 14, 2005) at 22 (*citing Shapiro v. Comer*, TP-21,742 (RHC August 19, 1993) at

20). "Substantial compliance with the housing code" means the absence of any substantial housing violations. Certain violations are presumed to be substantial under the rental housing regulations, including frequent lack of hot water, lack of sufficient heat, defective toilet facilities, infestation of insects or rodents, and inadequate ventilation of interior bathrooms. 14 DCMR 4216.2.

34. At the hearing, Ms. Taylor testified to on-going problems in her unit including, a recurrent clogged toilet, an inoperable oven, an inoperable bathroom exhaust fan, inadequate hot water, inadequate heat, and an infestation of mice, roaches, and bed bugs. To establish that a rent increase was implemented while the rental unit was not in substantial compliance with the housing code, Tenant must show the existence of violations and that they were substantial. To establish that services and facilities were substantially reduced, Tenant must present competent evidence of the existence, duration, and severity of the reduced services. *Jonathan Woodner Company*, TP-27,730 at 11. Tenant must also show that she notified Housing Provider that service was required and Housing Provider failed to make repairs in a reasonable amount of time. *Id.*

35. At the hearing, Ms. Taylor testified to on-going problems in her unit including, a recurrent clogged toilet, an inoperable oven, an inoperable bathroom exhaust fan, inadequate hot water, inadequate heat, and an infestation of mice, roaches, and bed bugs. To establish that a rent increase was implemented while the rental unit was not insubstantial compliance with the housing code, Tenant must show the existence of violations and that they were substantial. To establish that services and facilities were substantially reduced, Tenant must present competent evidence of the existence, duration, and severity of the reduced services. *Jonathan Woodner Company,* TP-27,730 at 11. Tenant must also show that she notified Housing Provider that service was required and Housing Provider failed to make repairs in a reasonable amount of time. *Id.*

(1) Inoperable Toilet

36. Ms. Taylor had a keen memory and diligent documentation of her complaints and request for maintenance in her unit. Regarding the toilet, it is undisputed that Ms. Taylor's toilet was often clogged. Ms. Taylor submitted at least 83 written work orders requesting service on her toilet between November 14, 2005, and November 12, 2007. PX 118. Ms. Taylor testified that Housing Provider responded promptly to her requests, usually within 3-4 hours, and would unclog the toilet. On January 27, 2007, Housing Provider replaced some parts and the wax sealant on the toilet. After this repair, the toilet continued to become clogged on a regular basis. Tenant argues that the repeated clogging of her toilet was reduction in services and a substantial housing code violation, and therefore, the toilet should have been replaced by Housing Provider.

37. Ms. Hall testified that each time maintenance unclogged the toilet, it was found to have malfunctioned because inappropriate items were flushed down the toilet,

which was otherwise operable. Ms. Taylor denied ever flushing anything down the toilet other than human waste.

38. Ms. Taylor complained about the toilet to DCRA on at least one occasion, in her January 25, 2007, memo, and her apartment was inspected by DCTRA inspectors on at least three occasions. Ms. Hall testified that when Inspector Turner visited Ms. Taylor's apartment in January 2007, in discussing the clogged toilet, Ms. Taylor admitted that she flushed small amounts of food down the toilet. Ms. Taylor testified that Ms. Hall's testimony was untrue and that she never made any such statements. Nonetheless, no housing code violation was issued by DCRA regarding the toilet.

39. Although it is clear that Ms. Taylor's toilet was often clogged, there was no evidence that the toilet was clogged due to a faulty toilet versus inappropriate items or excessive toilet paper being flushed. Housing Provider promptly responded to each complaint regarding the toilet being clogged. Tenant's belief that the toilet should be replaced was not supported by any evidence. Accordingly, Tenant failed to prove that the intermittent clogging of her toilet was a substantial housing code violation or a reduction in services contributable to Housing Provider. Tenant also failed to prove, by a preponderance of the evidence, that services and facilities were substantially reduced where the toilet was always promptly repaired.

(2) Inoperable Oven

40. Regarding the oven being inoperable, Ms. Taylor testified that the oven in her unit has never worked since she moved in and therefore, she can only cook on the stove. Ms. Taylor complained to Housing Provider and DCRA about the oven being inoperable on at least two occasions, in her May 2006 memo and her January 2007 memo. PX 115, 117. Although over 100 copies of work request were admitted into evidence, only one request, dated August 3, 2007, complained of an inoperable oven. PX 118A at. 12.

41. Ms. Hall testified that she inspected Tenant's oven on two occasions and on both occasions, the broiler light came on and the oven heated. DCRA inspected Ms. Taylor's unit on three occasions, and Ms. Taylor testified that each time she complained about the oven being inoperable. DCRA never issued a notice of violation regarding an inoperable oven. Although I found Ms. Taylor's testimony that she has been unable to use the oven to be credible, I also found Ms. Hall's testimony, that the oven was operable on her two inspections, to be credible. Therefore, it is not clear from the record if Ms. Taylor simply does not know how to use the oven or if the oven was, at times, inoperable. I find that Ms. Hall's credible testimony, taken together with DCRA's failure to issue a notice of violation after three inspections, makes it more likely than not, that the oven was operable. The record lacks substantial evidence that the oven was inoperable. Accordingly, I find that no substantial housing code violation existed and services and facilities were not substantially reduced.

(3) Inadequate Hot Water

42. Ms. Taylor testified that between November 2005 and February 27, 2007, the water in her apartment was often lukewarm. Ms. Taylor testified that the problem was corrected on February 27, 2007, when Housing Provider repaired the boiler. Ms. Hall testified that there was no problem with the delivery of hot water to Ms. Taylor's apartment and the Housing Provider never made any repairs to the boiler which delivers hot water to Ms. Taylor's apartment. Ms. Hall further testified that the hot water is drawn from the same boiler for all units on the A side of the building and that if there was a problem with the hot water, it would have affected all the units drawing from the boiler. However, the fact that Housing Provider did not receive complaints from other tenants does not necessarily mean that other tenants did not experience problems. Nonetheless, Tenant failed to prove, by a preponderance of the evidence, that she lacked hot water or that it was an on-going problem for 15 months.

43. Ms. Taylor complained of a lack of hot water in a work request submitted in November 2005, shortly after she moved into the apartment. In December 2005, Housing Provider inspected Ms. Taylor's apartment in response to her complaint. No repairs were made to the hot water delivery and there is no documentation of additional complaints regarding a lack of hot water until January 2007. None of the 100+ work orders submitted by Ms. Taylor complained of a lack of hot water. Ms. Taylor's January 25, 2007, memo that was given to DCRA and Ms. Hall, noted a lack of hot water. PX 117. It is notable that Ms. Taylor's memo states, "Insufficient hot water, early am and early pm." Early morning and early evening are the times when most tenants are likely to be home and using the hot water which may result in periods of reduced hot water, which does not amount to a substantial housing code violation or a substantial reduction in services. The housing regulations establish sufficient hot water at a temperature of not less than 120 degrees Fahrenheit. *See* 14 DCMR 606.1. A housing provider is further required to "provide and maintain a continuous supply of running hot water to meet normal needs." 14 DCMR 606.2. There was no evidence regarding the temperature of the water or how often it was "lukewarm."

44. Although Ms. Taylor was adamant that Housing Provider repaired the boiler on February 27, 2007, Ms. Hall, who I also found to be credible, denied that Housing Provider performed any repairs on the boiler in February 2007 or at any other time. Ms. Taylor testified that Housing Provider had posted a notice informing all tenants that the boiler was being repaired in February 2007, but she did not have a copy of the alleged notice. Ms. Taylor's apartment was inspected by DCRA after her January 2007 memo and no notice of violation was issued. Accordingly, Tenant has failed to prove that she lacked adequate hot water such that a substantial housing code violation existed or that services and facilities were substantially reduced.

(4) Inadequate Heat

45. Ms. Taylor testified that her apartment was often cold in the winter months. At one point Ms. Taylor testified that the problem was corrected in February 2006. Subsequently, in here rebuttal testimony, Ms. Taylor testified that problem was not corrected until February 2007. It is not clear from the record which date was correct. In any event, Ms. Hall testified that no repairs were made to the heating system in the Fall 2006 or 2007, other than changing the filters, which is done at every change of season.

46. Ms. Taylor complained about a lack of heat in her May 2006 and January 2007, memos. Once again, none of the 100+ work orders submitted by Ms. Taylor complained of a lack of heat. Ms. Taylor has called DCRA to complain about a lack of heat and DCRA responded immediately. Ms. Hall accompanied the DCRA inspector to Ms. Taylor's apartment. Ms. Hall observed the apartment to be extremely hot and testified that Ms. Taylor also had the oven on to heat the apartment. Ms. Taylor denied that the oven was on (because it is inoperable) and denied that the inspector measured the temperature in the apartment to be 90 degrees. The housing regulations require that heat be sufficient enough to maintain a minimum of 68 degrees Fahrenheit between the hours of 6:30 a.m. and 11:00 p.m. and a minimum of 65 degrees Fahrenheit between 11:00 p.m. and 6:30 a.m. *See* 14 DCMR 501.4. There was no evidence regarding the temperature in Ms. Taylor's apartment at any time.

47. Despite the contradicting testimony, which I am unable to resolve, I find that DCRA's failure to issue a notice of violation in response to a lack of heat call on a cold winter day, supports Housing Provider's contention that the heat was in fact operable and sufficient or at least above 65 degrees Fahrenheit. Although Ms. Taylor may have found the heat to be less than her comfort level, she failed to prove, by a preponderance of the evidence, that the heat was inoperable or insufficient such that a substantial housing code violation existed or that facilities and services were substantially reduced.

(5) Inoperable Exhaust Fan

48. Ms. Taylor testified that there was no ventilation in her bathroom. The D.C. Housing Code requires that each bathroom be naturally or mechanically ventilated. *See* 14 DCMR 507. Ms. Taylor complained about a lack of ventilation in her December 2005 meeting with Ms. Hall and her May 2006 and January 2007, memos. PX 114, 117. None of Ms. Taylor's 100+ work request complained of a lack of bathroom ventilation.

49. Ms. Hall testified that she investigated Ms. Taylor's complaint on at least two occasions, including January 2007, with the DCRA inspector. Each time, she found the ventilation system to be in working condition. Ms. Hall testified that the bathrooms do not have individual fans. Rather, there are vents in the ceiling of the bathroom that connect to a large fan on the roof of the building that extracts

the humidity and air. The housing regulations list inadequate ventilation of interior bathrooms as a substantial housing code violation. 14 DCMR 42.16.2. DCRA inspected Ms. Taylor's unit on January 27, 2007, in response to her complaint, *inter alia*, that the bathroom lacked ventilation. DCRA did not issue a notice of violation. I found Ms. Hall's testimony regarding the roof top ventilation to be credible. Taken together with DCRA's failure to issue a notice of violation in January 2007, Tenant has failed to establish that a substantial housing code violation existed or that services and facilities were substantially reduced.

(6) Mice, Roach, and Bed Bug Infestation

50. Ms. Taylor admitted into evidence 15 work requests between December 2005 and November 2007, requesting extermination services for rodents and roaches. PX 118A. She further complained about rodent and roach infestation in November 2005 and her May 2006 and January 2007, memos. PX 114, 117. I received into evidence seven photographs of dead mice in Ms. Taylor's apartment. PX 100A-100G. Ms. Taylor testified that the roach infestation has existed since her occupancy, is particularly heavy in the kitchen and bathroom areas, and increases if there is not frequent extermination.

51. To counter Tenant's claim, Housing Provider offered evidence of the lengths it employed to correct the roach and rodent infestation problems complained of by Ms. Taylor. Ms. Hall testified that Housing Provider has a contractor for extermination services which is on site on a daily basis. Routine extermination is scheduled for the building and individual apartments on a rotating basis and tenants may request additional extermination services for their apartments at any time. In *Cascade Park Apts. v. Walker*, TP-26,197 (RHC January 14, 2005), where the housing provider offered testimony of its efforts to correct housing code violations as evidence to defeat the claims of the tenant, the Commission stated:

> "Confronted with a similar scenario in *Interstate General Corp. v. D.C. Rental Hous. Comm'n*, 501 A.2d 1261 (D.C. 1985), the court held: 'These matters are irrelevant to the question of whether the tenants were substantially deprived of a service which the landlord contracted to provide.' The court rejected the housing provider's argument that § 42-3502.11 'is couched in such a way as to imply that the landlord's conduct must constitute willful neglect or affirmative wrong doing before a reduction in service can be termed substantial. This is not the case. *Id.*"

Cascade Park Apts. at 44 (emphasis in original).

52. The Commission has determined that a housing provider may not implement a rent increase for a rental unit in which substantial housing code violations exist, even where the housing provider has made substantial, but unsuccessful, efforts to abate the violations. *See Jonathan Woodner Co.*, TP-27,730 at 5-6, *citing*

Hutchinson v. Home Realty, Inc., TP-20,523 (RHC September 5, 1989). In addition, the Commission has held that a tenant subjected to severe rodent infestation suffers a reduction in services. *See Cascade Park Apts.*, TP-26,197 at 23 ("The housing provider's ineffectual efforts to alleviate the infestation by providing extermination services, does not obviate the substantial reduction in services the tenants faced when they were subjected to rodent infestation for a substantial period of time").

53. Tenant has proven, by a preponderance of the evidence, that her apartment was infested with roaches and mice, from November 2005 through the present, which amounted to a substantial housing code violation and a substantial reduction in facilities and services. [footnote omitted] Therefore, when Ms. Taylor's rent was increased on November 1, 2006, and July 1, 2007, her apartment was not in substantial compliance with the housing code. Accordingly, Housing Provider was barred from increasing Ms. Taylor's rent in November 2006 or July 2007. Therefore, Tenant is awarded a refund of the rent she was overcharged between November 1, 2006, and January 8, 2008 (the date of the hearing), due to the invalid rent increases as calculated herein at IV.C. (Charts A and B) [footnote omitted] plus interest (see IV.E. Chart D).

54. In addition, because services and facilities were substantially reduced due to the roach and rodent infestation, I will award damages pursuant to the Act. *See* D.C. Official Code § 42-3502.11. The Rental Housing Commission has consistently held that the hearing examiner, now the Administrative Law Judge, is not required to assess the value of a reduction in services and facilities with "scientific precision," but may instead rely on his or her "knowledge, expertise and discretion as long as there is substantial evidence in the record regarding the nature of the violation, duration, and substantiality." *Kemp v. Marshall Heights Cmty. Dev.*, TP 24,786 (RHC Aug. 1, 2000) at 8 (*citing Calomiris v. Misuriello*, TP 4809 (RHC Aug. 30, 1982) and *Nicholls v. Tenants of 5005, 07, 09 D St., S.E.*, TP 11,302 (RHC Sept. 6, 1985)). It is not necessary for an Administrative Law Judge to receive expert testimony or precise evidence concerning the degree to which services and facilities have been reduced in order to compensate Tenant for the value of the reduced services.

55. I find that the roach and rodent infestation was serious and has been ongoing since November 1, 2005, to present, and I will assign a value of $25 per month and award a reduction in rent or rent rollback [footnote omitted] of $25 per month beginning November 1, 2005, through January 8, 2008. [footnote omitted] Accordingly, for the period of November 1, 2005, through August 5, 2006 (10 months), Tenant is awarded a rent ceiling reduction of $250. [footnote omitted] For the period of August 6, 2006, through January 8, 2008 (16 months and 32 days), Tenant is awarded a rend refund of $25/month, for a total of **$425,** as calculated herein at IV.D.(6) (Chart C), plus interest (*see* IV.E. Chart D):

E. Tenant's Claims of Retaliation

56. Ms. Taylor alleges that Housing Provider retaliated against her in violation of Section 502 of the Rental Housing Act by increasing her rent within six months of her participation in a protected activity. The Rental Housing Act prohibits a housing provider from retaliating against tenants who exercise one of several rights expressly enumerated in the statute. D.C. Official Code § 42-3505.02(a). Retaliatory action includes, but is not limited to "any action or proceeding not otherwise permitted by law which . . . would unlawfully increase rent . . . . D.C. Official Code § 42-3505.02(a). *See also* 14 DCMR 4303.3 ("Retaliatory action shall include . . . (b) Any action which would unlawfully increase rent. . . .").

57. The law also provides that retaliatory action should be presumed "if within the 6 months preceding the housing provider's action," the tenant, *inter alia,* has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the accommodation into compliance with the housing regulations, contacted an appropriate District government official, "either orally in the presence of a witness or in writing," concerning existing violations of the housing regulations, or was involved in any lawful activities pertaining to a tenant organization. D.C. Official Code §§ 42-3505.02(b)(1), (2) and (4).

58. 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). In this case, Housing Provider increased Ms. Taylor's rent on two occasions, November 1, 2006, and July 1, 2007.

59. Second, the tenant must raise the presumption of retaliation by establishing that the housing provider's conduct occurred within six months of the tenant performing one of the six protected acts listed in D.C. Official Code § 42-3505.02(b). If so, the statute by definition applies, and the landlord is presumed to have taken "an action not otherwise permitted by law," unless the housing provider can meet its burden under the statute. *See Borger Mgmt Inc., v. Miller,* TP-27,445 (RHC March 4, 2004) at 7 (*citing Youssef v. United Mgmt. Co., Inc.,* 683 A.2d 152, 155 (D.C. 1996)). Retaliation is then presumed and the burden shifts to the housing provider to provide clear and convincing evidence that their actions were not retaliatory. *See Youssef,* 683 A.2d at 155. The Rental Housing Act provides:

> "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 the presumption."

D.C. Official Code § 42-3505.02(b); *De Szunyogh v. William C. Smith & Co.,* 604 A.2d 1, 4 (D.C. 1992).

60. The evidence in this case shows that Ms. Taylor participated in four protected acts: (1) Ms. Taylor testified that in April 2006, the tenants formed a tenant organization and she attended the meeting; (2) in May 2006, Ms. Taylor provided Housing Provider with a written memo requesting certain repairs and services for her apartment (PX 114); (3) in August and December 2006, Ms. Taylor requested that DCRA inspect her apartment when they conducted building wide inspections; and (4) In January 2007, Ms. Taylor reported certain problems regarding her apartment to DCRA. The only actions that occurred within six months of the November 1, 2006, and July 1, 2007, rent increases, were the May 6, 2006, memo, and the January 2007 DCRA complaint.

61. Therefore, Tenant successfully raised the statutory presumption of retaliation because Ms. Taylor testified that she contacted DCRA on January 25, 2007 (PX 117), and in a written memo, which was also provided to Ms. Hall, reported housing code violations, which is one of the actions listed in the Act that triggers the presumption of retaliation. *See* D.C. Official Code § 42-3505.02(b); *Jordan v. Swann*, TP-27,928 (RHC June 14, 2005) at 6. Tenant's rental unit was subsequently inspected on January 27, 2007, although no notice of violation was issued. Just short of six months later, on July 1, 2007, Housing provider increased Ms. Taylor's rent. Tenant also successfully raised the statutory presumption of retaliation because she gave Housing Provider a written memo on May 15, 2006 (PX 115), which Ms. Hall acknowledged receiving, complaining of problems in her apartment, including mice and roach infestations. Just short of six months later, on November 1, 2006, Housing Provider increased Ms. Taylor's rent. Based on the evidence, Housing Provider acted within six months of Ms. Taylor's participation in protected activities, thereby raising the presumption of retaliation.

62. Housing Provider offered no testimony in response to the allegations of retaliation. In his closing argument, counsel for Housing Provider argued that there was no retaliation because the rent increases imposed were building-wide. Such evidence may or may not be sufficient to rebut the presumption of retaliation. However, counsel's arguments do not amount to evidence. *See Hutchinson v. D.C. Office of Employee Appeals,* 710 A.2d 227, 232 (D.C. 1998) *citing Cobb v. Standard Drug Co.,* 453 A.2d 110, 112 (D.C. 1982) (statements of counsel, not supported by the record, are not evidence). Ms. Hall failed to provide any testimony or documentary evidence regarding the rent increases at issue being building wide or any other justification. As such, Housing Provider has failed to put forth clear and convincing evidence to rebut the presumption of retaliation and therefore I will enter judgment in Tenant's favor on the issue of retaliation.

63. Having found that Housing Provider retaliated against Ms. Taylor by increasing her rent in November 2006 and July 2007, there remains the issue of any remedy owed to Ms. Taylor as a result of the retaliation. The Rental Housing Act provides that when a housing provider retaliates against a tenant, he shall be subject to a civil fine only if he acted willfully:

> "Any person who *willfully* (1) collects a rent increase after it has been disapproved under the chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (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 of any final administrative order issued under this chapter,* or (4) fails to meet obligations required under this chapter shall be subject to a civil fine or not more that $5000 for each violation."

D.C. Official Code § 42-3509.01 (emphasis added). In addressing the imposition of a fine, the Rental Housing Commission has made a distinction between the "knowing" violation of the Act and "willful" violations, stating:

> "'Willfully' goes to the intent to violate the law. 'Knowingly' is simply that you know what you are doing. If you know that you are increasing the rent, the fact that you don't intend to violate the law would be 'knowingly.' If you also intended to violate the law, that would be 'willfully.' Knowing is a lower standard."

Borger Mgmt. Inc., TP-27,445 at 11 (*citing Quality Mgmt. Inc, v. D.C. Rental Hous. Comm'n,* 505 A.2d 73, 75-76 (D.C. 1986)).

64. Regarding the November 1, 2006, rent increase, which I previously found was invalid due to the existence of substantial housing code violations in Ms. Taylor's apartment, there is no evidence that the housing provider willfully violated the law where they provided regular, albeit ineffective, extermination services.

65. Regarding the July 1, 2007, rent increase, although Ms. Hall did not provide any direct testimony on the issue of retaliation, Ms. Hall testified that she has been the account manager for the Woodner Apartments for three to four years and that she was responsible for implementing rent increases. Ms. Hall acknowledged that she was aware that the law allows housing providers to increase the rent only once every 12 months. Nonetheless, Ms. Hall did not provide any explanation for Housing Provider's decision to increase Ms. Taylor's rent on July 1, 2007, only eight months following the November 1, 2006, rent increase. Ms. Hall also acknowledged that she was aware of the elderly exception and that Ms. Taylor had been approved for elderly status, but she did not apply the exception to Ms. Taylor because Ms. Taylor was not the signatory on the lease. Ms. Hall testified that Housing Provider disagreed with Ms. Taylor's request for an elderly exception and that Housing Provider filed an objection with the Rent Administrator, but no proof of such an objection was offered into evidence. I find that Ms. Hall is an experienced housing manager and was well aware of the requirements of the law and her explanation for not applying the elderly exemption to Ms. Taylor's rent increase was both unpersuasive and disingenuous. I therefore find that Housing Provider's act of increasing Ms. Taylor's rent on July 1, 2007, was willful and I impose a fine of $500. D.C. Official Code § 42-3509.01.

Final Order at 12-43; R. at 151-181.

The ALJ made the following "Conclusions of Law and [determination of] Remedies:"

A. Tenant's allegation that the rent ceiling filed with the RACD was improper

The ALJ determined that the Housing provider had failed to properly perfect the 2005 CPI-W rent ceiling increase from $1,860 to $1,910, and barred the Housing Provider from implementing the $50 rent ceiling increase in a subsequent increase in rent charged.

B. Tenant's allegation that her rent was increased in an amount larger than allowed by law

Regarding the September 1, 2005 increase in rent charged from $890 to $914, the ALJ determined that it was improper because it implemented an improperly perfected 2005 CPI-W increase, and the ALJ thus rolled back the rent to $890.

Regarding the validity of the rent charged on November 1, 2005 (through October 31, 2006, the ALJ determined that the rent charged increase from $890 to $1,070 was improperly perfected, that the Housing Provider was barred from charging the Tenant an amount in excess of $890, and thus awarded the Tenant a rent refund of $2,160 plus interest (following calculations).

Regarding the validity of the rent increase on November 1, 2006 (through June 30, 2007) and the Tenant's elderly status under the Act, the ALJ determined that the Tenant had failed to prove that she met the elderly status for a rent discount under the Act, but that the Tenant had proved that the November 1, 2006 rent increase was improper because it implemented the improperly perfected 2005 CPI-W increase. The ALJ awarded the Tenant a rent refund of $1,968 plus interest (following calculations).

Regarding the validity of the rent increase on July 1, 2007 (through January 31, 2008), the ALJ determined that the increase illegally occurred within twelve (12) months of the implementation of the November 1, 2006 rent increase, that the Tenant had sufficiently proved that she met the elderly status for a rent discount under the Act, that the increase occurred when the Tenant's unit was not in substantial compliance with the D.C. Housing Regulations. The ALJ awarded the Tenant a rent refund for rent overcharges in the amount of $2,159.36 plus interest (following calculations).

See Final Order at 43-47. R. at 147-151.

C. Calculation of Rent Refund

The ALJ calculated the total amount of the rent refund to the Tenant for the above periods of time to be $6,287.36 plus interest.

See Final Order at 45-47. R. at 147-149.

D. Tenant's allegation that her rent was increased while her apartment was not in substantial compliance with the D.C. Housing Regulations and that services and facilities were substantially reduced.

The ALJ determined that the Tenant had failed to prove that the following services were substantially reduced or amounted to substantial housing code violations: inoperable toilet, inoperable oven, lack of adequate hot water, lack of adequate heat, or inoperable exhaust fan.

The ALJ determined that the Tenant had proven that, from the time she first occupied the unit to present, her apartment had a serious roach and rodent infestation that amounted to both a reduction in facilities and services and a substantial housing code violation. The ALJ assessed the reduction in services and facilities at a value of $25/month, and awarded the Tenant a rent refund of $425 plus interest (following calculations).

See Final Order at 47-48. R. at 146-147.

E. Interest

The ALJ applied the judgment interest rate of the Superior Court of the District of Columbia in the amount of 4%, *see* 14 DCMR § 3826.3, to the rent overcharges from November 1, 2005 through September 15, 2008 for a total charge of $476.63 in interest.

With interest, the ALJ calculated the total amount of the rent refund due and owing to the Tenant in the amount of $6,736.66.

See Final Order at 48-49, 51-55. R. at 140-143, 145-146.

F. Tenant's allegation that Housing Provider took retaliatory action in violation of Section 502 of the Act

The ALJ determined that the Tenant had sufficiently proven that her rent was increased on two occasions within six (6) months of a protected activity, thereby creating a presumption of retaliation, and that the Housing Provider had failed to rebut the presumption of retaliation with clear and convincing evidence.

The ALJ also determined that the Housing Provider's actions regarding the July 2007 rent increase were willful insofar as the Housing Provider knowingly and willfully increased the Tenant's rent in less than twelve (12) months following the previous rent increase and failed to apply the elderly status discount to which the Tenant was entitled.

The ALJ assessed a fine in the amount of $500 on the Housing Provider for such willful violation of the Act.

See Final Order at 49. R. at 145.

G. Rent Rollback

The ALJ rolled back the Tenant's monthly rent of $1,198 to $865, effective January 8, 2008, until the Housing Provider restores the services and facilities to the Tenant's apartment, namely by ridding the unit of the mice and roach infestation. The amount of $865 represents the last documented and authorized rent charged reduced by $25, the monthly value of the reduction in services and facilities.

See Final Order at 49-51. R. at 143-145.

On October 2, 2008, the Housing Provider filed a timely notice of appeal (Notice of Appeal) with the Commission, in which it makes the following assertions of error:[3]

Retaliatory Action.

The Administrative Laws Judge erred in her finding that the Housing Provider retaliated against the Petitioner. The evidence did not support such a finding. The action taken by the Landlord to support retaliation was the implementation of general applicability increase. The evidence presented in this case demonstrated that the increases were building-wide, were not isolated to the Petitioner; and while arguably invalid based on technicalities, were otherwise authorized by law. Those facts provide the basis at law to rebut any presumption of retaliation.

The second reason mentioned to support the finding of retaliation was the Housing Provider's failure to acknowledge an elderly exception. Housing Provider submits that it was correct in refusing to recognize the elderly exemption and, as a result, such an action cannot constitute retaliation. Further, acting in good faith, an unsettled interpretation of the lease does not form the basis of lawful retaliation.

[3] The language is recited as it appeared in the Notice of Appeal. See Notice of Appeal at 1-2.

Elderly Exemption.

The Administrative Law Judge erred in determining that the Petitioner was entitled to an elderly status with regard to rent increases. The law does not provide a status designation solely for the occupants of the premises. The evidence in this case does not support a finding that the Petitioner was other than a mere occupant of her son who was and is the contractual tenant, the person who put her in possession, and who has the right to remove her from possession. The evidence presented did not legally nor factually establish the Petitioner's entitlement to the status of tenant for the purpose of obtaining elderly status.

Reduction of Services.

The evidence presented at the hearing was not sufficient to support the Administrative Law Judge's determination that there had been a reduction of services. The evidence established that any previously existing services were maintained during the period of the Petitioner's occupancy.

Material Non-Compliance with the Housing Code.

The evidence in this case does not support the Administrative Law Judge's finding that the premises were in material non-compliance on the dates that increases were actually implemented. The complaints made by the Petitioner regarding insect and rodent infestation do not take place on or around the time of implementation of rent increases, and the evidence was undisputed that remedial actions were taken by Housing Provider following the complaints.

Timeliness of Rent Increase.

The Administrative Law Judge erred by determining that all of the post-2004 increases with the exception of the November 1, 2006 increase were untimely. The evidence presented did not support such a determination.

Notice of Appeal at 1-2.

On October 20, 2008, the Tenant also filed a notice of appeal with the Commission (Cross Appeal), in which she states, *inter alia*, the following: "Ms. Taylor appeals the Administrator's determination that her elderly status and her son's disabled status did not entitle

her to an exemption from the November 1, 2006 rent increase taken by her landlord . . . ." See Cross Appeal at 1.[4]

On August 31, 2009, the Housing Provider filed a brief in support of its Notice of Appeal. See Housing Provider's Brief. On October 2, 2009, Ms. Taylor filed a brief in opposition. See Taylor's Brief. The Commission held its appellate hearing on December 17, 2009.

II. PRELIMINARY ISSUES

The Commission addresses three (3) preliminary issues before addressing the issues raised in the appeals:

A. Whether the Tenant's Cross Appeal is untimely and must be dismissed

B. Whether issues in the Housing Provider's Notice of Appeal are clear and concise.

C. Whether the Tenant had standing to file the Tenant Petition

III. DISCUSSION OF PRELIMINARY ISSUES

A. Whether the Tenant's Cross Appeal is untimely and must be dismissed.

Under the Act and its regulations, the time limit for filing an appeal with the Commission is mandatory and jurisdictional. See, e.g., Salazar v. Varner, RH-TP-09-29,645 (RHC June 16, 2015); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Mar. 11, 2015); Allen v. L.C. City Vista LP, RH-TP-12-30,181 (RHC Apr. 29, 2014). Under 14 DCMR § 3802.2 (2004),[5] a notice of appeal must be filed within ten (10) days after a final decision is issued, plus three (3)

[4] For reasons of judicial efficiency, the Commission will not recite the entire language of the Cross Appeal.

[5] 14 DCMR § 3802.2 provides the following: "A notice of appeal shall be filed by the aggrieved party within ten (10) days after a final decision of the Rent Administrator is issued; and, if the decision is served on the parties by mail, an additional three (3) days shall be allowed."

days if the decision was mailed to the parties. The ten (10) days do not include intermediate weekends or holidays. 14 DCMR § 3816.3.[6]

The Final Order in this case was served on the parties, by mail, on September 16, 2008; therefore, the ten (10) day time period for filing a notice of appeal, allowing three (3) days for service by mail and excluding intermediate weekends, expired on October 3, 2008, seventeen (17) days before the Cross Appeal was filed with the Commission on October 20, 2008. 14 DCMR §§ 3802.2 & 3816.3; see Final Order at 1; R. at 192; Cross Appeal at 1. Accordingly, the Commission dismisses the Cross Appeal as untimely, and will not address the issue raised therein.[7] 14 DCMR §§ 3802.2, 3816.3; Final Order at 1; R. at 192; Cross Appeal at 1.

B. Whether issues raised in the Housing Provider's Notice of Appeal are clear and concise.

The Commission's regulation concerning the initiation of appeals, 14 DCMR § 3802.5 (b), provides that a notice of appeal shall contain, in relevant part, the following: "a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator [or ALJ]." See Sellers v. Lawson, TP 29,437 (RHC Dec. 6, 2012); Hawkins v. Jackson, TP 29,201 (RHC Aug. 31, 2009); see also Covington v. Foley Props., Inc., TP 27,985 (RHC June 21, 2006) at 4 ("when an appeal issue is not a clear and concise statement of an alleged error it is 'violative of the Commission's rules on appeals'") (quoting Pierre-Smith v. Askin, TP 24,574 (RHC Feb. 29, 2000)). Additionally, the Commission has held that an appeal may be dismissed for failing to

[6] 14 DCMR § 3816.3 provides the following: "When the time period prescribed or allowed is ten (10) days or less, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation."

[7] Although the Commission has often recognized the challenges that *pro se* litigants can face in prosecuting their claims under the Act without legal assistance, the Commission's review of the record in this reveals that the Tenant was represented by legal counsel at the time the Cross Appeal was filed. Cross Appeal at 8; see Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)).

comply with 14 DCMR § 3802.5. 14 DCMR § 3802.13;[8] Canales v. Martinez, TP 27,535 (RHC June 29, 2005) at 10 (citing Kenilworth Parkside RMC v. Johnson. TP 27,782 (RHC June 22, 2005); Vicente v. Anderson, TP 27,201 (RHC Aug. 20, 2004)).

In this case, the Housing Provider's Notice of Appeal asserts that: "[t]he Administrative Law Judge erred in determining that all of the post-2004 increases, with the exception of the November 1, 2006 increase, were untimely. The evidence presented did not support such a determination." See Notice of Appeal at 2. The Commission observes that this issue is not stated in a manner which explains or identifies what the evidence in the record is that does not support the ALJ's findings of fact, or why the conclusions of law are misapplied. Id.; see Norwood v. Peters, TP 27,678 (RHC Feb. 3, 2005).

The Commission determines that the Housing Provider's bare allegation, without reference to contradictory evidence in the record, does not conform to the requirement of a "clear and concise" statement of alleged error under 14 DCMR § 3802.5(b), and the Commission therefore dismisses this issue. 14 DCMR § 3802.13; see Sellers, TP 29,437; Hawkins, TP 29,201; Canales, TP 27,535; Vicente, TP 27,201.

C. Whether the Tenant had standing to file the Tenant Petition

The Commission observes that the Housing Provider did not challenge the Tenant's standing in this case in its Notice of Appeal, but raised the issue for the first time in its brief. See Housing Provider's Brief at 4. Ordinarily, the Commission's review is limited to the issues raised in a notice of appeal, however, the Commission may raise issues of jurisdiction *sua sponte*. See 14 DCMR § 3807.4; Allen, RH-TP-12-30,181; Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) ("not only may a party raise jurisdiction for the first time on

[8] 14 DCMR § 3802.13 provides the following: "The Commission may dismiss the appeal for failure to comply with the requirements of § 3802.5."

appeal, but an appellate court may *sua sponte* address the issue of the court's jurisdiction"); King v. Remy, TP 20,962 (RHC May 18, 1988) (reversing decision of Rent Administrator and dismissing tenant petition for lack of jurisdiction). The District of Columbia Court of Appeals (DCCA) has held that "standing" is a threshold jurisdictional requirement before a court may address the merits of a party's claim. Terry v. Gaben Mgmt., RH-TP-12-30,206 (RHC Dec. 8, 2014) (citing Grayson v. AT&T Corp., 13 A.3d 219, 229 (D.C. 2011)). The Commission has adopted the DCCA's jurisdictional requirement of "standing." See Miller v. Daro Realty, RH-TP-08-29,407 (RHC Sept. 18, 2012); Young v. Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012).

The Act defines a "tenant" as "a tenant, subtenant, lessee, sublessee, or other person entitled to the possession, occupancy, or the benefits of any rental unit owned by another person." D.C. OFFICIAL CODE § 42-3501.03(36) (2001). Under the Act, only a tenant or a tenant association, as those terms are defined by the Act, has standing to file a tenant petition challenging a rent increase. 14 DCMR § 4214.3 (providing, in relevant part, that "[t]he tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, challenge or contest any rent or rent increase."); see Terry, RH-TP-12-30,206; Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012) (affirming ALJ's finding that Mr. Segreti was a "tenant" under the Act where the evidence demonstrated that he had paid rent, even though there was no lease agreement); Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012) (determining that the essential requirement to establish "tenancy" under the Act, is that a person "'continues to pay rent' for the housing accommodation at issue" (quoting Adm'r of Veterans Affairs v. Valentine, 490 A.2d 1165, 1169-70 (D.C. 1985))); Davenport v. Cowan, TP 20,709 & VA 20,199 (RHC Apr. 26, 1989) (noting that "if the leaseholder dies or vacates the rental unit and the housing provider accepts

the rent from a person not on the lease and makes no attempt to remove the person that person is a de facto tenant.").

The Housing Provider contends in its brief that the Tenant, Ms. Taylor, does not have standing because she is not a tenant of the Housing Accommodation but instead "occupies a unit rented by her son, David Taylor, with the permission of the landlord." See Housing Provider's Brief at 4. In support of this contention, the Housing Provider further asserts that Ms. Taylor "has no privity of contract or estate" with the Housing Provider. Id. at 4. According to the Housing Provider, David Taylor is the only person with standing to pursue this Tenant Petition because he is the only tenant listed on the lease agreement. Id.

In the Final Order, the ALJ made the following findings of fact concerning whether Ms. Taylor was a "Tenant" of the Housing Provider:

> 1. Tenant, Gloria Taylor, is 73 years old and has resided in unit A868 at 3636 16th Street, N.W. ("The Woodner Apartments"), since November 1, 2005. The lease for the apartment was signed by Tenant's adult son, David Taylor, on November 1, 2005. PX 101. David Taylor never resided at the apartment but rented the apartment for his mother and adult disabled brother, Timothy Taylor, to reside in . . . .
>
> 3. During Gloria Taylor's first year in the apartment, David Taylor was supplementing her rent. Ms. Taylor would send David Taylor $800 each month and David Taylor would send a check to Housing Provider for the full amount of the rent. Beginning in December 2006, Ms. Taylor began to pay the rent directly to Housing Provider by cashier's check rather than through her son. PX 103. Housing Provider was aware that Ms. Taylor and her son Timothy were occupying the apartment since at least November 30, 2005, and accepted rent payments from Ms. Taylor on a monthly basis.

Final Order at 3; R. at 190. The ALJ concluded that Ms. Taylor is a "tenant" under the Act, explaining as follows:

> Any person who occupies a rental unit by agreement with the housing provider for payment of rent, is a tenant, even though there is no written lease . . . . Although [Ms.] Taylor did not sign the lease, Housing Provider was aware of and authorized Ms. Taylor and her son, Timothy, to occupy the apartment and

knowingly accepted rent payments from Ms. Taylor and responded to complaints submitted by Ms. Taylor.

Final Order at 12-13; R. at 180-81 (citing Nicholas v. Howard, 58 A.2d 1039, 1040 (D.C. 1983); Dias v. Perry, TP 24,379 (RHC Apr. 20, 2001) at 9-10).

The Commission's standard of review 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 contains conclusions of law not in accordance with 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 reviewed the record and determined there is substantial evidence supporting the ALJ's finding that Ms. Taylor was a "tenant," and therefore had standing as a "tenant," under the Act. See Hearing CD (OAH Jan. 8, 2008); supra at 36; see also Terry, RH-TP-12-30,206; Eastern Savings Bank, RH-TP-08-29,397; Marguerite Corsetti Trust, RH-TP-06-28,207; Davenport, TP 20,709 & VA 20,199. Furthermore, the Commission is satisfied that, as a "tenant," Ms. Taylor challenged a number of allegedly illegal rent increases. See Hearing CD (OAH Jan. 8, 2008); supra at 2; see also Terry, RH-TP-12-30,206; Eastern Savings Bank, RH-TP-08-29,397; Marguerite Corsetti Trust, RH-TP-06-28,207; Davenport, TP 20,709 & VA 20,199.

Additionally, the Commission's review of the record supports the ALJ's determination that both the Housing Provider and the leaseholder, David Taylor, "authorized" Ms. Taylor to occupy the unit. See Hearing CD (OAH Jan. 8, 2008); supra at 2-3, 8-10. Finally, the Commission's review of the substantial evidence of record reflects that Ms. Taylor tendered funds to the Housing Provider for rent payments. See Hearing CD (OAH Jan. 8, 2008); see also PX 103, 103A-103L; R. at 247-259; supra at 3-5.

Accordingly, where the Commission's review of the record reveals that the ALJ's determination that Ms. Taylor was "tenant" under the Act was in accordance with the provisions of the Act and supported by substantial evidence, the Commission affirms the ALJ on this issue. D.C. OFFICIAL CODE § 42-3501.03(36); 14 DCMR §§ 3807.1, 4214.3; Terry, RH-TP-12-30,206; Eastern Savings Bank, RH-TP-08-29,397; Marguerite Corsetti Trust, RH-TP-06-28,207; Davenport, TP 20,709 & VA 20,199.

IV. ISSUES ON APPEAL[9]

A. Whether the ALJ erred in determining that the Housing Provider retaliated against Ms. Taylor.

B. Whether the ALJ erred in determining that Ms. Taylor was entitled to an elderly exemption, in that she was an occupant of the housing accommodation and not a tenant under the Act.

C. Whether the ALJ erred in determining that there was a reduction of services.

D. Whether the ALJ erred in determining that rent increases were illegal because they were implemented while substantial housing code violations existed.

V. DISCUSSION OF THE ISSUES ON APPEAL

A. Whether the ALJ erred in determining that the Housing Provider retaliated against the Tenant.

The ALJ concluded in the Final Order that the Housing Provider retaliated against the Tenant. See Final Order at 38-43; R. at 151-56. The ALJ held that the Housing Provider engaged in two acts of retaliation because it "increased Ms. Taylor's rent on two occasions, November 1, 2006, and July 1, 2007." See Final Order at 39; R. at 155. The ALJ further held

[9] The Commission, in its discretion, has rephrased the issues on appeal in this section of its Decision and Order to omit the Housing Provider's supporting assertions that were included in the statements of the issues on appeal. See, e.g., Gelman Mgmt. Co. v. Grant, TP 27,995, TP 27,997, TP 27,998, TP 28,002, & TP 28,004 (RHC Aug. 19, 2014); Atchole v. Royal, RH-TP-10-29,891 (RHC Mar. 27, 2014); Gelman Mgmt. Co. v. Campbell, RH-TP-06-29,715 (RHC Dec. 23, 2013) at n.16. For the complete language of the Housing Provider's Notice of Appeal, see supra at 30-31. See also Notice of Appeal at 1-2.

that the Tenant raised the presumption of retaliation for both respective rent increases. Final Order at 40-41; R. at 153-54. First, the "Tenant testified that she contacted DCRA on January 25, 2007 (PX 117), and in a written memo, which was also provided to Ms. Hall," to report "housing code violations," and "short of six months later, on July 1, 2007, Housing Provider increased Tenant's rent." Final Order at 40; R. at 154. Second, "she gave Housing Provider a written memo on May 15, 2006 (PX 115), which Ms. Hall acknowledged receiving, complaining of problems in her apartment, including mice and roach infestations" and "short of six months later, on November 1, 2006, Housing Provider increased [the Tenant's] rent." Final Order at 40-41; R. at 153-54. The ALJ also held that the Housing Provider "failed to put forth clear and convincing evidence to rebut the presumption of retaliation" because the "Housing Provider offered no testimony in response to the allegations of retaliation." Final Order at 41; R. at 153. The ALJ finally held that the Housing Provider willfully retaliated against Ms. Taylor, and imposed a $500 fine pursuant to D.C. OFFICIAL CODE § 42-3509.01(b), because the account manager "was aware that the law allows housing providers to increase the rent only once every 12 months" and "was aware of the elderly exception and that Ms. Taylor had been approved for elderly status" when the Housing Provider increased the rent on July 1, 2007. Final Order at 41; R. at 153.

The Housing Provider contends that the ALJ erred because the evidence in the record demonstrates that "the rent increases were imposed building wide" and not just on the Tenant, and this provides "the basis at law to rebut any presumption of retaliation." See Housing Provider's Brief at 4-5. The Housing Provider further argues that the ALJ erred because a "reason given to support the finding" that the Housing Provider willfully retaliated was its "failure to acknowledge [Ms.] Taylor's elderly exemption" and maintains that the Tenant was

"wrongfully" granted "an elderly exemption" and "the Housing Provider was acting in good faith" and therefore "such action cannot constitute retaliation." See Housing Provider's Brief at 5-6.

In opposition, the Tenant asserts that the ALJ "correctly found that the [Housing Provider] failed to rebut the statutory presumption of retaliation established by the evidence in the record." See Taylor's Brief at 22. She admits that although "exhibits in the record show that other apartments in the building received rent increases at the same time as Ms. Taylor[,]" she maintains that "this evidence alone – without further documentation or witness testimony to support or explain it – is not sufficient to establish that the rent increases in questions were building-wide, much less to rebut a presumption of retaliation." Taylor's Brief at 24.

The retaliation provision in the Act provides, in relevant part, the following:

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

D.C. OFFICIAL CODE § 42-3505.02(a)-(b).

Under D.C. OFFICIAL CODE § 42-3505.02(a)-(b), the determination of retaliation is a two-step process. See Smith v. Joshua, TP 28,961 (RHC Feb. 3, 2012); Jackson v. Peters, TP 28,898 (RHC Feb. 3, 2012). The first step is to determine whether a housing provider committed an act that is considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a). See Smith, TP 28,961; Jackson, TP 28,898. Second, for retaliation to be presumed, a tenant must establish that a housing provider's conduct occurred within six (6) months of the tenant performing one of the protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b). See Smith, TP 28,961; Jackson, TP 28,898. If so, "the statute by definition applies, and the landlord is presumed to have taken 'an action not otherwise permitted by law' unless it can meet its burden under the statute." De Szunyogh v. William C. Smith & Co., 604 A.2d 1, 4 (D.C. 1992) (citing former D.C. OFFICIAL CODE § 45-2552 (1985)); Borger Mgmt. Inc., v. Miller, TP 27,445 (RHC Mar. 4, 2004) at 7 (citing Youssef v. United Mgmt. Co., Inc., 683 A.2d 152, 155 (D.C. 1996)); Hoskinson v. Solem, TP 27,673 (RHC July 20, 2005) at 8-9; Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003) at 5-6.

"In order to trigger a presumption of retaliatory action, a tenant need only present some evidence that the tenant engaged in protected activity . . . within six months before the allegedly retaliatory action." Bridges v. Clark, 59 A.3d 978, 983 (D.C. 2013) (citing D.C. OFFICIAL CODE § 42-3505.02 (b) (2001)); see also De Szunyogh, 604 A.2d at 4 ("if a tenant alleges acts which

fall under the retaliatory eviction statute . . . the statute by definition applies") (emphasis added). The evidentiary burden then shifts to the housing provider to come forward with "clear and convincing" evidence to rebut the presumption that its actions were retaliatory. See Youssef, 683 A.2d at 155; Hoskinson, TP 27,673 at 8. If the housing provider does not rebut the presumption of retaliation with clear and convincing evidence, the hearing examiner will enter judgment in favor of the tenant. Hoskinson, TP 27,673 at 9; Redman, TP 27,104 at 6. "In order to rebut this presumption, the landlord must, at a minimum, come forward with a legitimate, non-retaliatory reason for the challenged action." Gomez v. Independence Mgmt. of Delaware, Inc., 967 A.2d 1276, 1291 (D.C. 2009) (citing Robinson v. Diamond Housing Corp., 463 F.2d 853, 865 (1972) ("Once the presumption is established, it is then up to the landlord to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed."). "But when the statutory presumption comes into play, it will not suffice merely to articulate a legitimate, non-retaliatory reason, because the legislature has assigned a substantial burden of proof ('clear and convincing evidence') to the landlord." Id. (citing D.C. OFFICIAL CODE § 42-3505.02(b)).

Regarding the first step of the Tenant's claim, the ALJ concluded that the Housing Provider engaged in two (2) retaliatory acts because it increased Ms. Taylor's rent on two occasions, November 1, 2006, and July 1, 2007, and both these increases were not otherwise permitted by law. See Milligan v. Novak, TP 23,176 (RHC Sept. 6, 1996) (citing Wahl v. Watkins, 491 A.2d 477 (D.C. 1985)); see also Final Order at 39; R. at 155. The Commission observes that the ALJ concluded that the November 1, 2006 increase was invalid because it was implemented while the Tenant's apartment was not in substantial compliance with the D.C. housing regulations under D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A). See Final Order at 23; R.

at 32. Moreover, the ALJ determined that the July 1, 2007 rent increase was invalid on two (2) grounds: (1) it was implemented while the Tenant's apartment was not in substantial compliance with the D.C. housing regulations under D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A), 14 DCMR § 4216.1; (2) it was implemented less than 12 months after the Housing Provider's prior rent increase on November 1, 2006 under D.C. OFFICIAL CODE § 42-3502.08(g); and (3) it did not account for the Tenant's entitlement to an elderly exemption under D.C. OFFICIAL CODE §§ 42-3501.03(36) & 42-3502.08(h)(2). See Final Order at 23; R. at 32.

The Commission's review of the record indicates that there is substantial evidence supporting the ALJ's conclusion that the rent charged increases on both November 1, 2006 and June 27, 2007 occurred while the unit was not in substantial compliance with the D.C. housing regulations. See supra at 39. Increasing a tenant's rent while a unit is not in substantial compliance with the housing code is not permitted under the Act. See D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A). Furthermore, regarding the July 1, 2007 rent increase, the Commission's review of the record indicates that it was invalid under D.C. OFFICIAL CODE § 42-3502.08(g) because it occurred less than 12 months after the Housing Provider's prior rent increase on November 1, 2006. The Commission therefore determines that when the Housing Provider implemented the respective rent increases on November 1, 2006, and July 1, 2007, it was taking "an action not otherwise permitted by law[,]" see Milligan, TP 23,176 (citing Wahl, 491 A.2d at 480), and thus the ALJ reasonably concluded that the Housing Provider engaged in two (2) acts considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a).

Regarding the second step of the Tenant's retaliation claim, the ALJ held that the Tenant successfully raised the presumption of retaliation because the Housing Provider's two (2) acts of retaliation each occurred, respectively, within six (6) months following the Tenant engaging in a

protected act under D.C. OFFICIAL CODE § 42-3505.02(b). See Final Order at 40-41; R. at 153-54. First, the "Tenant testified that she contacted DCRA on January 25, 2007 (PX 117), and in a written memo, which was also provided to Ms. Hall, reported housing code violations," and "short of six months later, on July 1, 2007, Housing provider increased Tenant's rent." See Final Order at 40; R. at 154. Second, the Tenant "gave Housing Provider a written memo on May 15, 2006 (PX 115), which Ms. Hall acknowledged receiving, complaining of problems in her apartment, including mice and roach infestations" and "short of six months later, on November 1, 2006, [the] Housing Provider increased [the Tenant's] rent." See Final Order at 40-41; R. at 153-54.

The Housing Provider does not contest that the Tenant engaged in protected acts under D.C. OFFICIAL CODE § 42-3505.02(b) and that the protected acts occurred within the six (6) month period preceding the respective illegal rent increases. See generally Housing Provider's Brief. The Commission's review of the record also manifests that there is substantial evidence in the record to support the ALJ's determinations that the Tenant engaged in protected acts under D.C. OFFICIAL CODE § 42-3505.02(b) and that the protected acts occurred within the six (6) month period preceding the respective illegal rent increases. See Hearing CD (OAH Jan. 8, 2008); see also Petitioner's Exhibits 115 and 117. The Commission therefore determines that, based on the substantial evidence in the record, the ALJ reasonably concluded that the Tenant's actions constitute protected acts, see D.C. OFFICIAL CODE § 42-3505.02(b)(1)-(2), and because such acts happened within the six (6) month period preceding the Housing Provider's illegal rent increases, the presumption of retaliation arises as to the illegal rent increases on November 1, 2006 and July 1, 2007. See Bridges, 59 A.3d at 983 (citing D.C. OFFICIAL CODE § 42-3505.02(b)); De Szunyogh, 604 A.2d at 4; see also Final Order at 40-41; R. at 153-54.

Having determined that the presumption of retaliation applied to the two (2) rent increases, the ALJ correctly shifted the evidentiary burden to the Housing Provider to come forward with "clear and convincing" evidence to rebut the presumption that its actions were retaliatory. See Final Order at 41; R. at 153; see also Youssef, 683 A.2d at 155; Hoskinson, TP 27,673 at 8. The ALJ made the following determination regarding the merits of the Housing Provider's rebuttal evidence regarding retaliation:

> 62. Housing Provider offered no testimony in response to the allegations of retaliation. In his closing argument, counsel for Housing Provider argued that there was no retaliation because the rent increases imposed were building-wide. Such evidence may or may not be sufficient to rebut the presumption of retaliation. However, counsel's arguments do not amount to evidence. *See Hutchinson v. D.C. Office of Employee Appeals,* 710 A.2d 227, 232 (D.C. 1998) *citing Cobb v. Standard Drug Co.,* 453 A.2d 110, 112 (D.C. 1982) (statements of counsel, not supported by the record, are not evidence). Ms. Hall failed to provide any testimony or documentary evidence regarding the rent increases at issue being building wide or any other justification. As such, Housing Provider has failed to put forth clear and convincing evidence to rebut the presumption of retaliation and therefore I will enter judgment in Tenant's favor on the issue of retaliation.

Final Order at 41; R. at 153 (emphasis added).

The "clear and convincing evidence" standard is most easily defined as that evidentiary standard that "lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt." Karpinski v. Evolve Prop. Mgmt., LLC., RH-TP-09-29,590 (RHC Aug. 19, 2014) (quoting Addington v. Texas, 441 U.S. 418, 423-24 (U.S. 1979)); see also In re Estate of Frances Walker, 890 A.2d 216, 223 (D.C. 2006). According to the DCCA, it is an "intentionally elevated" standard, meaning such evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established. In re Kline, 113 A.3d 202, 213 (D.C. 2015) (citing In re Dortch, 860 A.2d 346, 358 (D.C. 2004)). As the DCCA has noted,

> While the 'preponderance' standard 'allows both parties to share the risk of error in roughly equal fashion,' the more stringent 'clear and convincing' standard 'expresses a preference for one side's interests' by allocating more of the risk of error to the party who bears the burden of proof.

In re Dortch, 860 A.2d at 358 (quoting Herman & Maclean v. Huddleston, 459 U.S. 375, 390, 103 S. Ct. 683 (1983)); Blackson v. United States, 897 A.2d 187, 195 n.12 (D.C. 2006); see, e.g., Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005) (upholding determination that housing provider failed to produce clear and convincing evidence that rent increase was not retaliatory where housing provider testified about increased expenses for the housing accommodation as a whole, but was unable to show that the tenant's rent increase was proportional to the expenses attributable to her unit); Hoskinson, TP 27,673 (explaining that clear and convincing evidence to rebut a presumption of retaliation must "extend beyond the defense that a law permitted the alleged retaliatory action" (quoting Redman, TP 27,104)).

As indicated supra at 39, the ALJ determined that the Housing Provider "failed to put forth clear and convincing evidence to rebut the presumption of retaliation" for a number of reasons: (1) the Housing Provider offered no testimony in response to the allegations of retaliation; (2) although in closing argument, counsel for Housing Provider contended that there was no retaliation because the allegedly illegal rent increases on November 1, 2006 and July 1, 2007 were part of building-wide rent increases, counsel's arguments do not amount to evidence when unsupported by the record; and (3) Ms. Livia Hall, the Housing Provider's building account manager, failed to provide any testimony or documentary evidence supporting the November 1, 2006 and July 1, 2007 rent increases, respectively, as building-wide or providing other evidence as justification for such rent increases. Final Order at 41; R. at 153 (citing

Hutchinson v. D.C. Office of Emp. Appeals, 710 A.2d 227, 232 (D.C. 1998); Cobb v. Standard Drug Co., 453 A.2d 110, 112 (D.C. 1982)).[10]

The Commission's review of the record does not reveal substantial evidence introduced by the Housing Provider, who has the burden of proof under D.C. OFFICIAL CODE § 42-3505.02(b), that undermines the ALJ's determinations regarding the failure of the Housing Provider to introduce testimonial or documentary evidence to support the Housing Provider's rebuttal of the Tenant's claims of retaliation by means of the illegal rent increases in November 1, 2006 and July 1, 2007. However, in the Housing Provider's brief, the Housing Provider asserts that the ALJ failed to consider the following evidence in the record that supported its rebuttal of the Tenant's claims of retaliation: two (2) CPI-W rent increase notices filed by the Housing Provider with RAD for, respectively, the November 1, 2006 rent increase notice (PX 109) and the July 1, 2007 rent increase notice (PX 123), both of which notices had been introduced as evidence of illegal rent increases by the Tenant, not by the Housing Provider. R. at 314-315, 445-450; see Housing Provider's Brief at 4-5. The Commission's review of the record indicates that PX 109 refers to rent increases for 26 units, and PX 123 refers to rent increases for approximately 134 units. R. at 314-315, 445-450.

The Commission will defer to an ALJ's decision so long as it flows rationally from the facts and is supported by substantial evidence. Carmel Partners, Inc. v. Fahrenholz, TP 28,273 (RHC Oct. 9, 2012); Majerle Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 866 A.2d 41, 46 (D.C. 2004). The Commission will sustain a Hearing Examiner's interpretation of the Act unless it is unreasonable or embodies a material misconception of the law, even if a different interpretation

[10] Citing PX 109 and PX 123, the Housing Provider asserts in its brief on appeal that it rebutted the presumption of retaliation because the rent increases were imposed "building-wide" and not only on the Tenant. See Housing Provider's Brief at 4-5; R. at 314-315, 445-450. The Commission's review of the record indicates that the counsel for the Housing Provider made no reference to PX 109 and PX 123 in closing arguments. See Hearing CD (OAH Jan. 8, 2008).

also may be supportable. Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007); Carmel Partners, Inc., TP 28,273. In determining whether an ALJ's decision is supported by substantial evidence, the Commission will review the record as a whole, not only reviewing evidence that supports an ALJ's decision, but also taking account of "evidence in the record which detracts from the evidence relied upon [by the ALJ]." Sandula v. D.C. Police & Firefighters' Ret. & Relief Bd., 979 A.2d 32, 39 (D.C. 2009) at 39 (citing 6 JACOB A. STEIN, GLENN A. MITCHELL, BASIL J. MEZINES, ADMINISTRATIVE LAW § 51.02[1], at 51-147-48 (2008)); Eilers v. D.C. Bureau of Motor Vehicles Servs., 583 A.2d 677, 685 (D.C. 1990). The Commission has consistently asserted that its role is not to weigh the testimony and substitute itself for the trier of fact who heard and evaluated the conflicting testimony and other evidence, observed the adversary witnesses, and determined the weight to be accorded the testimony and other evidence. Karpinski, RH-TP-09-29,590; Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014); Ford v. Dudley, TP 23, 973 (RHC June 3, 1999); Stancil v. Carter, TP 23,265 (RHC July 31, 1997).[11]

Although the Commission's review of the record indicates that the Housing Provider failed to introduce testimonial or documentary evidence to support its claims that the allegedly retaliatory rent increases were "building wide," the Commission's review of the entire record reveals that two (2) CPI-W rent increase notices filed by the Housing Provider with RAD for, respectively, the November 1, 2006 rent increase notice (PX 109) and the July 1, 2007 rent increase notice (PX 123), had been introduced as evidence of illegal rent increases by the Tenant. R. at 314-315, 445-450; see Housing Provider's Brief at 4-5. Contrary to the ALJ's

[11] The ALJ has a responsibility to weigh the record evidence. Miller, TP 27,445. She has "discretion to reasonably reject any evidence offered." See Miller, TP 27,445 (quoting Harris v. D.C. Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986)). Furthermore, "in rendering a decision, the [ALJ] is entrusted with a degree of latitude in deciding how she shall evaluate and credit the evidence presented." Miller, TP 27,445 (quoting Harris, 505 A.2d at 69).

determination, Housing Provider's counsel's closing argument regarding "building-wide" rent increases were thus, at least, arguably supported by evidence in the record. Cf. Hutchinson, 710 A.2d at 232; Cobb, 453 A.2d at 112. The ALJ even noted as follows with respect to record evidence of building-wide rent increases on November 1, 2006 and July 1, 2007 (excepting Housing Provider's counsel's mere contentions in closing argument): "[s]uch evidence may or may not be sufficient to rebut the presumption of retaliation." Final Order at 41; R. at 153.

In order to determine whether PX 109 and PX 123 constitute "clear and convincing" evidence of "building-wide" rent increases sufficient to support the Housing Provider's rebuttal of the Tenant's claims of retaliation as required by D.C. OFFICIAL CODE § 42-3505.02(b), and to assure that the ALJ's decision "flows rationally from the facts and is supported by substantial evidence," see Majerle Mgmt., Inc., 866 A.2d at 46; Carmel Partners, Inc., TP 28,273, the Commission reverses the ALJ's determination that the Housing Provider had failed to rebut the presumption of retaliation by clear and convincing evidence as required by D.C. OFFICIAL CODE § 42-3505.02(b), and hereby remands this issue to the ALJ to determine whether PX 109 and PX 123 constitute "clear and convincing" evidence sufficient to rebut the presumption of retaliation. The Commission commits to the discretion of the ALJ whether any further proceedings are required to assist the ALJ in the determination required by D.C. OFFICIAL CODE § 42-3505.02(b), or whether the current record is sufficient to allow her to make the determination. Because the Commission has remanded this issue to OAH, the Commission vacates the ALJ's imposition of a $500 fine pursuant to D.C. OFFICIAL CODE § 42-3509.01(b), for willfully violating the Act when the Housing Provider increased the rent on July 1, 2007, subject to her determination whether the Housing Provider rebutted the presumption of retaliation by clear and convincing evidence. See Final Order at 41; R. at 153.

B. Whether the ALJ erred in determining that Ms. Taylor was entitled to an elderly exemption.

The Housing Provider contends on appeal that the ALJ erred in determining that the Tenant was entitled to an elderly exemption with regard to rent increases because "[t]he evidence in this case does not support a finding that [the Tenant] was other than an occupant of the unit rented by her son who was and is, the only contractual tenant." See Housing Provider's Brief at 6.

In determining that the Tenant was entitled to the elderly exemption for rent increase, the ALJ explained in the Final Order that "[i]t is undisputed that on November 28, 2006, Ms. Taylor, who is 73 years old, applied and was approved for elderly status [by RACD on the same day]. Ms. Taylor promptly notified Housing Provider the same day." Final Order at 33; R. at 241. As the Commission stated previously, it will uphold an ALJ's determinations where they are in accordance with the provisions of the Act, and supported by substantial record evidence. 14 DCMR § 3807.1; *see supra* at 37.

The Act provides, in relevant part, that:

> [A]n increase in the amount of rent charged while the unit is occupied shall not exceed, taken as a percentage of the current allowable amount of rent charged for the unit, 2% plus the adjustment of general applicability; provided . . . that the amount of any such increase in rent charged for a unit occupied by an elderly or disabled tenant without regard to income but otherwise as defined in 42-3502.06(f) shall not exceed the lesser of 5% or the adjustment of general applicability.

D.C. OFFICIAL CODE § 42-3502.08(h)(2) (Supp. 2007). The Act defines an "elderly tenant" as "an individual who is, and who proves to the satisfaction of the Rent Administrator that he or she is, at least 62 years of age, and has an income of not more than $40,000 per year at the time of approval by the Rent Administrator of a petition for capital improvements pursuant to § 42-

3502.10." D.C. OFFICIAL CODE § 42-3502.06(f)(2)(B); cf. Bohn Corp. v. Robinson, RH-TP-08-29,328 (RHC July 2, 2014).

As previously discussed, see supra at 34-38, there is substantial evidence in the record supporting a determination that the Tenant in this case qualified as a "tenant" under D.C. OFFICIAL CODE § 42-3501.03(36). Moreover, the Commission's review of the record reveals undisputed evidence that RACD had approved the elderly status of the Tenant without contention and that the Tenant was occupying the unit. See Hearing CD (OAH Jan. 8, 2008). Therefore, the Commission is satisfied that the ALJ's determination that the Tenant was entitled to an elderly exemption under the Act was in accordance with the relevant provisions of the Act, and supported by substantial evidence, the Commission affirms the ALJ on this issue. D.C. OFFICIAL CODE §§ 42-3501.03(36) & 42-3502.08(h)(2); cf. Bohn Corp., RH-TP-08-29,328.

C. Whether the ALJ erred in determining that there was a reduction of services.

The Housing Provider asserts that "[t]he evidence presented at the hearing was not sufficient to support the [ALJ's] determination that there had been a reduction of services." See Housing Provider's Brief at 10. The Housing Provider contends that having a "problem that came and went is not enough" and the Tenant "was vague as to the specific times the problem existed and the severity of the problem at different times." See Housing Provider's Brief at 11. The Housing Provider also maintains that a tenant does not have a claim "if the landlord acts to promptly restore the service to the [previous] level" and that "each time" the Tenant here requested extermination services "the landlord provided those services, in addition to the regularly provided maintenance extermination services." See Housing Provider's Brief at 10-11.

In opposition, the Tenant contends that the ALJ "properly found that the infestation resulted in a substantial reduction in services and facilities" because she "established on the

record below that she suffered from a persistent mice and roach infestation in her apartment throughout her tenancy." See Tenant's Brief at 12, 14. According to the Tenant, "[t]he work request forms, written notices to the housing provider, photographs, and detailed witness testimony offered by Ms. Taylor establish the existence, duration, and severity of the infestation problems." See Tenant's Brief at 15. The Tenant further argues that the Housing Provider's "extermination services have not been sufficient" and "[b]y failing to provide sufficient extermination services or to take other steps to prevent these infestations, the [Housing Provider] has violated its obligations under the D.C. Housing Code to maintain the premises in a rodent-proof and insect-proof condition." See Tenant's Brief at 16.

The ALJ found in the Final Order that the Tenant had proven the existence of a rodent and roach infestation in her unit since November 2005, that she notified the Housing Provider of the infestation multiple times since its outset, and that the Housing Provider's extermination services were insufficient to abate the infestation. Final Order at 35-36; R. at 158-59.

The Commission will uphold the ALJ's decision where it is in accordance with the Act and supported by substantial evidence. 14 DCMR § 3807.1; see supra at 37. Where substantial evidence exists to support the 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 examiner." WMATA v. D.C. Dep't of Emp't Servs., 926 A.2d 140, 147 (D.C. 2007); see Young v. D.C. Dept. of Emp't Servs., 865 A.2d 535, 540 (D.C. 2005); Atchole, RH-TP-10-29,891; Marguerite Corsetti Trust, RH-TP-06-28,207; Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011); Turner v. Tscharner, TP 27,014 (RHC June 13, 2001) at 11. As noted supra at 48, the Commission has consistently asserted that its role is not to weigh the testimony and substitute itself for the trier of fact who heard and evaluated the conflicting

testimony and other evidence, observed the adversary witnesses, and determined the weight to be accorded the testimony and other evidence. Karpinski, RH-TP-09-29,590; Notsch, RH-TP-06-28,690; Ford, TP 23, 973; Stancil, TP 23,265.[12]

The Commission has held that the burden of proof is on the tenant when asserting a claim of reduction of services under the Act. See Karpinski, RH-TP-09-29,590; Atchole, RH-TP-10-29,891; Pena v. Woynarowsky, RH-TP-06-28,817 (RHC Feb. 3, 2012); see also D.C. OFFICIAL CODE § 2-509(b).[13] A tenant may seek relief under the Act where an "unauthorized reduction in services or facilities related to the rental unit" has occurred. 14 DCMR § 4214.4(d).[14] A landlord is not permitted to reduce services "required by law or the terms of a rental agreement" that were previously provided to the tenant in connection with the use and occupancy of a rental unit without decreasing the rent to "reflect proportionally the value of the change in services." D.C. OFFICIAL CODE §§ 42-3501.03(27) & 42-3502.11.[15]

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[12] The ALJ has a responsibility to weigh the record evidence. Miller, TP 27,445. She has "discretion to reasonably reject any evidence offered." See Miller, TP 27,445 (quoting Harris v. D.C. Rental Hous. Comm'n, 505 A.2d 66, 69 (D.C. 1986)). Furthermore, "in rendering a decision, the [ALJ] is entrusted with a degree of latitude in deciding how she shall evaluate and credit the evidence presented." Miller, TP 27,445 (quoting Harris, 505 A.2d at 69).

[13] D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, the following: "In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof . . . ."

[14] 14 DCMR § 4214.4(d) reads as follows:

> The tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, complain of and request appropriate relief for any other violation of the Act including, but not limited to, the following: . . .
>
> > (d) Any unauthorized reduction in services or facilities related to the rental unit not permitted by the Act or authorized by order of the Rent Administrator.

[15] The Act's provision governing reduction of related services states the following:

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

D.C. OFFICIAL CODE § 42-3502.11. The Act defines a "related service" as follows:

The Commission has explained that a tenant must satisfy a three-prong test in order to successfully pursue a claim of reduction or elimination of services. See, e.g., Kuratu v. Ahmed, Inc., RH-TP-07-28,895 (RHC Dec. 27, 2012); Pena, RH-TP-06-28,817; Drell, TP 27,344; Davis v. Madden, TP 24,983 (RHC Mar. 28, 2002); Ford, TP 23,973. First, a tenant must provide evidence that a substantial elimination or reduction in a related service occurred, and the fact-finder must find that a substantial elimination or reduction in a related service occurred; second, a tenant must establish the duration of the reduction in services; finally, a tenant must show that the housing provider had knowledge of the alleged reduction in services. See Pena, RH-TP-06-28,817; Ford, TP 23,973.

The Commission's review of the record reveals that the ALJ identified and applied the correct provisions of the Act governing reductions in services, as well as the requirement that a tenant demonstrate the existence, duration, and severity of the reduction, and that notice was given to the housing provider. Final Order at 28-29; R. at 165-66 (citing D.C. OFFICIAL CODE §§ 42-3501.03(27) & 42-3502.11; Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005); Cascade Park Apartments v. Walker, TP 26,197 (RHC Jan. 14, 2005)).

The Commission's review of the record reveals that the ALJ's determinations on this issue were supported by substantial evidence, including the testimony and documentary evidence submitted at the OAH hearing. See 14 DCMR § 3807.1. For example, the Tenant testified that she observed cockroaches in her unit since the outset of her tenancy, and mice in her unit on a weekly basis beginning on November 11, 2005, that she notified the Housing Provider of these

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> "Related services" means services provided by a housing provider required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse.

D.C. OFFICIAL CODE § 42-3501.03(27).

issues during a meeting on December 23, 2005, during inspections of her unit on December 28, 2005 and May 15, 2006, and during DCRA inspections of her unit. See Hearing CD (OAH Jan. 8, 2008); see also Petitioner's Exhibits 114, 115, 116, and 117. The Tenant further testified that the Housing Provider's extermination services have not fixed the problem. See Hearing CD (OAH Jan. 8, 2008). Additionally, the Commission notes that the Tenant introduced into evidence work request forms for pest extermination services she submitted to the Housing Provider, demonstrating that the Tenant requested extermination services from the Housing Provider on December 16, 2005, February 3, 2006, February 21, 2006, May 5, 2006, September 1, 2006, March 29, 2007, April 9, 2007, May 28, 2007, June 5, 2007, July 17, 2007, July 23, 2007, August 3, 2007, October 17, 2007, November 10, 2007, and November 26, 2007. See Petitioner's Exhibit 118A; R. at 421-435. The Tenant also introduced nine (9) photographs of dead mice in her unit. See Petitioner's Exhibits 100-(H).

Accordingly, the Commission is satisfied based on its review of the record, that the ALJ's determination that the infestation of mice and rodents in the Tenant's unit constituted a reduction in services was in accordance with the provisions of the Act and supported by substantial evidence. 14 DCMR § 3807.1; see D.C. OFFICIAL CODE §§ 42-3501.03(27) & 42-3502.11; Kuratu, RH-TP-07-28,895; Pena, RH-TP-06-28,817; Drell, TP 27,344.

Although the Housing Provider argues that a tenant should not be able to recover for a reduction in services where the Housing Provider acted promptly to provide extermination services, see Housing Provider's Brief at 10-11, the Commission has previously held that a housing provider's unsuccessful efforts to abate conditions in a tenant's unit, including rodent or insect infestations, are irrelevant to the question of whether services have been reduced in a tenant's unit. See, e.g., Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013);

Dejean v. Gomez, RH-TP-07-29,050 (RHC Aug. 15, 2013); Enobakhare, TP 27,730. The Commission affirms the ALJ on this issue.

D. Whether the ALJ erred in determining that rent increases were illegal because they were implemented while substantial housing code violations existed.

The Housing Provider asserts that the ALJ erred because "[t]he complaints made by the [Tenant] regarding insect and rodent infestation do not take place on or around the time of implementation of rent increases and the evidence was undisputed that remedial actions were taken by Housing Provider following the complaints." See Housing Provider's Brief at 12. In opposition, the Tenant contends that "[e]ven assuming that the [Housing Provider] has made good faith but ultimately unsuccessful efforts to eliminate the infestation, the 2006 rent increase on [the Tenant's] apartment nonetheless was unlawful." See Taylor's Brief at 17. She asserts "[a] housing provider does not meet its obligations to its tenant simply by making efforts to eliminate a persistent housing code violation." See Taylor's Brief at 17 (citing Hutchinson, TP 20,523 at 6).

The ALJ concluded in the Final Order that two (2) rent increases were illegal because they occurred while the Tenant's unit was not in substantial compliance with the housing code. Final Order at 36-37; R. at 157-58. The ALJ held that the Tenant proved "that her apartment was infested with roaches and mice, from November 2005 through the present, which amounted to a substantial housing code violation . . . ." Final Order at 36; R. at 158. The ALJ thus held that when the Tenant's "rent was increased on November 1, 2006, and July 1, 2007, her apartment was not in substantial compliance with the housing code. Accordingly, Housing Provider was barred from increasing [the Tenant's] rent in November 2006 or July 2007." Final Order at 37; R. at 157.

The Act provides that a housing provider may not increase the rent for a rental unit if the unit is not in substantial compliance with the housing regulations. D.C. OFFICIAL CODE § 42-3502.08(a)(1).[16] The District's regulations define "substantial compliance with the housing code" as "the absence of any substantial housing violations as defined in § 103(35) of the Act,[17] including" the "[i]infestations of insects or rodents[.]" 14 DCMR § 4216.2-(i).

The Commission has held that "the crucial inquiry" for purposes of D.C. OFFICIAL CODE § 42-3502.08(a)(1) "is whether . . . [the] alleged substantial housing code violation exists at the time the rent increase is taken." Hamlin v. Daniel, TP 27,626 (RHC June 10, 2005) (quoting Hutchinson, TP 20,523 at 6); see also Stancil, TP 23,265; Nwanko v. William J. Davis, Inc., TP 11,728 (RHC Aug. 6, 1986). Unsuccessful efforts to abate a violation do not legitimize an increase. See Enobakhare, TP 27,730 at 5-6 (citing Hutchinson, TP 20,523) ("a housing provider may not implement a rent increase for a rental unit in which substantial housing code violations exist, even where the housing provider has made substantial, but unsuccessful, efforts to abate the violations"); Hutchinson, TP 20,523 ("It is commendable if a housing provider makes efforts to abate a substantial violation, but efforts, alone, do not suffice"). However, a housing provider must have notice of the violation. See H.G. Smithy Co. v. Alston, TP 25,033 (RHC Sept. 30,

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[16] D.C. OFFICIAL CODE § 42-3502.08(a)(1) provides as follows:

> Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless:
>
> > (A) The rental unit and the common elements are in substantial compliance with the housing regulations, if noncompliance is not the result of tenant neglect or misconduct. Evidence of substantial noncompliance shall be limited to housing regulations violation notices issued by the District of Columbia Department of Consumer and Regulatory Affairs and other offers of proof the Rental Housing Commission shall consider acceptable through its rulemaking procedures[.]

[17] The Act defines "substantial violation" as "the presence of any housing condition, the existence of which violates the housing regulations, or any other statute or regulation relative to the condition of residential premises and may endanger or materially impair the health and safety of any tenant or person occupying the property." D.C. OFFICIAL CODE § 42-3501.03(35).

2003) at 10 (citing Gavin v. Fred A. Smith Co., TP 21,918 (RHC Nov. 18, 1992) at 4) ("Although a housing provider may not raise rent for a rental unit if it and the common elements are not in substantial compliance with the housing regulations, this is only so if the housing provider has notice of the existing housing code violations"). As the Commission has noted, "[i]f the housing provider was first notified of the violations after the effective date of the rent increase, the rent increase is valid." H.G. Smithy Co., TP 25,033.

In the instant case, the Commission's review of the record reveals substantial evidence to support the ALJ's finding (1) that an unabated mice and roach infestation existed from November 2005 through the date of the hearing, see Hearing CD (OAH Jan. 8, 2008), (2) that the Housing Provider increased the Tenant's rent on November 1, 2006, and July 1, 2007, see Petitioner's Exhibit 109; R. at 314-15; Petitioner's Exhibit 123; R. at 445-50, and (3) that the Housing Provider was notified about the infestations before the rent increases occurred. See supra at 55. Therefore, the Commission is satisfied that the ALJ's conclusion that the Housing Provider illegally raised the Tenant's rent on November 1, 2006, and July 1, 2007, because these increases were implemented while substantial housing code violations existed, was supported by substantial evidence. 14 DCMR § 807.1; see Enobakhare, TP 27,730 at 5-6 (citing Hutchinson, TP 20,523); Stancil, TP 23,265.

Accordingly, the Commission affirms the ALJ on this issue.[18]

[18] As discussed previously, the Housing Provider argues that "complaints made by the [Tenant] regarding insect and rodent infestation do not take place on or around the time of implementation of rent increases and the evidence was undisputed that remedial actions were taken by Housing Provider following the complaints." See Housing Provider's Brief at 12. This argument is tantamount to asserting that because the Housing Provider made extermination efforts before the increases occurred, the increases are valid. See Housing Provider's Brief at 12. "It is commendable if a housing provider makes efforts to abate a substantial violation, but efforts, alone, do not suffice." Hutchinson, TP 20,523. "[A] housing provider may not implement a rent increase for a rental unit in which substantial housing code violations exist, even where the housing provider has made substantial, but unsuccessful, efforts to abate the violations." Enobakhare, TP 27,730 at 5-6 (citing Hutchinson, TP 20,523). Regardless of the Housing Provider's unsuccessful extermination efforts, there is substantial evidence in the record

IV. CONCLUSION

Based on the foregoing, with respect to Issue A, the Commission reverses the ALJ's determination that the Housing Provider had failed to rebut the presumption of retaliation by clear and convincing evidence as required by D.C. OFFICIAL CODE § 42-3505.02(b), and hereby remands this issue to the ALJ to determine whether PX 109 and PX 123 constitute "clear and convincing" evidence sufficient to rebut the presumption of retaliation. The Commission commits to the discretion of the ALJ whether any further proceedings are required to assist the ALJ in the determination required by D.C. OFFICIAL CODE § 42-3505.02(b), or whether the current record is sufficient to allow her to make the determination. The Commission vacates the ALJ's imposition of a $500 fine pursuant to D.C. OFFICIAL CODE § 42-3509.01(b), for willfully violating the Act when the Housing Provider increased the rent on July 1, 2007, subject to her determination whether the Housing Provider rebutted the presumption of retaliation by clear and convincing evidence. See Final Order at 41; R. at 153.

The Commission affirms the ALJ on the remaining issues B, C, and D.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

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that substantial housing code violations existed at the time of the challenged rent increases, and thus the increases are illegal. See supra at 58-59; see also Enobakhare, TP 27,730 at 5-6 (citing Hutchinson, TP 20,523).

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** in RH-TP-07-29,040 was mailed, postage prepaid, by first class U.S. mail on this **1st day** of **September, 2015** to:

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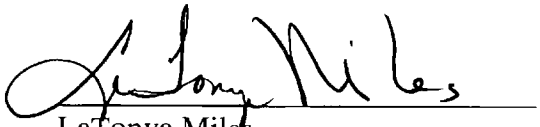

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