DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-08-29,149

In re: 2950 Van Ness Street, N.W., Unit 923

SMITH PROPERTY HOLDINGS CONSULATE, LLC
Housing Provider/Appellant

v.

BRADY LUTSKO
Tenant/Appellee

DECISION AND ORDER

March 10, 2015

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

[1] OAH assumed jurisdiction over tenant petitions from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD) pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to DHCD by § 2003 the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.)).

I. PROCEDURAL HISTORY

On January 3, 2008, Tenant/Appellee Brady Lutsko (Tenant), resident of 2950 Van Ness Street, N.W., unit 923 (Housing Accommodation) filed Tenant Petition RH-TP-08-29,149 (Tenant Petition) with RAD, against Smith Property Holdings Consulate, LLC (Housing Provider). *See* Tenant Petition at 1-5; Record for RH-TP-08-29,149 (R.) at 1-5. The Tenant Petition raised the following claims against the Housing Provider:

1. The building where my/our rental unit(s) is located is not properly registered with the RAD.

2. The landlord (housing provider), manager, or other agent has taken retaliatory action against me/us in violation of Section 502 of the Act.

Tenant Petition at 2; R. at 4.

A hearing was held on this matter on April 24, 2008. R. at 63. A Final Order was issued on July 8, 2008, Lutsko v. Smith Property Holdings Consulate, LLC, RH-TP-08-29,149 (OAH July 8, 2008) (Final Order); R. at 36-103.

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

A. Housing Provider's Failure to Notify Tenant/Petitioner of its Exemption from the Rent Stabilization Provisions of the Act.

1. Tenant/Petitioner began leasing Unit 923 at the Property from the Housing Provider/Respondent on September 10, 2002. The lease was for one year at $1,299 per month, ending September 30, 2003. Petitioner's Exhibit "PX" 103.

2. Housing Provider/Respondent filed its [R]egistration/[C]laim of [E]xemption form with RAD on August 18, 1999, indicating the building was constructed after December 31, 1975, and therefore exempt from the rent stabilization provisions of the Act. However, it did not notify Tenant/Petitioner of this exemption in its lease agreement. PX 100, Respondent's Exhibit ("RX") 200.

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

3. There are two versions of the Housing Provider/Respondent's Registration/Claim of Exemption form filed with RAD, PX[ ]100 and RX 200. The Registration/Claim of Exemption [f]orm filed with the RACD [sic] contains seven pages, including a page that water and sewer fees were included in the rent. PX 100.

4. Housing Provider's version omits the services and facilities information that is part of the form. Respondent's Exhibit "RX" 200.

5. Housing Provider/Respondent did not post its [R]egistration/[C]laim of [E]xemption form in a public place or its management office or on its premises during the relevant time period January 3, 2005 through January 3, 2008, which was the relevant period of Tenant/Petitioner's tenancy.

6. Housing Provider/Respondent did not notify Tenant/Petitioner of its claim of exemption prior to, during, or after the execution of the lease.

7. Housing Provider/Respondent knew or should have known that the [R]egistration/[C]laim of [E]xemption form was not posted in compliance with the Act, and was not provided with Tenant/Petitioner's rental application, nor was [sic] mailed to Tenant/Petitioner.

8. Housing Provider/Respondent intentionally omitted posting the complete [R]egistration/[C]laim of [E]xemption form because the completed form disclosed that water [and] sewer usage fees were to be included in the tenants' rent, but the Tenant/Petitioner was charged additionally and separately for this [sic] utility charge[s] during the relevant time period of January 3, 2005 through January 5, 2008.

9. Housing Provider/Respondent knew that failure to notify Tenant/Petitioner of its Registration/Claim of Exemption form and failure to post it was a violation of the Act.

10. There is no evidence that Housing Provider filed an amended registration statement indicating that water [and] sewer charges were not included in a tenant's rent within 30 days of September 2002, which is when Tenant/Petitioner began paying $15 per month additionally for water usage.

11. There is no evidence that Housing Provider filed a petition pursuant to 14 District of Columbia Municipal Regulations (DCMR) [§] 4211.1 that it proposed to change the related services or facilities, i.e. water and sewer charges at the [H]ousing [A]ccommodation before, during and after Tenant/Petitioner's tenancy.

B. Invalid Increases in Tenant/Petitioner's Rent

12. In the narrative portion of the [T]enant [P]etition, Tenant/Petitioner specifically requests that this administrative court "reverse [the Housing Provider's] illegal rent increase and penalty for not signing new terms."

13. On July 28, 2003, Tenant/Petitioner received notice from the Housing Provider that effective October 1, 2003, his monthly rent would be adjusted from $1,299 to $1,338 or $1,438 if he chose the month-to-month option. PX 103, page 1.

14. Tenant/Petitioner chose the month-to-month option and began paying rent of $1,438 as of October 1, 2003. PXs 102 and 103.

15. Tenant/Petitioner continued paying rent of $1,438, during the relevant time period of this proceeding until December 2007, when he paid $1,875 in response to another notice of rent increase. PX 102, page 2, PX 104.

16. Tenant/Petitioner began paying $1,875 for the December 2007 rent, which was the option offered for a ten-month lease. PX 104, pages 1 and 3.

17. Tenant/Petitioner received notice of the second rent increase on September 13, 2007, which was effective December 2007 and increased Tenant/Petitioner's rent from $1,438 as a month-to-month tenant to $2,120 as a month-to-month tenant, assuming Tenant/Petitioner signs a new lease. PX 104.

18. This notice of rent increase dated September 13, 2007, was not filed with the Rent Administrator.

19. Tenant/Petitioner paid the $1,875 for the December 2007 rent without signing a new 10-month lease. Because there was such a huge disparity in the rent increase from $1,438 to $2,120 as a month-to-month tenant if a new lease was signed, Tenant/Petitioner was denied a meaningful choice.

20. Housing Provider/Respondent assessed Tenant/Petitioner a $245 charge for breaking the 10-month lease and also assessed him rent at $2,120 for January 2008, PX 102, page 3, which is the rent amount for a month-to-month tenant. PX 104, page 1.

21. Tenant/Petitioner vacated the premises effective January 15, 2008, because he could not afford the substantial increase in rent and also would not agree to negotiate a brand new lease with substantial changes in the provisions of the lease. PX 102, page 3.

22. Housing Provider submitted a final bill to Tenant/Petitioner. Tenant/Petitioner paid $1,298.98 on this final bill prorated through January 15, 2008. PX 102, page 3.

C. Improper Water Usage Charges Inconsistent with Housing Provider's Registration[/]Claim of Exemption Form

23. When Tenant/Petitioner signed his lease in 2002, there was an addendum he signed in which he agreed to a flat-rate fee of $15 per month for water usage. PX 102, page 4. This $15 flat fee for water usage was also identified on Housing Provider's pricing form dated July 11, 2002. PX 102, page 4. PX 103.

24. In June 2004, Housing Provider hired a third-party to bill water based on a ration utility billing system that bills tenants for a portion of the buildings total water bill based on a square footage allocation, which resulted in an additional $438.42 in fees charged to him. (Tenant petition narrative paragraph six.) These additional fees commenced in June 2004.

25. The Housing Provider's certified Registration/Claim of Exemption form consisting of three pages, and presented by the Housing Provider, RX 200, is substantially different from the Registration/Claim of Exemption form Tenant/Petitioner received from the Rent Administrator consisting of six pages. PX[ ]100.

26. Housing Provider's Registration/Claim of Exemption form filed with the Rent Administrator represents that water and sewer charges are part of the rent a tenant pays, when it is not. PX 100, page 5. Housing Provider/Respondent had reason to conceal the complete Registration/Claim of Exemption form because it failed to file the necessary amended registration statement within the 30 day time period allotted by law, when a change is made such as charging tenants separately for water and sewer.

27. The amended registration form should have been filed no more than 30 days after it began billing tenant separately for water and sewer fees. Tenant/Petitioner's lease commenced in October 2002 with water [and] sewer charges being billed separately. Therefore, the Housing Provider should have, but did not file an amended registration form before 2002, which reflected water [and] sewer charges were no longer inclusive with a tenant's rent. Nor did Housing Provider file a petition pursuant to 14 DCMR [§] 4211.1 that it proposed to change the related services or facilities, i.e. water and sewer charges at the [H]ousing [A]ccommodation.

28. By concealing the complete Registration/Claim of Exemption form from tenants consisting of six pages, PX 100, it enabled Housing Provider to charge tenants separately for water and sewer usage without letting them know it should have been included with the tenants' rent.

29. By concealing the complete Registration/Claim of Exemption form from tenants, consisting of six pages, PX 100, tenants were not aware that Housing Provider's water and sewer charges were illegal.

30. Tenant/Petitioner paid $1,111.59 for water and sewer and other utilities charges from June 2004 through January 15, 2008. PX 102, page 2.

31. Housing Provider's failure to notify Tenant/Petitioner of its Registration/Claim of Exemption filing was intentional misrepresentation because it caused Tenant/Petitioner to not be aware that he overpaid water usage and sewer charges from the date of his tenancy through the date of the termination in his tenancy January 15, 2008, because Housing Provider did not petition the Rent Administrator in compliance with 14 DCMR [§] 4211.1 that it proposed to change the related services or facilities, i.e. water and sewer charges at the [H]ousing [A]ccommodation nor file an amended registration statement that a tenant's services and facilities no longer included water and sewer expenses.

D. Tenant/Petitioner's Claims of Retaliation

32. From July 21, 2006, through May 1, 2007, Tenant/Petitioner made ongoing complaints about second hand smoking odors inside his apartment. PX 101.

33. The second hand smoke odor was coming from nearby apartments and filtering into Tenant/Petitioner's unit and posed a serious threat to Tenant/Petitioner's health. PX 106, page 12.

34. Housing Provider/Respondent knew that the Tenant had a duty and right to report the second hand smoke odor problem under the terms of his lease. PX 1[0]3, page 5. The second hand smoke odor was also a ventilation problem in Tenant/Petitioner's unit which existed more than two days and Housing Provider had not promptly corrected the ventilation problem in Tenant/Petitioner's unit.

35. Two individuals visiting Tenant/Petitioner's unit during his tenancy also observed a strong odor of cigarette smoke on various occasions. PX 106, page[s] 1 and 12.

36. On September 13, 2007, Tenant/Petitioner received notice from the Housing Provider/Respondent that his rent would increase to $1,875 if he chose a new 12-month lease or $2,120 per month if he chose to continue to be a month-to-month tenant. PX 104, page 1.

37. Tenant/Petitioner paid a $245 penalty for refusing to sign a new lease. (Tenant [P]etition, narrative paragraph 5, PX 102, page 3.)

38. On October 10, 2007, Housing Provider/Respondent notified Tenant/Petitioner for the first time by email that the Property is not a rent controlled building, and therefore, pricing is based on market conditions. PX 101, page 5. Tenant/Petitioner did not receive a true copy of the Registration/Claim of Exemption form at that time.

39. Advertised rates for a one-bedroom unit at The Consulate from October 2007 through February 2008 ranged from $1[,]385 per month to $1,675 per month on Craigslist. PX 105, page 1.

40. Housing Provider/Respondent also advertised via its www.archstoneapartments.com website, that its one-bedroom units at the Property were renting for $1660-$1785 per month in October 2007. PX 106, page 3.

41. On October 11, 2007, Housing Provider/Respondent, through its agent Eileen McKenzie, informed Tenant/Petitioner that its renewal raters were not negotiable. PX 101, page 4.

42. Aimee Storm contacted the Housing Provider/Respondent on October 9, 2007, and was advised by Eileen McKenzie that the current leasing rate for a one-bedroom apartment at the Property runs $1,680 per month. PX 106, page 12.

43. Because Housing Provider/Respondent demanded a rent from Tenant that was considerably greater than the rents that Housing Provider advertised in its listings, I find that Housing Provider, by and through its agent Eileen McKenzie, intentionally misrepresented to Tenant/Petitioner in its October 10, 2007, email, that the Housing Provider would be leasing Tenant/Petitioner's unit for $1,835 per month in December 2007, which was the market rate. PX 105, page 5.

44. Based on its advertising rates from the time period of September 2007 through December 2007, Housing Provider knew or should have known that the market rate of $1,835 per month in December 2007, quoted to the Tenant/Petitioner was patently false.

45. Housing Provider knowingly and intentionally misrepresented the patently false market rate of $1,835 per month in December 2007, to Tenant/Petitioner for the purpose of coercing Tenant/Petitioner to sign a new lease with entirely different terms and at an exorbitant rent increase that would result in him accepting the unreasonable rent increase and changes, or leaving by coercion.

Final Order at 3-10; R. at 94-101. The ALJ made the following conclusions of law in the Final Order:[3]

1. The [H]ousing [A]ccommodation was registered with RAD in 1999, but in accordance with the Act [sic], Respondent failed to notify Tenant/Petitioner of the exemption of his rental unit under the Act, which renders the registration void *ab initio*;

2. The rent increases implemented by Respondent in 2007 were invalid because Respondent did not file the proper rent increase forms with RAD as required by 14 DCMR [§] 4205.4 after it failed to properly notify Tenant/Petitioner of its exemption;

3. The rent increase from $1,438 to $2,120 as a month-to-month tenant was a huge disparity. Tenant/Petition was denied a meaningful choice because the choice presented by the Housing Provider conflicted with Section 42-3505.01 of the Act, because it denies the Tenant/Petition a meaningful opportunity to remain as a month-to-month tenant;

4. Tenant/Petitioner's second hand smoke odor he complained of was a ventilation problem in the unit that violated Title 14, Chapter 5 of the housing regulations;

5. Respondent directed retaliatory action against Tenant/Petitioner in violation of the Act when Housing Provider/Respondent demanded an improper rent increase in 2007 after he complained of second hand smoke odor in his apartment;

6. Housing Provider's actions in failing to notify Tenant/Petitioner of its complete Registration/Claim of Exemption form filed with RAD by mail or delivery to Tenant/Petitioner, and its failure to renew Tenant/Petitioner's lease based on the existing lease terms were knowing and willful violations of the Act; and

7. There is no evidence that Housing Provider filed a petition pursuant to 14 DCMR [§] 4211.1 or an amended registration statement within 30 days of implementing the change of having water and sewer charges excluded from tenants' rent as required by the Act. *See* D.C. Official Code § 42-3502.05 (g) under the former provisions of the Act, and D.C. Official Code § 42-3502.05 (g)(1)(C) under the current provisions of the Act.

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

A. Tenant's Claim that the Rental Property Was Not Properly Registered or Exempt

1. Tenant's first complaint is that the building where his rental unit was located was not properly registered with the RAD. It is undisputed that on or after the date of the filing of this [T]enant [P]etition, Tenant/Petitioner became aware that as of August 1, 1999, Housing Provider/Respondent had filed a [R]egistration/[C]laim of [E]xemption form with RAD on August 18, 1999. What is disputed is whether or not Tenant/Petitioner was ever made aware that the property was exempt from the rent stabilization provisions of the Act based on proper notices the Housing Provider/Respondent gave to him.

2. Based on the credible evidence of the Tenant/Petitioner, I conclude that the Housing Provider/Respondent failed to comply with the provisions of the Act by properly notifying the Tenant/Petitioner that its Property was exempt from the Act. I further conclude that the Housing Provider/Respondent failed to properly post the [R]egistration/[C]laim of [E]xemption form in a public place or in its managing agent office for Tenant/Petitioner to know. I also conclude that the first time [T]enant/Petitioner became aware that the Property was not subject to rent control was in an October 10, 2007 email from Eileen McKenzie, Housing Provider/Respondent's agent, which was insufficient notice because it did not contain the complete Registration/Claim of Exemption form in compliance with the Act, and was not given to Tenant/Petitioner prior to the execution of his lease. PX 101, page 5.

3. It is settled law that the burden of proof is on the housing provider to prove eligibility for an exemption from the Act. *Revithes v. D. C.* [sic] *Rental Hous. Comm'n*, 536 A.2d 1007 (D.C. 1987); *Best v. Gayle*, TP 23,043 (RHC Nov. 21, 1996) at 5. In this case, Housing Provider/Respondent failed to meet its burden of proof that it was eligible for the exemption by complying with the provisions of the Act. As the Rental Housing Commission stated in *Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 5, "[t]he filing of a claim of exemption form does not *ipso facto* meet the burden of proof on exemption, because the facts stated therein must be proven not to be a misrepresentation. . . . We conclude, some evidence of the exemption must be presented at the OAD [sic] hearing, not merely an assertion, or oral statement, or the Registration/Claim of Exemption Form for the Commission to review to determine the record contains substantial evidence to support the claim of exemption," *citing The Vista Edgewood Terrace v. Rascoe*, TP 24,858 (RHC Oct. 13, 2000) at 12-13.

4. The Act, D.C. Official Code § 42-3502.05(d) provides:

Prior to the execution of a lease or other rental agreement after July 17, 1985, a prospective tenant of any unit exempted under subsection (a) of this section **shall receive a notice in writing advising the prospective tenant that rent increases for the accommodation are not regulated by the rent stabilization program**.

5. The Act, D.C. Official Code § 42-3502.05(h) further provides:

   Each registration statement filed under this section shall be available for public inspection at the Division, and each housing provider shall keep a duplicate of the registration statement posted in a public place on the premises of the housing accommodation to which the registration statement applies. Each housing provider may, instead of posting in each housing accommodation comprised of a single rental unit, mail to each tenant of the housing accommodation a duplicate of the registration statement.

6. The regulations governing the registration requirements for rental units and housing accommodations are as follows:

   14 DCMR [§] 4101.3 (emphasis added)

   The registration requirements of the Act shall be satisfied for any rental unit not properly registered under the Rental Housing Act of 1980 only if the following applies:

   a) The housing provider of the rental unit has properly completed and filed with the Rent Administrator a new Registration/Claim of Exemption form pursuant to the Act and any regulations promulgated thereunder; and

   b) The housing provider has complied with the posting or mailing requirements of § 4101.6, and certified compliance to the Rent Administrator on a form provided for such certification.

7. The second regulation that is controlling is 14 DCMR [§] 4101.6, which states:

   Each housing provider who files a Registration/Claim of Exemption form under the Act **shall,** prior to or simultaneously with the filing post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit or housing accommodation to which it applies, or **shall** mail a true copy to each tenant of the rental unit or housing accommodation.

8. The language of 14 DCMR [§] 4101.6 is very clear and unambiguous. Notice is only accomplished when the housing provider follows the

provisions of 14 DCMR [§] 4101.6 by posting a **true** copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit or by mailing a true copy to each tenant. Nothing short of this will do. In this case, neither of these two requirements was [sic] met. This administrative court declines to accept the Housing Provider's statements of compliance by notifying the public that its records were on file in the managing agent's office. The undersigned does not credit the testimony of the Housing Provider that sending a disclosure notice to tenants was sufficient when the disclosure notice does not contain the entire Registration/Claim of Exemption form. Also, based on the testimony alone of Housing Provider's representative, posting notice that the exemption form was on file does not comply with the above-cited regulation for two important reasons. First, there is a discrepancy in the Registration/Claim of Exemption forms presented by the Housing Provider, RX 200, and presented by the Tenant/Petitioner PX 100. This is all the more reason the complete registration form should have been posted. It is unclear based on PX 100 and RX 200 exactly what version of the [R]egistration/[C]laim of [E]xemption form was being stored in the managing agent's office for tenants to observe. Second, if the entire form is either posted or sent to the Tenant/Petitioner as required by the Act and Regulations, then there would be no dispute that Tenant/Petitioner was aware of the exemption as well as the services and facilities included in a tenant's tenancy. This was not done in this instance.

9. The Rental Housing Commission, in a recent decision, elaborated on a Housing Provider/Respondent's failure to give notice of an exemption. It specifically held that failure to give notice of the exemption renders it void *ab inito*. *Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 5. In addition, the Commission held that the rental property is not exempt, because the [h]ousing [p]rovider did not give the [t]enant proper notice of the exemption, which denied the [t]enant a substantial right under the Act. *Id.* at 8. The Commission then reasoned that "it logically follows that the [h]ousing [p]rovider could not raise the rent. . . . For a rent increase to be proper on exempt property, the [t]enant was entitled to notice of the exemption." *Id.* The Commission relied on D.C. Official Code §§ 42-3502.05(d) and (h) (2001), and on 14 DCMR [§] 4101.9 (1991), which states:

   Any housing provider who has failed to satisfy the registration requirements of the Act; [sic] pursuant to 4101.3 or 4101.4 shall not be eligible for and shall **not** take or implement the following:

   (a) Any upward adjustment in the rent ceiling for a rental unit authorized by the Act;
   (b) Any increase in the rent charged for a rental unit which is not properly registered; or

(c) **Any of the benefits with accrue to the housing provider of rental units exempt from the Rent Stabilization Program.**

10. In this case, as was in the case of *Butler v. Toye*, the Housing Provider did not comply with the notice of exemption posting and mailing requirements, and therefore could not benefit from the exemption form he filed. *Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 9. The fact that Housing Provider testified that it posted a notice that such an exemption form was on file in its managing office is insufficient, and I further conclude that the Housing Provider's testimony that such a positing existed in lieu of the actual exemption form being posted is not credible. No documentary evidence of the exact language of the posting was produced in support of the Housing Provider's case on the notice of the exemption. This is also problematic for the two reasons discussed above for meeting the posting or notice requirements under the Regulations and Act. Tenant/Petitioner testified credibly that he never saw such a posting during his entire tenancy and was never mailed notice of such an exemption. Housing Provider provided no rebuttal evidence or other proof that proper notice of the complete Registration/Claim of Exemption form was mailed to Tenant/Petitioner.

11. I further note in the findings of fact that the Housing Provider misrepresented in its [R]egistration[/C]laim of Exemption form that water and sewer charges were included in a tenant's rent. PX 100. If all tenants received this full and complete exemption form in the mail or its posting, they would have also been placed on notice that their water and sewer expenses charged were illegal and have a valid claim against the Housing Provider for reduction in services and facilities. The failure to post the exemption form clearly deprived the tenants of substantial rights. Tenant/Petitioner was prejudiced by the defect of failing to notify him of the Registration/Claim of Exemption form and failing to notify him that the property was exempt from the rent stabilization provisions of the Act. If disclosure were provided, Tenant/Petitioner would have been better informed that the subject property was not subject to rent control and fully aware that he was not required to pay water and sewer charges, and would have been in a better position to file a claim at the commencement of his lease against the Housing Provider for these erroneous utilities charges and for its failure to cure the misrepresentation in its Registration/Claim of Exemption form. *Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 8; *see also Nwankwo v. District of Columbia* [sic] *Rental Hous. Comm'n*, 542 A.2d 827 (D.C. 1988).

B. Tenant's Invalid Rent Increases

12. In the narrative provision of Tenant/Petitioner's [T]enant [P]etition, he alleges an "illegal rent increase." This is sufficient to place Housing

Provider/Respondent on notice of a claim of an illegal rent increase, and in accordance with the established precedent set forth in *Butler v. Toye*, I am ordering a rent refund of the rent increase implemented in December 2007 as set forth in Tenant/Petitioner's final bill. PX 102, page 3. For the reasons set forth below in Section C, the refund due for invalid rent increases in 2007 is $437 for the month of December, which represents the difference between $1,875- $1,438 = $437. I am also ordering a rent refund of the January 2008 rent, which includes the $245 penalty assessed, as well as the difference between $ 1,298.98 [(]amount Tenant was billed on his last bill[)] - $709.43 [(]the amount of the rent prior to the December 2007 rent increase, $ 1438, plus $28.17 charged for water, sewer, trash and utility fees, prorated for fifteen days[)] = $ 589.55. The total rent refund is $437 + $245 + $589.55 = $1,271.55.

13. Housing Provider argues that the D.C. Court of Appeals has determined that a [h]ousing [p]rovider may freely contract with an existing tenant by requiring him to sign a new lease with new terms any time after an existing lease expires, i.e. the [h]ousing [p]rovider may offer a tenant a discounted rent if he signs a new lease and charge a higher monthly rent if he continued his month-to-month tenancy. *Double H v. Brian David*, 947 A.2d 38, 39-40 (D.C. 2008). We agree, however, the D.C. Court of Appeals did not give a [h]ousing [p]rovider in *Double H v. Brian David*, 947 A.2d 38, 39-40 (D.C. 2008), broad discretion to charge an exorbitant rent when requiring a tenant to agree to a new or renewed lease because it may conflict with Section 42-3505.01 of the Act, which prohibits evicting a tenant without compliance with Section 42-3505.01 of the Act.

14. I further conclude that the instant case is distinguishable from *Double H v. Brian David*, 947 A.2d 38, 39-40 D.C. 2008), because the Tenant/Petitioner in the instant case was not provided proper notice by the Housing Provider that the Property was exempt from the rent stabilization provisions of the Act. Even assuming arguendo that the Housing Provider has the freedom to contract as he will, I further conclude consistent with the D.C. Court of Appeals['] ruling in *Double H v. Brian David*, 947 A.2d 38, 39-40 (D.C. 2008), that there was a huge disparity between (i) the monthly rent charged to the tenant who continued residence as a month-to-month tenant and (ii) the monthly rent charged upon execution of a new lease. *Double H v. Brian David*, 947 A.2d 38, 39-40 (D.C. 2008). The choice of signing a new lease for $2,120 for a month-to-month tenancy denied Tenant/Petitioner a meaningful opportunity to remain as a month-to-month tenant because it conflicted with § 42-3505.01 of the Act in that it demanded rent in excess of what it was entitled to under the Act. *Double H v. Brian David*, 947 A.2d 38, 39-40 (D.C. 2008).

15. Finally as it pertains to the issue of an illegal rent increase, I will not order a rollback of Tenant/Petitioner's rent in December 2007, since

Tenant/Petitioner now has possession of the complete Registration/Claim of Exemption form, which renders proper notice to Tenant/Petitioner moot because he has now obtained this information, albeit from another source. PX 100. D.C. Official Code § 42-3509.01(a).

C. Whether Petitioner's challenge to the registration form and claim of the Housing Provider/Respondent's rent increase is time barred.

16. D.C. Official Code § 42-3502.09(e) [sic] states:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

17. It is undisputed that the [Tenant/P]etitioner filed his [T]enant [P]etition on January 3, 2008. Based on findings already made in this case, Housing Provider/Respondent is not exempt from the rent stabilization provisions of the Act; therefore, filing of registration statements and notices of rent increase were required under the Act. D.C. Official Code § 42-3502.0(g)(1). There is no evidence that the [Housing Provider/]Respondent filed with the Rent Administrator an amended registration statement for the [Tenant/]Petitioner's Unit 923. It is undisputed that the Housing Provider/Respondent sent on July 28, 2003, notice of a rent increase effective October 1, 2003. PX 103. Tenant/Petitioner's rent increased beginning October 2003 from $1,299 to $1,438. Tenant/Petitioner received notice of another rent increase on September 13, 2007, which was effective beginning December 2007, until he moved out on January 15, 2008. PX 104.

18. Tenant/Petitioner does not and cannot make a challenge to the rent increase effective October 1, 2003, because it is barred by the applicable statute of limitations. *Kennedy v.* [*D.C.*] *Rental Hous. Comm'n*, 709 A.2d 94, 97 (D.C. 1998). In other words, when the Housing Provider implemented the rent increase in October 1, 2003, from $1,299 to $1,438, and this remained the same until December 1, 2007, Tenant/Petitioner could not challenge this rent increase because it was implemented before January 3, 2005 more than three years prior to the date of the filing of the [T]enant [P]etition. *Kennedy v. D.C. Rental Hous. Comm'n*, 709 A.2d 94, 97 (D.C. 1998).

19. Tenant/Petitioner can, however, challenge the illegal rent increase effective December 2007, because he was not properly placed on notice that the property was exempt from the rent stabilization provisions of the

Act during his tenancy. *Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 9. The first he learned of any exemption was based on an October 2007 email from the Housing Provider's agent, Eileen McKenzie. Even this email notice does not construe proper notice in compliance with the Act because it did not provide Tenant/Petitioner with a true copy of the Registration/Claim of Exemption form it filed in compliance with the Act. *Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 9. Tenant/Petitioner is due a refund of the December 2007 rent increase implemented of $1,875, plus the $245 increase of rent, which amounted to a penalty assessed for failing to sign the new lease terms. PX 102, page 3. If Tenant/Petitioner paid $1,438, he would have only been responsible for paying $695.80, which is the $1,438 rent prorated through January 15, 2008, plus the water, trash and utilities administrative fees, which totaled $13.63 when prorated through January 15, 2008 = $709.43. Tenant/Petitioner paid $1,298.98 from January 1 through January 15, 2008. PX 102, page 3. Tenant/Petitioner is due a refund for overpayment of rent in excess of $1,438 during the month of December 2007, and another refund, which is the difference between $1,298.98 and $709.43, which was paid through January 15, 2008. The total refund due is $1,271.55, pursuant to D.C. Official Code § 42-3509.01(a)(1).

20. Housing Provider/Respondent contends that because Tenant/Petitioner failed to challenge the [R]egistration/[C]laim of [E]xemption form within the first three years of his tenancy, his claim is time barred, citing *Kornblum v. Charles E. Smith Residential Realty, LP*, TP 26,155 (RHC Mar. 11, 2005) at 12. The undersigned disagrees. In *Kornblum*, *supra*, the administrative law judge held and the Rental Housing Commission affirmed on appeal, "that the tenant was barred by the statute of limitations contained in D.C. Code Section 45-2516(e) [currently 42-3502.06(e)] from challenging the validity of Respondent's claim of exemption and posting of Respondent's registration statement." *Id.* at 12. The evidence in that case can be distinguished from the facts of this case. Tenant in this case can challenge his unperfected rent increase of December 2007, and is entitled to relief for the time period of December 2007 through January 3, 2008 the date of the filing of the [T]enant [P]etition. The facts are also distinguishable in this case because I have determined that the Housing Provider did not comply with the law by posting the registration statement in the lobby of the [H]ousing [A]ccommodation prior to or during Tenant/Petitioner's tenancy or mailing the exemption to the Tenant/Petitioner.

21. In the *Kornblum* case, the [h]ousing [p]rovider provided proof of a rental application with a block marked DC Rent Control Buildings only, where the Housing Provider wrote in large letters the word "EXEMPT." In this case, Housing Provider's rental application, RX 201, has the same DC Rent Control Buildings Only provision as identified in the *Kornblum* case,

but there is no indication on the application whatsoever that the building was exempt from the rent stabilization provisions of the Act. Housing Provider's attempt to make such a provision analogous to proper notice of an exemption is rejected by this court because it failed to attach to the rental application, a copy of the [R]egistration/[C]laim of [E]xemption form on file with RAD and further failed to provide sufficient notice by mail or posting of the [R]egistration/[C]laim of [E]xemption form that the building was exempt from rent control. I do not credit the testimony of Ms. Brookins that disclosure forms were mailed to tenants as discussed previously because there was no evidence that the disclosure form mailings included the complete Registration/Claim of Exemption form. I further credit the Tenant/Petitioner's credible testimony that no such form was ever mailed received, or posted by the Housing Provider.

22. Housing Provider further argues that *Tenants Council of Tiber Island-Carrollsburg Square v. D.C. Rental Hous. Comm'n*, 426 A.2d 868, 875 ([D.C.] 1981) is controlling and stands for the proposition that a failure to post the registration mandates neither dismissal of hardship petitions nor rent rollbacks. Housing Provider's argument is misplaced. The D.C. Court of Appeals specifically affirmed the Rental Housing Commission's decision in *Tenants Council of Tiber Island-Carrollsburg Square*, and concluded that evidence was adduced at the hearing that the landlord kept a copy of the registration form posted in the resident manager's office, and that such a posting substantially and sufficiently comports with the intent of the Act. *Id.* at 875. In this case, there was insufficient credible evidence that the Housing Provider/Respondent complied with the posting requirements of the Act and Regulations; therefore, *Tenants Council of Tiber Island-Carrollsburg Square* is not applicable.

D. Tenant's Claims of Retaliation

23. Finally, Tenant contends that the Housing Provider retaliated against him after he complained about the smoking odors during the time period July 2006 through May 2007, by serving him in September 2007 with notices of an improper and unreasonable renewal lease and rent increase. Tenant can succeed on this claim by proving that within six months of his engaging in a "protected act," Housing Provider took certain statutorily defined "housing provider action." If he succeeds in meeting the threshold requirements, Tenant benefits from a presumption of retaliation, including that the [H]ousing [P]rovider took "an action not otherwise permitted by law," unless Housing Provider "comes forward with clear and convincing evidence to rebut this presumption." D.C. Official Code § 42-3505.02 (b); *DeSzunyogh v. Smith*, 604 A.2d 1, 4 (1992); *Twyman v. Johnson*, 655 A.2d 850, 858 (D.C. 1995).

24. First, the analysis begins with "housing provider action." Housing Provider's actions under the Act must be: "unlawfully increase rent. . . increase the obligation of a tenant . . .undue or unavoidable inconvenience, . . . 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 . . ." D.C. Official Code § 42-3505.02(a). Second, Tenant must have exercised a right, including that he complained about housing code violations, or otherwise made efforts to secure other rights under the Act. D.C. Official Code § 42-3505.02(b). Third, Tenant must show that he exercised a right under the Act within *six months* of the [H]ousing [P]rovider's action. D.C. Official Code § 42-3505.02(b)

25. If Tenant meets those three criteria, he benefits from a presumption that Housing Provider retaliated against him. The burden then shifts to Housing Provider to rebut the presumption with clear and convincing evidence. *Id.* However, if Tenant fails to meet the three threshold criteria, he is not entitled to the presumption of retaliation.

26. The Act provides that if a tenant makes a "witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or rental unit into compliance with the housing regulations," and/or "made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider" retaliation is presumed and may only be rebutted by clear and convincing evidence adduced by the housing provider. D.C. Official Code § 42-3505.02(b).

27. In this case, all three criteria are met. Tenant complained in writing by email about the smoking odors during the time period July 2006 through May 2007, and Housing Provider responded by serving him in September 2007 with notices of an improper and unreasonable renewal lease and rent increase. PX 104. The second hand smoke problem is a violation of the following provisions of Title 14, Chapter 5 of the housing code:

    500.1 The owner of a building used for residential purposes shall provide that building with adequate facilities for heating, ventilating, and lighting.

    500.2 Each facility provided and maintained to comply with this section shall be properly and safely installed, and shall be maintained in a safe and good working condition.

    506.9 Not more than seventy-five percent (75%) of the air supplied by mechanical ventilation shall be recirculated air.

506.10 The recirculation of air from kitchens, bathrooms, furnace rooms, laundry rooms, and garages is prohibited.

506.11 No air supplied to habitable rooms shall be drawn from a plenum or system fed with air returned from habitable rooms occupied by other families, common space, or commercial or industrial establishments.

506.12 For buildings erected, altered, or converted under permits issued after June 30, 1961, the requirements for mechanical ventilation shall be in accordance with the applicable provisions of sections 3-527 through 3-533, inclusive, of the 1961 D.C. Building Code, as amended.

508.1 If mechanical ventilation is provided for any residential building by the owner or licensee, the owner or licensee shall maintain that system in safe and good working condition.

508.2 If the mechanical ventilation system is not under the control of the occupant of any habitation, the owner or licensee of the residential building shall keep that equipment in constant and continuous operation.

28. The presumption of retaliation applies here and the Housing Provider has not rebutted by clear and convincing evidence that the exorbitant rent increase and refusal to honor the previous lease terms was not brought on because the Tenant/Petitioner complained about the second hand smoke odor, which was coming from nearby apartments and filtering into [T]enant/[P]etitioner's apartment. PX 106, page 12. If the second hand smoke odor was coming from nearby apartments and filtering into Tenant/Petitioner's unit, it raises concerns over the apartment building's ventilation being adequate, as addressed under Title 14, Chapter 5 above. 14 DCMR [§] 500.1; 14 DCMR [§] 500.2.

29. The presumption of retaliation also applied in this case because based on the lease terms, Tenant/Petitioner was enforcing his right "to report to Landlord any damage or defect in Tenant's apartment." PX 103, page 5, paragraph 5.1. When a tenant makes an effort to secure or enforce any of the tenant's rights under the tenant's lease, retaliation also can be presumed in that instance. D.C. Official Code § 42-3505.03(b)(5) [sic].

30. In addition, Housing Provider's refusal to renew a lease based on the previous lease terms resulted in the termination of Tenant/Petitioner's tenancy without cause in violation of the Act. 14 DCMR [§] 4303.3(c). Also, the extraordinary rent increase of 47 percent was an action not otherwise permitted by law, since the Housing Provider failed to notify the Tenant/Petitioner the building was exempt from the rent stabilization provisions of the Act. I further conclude that the exorbitant rent increase

was an act not otherwise permitted by law seeking to recover possession of the rental unit. 14 DCMR [§] 4303.3(a).

31. The evidence clearly establishes that after receiving Tenant's email beginning July 21, 2006 through May 1, 2007, PX 101, page 1, complaining of second hand smoke, which was impairing his health and interfering with the quiet enjoyment of his unit, Housing Provider retaliated by causing a constructive termination of the tenancy without cause by significantly changing the lease provisions by raising the rent when the Housing Provider had no legal basis for raising the rent, especially since it failed to put the Tenant/Petitioner on proper notice that the Property was not subject to the rent stabilization provisions of the Act.

32. I also find the Housing Provider/Respondent's retaliatory conduct in sending the notices of renewal lease, misrepresenting the market rate of a one-bedroom apartment, changing the lease provisions, and extraordinary rent increase to be knowing and willful retaliation. It is clear that these actions violated the Act because they unlawfully increased rent by requiring Tenant/Petitioner to pay more rent when Housing Provider was not eligible to implement a rent increase because it failed to file the necessary rent increase notice forms pursuant to D.C. Official Code § 42-3502.05(g)(1). Housing Provider's actions also were retaliatory because the December 2007, rent increase unlawfully increased the obligation of the Tenant/Petitioner in violation of the Act. In addition, Housing Provider's failure to honor the prior lease terms constituted undue or unavoidable inconvenience and harassment in violation of the Act. Beyond this, the Housing Provider's demand for Tenant/Petitioner to sign new lease terms, PX 104, was a refusal to honor the existing lease or rental agreement or any provision of a lease or rental agreement, and a refusal to renew a lease or rental agreement, and a constructive termination of Tenant/Petitioner's tenancy without cause. . ." D.C. Official Code § 42-3505.02(a). It is clear from the exchange of email that the Housing Provider's renewal rates were not negotiable. PX 101. It is clear from the exchange of email and from the advertised listing of one-bedroom units in the Housing Provider's complex that Tenant/Petitioner was being charged an excessive rent increase that was not the market rate as represented in its October 10, 2007 email. PX 101. It is also clear that the renewal lease it offered in 2007 offered substantial changes in the terms and conditions than the prior lease executed in 2002. PX 103 and 104.

33. Beyond this, because the Housing Provider charged a rent increase that was not the market rate and misrepresented the market rate to the Tenant/Petitioner, Housing Provider's actions did rise to the level of being willful, i.e. intentional violation of the law, deliberate and the product of conscious choice. *Borger Mgmt, Inc. v. Miller*, TP 27,445 (RHC Mar. 4, 2004). In accordance with the Act, a fine of $5,000 will be imposed.

Additional fines for each violation of the Act will be imposed as set forth in Section F below. *See Borger Mgmt., Inc. v. Miller*, TP 27,445 (RHC Mar. 4, 2004); *Watson v. Cofer*[,] TP 21,253 (RHC Nov. 1, 1990).

E. Tenant's Claim of Improper Water and [S]ewer Charges or Changes to Tenant's Initial Lease Terms Without His Consent

34. Based on the terms of Tenant/Petitioner's lease and renewal lease, a separate addendum respecting utilities assessed water and sewer charges in addition to the rent. PX 103, pp. 8 and 19 and PX 104, pp. 5 and 13. Yet, Housing Provider's Registration/Claim of Exemption form, PX 100, indicates that Tenant/Petitioner should not have paid water and sewer usage charges at all because it is a part of each tenant's rent. Tenant/Petitioner cannot make a challenge to the improper water and sewer charges that began at the beginning of his lease and the increase effective June 2004, because these claims are also barred by the applicable statute of limitations. *Kennedy v. D.C. Rental Hous. Comm'n*, 709 A.2d 94, 97 (D.C. 1998). However, Housing Provider will be assessed a fine for improper registration as set forth in Section F below.

35. Tenant/Petitioner also did not make a proper claim to recoup the water and sewer usage charges. After discovering during the course of the proceedings that water and sewer charges should have been part of rent based on PX 100, Tenant/Petitioner sought to recoup his entire water and sewer charges. In order to do so, Tenant/Petitioner should have checked the box marked services and facilities were reduced. By failing to do so, Tenant/Petitioner did not place the Housing Provider on notice of his claim that services and facilities were reduced. Therefore, his improper water and sewer charges could not be refunded in this case. *Parreco v. D.C. Rental Hous. Comm'n*, 885 A.2d 327, 332 (D.C. 2005).

F. Fines and Penalties Assessed Against the Housing Provider/Respondent

36. Under the Act, a [h]ousing [p]rovider is subject to a civil fine of not more than $5,000 for each violation of the Act. The controlling provisions [sic] of the Act are [sic] D.C. Official Code § 42-3509.01, which provides:

> (b) Any person who knowingly or willfully . . . (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, . . . shall be subject to a civil fine of not more than $5,000 for each violation.

37. Housing Provider/Respondent has violated the Act in at least three instances. First, Housing Provider failed to properly notify the Tenant/Petitioner of its exemption from the rent stabilization provisions of the Act; therefore its [R]egistration/[C]laim of [E]xemption filing was

improper or void *ab initio*, and of no legal effect. *See Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 9; D.C. Official Code § 42-3502.05(d). Second, Housing Provider was subject to the rent stabilization provisions of the Act during Tenant/Petitioner's tenancy because it failed to properly notify Tenant/Petitioner of its exemption. As such, it failed to file the proper rent increase notices with the Rent Administrator; therefore its 2007 rent increase implemented was not perfected in 2007, and was invalid pursuant to the dictates of *Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 9. *See also* D.C. Official Code § 42-3502.05(g)(1). Third, Housing Provider retaliated against Tenant/Petitioner for reporting secondhand smoke in his unit as required under the terms of his lease, and for complaining about the second hand smoke odor in his unit, which was a housing code violation, which also impaired Tenant/Petitioner's health. D.C. Official Code § 42-3505.02. The retaliation consisted of misrepresenting the market rate of [T]enant's unit when negotiating new lease terms, charging Tenant/Petitioner a $245 rent increase/penalty, and forcing Tenant/Petitioner to sign a new 12-month lease, or otherwise submit to an increased month-to-month tenancy rent that was 47 percent greater than what he was paying. This resulted in the forced termination of Tenant/Petitioner's lease or constructive termination of the tenancy without cause.

38. In addressing the first violation of the Act, the failure to properly notify Tenant/Petitioner of its exemption, I find this failure to be both knowing and willful violations [sic] of the Act. The record evidence established that Housing Provider/Respondent did not post its [R]egistration/[C]laim of [E]xemption form in a public place or its management office, nor did it provide Tenant/Petitioner a copy prior to, during or after his tenancy. The Housing Provider/Respondent knew or should have known that the failure to post this form deprived a tenant of substantial rights. When comparing Housing Provider/Respondent's RX 200, [Registration/C]laim of [E]xemption form and Tenant/Petitioner's version of the Housing Provider's [Registration/C]laim of [E]xemption form, PX 100, the two are clearly different. The Housing Provider's certification omits pages of the form pertaining to services and facilities included in a tenant's rent such as water and sewer. Tenant/Petitioner's version includes this critical information. Such deception is a willful violation of the Act because Housing Provider/Respondent intentionally concealed the complete [R]egistration/[C]laim of [E]xemption information from tenant and the public to misinform tenants and to avoid penalties associated with failing to timely file an amended registration statement within 30 days of changes made to a previous form. D.C. Official Code § 42-3502.05(g)(1)(C).

39. Housing Provider's conduct was also willful because it failed to post and mail to tenants the ***complete*** registration form. Housing Provider had an improper motive and/or reason to conceal this information to avoid letting

tenants know it was overcharging for water and sewer fees under a separate addendum of their leases in violation of the Act.

40. In assessing the second violation of the Act, the illegal rent increases, I also conclude that Housing Provider's conduct was a knowing and willful violation of the Act because the illegal rent increases involved the Housing Provider demanding the December 2007 rent increase after it intentionally failed to post the exemption form or provide Tenant/Petitioner with a copy prior to, during or after his tenancy. The intentional reasons Housing Provider failed to post or provide Tenant/Petitioner with the exemption notice are mentioned above, i.e. it would have exposed Housing Provider to a penalty for untimely filing an amended registration statement within 30 days of changes made to a previous form. The illegal rent increase of $245 reflected in the January 2008 invoice, PX 102, page 3, was also intentional because Housing Provider assessed the penalty after retaliating against the Tenant/Petitioner for exercising his rights under the lease to report defects in his unit such as second hand smoke odors, which posed a threat to Tenant/Petitioner's health. The retaliation involved demanding that Tenant sign a new lease on substantially different terms than his prior lease and a substantially higher rate.

41. In assessing the third violation of the Act, the retaliation, I conclude again that the retaliation was knowing and willful. There is sufficient evidence to establish that Tenant/Petitioner complained in writing by email of the second hand smoke odors, and the Housing Provider did not promptly eliminate the problem after July 2006. PX 100. The parties exchanged emails through May 2007. PX 100. The excessive rent increase followed in September 2007. Housing Provider then assessed a $245 rent increase in violation of the Act in its final bill to tenant for failing to sign the new lease terms. PX 102, page 3. Housing Provider did not provide any clear and convincing evidence that its demand for a rent increase, which was illegal, and demand to sign a new 12-month lease with different terms, and its falsification of the market rate of a one-bedroom unit to Tenant/Petitioner was not intentionally done.

42. In light of the Housing Provider's egregious conduct as set forth above, I will assess fines of $5,000 for each violation of the Act. The full fines are warranted because Housing Provider's conduct in assessing the $245 penalty for not signing a new lease that included an invalid rent increase, misrepresenting its market rates of Tenant's unit when Tenant/Petitioner attempted to renew his lease, concealing the complete registration form from Tenant/Petitioner to avoid reimbursing tenants for improper water and sewer charges and to avoid further penalties under the Act, causing termination of Tenant/Petitioner's tenancy without cause, and failing to renew his lease on the same terms as his prior lease, seriously

inconvenienced Tenant/Petitioner, and demonstrates egregious conduct and a callous disregard for Tenant/Petitioner's protected rights. D.C. Official Code § 42-3505.03(a) and (b)(5). The total fines assessed are $15,000. *Borger Mgmt., Inc. v. Miller*, TP 27,445 (RHC Mar. 4, 2004); *Watson v. Cofer*, TP 21,253 (RHC Nov. 1, 1990).

Final Order at 11-34; R. at 70-93 (emphasis in original) (footnotes omitted).

On July 23, 2008 the Housing Provider filed a timely Notice of Appeal of the Final Order with the Commission (Notice of Appeal). *See* Notice of Appeal at 1. The Housing Provider raises the following issues on appeal:[4]

1. The subject [H]ousing [A]ccommodation ("the Consulate") is exempt from the rent stabilization provisions of the Rental Housing Act, because it was constructed after December 31, 1975. A Claim of Exemption form was filed in 1999. Nevertheless, the ALJ ruled that the Consulate was not exempt because the Tenant Petitioner ("Lutsko") was not provided a copy of the 1999 Claim of Exemption form at any time before or during his tenancy, and was not notified of the exemption before he moved in, in 2002.

2. Lutsko's claim is barred in its entirety, including his challenge to the Claim of Exemption, by the Rental Housing Act's three year statute of limitations period for bringing claims.

3. The ALJ erred, as a matter of law, in finding that Smith Consulate LLC was required to mail the tenants a copy of the Claim of Exemption form as a condition of claiming an exemption.

4. Lutsko's claims are barred in their entirety by Smith Consulate LLC's mailing of a disclosure letter to all tenants in 2006, pursuant to the 2006 amendments to the Rental Housing Act, in which the tenants were notified of the availability of the Claim of Exemption form in the management office for review.

5. The Rental Housing Act may not be read to invalidate a Claim of Exemption as to any individual tenant, not notified of the exemption before entering a lease for a rental unit in an exempt housing accommodation.

6. The ALJ ruled that because a copy of the Claim of Exemption form certified by the Rent Administrator submitted by Smith Consulate LLC had fewer pages than a copy Lutsko himself obtained from the Rent Administrator, Smith Consulate LLC intentionally sought to conceal from all tenants that water and sewer cha[r]ges should have been included in the rent, rather than

[4] The Commission recites the issues in the language of the Housing Provider in the Notice of Appeal.

charged for separately. There was no material difference between the forms and no facts in evidence to support a finding that Smith Consulate LLC tried to conceal anything.

7. The ALJ erred in holding that water and sewer services could not be separately charged for, but were required to be paid from the tenants rent. Because the Consulate is exempt, the ALJ had no authority to take up the issue of how water and sewer charges were passed on to the tenants.

8. The ALJ based her decision, in part, on allegations in the text of Lutsko's [T]enant [P]etition rather than evidence presented at the evidentiary hearing. Her Final Order quotes from the petition itself to establish a factual basis for some of her findings, without _____ [sic] that no testimony or other evidence to support these quotes.

9. The Final Order includes findings of fact for which there is no evidence at all in the record, and is internally inconsistent in other areas. Some "facts" are simply made up by the ALJ, to justify her ruling the way she did, and in order to support the imposition of fines. A copy of the hearing transcript has been ordered and will be provided to support this appeal point.

10. The ALJ rejected certain testimony of Smith Consulate LLC's witness on the grounds of credibility, without any reasonable basis for doing so, or any evidence or other basis set out by her in the Final Order that would sustain a challenge to the witness['s] credibility.

11. No evidence whatsoever was offered that would support a finding that Smith Consulate LLC acted willfully, i.e., with the intention of violating the Rental Housing Act or concealing anything from any tenant, including Lutsko.

12. The ALJ ignored decisions of both the Acting Rent Administrator and the D.C. Court of Appeals in declaring unlawful a "flexible lease" letter sent to Lutsko, setting a schedule of available rents, depending on whether he chose to sign a new lease, and if so, its duration.

13. Because the Consulate is an exempt property, and nothing Smith Consulate LLC did was unlawful, there was no factual basis to support the ALJ's finding that it retaliated against Lutsko.

Notice of Appeal at 1-3. The Commission held its hearing in on October 21, 2008.

II. ISSUES ON APPEAL[5]

A. Lutsko's claim is barred in its entirety, including his challenge to the Claim of Exemption, by the Rental Housing Act's three year statute of limitations period for bringing claims.

B. The ALJ rejected certain testimony of Smith Consulate LLC's witness on the grounds of credibility, without any reasonable basis for doing so, or any evidence or other basis set out by her in the Final Order that would sustain a challenge to the witness['s] credibility.

C. The subject [H]ousing [A]ccommodation ("the Consulate") is exempt from the rent stabilization provisions of the Rental Housing Act, because it was constructed after December 31, 1975. A Claim of Exemption form was filed in 1999. Nevertheless, the ALJ ruled that the Consulate was not exempt because the Tenant Petitioner ("Lutsko") was not provided a copy of the 1999 Claim of Exemption form at any time before or during his tenancy, and was not notified of the exemption before he moved in, in 2002.

D. The ALJ erred, as a matter of law, in finding that Smith Consulate LLC was required to mail the tenants a copy of the Claim of Exemption form as a condition of claiming an exemption.

E. Lutsko's claims are barred in their entirety by Smith Consulate LLC's mailing of a disclosure letter to all tenants in 2006, pursuant to the 2006 amendments to the Rental Housing Act, in which the tenants were notified of the availability of the Claim of Exemption form in the management office for review.

F. The Rental Housing Act may not be read to invalidate a Claim of Exemption as to any individual tenant, not notified of the exemption before entering a lease for a rental unit in an exempt housing accommodation.

G. The ALJ ruled that because a copy of the Claim of Exemption form certified by the Rent Administrator submitted by Smith Consulate LLC had fewer pages than a copy Lutsko himself obtained from the Rent Administrator, Smith Consulate LLC intentionally sought to conceal from all tenants that water and sewer cha[r]ges should have been included in the rent, rather than charged for separately. There was no material difference

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

between the forms and no facts in evidence to support a finding that Smith Consulate LLC tried to conceal anything.

H. The ALJ erred in holding that water and sewer services could not be separately charged for, but were required to be paid from the tenants rent. Because the Consulate is exempt, the ALJ had no authority to take up the issue of how water and sewer charges were passed on to the tenants.

I. The Final Order includes findings of fact for which there is no evidence at all in the record, and is internally inconsistent in other areas. Some "facts" are simply made up by the ALJ, to justify her ruling the way she did, and in order to support the imposition of fines. A copy of the hearing transcript has been ordered and will be provided to support this appeal point.

J. The ALJ based her decision, in part, on allegations in the text of Lutsko's [T]enant [P]etition rather than evidence presented at the evidentiary hearing. Her Final Order quotes from the petition itself to establish a factual basis for some of her findings, without _____ [sic] that no testimony or other evidence to support these quotes.

K. No evidence whatsoever was offered that would support a finding that Smith Consulate LLC acted willfully, i.e., with the intention of violating the Rental Housing Act or concealing anything from any tenant, including Lutsko.

L. The ALJ ignored decisions of both the Acting Rent Administrator and the D.C. Court of Appeals in declaring unlawful a "flexible lease" letter sent to Lutsko, setting a schedule of available rents, depending on whether he chose to sign a new lease, and if so, its duration.

M. Because the Consulate is an exempt property, and nothing Smith Consulate LLC did was unlawful, there was no factual basis to support the ALJ's finding that it retaliated against Lutsko.

III. DISCUSSION

A. Lutsko's claim is barred in its entirety, including his challenge to the Claim of Exemption, by the Rental Housing Act's three year statute of limitations period for bringing claims.

The Housing Provider asserts on appeal that the Tenant's claims are barred because of the Act's three-year statute of limitations period. Notice of Appeal at 1. In its brief, the Housing

Provider specified that under D.C. OFFICIAL CODE § 42-3502.06(e) (2001),[6] tenants are barred from challenging a housing accommodation's claim of exemption "more than three years after the commencement of the tenancy." Brief of Housing Provider at 12 (citing Kornblum v. Charles E. Smith Residential Realty, L.P., TP 26,155 (RHC Mar. 11, 2005) at 12).

The Commission's standard of review of the ALJ's decision is contained at 14 DCMR § 3807.1 (2004), and provides the following:

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

14 DCMR § 3807.1; *see, e.g.*, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014); Karpinski v. Evolve Prop. Mgmt., RH-TP-09-29,590 (RHC Aug. 19, 2014).

The ALJ determined that the Tenant's challenge to the rent increase effective December 2007 was not barred by the Act's statute of limitations because "he was not properly placed on notice that the property was exempt from the rent stabilization provisions of the Act during his tenancy." Final Order at 20; R. at 84. The ALJ disagreed with the Housing Provider's assertion that the Commission's decision in Kornblum, TP 26,155, was controlling in this case. *Id.* at 21-22; R. at 82-83. The ALJ explained that the facts in Kornblum, TP 26,155, are distinguishable from those in this case because the Housing Provider in this case did not properly notify the

---

[6] The Act's statute of limitations is contained at D.C. OFFICIAL CODE § 42-3502.06(e), and provides the following:

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

Tenant of its claim of exemption, whereas in Kornblum, TP 26, 1055, the housing provider had written the word "exempt" in large letters on the tenant's rental application. *Id.* at 21; R. at 83.

The Commission agrees with the ALJ that the Housing Provider's reliance on Kornblum, TP 26,155, as a bar to the Tenant's claim is misplaced. *See id.*; Brief of Housing Provider at 12. First, the Commission notes that the Housing Provider misrepresents the holding in Kornblum, TP 26,155, that a tenant is barred from challenging a claim of exemption more than three years after the outset of his or her tenancy. *Compare* Kornblum, TP 26,155 at 12-13, *with* Brief of Housing Provider at 12. In Kornblum, TP 26,155, where tenancy began in 1998, and the tenant petition was filed in 2000 (i.e., less than three years after the outset of the tenancy), the Commission correctly did not make any connections between a challenge to a claim of exemption, the start of tenancy, and the statute of limitations, as claimed by the Housing Provider in the instant matter. Kornblum, TP 26,155 at 1, 12-13.

In Kornblum, TP 26,155, the tenant asserted on appeal that the statute of limitations did not bar her claim, because the housing provider was not in compliance with the notice requirements for its claim of exemption, because it had not properly mailed or posted the claim of exemption at the time of filing. *Id.* at 12. Without discussing, citing, or drawing any conclusions related to the Act's statute of limitations, the Commission in Kornblum, TP 26,155, instead affirmed the ALJ's determination that the housing provider was in compliance with the law regarding notice of its claim of exemption, because substantial evidence supported the ALJ's determinations that (1) the housing provider had posted the claim of exemption at the time of filing, and (2) the housing provider had notified the tenant of the claim of exemption prior to the signing of her lease.

While the Commission determines that the ALJ appropriately rejected the Housing Provider's interpretation of, and claims regarding, the Commission's decision in Kornblum, TP 26,155, the Commission nonetheless disagrees with the ALJ's interpretation of the Act that the resolution of the statute of limitations issue in this case is dependent upon the timing and propriety of the Housing Provider's notice of a purported exemption to the Tenant. *See infra* 30-32. The Commission is satisfied that the ALJ's interpretation constitutes plain error.[7] The Commission bases its determination on the plain language of the Act's statute of limitations provision, as discussed *infra*. *See* D.C. OFFICIAL CODE § 42-3502.06(e).[8]

The DCCA has explained that a court must look at the "plain meaning" of the words of a statute or regulation when the words are clear and unambiguous, and construe the words according to their ordinary sense and with the meaning commonly attributed to them. *See* District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006); *see also* Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007); Tenants of 4021 9th St., N.W. v. E&J Props., LLC, HP 20,812 (RHC June 11, 2014); Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014); Carpenter v. Markswright Co., RH-TP-10-29,840 (RHC June 5, 2013).

---

[7] While the Commission's review of an issue is typically limited to the issues raised in the notice of appeal, it may always correct "plain error." 14 DCMR § 3807.4; *see* Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984); Munonye v. Hercules Real Estate Servs., RH-TP-07-29,164 (RHC July 7, 2011).

[8] The Commission notes that, although the ALJ's interpretation of the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) is mistaken in its application to claims of exemption, the Commission determines on alternative (albeit related) grounds to the ALJ's erroneous interpretation that the Tenant's claim is not barred by the statute of limitations. *See infra* at 30-32. *See, e.g.,* Karpinski, RH-TP-09-29,590 (determining that ALJ's failure to determine whether services and facilities were "related" services and facilities, as those terms are defined by the Act, was harmless because the tenant's claim failed on other grounds); Young v Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012) at n.5 (determining that hearing examiner's failure to include ex parte communication in the record was harmless error where the Commission was satisfied the hearing examiner did not consider the communication in the final order); Jackson v. Peters, RH-TP-12-28,898 (RHC Feb. 3, 2012) at n.21 (deciding that ALJ's statement that the tenant could not appeal an order was harmless error where the Commission exercised jurisdiction over the appeal by accepting the filing of the tenant's notice of appeal).

The Act's statute of limitations, recited *supra* at n.6, provides that "a tenant has up to three years from the date that a rent increase becomes effective to file a tenant petition challenging that rent increase." Levy, RH-TP-06-28,830; RH-TP-06-28,835 at 12; *see also* United Dominion v. D.C. Rental Hous. Comm'n, 101 A.3d 426 (D.C. 2014), *aff'g* United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC July 3, 2013), United Dominion Mgmt. Co. v. Kelly, RH-TP-06-28,707 (RHC Aug. 15, 2013), and United Dominion Mgmt. Co. v. Rice, RH-TP-06-28,749 (RHC Aug. 15, 2013); Smith Prop. Holdings Five (D.C.) LP v. Morris, RH-TP-06-28,833 (RHC Sept. 27, 2013).

The Commission interprets the plain language of D.C. OFFICIAL CODE § 42-3502.06(e) as placing a limitation only on a tenant's challenge to a rent adjustment, and making no reference on challenges to claims of exemption, which the Commission is satisfied are not rent adjustments. D.C. OFFICIAL CODE § 42-3501.03(28); 14 DCMR § 4200.7;[9] *cf.* Hinman, RH-TP-06-28,728 (discussing the meaning of the term "rent adjustment" as used in D.C. OFFICIAL CODE § 42-3502.06(e)).

Moreover, the statute only references a tenant's challenge to a rent adjustment, whereas the DCCA has held that a claim of exemption is a defense to a tenant petition that must be proven by the housing provider. Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990) (holding that a housing provider has the burden of proving he is exempt from the coverage of the Act); Revithes v. D.C. Rental Hous. Comm'n, 536 A.2d 1007, 1017 (D.C. 1987) (explaining that a housing provider bears the burden of proving qualification for an exemption from the Act); *see* Renjilian v. Thelen, TP 27,686 (RHC July 11, 2005) (explaining that a "claim

[9] D.C. OFFICIAL CODE § 42-3501.03(28) provides as follows: "'Rent' means the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities." 14 DCMR § 4200.7 provides the following: "A rent adjustment is any increase or decrease in the rent required or permitted by the Act and this chapter."

of exemption is an affirmative defense that must be proved by the housing provider"); Norwood v. Peters, TP 27,678 (RHC Feb. 3, 2005) ("The [t]enant does not have to prove [h]ousing [p]rovider is not exempt . . . [t]he claim of exemption is an affirmative defense that must be proved by the housing provider"). In addition to the case law cited, this holding is also supported by the regulations setting forth the various bases for filing tenant petitions, which do not specifically provide that a challenge to a claim of exemption is a basis for filing a tenant petition. 14 DCMR § 4214.1-.4.[10]

---

[10] 14 DCMR § 4214.1-.4 provides, in relevant part, as follows:

> 4214.1 The tenant of a rental unit . . . may, by petition filed with the Rent Administrator, challenge or contest the following:
>
> (a) The base rent for a rental unit or housing accommodation established under § 4201 . . . ;
>
> (b) The initial rent ceiling for the rental unit or housing accommodation established under § 4202 . . . ; or
>
> (c) The initial rent ceiling for the rental unit or housing accommodation established under § 4203 . . . .
>
> 4214.2 The tenant of a rental unit . . . may, by petition filed with the Rent Administrator, challenge or contest any rent ceiling adjustment taken and perfected by a housing provider . . . .
>
> 4214.3 The tenant of a rental unit . . . may, by petition filed with the Rent Administrator, challenge or contest any rent or rent increase . . . .
>
> 4214.4 The tenant of a rental unit . . . may, by petition filed with the Rent Administrator, complain off and request appropriate relief for any other violation of the Act including, but not limited to, the following:
>
> (a) Any violation of the notice requirements of § 501 of the Act [regarding evictions] . . . ;
>
> (b) Any proposed retaliatory eviction or other retaliatory act in violation of § 502 of the Act;
>
> (c) Any demand for a security deposit in violation of § 217 of the Act;
>
> (d) Any unauthorized reduction in services or facilities . . . ;
>
> (e) Any condition of the rental unit . . . which constitutes a substantial or prolonged violation of the housing regulations;
>
> (f) Any failure to adequately serve notice on the tenant of a proposed rent ceiling adjustment or hearing on a proposed rent ceiling adjustment . . . .

The Commission notes that the only rent increase that the Tenant challenged in the Tenant Petition occurred in December 2007. *See* Final Order at 20; R. at 84; Tenant Petition at 2; R. at 4. The Commission's review of the record reveals that the Tenant Petition was filed on January 3, 2008, less than three (3) years after the December 2007 increase. *See* Tenant Petition at 1; R. at 5; Final Order at 1; R. at 103; *see also* D.C. OFFICIAL CODE § 42-3502.06(e). Accordingly, the Commission determines that the Tenant's challenge to the December 2007 rent increase was not barred by the Act's statute of limitations, and thus affirms the ALJ on this issue, albeit on alternative grounds.

B. The ALJ rejected certain testimony of Smith Consulate LLC's witness on the grounds of credibility, without any reasonable basis for doing so, or any evidence or other basis set out by her in the Final Order that would sustain a challenge to the witness['s] credibility.[11]

The Housing Provider objects on appeal to the ALJ's conclusion in the Final Order to reject, on credibility grounds, the testimony of the Housing Provider's witness. Notice of Appeal at 3. Specifically, the Housing Provider asserts that the ALJ made the credibility determination without supporting evidence or a reasonable basis. *Id.* In the Notice of Appeal, the Housing Provider fails to identify which of the Housing Provider's witnesses or what testimony it is referring to on this issue. *Id.* However, in the Housing Provider's Brief, the Housing Provider specifically objects to the ALJ's credibility determinations on the testimony by Elizabeth Brookins, the Housing Provider's rent control manager, regarding whether the Tenant was notified of the Housing Accommodation's claim of exemption. Brief of Housing Provider at 13-14.

[11] The Commission, in its discretion and in the interest of efficiency, will address issue B, recited above, out of the order that this issue was presented in the Notice of Appeal, because the Commission observes that the validity of the ALJ's credibility determination is implicated in several additional issues raised on appeal. *See, e.g.*, Barac Co., VA 02-107 at n.11; Ahmed, Inc., RH-TP-28,799 at n.8; Levy, RH-TP-06-28,830; RH-TP-06-28,835 at n.9.

The Commission will affirm decisions made by an ALJ, unless they are founded on "arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record." 14 DCMR § 3807.1; *see, e.g.,* Burkhardt, RH-TP-06-28,708; Karpinski, RH-TP-09-29,590.

The DCCA has stated that when assessing an ALJ's credibility determination, "the relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence." Gary v. D.C. Dep't of Empl. Servs., 723 A.2d 1205 (D.C. 1998) (quoting McEvily v. D.C. Dep't of Empl. Servs., 500 A.2d 1022, 1024 n.3 (D.C. 1985)); *see* Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) (explaining that where an ALJ's findings are supported by substantial evidence, the findings will not be overturned even if substantial evidence exists to the contrary); Boyd v. Warren, RH-TP-10-29,819 (RHC June 5, 2013); Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Feb. 15, 2012). Additionally, "the Commission has consistently stated that credibility determinations are 'committed to the sole and sound discretion of the ALJ.'" Notsch, RH-TP-06-28,690 (quoting Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 (D.C. 1994)) (emphasis added); *see* Burkhardt, RH-TP-06-28,706; Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012). Finally, as noted, the Commission has consistently asserted that "[w]here substantial evidence exists to support the hearing examiner's [or 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 [hearing] examiner.'" *See* Boyd, RH-TP-10-29,816 (quoting Hago, RH-TP-08-11,552 & RH-

TP-08-12,085 at 6); Loney v. Tenants of 710 Jefferson St., N.W., SR 20,089 (RHC Jan. 29, 2013)-at n.13; Marguerite Corsetti Trust, RH-TP-06-28,207.

In its brief, the Housing Provider offered two examples of evidence and testimony that directly contradict the ALJ's credibility determination against Ms. Brookins. Brief of Housing Provider at 13-14. First, the Housing Provider refers to a copy of a notice of the claim of exemption that was allegedly sent to all tenants in 2006, and asserts that a copy of the notice was produced at the OAH hearing. Brief of Housing Provider at 13. However, the Commission's review of the record reveals that the notice was not included in the record on appeal because it was never admitted into evidence, and thus cannot be considered by the Commission in this Decision and Order.[12] Hearing CD (OAH April 24, 2008) at 2:00.

Next, the Housing Provider asserted that the Tenant "did not offer testimony that refuted or conflicted with Brookins['] testimony" that notice of the claim of exemption was posted at the Housing Accommodation, and offered the following quotation of the Tenant's testimony at the OAH hearing in support of its assertion: ". . . there's no way either of us know for sure that those signs were posted. In theory, they were supposed to be posted. I didn't see them. They could have been posted there that day." Brief of Housing Provider at 13-14.

However, upon review of the record, the Commission notes that the Tenant's complete testimony on this matter was as follows:

> . . . there's no way that either of us know for sure that those signs were posted. In theory, they were supposed to be posted. I didn't see them. They could have been there that day. They could not have. So I object to [Ms. Brookins' testimony as to whether such notice was present at the Housing Accommodation].

[12] The Commission's regulations prohibit the consideration of new evidence on appeal. 14 DCMR § 3807.5; *e.g.*, Barac Co., VA 02-107 (where a document was not introduced into evidence at the hearing below, the Commission could not consider it on appeal); Hawkins v. Jackson, RH-TP-08-29,201 (RHC Aug. 21, 2009) at 9 n.9 (noting that the Commission cannot consider factual allegations that were not raised below, were not part of the record on appeal, and constituted inadmissible new evidence).

Hearing CD (OAH Apr. 24, 2008) at 1:55 (emphasis added). Thus, the Commission notes that the Tenant's testimony does conflict with the testimony offered by the Housing Provider's witness, regarding whether notice of the claim of exemption was posted. *Id.* at 1:48-2:00.

In the Final Order, the ALJ stated the following with regard to Ms. Brookins' testimony:

> I do not credit the testimony of Ms. Brookins that the disclosure forms were mailed to tenants as discussed previously because there was no evidence that the disclosure mailings included the complete Registration/Claim of Exemption form.
>
> . . . In this case, there was insufficient credible evidence that the Housing Provider/Respondent complied with the posting requirements of the Act and Regulations.

Final Order at 22; R. at 82. The ALJ also addressed the credibility of the Tenant's testimony on the same issue of whether the Housing Provider mailed the disclosure form, as follows: "I further credit the Tenant/Petitioner's credible testimony that no such form was ever mailed, received, or posted." *Id.*

As explained, *supra* at 33-34, the ALJ who hears the conflicting testimony and opposing witnesses is responsible for "determining the weight to be accorded to their testimony," and the Commission will not substitute its own judgment for that of the ALJ. Washington Cmtys. v. Joyner, TP 28,151 (RHC Jul. 22, 2008) at 15 (quoting Fort Chaplin Park Assocs., 49 A.2d at 1079); *see* Burkhardt, RH-TP-06-28,706; Karpinski, RH-TP-09-29,590. Regardless of the amount and nature of any contrary evidence, an ALJ's decision will be upheld if based upon substantial evidence in the record. *See* Gary, 723 A.2d 1205 (quoting McEvily, 500 A.2d 1022, at 1024 n.3); Notsch, RH-TP-06-28,690; Boyd, RH-TP-10-29,816; Hago, RH-TP-08-11,552 & RH-TP-08-12,085; Loney, SR 20,089; Marguerite Corsetti Trust, RH-TP-06-28,207.

Accordingly, because the Commission's review of the record reveals substantial evidence (e.g., the Tenant's testimony) to support the ALJ's determination that notice of the claim of

exemption was not properly mailed or posted, the Commission is satisfied that the ALJ's credibility determination in favor of the Tenant is not arbitrary, capricious, or an abuse of discretion, and is in accordance with the provisions of the Act. 14 DCMR § 3807.1; Burkhardt, RH-TP-06-28,706; Karpinski, RH-TP-09-29,590; Washington Cmtys., TP 28,151; Boyd, RH-TP-10-29,816 (quoting Hago, RH-TP-08-11,552 & RH-TP-08-12,085 at 6); Loney, SR 20,089 at n.13; Marguerite Corsetti Trust, RH-TP-06-28,207.

C. The subject [H]ousing [A]ccommodation ("the Consulate") is exempt from the rent stabilization provisions of the Rental Housing Act, because it was constructed after December 31, 1975. A Claim of Exemption form was filed in 1999. Nevertheless, the ALJ ruled that the Consulate was not exempt because the Tenant Petitioner ("Lutsko") was not provided a copy of the 1999 Claim of Exemption form at any time before or during his tenancy, and was not notified of the exemption before he moved in, in 2002.

D. The ALJ erred, as a matter of law, in finding that Smith Consulate LLC was required to mail the tenants a copy of the Claim of Exemption form as a condition of claiming an exemption.

E. Lutsko's claims are barred in their entirety by Smith Consulate LLC's mailing of a disclosure letter to all tenants in 2006, pursuant to the 2006 amendments to the Rental Housing Act, in which the tenants were notified of the availability of the Claim of Exemption form in the management office for review.

F. The Rental Housing Act may not be read to invalidate a Claim of Exemption as to any individual tenant, not notified of the exemption before entering a lease for a rental unit in an exempt housing accommodation.[13]

The Housing Provider asserts on appeal that the ALJ erred in finding that the Housing Accommodation "was not exempt because the Tenant . . . was not provided a copy of the 1999

[13] The Commission, in its discretion, will combine its discussion of these four (4) issues raised by the Housing Provider in the Notice of Appeal, because it observes that these issues raise substantially similar contentions, and because these issues involve overlapping legal issues and the application of common legal principles. *See, e.g.*, Bower, TP 27,838; Barac Co., VA 02-107; Ahmed, Inc., RH-TP-28,799 at n.8; Levy, RH-TP-06-28,830; RH-TP-06-28,835 at n.9. *See infra* at n.16.

Claim of Exemption form at any time before or during his tenancy, and was not notified of the exemption before he moved in." Notice of Appeal at 1. The Housing Provider also alleges that the ALJ erred in finding that the Housing Provider was required to mail the Tenant a copy of the claim of exemption form. Notice of Appeal at 2. Additionally, the Housing Provider asserts that the Tenant's claim is at least barred after 2006, because the Housing Provider claimed that it mailed disclosure letters to all tenants at that time, notifying the tenants of the availability of the rent control filings for viewing at the front desk, which included the claim of exemption form. Brief of Housing Provider at 13.

The exemption claimed by the Housing Provider in this case is governed by D.C. OFFICIAL CODE § 42-3502.05(a)(2), which provides in relevant part as follows:

> (a) Sections 42-3502.05(f) through 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except:
>
> . . .
>
> (2) Any rental unit in any newly constructed housing accommodation for which the building permit was issued after December 31, 1975, or any newly created rental unit, added to an existing structure or housing accommodation and covered by a certificate of occupancy for housing use issued after January 1, 1980, provided, however, that this exemption shall not apply to any housing accommodation the construction of which is required by demolition of an housing accommodation subject to this chapter, unless the number of newly constructed rental units exceeds the number of demolished rental units.

D.C. OFFICIAL CODE § 42-3502.05(a)(2). The notice requirements for a claim of exemption are provided by D.C. OFFICIAL CODE § 42-3502.05(d) and (h):

> (d) Prior to the execution of a lease or other rental agreement after July 17, 1985, a prospective tenant of any unit exempted under subsection (a) of this section shall receive a notice in writing advising the prospective tenant that rent increases for the accommodation are not regulated by the rent stabilization program . . . .
>
> (h) Each registration statement filed under this section shall be available for public inspection at [RAD], and each housing provider shall keep a duplicate of

> the registration statement posted in a public place on the premises of the housing accommodation to which the registration statement applies. Each housing provider may, instead of posting in each housing accommodation comprised of a single rental unit, mail to each tenant of the housing accommodation a duplicate of the registration statement.

The following regulations also govern the registration and notice requirements for claims of exemption:

> 4101.6 Each housing provider who files a Registration/Claim of Exemption form under the Act shall, prior to or simultaneously with the filing, post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit or housing accommodation to which it applies, or shall mail a true copy to each tenant of the rental unit or housing accommodation . . . .
>
> 4106.8 Prior to the execution of a lease or other rental agreement, a prospective tenant of any unit exempted under 205(a) of the Act shall receive from the housing provider a written notice advising the prospective tenant that rent increases for the housing accommodation are not regulated by the rent stabilization program.

14 DCMR §§ 4101.6 & 4106.8.

The Act provides that a prerequisite to any valid claim of exemption from the Act is that proper notice of a housing accommodation's exempt status is given to the tenants. D.C. OFFICIAL CODE § 42-3502.05(d); 14 DCMR § 4106.8; Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013) (determining that housing accommodation was not exempt where housing provider had failed to give tenant proper notice prior to signing the lease agreement); Levy, RH-TP-06-28,830; RH-TP-06-28,835 (reversing the ALJ's determination that the housing accommodation was exempt from the Act where the housing provider had failed to provide the tenant with proper notice under D.C. OFFICIAL CODE § 42-3502.05(d)). The Commission has consistently held that failure to give a tenant notice of the exempt status of the housing accommodation renders the exemption void *ab initio*. Watkis, RH-TP-07-29,045; *see also, e.g.*, Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005) (affirming hearing examiner's

determination that claim of exemption was void *ab initio* where the housing provider failed to notify the tenant of the exemption); Butler v. Toye, TP 27,262 (RHC Dec. 2, 2004) (affirming the ALJ's conclusion that the housing provider could not benefit from a claim of exemption where he had failed to comply with the Act's notice requirements). The DCCA has instructed that the burden of proof is on the housing provider to prove eligibility for an exemption from the Act, including that proper notice was given to the tenant. *See* Revithes, 536 A.2d at 1017; Brooks v. Jones, RH-TP-09-29,531 (RHC May 9, 2012) (citing Goodman, 573 A.2d 1293); Vista Edgewood Terrace v. Rascoe, TP 24,858 (RHC Oct. 13, 2000) at 12-13; Butler, TP 27,262 at 5; Best v. Gayle, TP 23,043 (RHC Nov. 21, 1996) at 5.

It is not disputed that the Housing Provider filed a claim of exemption form in 1999, prior to the start of the Tenant's tenancy, on the basis that the building was constructed after December 31, 1975, in accordance with D.C. OFFICIAL CODE § 42-3502.05(a)(2). *See* Final Order at 3; R. at 101. However, the Commission's review of the record reveals that the ALJ found that the Housing Provider did not provide proper notice of the claim of exemption to the Tenant. *Id.* at 12-17; R. at 87-92 (citing D.C. OFFICIAL CODE § 42-3502.05(d); 14 DCMR § 4101.3, .6; Butler, TP 27, 262).

First, the ALJ determined that the Tenant did not receive notice that the housing accommodation was exempt at the time he executed his lease. Final Order at 3, 21-22; R. at 82-83, 101. Second, the ALJ determined that the Housing Provider did not comply with the posting and/or mailing requirements of 14 DCMR §§ 4101.6 & 4106.8. Final Order at 16; R. at 88. The ALJ explained that the Tenant and the Housing Provider offered conflicting testimony regarding whether notice of the exemption was mailed to the Tenant or posted at the Housing Accommodation. Hearing CD (OAH Apr. 24, 2008) at 12:03-12:10, 1:50-2:00. Although the

Housing Provider's witness testified that a notice of the claim of exemption was mailed to the tenants and posted in the lobby of the Housing Accommodation to inform tenants that the claim of exemption form was available for review in the office, the ALJ did not find this testimony to be credible. Hearing CD (OAH Apr. 24, 2008) at 1:50-2:00; *see* Burkhardt, RH-TP-06-28,708.[14]

As stated in the discussion of issue A, *supra* at 26, the Commission's standard of review requires the Commission to reverse a final order if it determines that it is "based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceeding before the Rent Administrator." 14 DCMR § 3807.1. The Commission has consistently defined substantial evidence as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See* Fort Chaplin Park Assocs., 649 A.2d at 1079 n.10; Bower, TP 27,838 at 22-23; Jackson, RH-TP-12-28,898; Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012); Marguerite Corsetti Trust, RH-TP-06-28,207.

The Commission's review of the record reveals substantial record evidence to support the ALJ's determination that the Tenant was not notified of the Housing Accommodation's exempt status prior to signing his lease agreement, in violation of D.C. OFFICIAL CODE § 42-3502.05(d). *See* Lease Agreement, PX 103; R. at 133-49. For example, the Tenant testified at the OAH

[14] In Burkhardt, RH-TP-06-28,708, the ALJ had found the housing provider's testimony regarding the posting of a sign in the laundry room, notifying tenants that an amended registration form was available for their review in the office to be credible. Burkhardt, RH-TP-06-28,708 at 8-10. The ALJ did not credit the tenant's testimony that she had never seen the notice. *Id.* After reiterating that the Commission will not substitute its own judgment for that of the ALJ, who is charged with making credibility determinations, the Commission affirmed the ALJ's conclusion that the tenant failed to establish that the housing provider had not given proper notice of the amended registration. *Id.* at 42. The Commission notes that Burkhardt, RH-TP-06-28,708, concerns an amended registration form and the present case concerns a claim of exemption form; however, both cases raise the issue of whether a housing provider offered proper notice and depend for their resolution on an ALJ's credibility determinations as to witnesses who offer conflicting testimony. *See generally* Final Order 3-30; Burkhardt, RH-TP-06-28,708.

hearing that he "was never notified that [the housing accommodation] was exempt from rent control until [he] questioned the rent increase that [he] received." Hearing CD (OAH Apr. 24, 2008) at 12:03-12:04. Additionally, the Commission's review of the lease agreement signed by the Tenant at the onset of his tenancy does not reveal that the Housing Provider identified the property as exempt from the rent control provisions of the Act. PX 103; R. at 132-51. Under the Commission's decision in Watkis, RH-TP-07-29,045, this violation alone is sufficient to render the claim of exemption void *ab initio*. Watkis, RH-TP-07-29,045 at 12-13; *see also* Levy, RH-TP-06-28,830; RH-TP-06-28,835; Daly v. Tippett, TP 27,718 (RHC June 1, 2007).

Regarding the Housing Provider's claim that the Tenant's claim is barred at least after 2006, when the Housing Provider claims to have mailed disclosure letters to all the tenants in the building notifying the tenants that the rent control filings (including the claim of exemption) were available for viewing at the Housing Accommodation's front desk, *see* Notice of Appeal at 2, the Commission notes that substantial record evidence, namely the testimony of the Tenant at the OAH hearing, supports the ALJ's determination that the Housing Provider did not properly mail or post the claim of exemption in 2006. *See* Hearing CD (OAH Apr. 24, 2008) at 12:03-12:10. The Commission's review of the ALJ's credibility determination in favor of the Tenant on this issue is discussed in detail, *supra* at 32-36.[15] *See* Watkis, RH-TP-07-29,045 ("Based on its review of the record, the Commission is satisfied that the ALJ's finding that the [h]ousing [p]rovider had not given [t]enant proper notice of the claim of exemption [in accordance with the Act] is supported by substantial evidence" and thus "the [h]ousing [p]rovider was not entitled to rely on the claim of exemption"); Levy, RH-TP-06-28,830; RH-TP-06-28,835 (determining "that

[15] As the Commission stated, "[w]here substantial evidence exists to support the hearing examiner's [or 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 [hearing] examiner.'" *See* Boyd, RH-TP-10-29,816; Loney, SR 20,089 at n.13; Marguerite Corsetti Trust, RH-TP-06-28,207.

there is substantial evidence in the record that . . . the [h]ousing [p]rovider . . . failed to comply with the registration/claim of exemption requirements of the Act under 14 DCMR § 4101.6"). Finally, the Commission is not persuaded, and the Housing Provider has not provided any legal authority from the Act or case law to support its contention, that providing the Tenant with notice of the claim of exemption in 2006, well after the outset of his tenancy, would cure the failure to provide him with written notice of the claim of exemption prior to the signing of his lease agreement. Notice of Appeal at 2; *see* 14 DCMR § 4106.8; Watkis, RH-TP-07-29,045.

Having been satisfied that the ALJ's determinations on this issue were in accordance with the relevant provisions of the Act and supported by substantial record evidence, the Commission affirms the ALJ's conclusion that the Housing Provider is not entitled to rely on the claim of exemption, and must adhere to the rent stabilization provisions of the Act. D.C. OFFICIAL CODE § 42-3502.05(d); 14 DCMR § 4106.8; Watkis, RH-TP-07-29,045; *see also, e.g,* Levy, RH-TP-06-28,830; RH-TP-06-28,835; Smith, TP 27,661; Butler, TP 27,262.

G. The ALJ ruled that because a copy of the Claim of Exemption form certified by the Rent Administrator submitted by Smith Consulate LLC had fewer pages than a copy Lutsko himself obtained from the Rent Administrator, Smith Consulate LLC intentionally sought to conceal from all tenants that water and sewer cha[r]ges should have been included in the rent, rather than charged for separately. There was no material difference between the forms and no facts in evidence to support a finding that Smith Consulate LLC tried to conceal anything.

H. The ALJ erred in holding that water and sewer services could not be separately charged for, but were required to be paid from the tenants rent. Because the Consulate is exempt, the ALJ had no authority to take up the issue of how water and sewer charges were passed on to the tenants.[16]

[16] The Commission, in its discretion, will combine its discussion of these two (2) issues raised in the Notice of Appeal, because it observes that these issues raise substantially similar contentions, and because these issues involve overlapping legal issues and the application of common legal principles. *See, e.g.*, Bower., TP 27,838; Barac Co., VA 02-107; Ahmed, Inc., RH-TP-28,799 at n.8; Levy, RH-TP-06-28,830; RH-TP-06-28,835 at n.9. *See supra* at n. 13.

The Housing Provider claims on appeal that the ALJ erred in considering whether water and sewer services could be charged separately from the Tenant's rent because the Housing Accommodation was exempt from the rent stabilization provisions of the Act. Notice of Appeal at 2. The Housing Provider states that because the Housing Accommodation was exempt, the ALJ lacked the authority to address the propriety of the water and sewer charges at all. *Id.* The Housing Provider also challenges the ALJ's determination that the Housing Provider sought to conceal from all tenants that water and sewer charges should have been included in the payment of rent, rather than charged for separately. *Id.*

The Commission's regulations provide that: "Any party aggrieved by a final decision of the Rent Administrator may obtain review of that decision by filing a notice of appeal with the Commission." 14 DCMR § 3802.1. The Commission has explained that "[i]n order for a party to have 'standing,' there must be an allegation of 'an actual or imminently threatened injury;' a mere contingent or speculative interest in a problem is not sufficient." Young, TP 28,635 (quoting York Apartments Tenants Ass'n v. D.C. Zoning Comm'n, 856 A.2d 1079, 1084 (D.C. 2004)). A party must demonstrate that they have suffered, or would suffer, an actual injury. Friends of Tilden Park, Inc. v. District of Columbia, 806 A.2d 1201, 1209 (D.C. 2002). Further, "[a] party has not been adversely affected or aggrieved by agency action, unless . . . it has suffered or will sustain some actual or threatened 'injury in fact' from the challenged agency action." Mitchell v. Salarbux, RH-TP-09-29,686 (RHC Feb. 3, 2012) at 3 (quoting Mallof v. D.C. Bd. of Elections & Ethics, 1 A.3d 383, 391 (D.C. 2010)). There must be "'a substantial probability that the requested relief would alleviate [the] asserted injury,' i.e., that [the] injury can be redressed." Mallof, 1 A.3d at 394 n.51 (quoting Miller v. D.C. Bd. of Zoning Adjustment, 948 A.2d 571, 574-75 (D.C. 2008); *see, e.g.*, Hago, RH-TP-08-11,552 & RH-TP-

08-12,085 (dismissing the tenant's appeal where the tenant lacked standing because he had settled his claims with the housing provider); In re: Landry, SC 001-04 (RHC May 12, 2004) (commenting that under 14 DCMR § 3802, only aggrieved parties can file appeals to the Commission); *see also* Smith Prop. Holdings Five (D.C.) L.P., RH-TP-14-28,794 (RHC Aug. 14, 2014) (asserting that a "prevailing party" is any party "in whose favor a judgment is rendered, regardless of the amount of damages awarded") (quoting Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014)).

In the Final Order, the ALJ concluded that the Tenant was barred from challenging the water and sewer charges due to the Act's statute of limitations, and because the Tenant failed to make a proper claim for reduction in services in his Tenant Petition. Final Order at 30; R. at 74. Based on its review of the record, the Commission determines that the Housing Provider, therefore, was the prevailing party on this issue, and did not suffer an actual injury because of the ALJ's holding regarding water and sewer charges, because the Tenant was not awarded any damages in connection to the alleged reduction in services. *Id.*; Young, TP 28,635; Mitchell, RH-TP-09-29,686; *see also* Mallof, 1 A.3d at 394-95.

Accordingly, the Commission dismisses issues G and H for lack of standing. *See* York Apartments Tenants Ass'n, 856 A.2d at 1084; Smith Prop. Holdings Five (D.C.) L.P., RH-TP-14-28,794 (RHC Aug. 14, 2014).

I. **The ALJ based her decision, in part, on allegations in the text of Lutsko's [T]enant [P]etition rather than evidence presented at the evidentiary hearing. Her Final Order quotes from the petition itself to establish a factual basis for some of her findings, without _____ [sic] that no testimony or other evidence to support these quotes.**

J. **The Final Order includes findings of fact for which there is no evidence at all in the record, and is internally inconsistent in other areas. Some "facts" are simply made up by the ALJ, to justify her ruling the way she did, and in order to support the imposition of fines. A copy of the hearing**

transcript has been ordered and will be provided to support this appeal point.[17]

The Commission has stated that "a notice of appeal must contain a clear and concise statement of the alleged errors in the ALJ's decision." Bohn Corp. v. Robinson, RH-TP-08-29,328 (RHC July 2, 2014) at 11 (finding the housing provider's claim that the ALJ "gave petitioner legal advice . . . without additional details identifying the specific 'legal advice' at issue [was in]sufficient to meet the requirements of 14 DCMR §3802.5(b).") (citing 14 DCMR § 3802.5(b)).[18] Further, "[t]he Commission may not review issues that are 'vague, overly broad, or do not allege a clear and concise statement of error [in the Final Order].'" Barac Co., VA 02-107 (citing Marbury Plaza , L.L.C. v. Tenants of 2300 & 2330 Good Hope Rd., S.E., CI 20,753 & CI 20,754 (RHC Apr. 18, 2005)); *see also, e.g.*, Paz v. Park Lee Associates, LLC, RH-TP-07,28,977 (RHC Jan. 31, 2013) (dismissing the housing provider's notice of appeal that asserted that the penalties and calculations were arbitrary and capricious because "[t]he [h]ousing

---

[17] The Commission, in its discretion, will combine its discussion of these two (2) issues raised in the Notice of Appeal, because it observes that these issues raise substantially similar contentions, and because these issues involve overlapping legal issues and the application of common legal principles. *See, e.g.*, Bower; TP 27,838; Barac Co., VA 02-107; Ahmed, Inc., RH-TP-28,799 at n.8; Levy, RH-TP-06-28,830; RH-TP-06-28,835 at n.9. *See supra* at nn. 13, 16.

[18] 14 DCMR § 3802.5 provides:

> The notice of appeal shall contain the following:
>
> (a) The name and address of the appellant and the status of the appellant (e.g., housing provider, tenant, intervenor);
>
> (b) The Rental Accommodations and Conversion Division (RACD) case number, the date of the Rent Administrator's decision appealed from, and a clear and concise statement of the alleged errors in the decision of the Rent Administrator;
>
> (c) The signature of the appellant or the appellant's attorney, or other person authorized to represent the appellant; and
>
> (d) The signatory's address and telephone number.

14 DCMR § 3802.5 (emphasis added).

[p]rovider [did] not identify which findings, penalties, or calculations [were] in error, nor . . . explain why they [were] in error."); Bedell v. Clarke, TP 24,979 (RHC Apr. 19, 2006) (dismissing claims raised by the tenant for alleging issues too vague for the Commission to decide and failure to state clear and concise statements of error as required by 14 DCMR § 3802.5). By requiring a clear and concise statement of the alleged errors in the ALJ's decision, the Commission's regulations are intended to meet "'a two-fold objective of providing the Commission with the subject matter for review and placing the opposing party on notice of the issues on appeal.'" McCaster v. Capitol Park Towers Co., RH-TP-07-29,043 (RHC Feb. 26, 2009) (quoting Gardiner v. Charles C. Davis Real Mgmt. Realty, TP 24,955 (RHC May 11, 2001) at 11).

The Housing Provider objects on appeal, in Issue I, *supra* at 44, to the ALJ's reliance on the Tenant Petition to establish a factual basis to support her legal conclusions instead of reliance upon evidence presented at the evidentiary hearing.[19] Notice of Appeal at 3. The Housing Provider fails to make specific references or citations to facts or evidence recited in the Tenant

[19] The Commission notes that at the time of the OAH hearing on April 24, 2008, 1 DCMR § 2939.1 defined the contents of the official record of a rental housing proceeding. It provides:

> The record of a proceeding in a rental housing case shall consist of the following:
>
> (a) The final order and any interlocutory orders of the Administrative Law Judge;
>
> (b) The recordings or any transcripts of the hearings before the Administrative Law Judge;
>
> (c) All documents and exhibits offered into evidence at the hearing;
>
> (d) Notices of hearing and proofs of service; and
>
> (e) All pleadings or other documents filed by the parties or the Rent Administrator at the Office of Administrative Hearings

1 DCMR §2939.1 (emphasis added). Thus, at the time of the hearing, the Tenant Petition was included in the official record as a "pleading[] or other document[] filed by the parties . . . at the Office of Administrative Hearings" pursuant to 1 DCMR § 2939.1(e). *See* 1 DCMR § 2939.1.

Petition, specific findings of fact that were based solely on the contents of the Tenant Petition, or specific conclusions of law that were made in error as a result of the ALJ's allegedly improper reliance on the Tenant Petition.[20] *Id.*

The Housing Provider's statement of Issue J, recited *supra* at 44-45, asserts generally that the ALJ's findings of fact are not based on record evidence, are "made up," and are inconsistent. Notice of Appeal at 3. In support of its argument, the Housing Provider provided a copy of the OAH hearing transcript to the Commission when it filed its Brief.[21] However, the Commission observes that the Housing Provider did not identify or address specific findings of fact from the Final Order that were not supported by substantial evidence, were made up, or were inconsistent.

---

[20] In its reasonable discretion, the Commission has reviewed the record in its entirety, and is only able to identify one instance where the ALJ made any general reference to the Tenant Petition. Finding of Fact 24 in the Final Order provides:

> 24. In June 2004, Housing Provider hired a third-party to bill water based on a ration utility billing system that bills tenants for a portion of the building's total water bill based on square footage allocation, which resulted in an additional $438.42 in fees charged to him. (Tenant Petition narrative paragraph six.)

Final Order at 6; R. at 98. The Commission observes that Finding of Fact 24 is supported by PX 102, a chart detailing rent and utility charges, which was admitted into evidence at the OAH hearing. Hearing CD (OAH Apr. 24, 2008) at 1:10; PX 102 at 2, 5; R. at 126, 129. The Commission also notes that the issue of water and sewer charges has already been dismissed on appeal for lack of standing. *See supra* at 42-44.

[21] The Commission notes that the Housing Provider failed to comply with the regulations governing the use of transcripts in Commission proceedings, which provide the following:

> 3820.4 The party requesting a transcript shall designate a qualified stenographer to transcribe the tape and the Commission shall deliver the duplicate tape directly to the qualified stenographer . . . .
>
> 3820.6 A transcript based upon a certified duplicate tape may be used in proceedings before the Commission if the qualified stenographer who produced the transcript certifies it as being complete, accurate, and based upon the certified duplicate tape.

14 DCMR § 3820.4, 3820.6. Based on its review of the record, the Commission determines that the Housing Provider failed to designate a qualified stenographer, failed to request that the Commission deliver a duplicate tape to such a qualified stenographer, and that the stenographer who produced the submitted transcript failed to certify it as being "complete, accurate, and based upon the certified duplicate tape." *See* Transcript of Apr. 14, 2008 OAH Hearing. Accordingly, where the Housing Provider has failed to comply with the relevant regulations, the Commission is not authorized by the Act to consider the transcript submitted by the Housing Provider in its determination of this appeal. 14 DCMR § 3820.4, 3820.6.

The Housing Provider also did not identify specific testimony from the OAH hearing transcript or other evidence in the record that allegedly conflicts with the ALJ's findings of fact. *Id.*

The Commission thus determines that the Housing Provider's statements of Issues I and J, *supra* at 44-45, are vague, overly broad, and fail to state a clear issue of alleged error for the Commission's review, in violation of 14 DCMR § 3802.5. *See* Bohn, RH-TP-08-29,328; Barac Co., VA 02-107; Paz, RH-TP-07,28,977; Bedell, TP 24,979; Notice of Appeal at 3. Therefore, the Commission dismisses these issues on appeal. 14 DCMR § 3802.5(b); Bohn, RH-TP-08-29,328; Barac Co., VA 02-107; Paz, RH-TP-07,28,977; Bedell, TP 24,979.

K. No evidence whatsoever was offered that would support a finding that Smith Consulate LLC acted willfully, i.e., with the intention of violating the Rental Housing Act or concealing anything from any tenant, including Lutsko.

The Housing Provider asserts on appeal that there is no evidence to support the ALJ's finding of willfulness. *See* Notice of Appeal at 3. Specifically, as elaborated in the Brief of the Housing Provider, the Housing Provider claims that the ALJ erred in assessing $5,000 in fines for failing to notify the Tenant of the claim of exemption, because there is no record evidence to support the finding that the Housing Provider acted with intent to violate the Act.[22] Brief of Housing Provider at 18-19.

The Commission will reverse final decisions of an ALJ that are based on "arbitrary action, capricious action, or an abuse of discretion." 14 DCMR § 3807.1; *see supra* at 26. Factual findings made by the ALJ are to be based on "substantial evidence on the record of the proceeding before the Rent Administrator." 14 DCMR § 3807.1. The Commission has stated that "[s]ubstantial evidence' has been consistently defined to mean "such relevant evidence as a

[22] The Commission notes that the ALJ assessed three fines against the Housing Provider: (1) $5,000 for failure to properly notify the Tenant of its claim of exemption, (2) $5,000 for taking an illegal rent increase, and (3) $5,000 for retaliation; however, the Housing Provider only specifically objected to the first fine, i.e., $5,000 for failing to notify the Tenant of the claim of exemption. Final Order at 31-33; R. at 71-73; Brief of Housing Provider at 18-19.

reasonable mind might accept as adequate to support a conclusion." Ahmed, Inc. v. Torres, RH-TP-07-29,064 (RHC Oct. 28, 2014) at 19 (citing Fort Chaplin Park Assocs., 649 A.2d at 1079 n. 10); *see also* Hardy, RH-TP-09-29,503; Bohn Corp., RH-TP-08-29,328. Provided that the ALJ's decision "flow[s] rationally from the findings of fact" and is supported by substantial evidence on the record, the Commission will affirm the decision. Dreyfus Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) at 44.

D.C. OFFICIAL CODE § 42-3509.01(b) provides for the imposition of civil fines, as follows:

> Any person who willfully (1) collects a rent increase after it has been disapproved under this 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[.]

A fine for willfulness "may be imposed under § 42-3509.01(b) only where the housing provider intended to violate or was aware it was violating a provision of the Act. Miller, 870 A.2d at 559; *see also* Torres, RH-TP-07-29,064, at 20; Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28-895 (RHC Sept. 27, 2013). In Miller, the DCCA explained that a finding of willfulness demands a "more culpable mental state" than is required for a finding that a party has acted knowingly in violation of the Act. Miller, 870 A.2d at 559; *see* Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 505 A.2d 73, 75 n. 6 (D.C. 1986); Torres, RH-TP-07-29,064 at 20; Recap v. Powell, TP 27,042 (RHC Dec. 19, 2002) at 4-6 (explaining that an intention to violate the Act is required for a finding of willfulness under D.C. OFFICIAL CODE § 42-3509.01(b)). To support a fine for a willful violation of the Act, an ALJ must "make specific findings of fact that the [h]ousing [p]rovider's violations of the Act were 'willful,' as required by the DCCA." Marguerite Corsetti Trust, RH-TP-06-28,207 at 18 (citing Miller, 870 A.2d at 559).

Knowing violations of the Act occur when a housing provider has "knowledge of essential facts bringing [its] conduct within the reach of [the Act]." Quality Mgmt., 505 A.2d at 75. *See* Torres, RH-TP-07-29,064 at 20; Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013). Conversely, willfulness "must be demonstrated by 'specific findings that the . . . violation . . . was committed with intent to violate the Act or at least with the awareness that this [would] be the outcome.'" Torres, RH-TP-07-29,064 at 20 (quoting Miller, 870 A.2d at 558-59) (alterations in original).

The Commission's review of the Final Order shows that the ALJ imposed $5,000 in civil fines against the Housing Provider, concluding that the Housing Provider violated the Act by failing to properly notify the Tenant that the Housing Accommodation was exempt from the rent stabilization provisions of the Act. Final Order at 31-34; R. at 70-73. The ALJ first finds that the Housing Provider did not post its claim of exemption form in a public place or its management office, or provide the Tenant with a copy, "prior to, during or after his tenancy," which the Housing Provider "knew or should have known . . . deprived [the Tenant] of substantial rights." Final Order at 31-32; R. at 72-73. The ALJ continues to assert that because the Housing Provider's claim of exemption form submitted into evidence at the OAH hearing did not include the pages pertaining to services and facilities, the Housing Provider willfully violated the Act by intentionally concealing the claim of exemption form so as "to misinform tenants and to avoid penalties associated with failing to timely file an amended registration statement within 30 days of changes made to a previous form." Final Order at 32; R. at 72; *see* RX 200; R. at 220-23.

Based on its review of the record, the Commission is not satisfied that the ALJ's determination that the Housing Provider acted willfully in failing to notify the Tenant of its claim

of exemption is in accordance with the provisions of the Act and supported by substantial record evidence. 14 DCMR § 3807.1. The Commission notes that the ALJ did not make separate and distinct findings in the "Findings of Fact" section of the Final Order regarding whether the Housing Provider's conduct was willfull, i.e., whether the Housing Provider intended to, or was aware that, it was violating the Act. Final Order at 3-10; R. at 94-101. As a result, the legal conclusions made by the ALJ on this issue appear to be without any record support. *Id.* at 31-32; R. at 72-73.

For example, the ALJ stated that "[t]he Housing Provider/Respondent knew or should have known that the failure to post [the claim of exemption] form deprived a tenant of substantial rights." *Id.* at 32; R. at 72. However, the Commission's review of the record does not disclose any explanation by the ALJ regarding how, or why, the Housing Provider "knew or should have known" that the failure to post the claim of exemption violated the Act. *Id.* Moreover, based on the Commission's review of the record, the only other support indicated by the ALJ that the Housing Provider's conduct was willful was that the Housing Provider submitted an incomplete copy of the claim of exemption (RX 200) at the OAH hearing. *Id.* The Commission's review of the record does not reveal that the ALJ made a reasonable connection between the submission of a document into evidence at the OAH hearing, and the intent to violate the Act by failing to give the Tenant proper notice of the claim of exemption at the time of signing his lease or any time thereafter.[23] *Id.* Aside from RX 200, the Commission's review of the record does not disclose that the ALJ cites or specifies any record evidence or testimony to support her conclusions on this issue. *Id.* at 31-32; R. at 72-73.

[23] The Commission notes that the ALJ's failure to connect that Housing Provider's conduct in submitting RX 200 into evidence at the OAH hearing, and the Housing Provider's failure to give the Tenant proper notice of the claim of exemption, is particularly important in this instance where the ALJ relies solely on the submission of RX 200 as the basis of her finding of willfulness. Final Order at 31-32; R. at 72-73.

Although the Housing Provider did not raise as issues, and thus contest, the other two fines on appeal, *see supra* at n.22, the Commission finds that the ALJ's assessment of these fines constitutes plain error. 14 DCMR § 3807.4; *see* Lenkin Co. Mgmt., 642 A.2d at 1286; Proctor, 484 A.2d at 550; Munonye, RH-TP-07-29,164. The Commission is not satisfied that substantial evidence in the record supports the ALJ's assessment of fines of $5,000 against the Housing Provider for willfully taking an illegal rent increase, nor does the Commission determine that the assessment of such fines are otherwise in accordance with the Act. 14 DCMR § 3807.1; Final Order at 30-34.

The Commission's review of the Final Order rather reveals that, as discussed above, the ALJ failed to make separate and distinct findings of fact regarding whether the Housing Provider acted willfully when taking the 2007 rent increase without complying with the requirements of the Act in the "Findings of Fact" section of the Final Order. Final Order at 3-10; R. at 94-101. Thus, as discussed *supra*, although the ALJ makes some legal conclusions on this issue, the conclusions lack record support. *Id.* at 32-33; R. at 71-72.[24]

Finally, the Commission is not satisfied that the ALJ's assessment of a fine of $5,000 for willful retaliation against the Housing Provider is supported by substantial evidence and in accordance with the Act. 14 DCMR § 3807.1; Final Order at 30-34. While the ALJ assessed the fine in light of its finding of retaliation, the Commission is unable to determine from its review

[24] For example, the ALJ stated that the "Housing Provider's conduct was a knowing and willful violation of the Act because the illegal rent increases involved the Housing Provider demanding the December 2007 rent increase after it intentionally failed to post the exemption form or provide Tenant/Petition with a copy prior to, during or after his tenancy." *Id.* at 32; R. at 72. However, the Commission's review of the record does not indicate that the ALJ provided factual support to demonstrate that the Housing Provider knew that the rent increase was a violation of the Act. *Id.* As noted *supra*, while the ALJ also discusses the Housing Provider's submission of the incomplete claim of exemption form at the OAH hearing (RX 200) as support for this fine, the record does not reveal that the ALJ made appropriate findings to show that the Housing Provider's conduct was done to intentionally violate the Act. *Id.*

of the record that the ALJ provided necessary, specific evidentiary support from the record to demonstrate that the Housing Provider's retaliation was actually willful. Final Order at 33; R. at 71.[25]

Accordingly, because the Commission is unable to determine that the ALJ's imposition of fines for (1) failing to properly notify the Tenant of the claim of exemption, (2) taking the 2007 rent increase without filing proper notice or rent increase with the Rent Administrator, and (3) retaliating against the Tenant for reporting the second hand smoke, are in accordance with the provisions of the Act or supported by substantial evidence, the Commission reverses the ALJ's imposition of $15,000 in fines, and remands to the ALJ for further findings of fact and conclusions of law consistent with this decision and based on the existing record. 14 DCMR § 3807.1.

The Commission instructs the ALJ on remand to either (1) make specific findings of fact that the Housing Provider's actions were willful, i.e., committed with intent to violate the Act, citing to record evidence or testimony, or (2) if on remand the ALJ determines that the record evidence does not support a conclusion that the Housing Provider's conduct was willful, to issue a revised Final Order vacating the three $5,000 fines. *See* Quality Mgmt., 505 A.2d at 75;

---

[25] For example, the ALJ stated that "[t]here is sufficient evidence to establish that Tenant/Petitioner complained in writing by email of the second hand smoke odors, and the Housing Provider did not promptly eliminate the problem after July 2006. PX 100. . . . Housing Provider then assessed a $245 rent increase in violation of the Act in its final bill to tenant for failing to sign the new lease terms. PX 102, page 3. Housing Provider did not provide any clear and convincing evidence that its demand for a rent increase, which was illegal, and demand to sign a new 12 month lease with different terms." Final Order at 33; R. at 71. The burden of proof in contested cases lies with the proponent of a rule or order. D.C. OFFICIAL CODE § 2-509(b). Thus, in the instant matter, in order to sustain a finding of willful retaliation, the Tenant must submit sufficient evidence that the Housing Provider knew that the rent increase taken after the Tenant complained about the second hand smoke was in violation of the Act. *See generally* D.C. OFFICIAL CODE § 2-509(b); D.C. OFFICIAL CODE § 42-3509.01(b); *see infra* at 57-60. As explained above, the Commission's review of the record does not reveal substantial evidence to support the ALJ's determination that the Housing Provider knew the rent increase was a violation of the Act. Final Order at 33; R. at 71. The Commission's review of the record does not reveal that the ALJ made separate findings of fact to reasonably support a determination that the Housing Provider's retaliatory behavior, i.e. raising the rent within six months after the Tenant complained about smoke odors, was done with the intent to violate the Act. *Id.*

Torres, RH-TP-07-29,064 at 20; Lizama, RH-TP-07-29,063; Marguerite Corsetti Trust, RH-TP-06-28,207 at 18. If the ALJ determines that the Housing Provider's conduct meets the legal standards for a finding of willfulness, the Commission further instructs the ALJ to be mindful of the prevailing rule in this jurisdiction that the amount of a fine should be in proportion to the seriousness of the offense and any damages awarded as a result of the offense. Dreyfuss Mgmt., LLC, RH-TP-07-28-895; *see* James v. United States, 59 A.3d 1233, 1238 (D.C. 2013); One 1995 Toyota Pick-Up Truck v. District of Columbia, 718 A.2d 558, 564 (D.C. 1998).

L. The ALJ ignored decisions of both the Acting Rent Administrator and the D.C. Court of Appeals in declaring unlawful a "flexible lease" letter sent to Lutsko, setting a schedule of available rents, depending on whether he chose to sign a new lease, and if so, its duration.

The Housing Provider claims on appeal that the ALJ erred in determining that the flexible lease letter was unlawful.[26] Notice of Appeal at 3. The Housing Provider, in its brief on appeal, asserts that the DCCA's holding in Double H. Hous. Corp. v. David, 947 A.2d 38 (D.C. 2008), is contrary to the ALJ's decision in the Final Order. *See* Final Order at 18-19; R. at 85-86; Brief of Housing Provider at 17.

---

[26] The Commission's review of the record reveals that the Housing Provider sent the Tenant a letter dated September 10, 2007, which contained several different rent increase amounts corresponding with an optional length of a new lease agreement, as follows:

Lease Option	Monthly Rent	Lease Option	Monthly Rent
12 – Month Lease	$1,785.00	6 – Month Lease	$1,875.00
11 – Month Lease	$1,880.00	5 – Month Lease	$2,085.00
10 – Month Lease	$1,875.00	4 – Month Lease	$2,050.00
9 – Month Lease	$1,770.00	3 – Month Lease	$2,120.00
8 – Month Lease	$1,765.00	2 – Month Lease	$2,120.00
7 – Month Lease	$1,935.00	1 – Month Lease	$2,120.00

PX 104 at 1; R. at 152; *see* Final Order at 5-6; R. at 98-99. The letter also provided that if the Tenant wished to remain in his unit on a month-to-month basis, he would be charged a monthly rent equal to the one-month lease option. PX 104 at 1; R. at 152. The Commission will hereinafter refer to this September 10, 2007 letter from the Housing Provider as the "Flexible Lease Letter."

In the Final Order, the ALJ found that the Housing Provider sent the Tenant a Flexible Lease Letter, attempting to increase the Tenant's rent effective December 2007, to an amount determined by the length of a new lease agreement. Final Order at 5-6; R. at 98-99. The ALJ determined that the Housing Provider was not entitled to take a rent increase of any amount in December 2007, because the Housing Provider had not properly notified the Tenant of its claim of exemption, and thus was not properly registered under the Act. *Id.*

The Commission will uphold an ALJ's decision so long as it is in accordance with the provisions of the Act and supported by substantial evidence. 14 DCMR § 3807.1. The Act's registration requirements apply to all rental units covered by the Act, and require that a housing provider file either a registration statement or establish a valid claim of exemption before a housing provider may take a rent increase. D.C. OFFICIAL CODE §§ 42-3502.05(a), (f), -3502.08(a)(1)(B);[27] 14 DCMR § 4101.1-.2, .9.[28] In the instant case, the Commission's

---

[27] D.C. OFFICIAL CODE § 42-3205.05(a) provides, in relevant part, as follows: "Sections 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except [those units that qualify for one of the enumerated exemptions.]"

D.C. OFFICIAL CODE § 42-3502.05(f) provides, in relevant part, as follows: "[E]ach housing provider of any rental unit not exempted by this chapter . . . shall file with the Rent Administrator . . . a new registration statement for each housing accommodation in the District for which the housing provider is receiving rent or is entitled to receive rent."

D.C. OFFICIAL CODE § 42-3502.08(a)(1)(B) provides: "Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless: . . . (B) The housing accommodation is registered in accordance with § 42-3502.05[.]"

[28] 14 DCMR § 4101.1-.2 provide as follows:

> 4101.1 The registration requirements of this section shall apply to each rental unit covered by the Act as provided by § 4100.3 and to each housing accommodation of which the rental unit is a part, including each rental unit exempt from the Rent Stabilization Program.
>
> 4101.2 The terms "to register" and "registration" shall be understood to include filing with the Rent Administrator the following:
>
> (a) For a rental unit covered by the Rent Stabilization Program, the information required to establish and regulation rent ceilings pursuant to § 205(f) of the Act and § 4204; or

review of the record reveals substantial evidence to support the ALJ's determination that the Housing Provider did not have a valid claim of exemption and did not file a registration statement for the Housing Accommodation, and thus was not permitted to take any rent increase in accordance with the Act. D.C. OFFICIAL CODE §§ 42-3502.05(a), (f), 42-3502.08(a)(1)(B); 14 DCMR § 4101.1-.2, .9; Revithes, 536 A.2d at 1017; Brooks, RH-TP-09-29,531 (citing Goodman, 573 A.2d 1293); Vista Edgewood Terrace, TP 24,858 at 12-13; Butler, TP 27,262 at 5; Best, TP 23,043 at 5; Final Order at 3, 16, 21-22; R. at 82-83, 88, 101; Hearing CD (OAH Apr. 24 2008) at 1:50-2:00; Lease Agreement, PX 103; R. at 133-49.

The Commission unequivocally asserts that it takes no position whatsoever on the merits of any contentions regarding the legality of flexible lease letters generally under the Act, nor is its determination herein grounded in any way on the DCCA's decision in Double H. Hous. Corp., 947 A.2d at 38. The Commission has previously affirmed the ALJ's determination that the Housing Provider was not properly registered because it had not complied with the notice requirements for a valid claim of exemption, *supra* at 36-42. *See* D.C. OFFICIAL CODE § 42-3502.05(d); 14 DCMR § 4106.8; Watkis, RH-TP-07-29,045. It is solely on these legal grounds under the Act that the Commission determines that the ALJ's conclusion regarding the impropriety of the Housing Provider's attempted rent increase in December 2007 is in accordance with the provisions of the Act and supported by substantial evidence. D.C. OFFICIAL

> (b) For rental units exempt from the Rent Stabilization Program the information required to establish the claim of exemption pursuant to § 205(a) of the Act and § 4103.

14 DCMR § 4101.9 provides, in relevant part, the following:

> Any housing provider who has failed to satisfy the registration requirements of the Act pursuant to §§ 4101.3 or 4101.4 shall not be eligible for and shall not take or implement the following: . . . (b) Any increase in the rent charged for a rental unit which is not properly registered[.]

CODE §§ 42-3502.05(a), (f), -3502.08(a)(1)(B); 14 DCMR §§ 3807.1, 4101.1-.2, .9. The Commission affirms the ALJ on this issue.[29]

M. Because the Consulate is an exempt property, and nothing Smith Consulate LLC did was unlawful, there was no factual basis to support the ALJ's finding that it retaliated against Lutsko.

As part of his Tenant Petition, the Tenant claimed that the Flexible Lease Letter sent to him by the Housing Provider in September 2007, constituted retaliatory action under the Act. Final Order at 23; R. at 81. On appeal, the Housing Provider asserts that the ALJ erred in finding that the Flexible Lease Letter constituted retaliatory action because (1) the Flexible Lease Letter was not unlawful, and (2) the Housing Accommodation is exempt from the Act. Notice of Appeal at 3; Brief of Housing Provider at 19.

The requirements for a claim of retaliation are contained at D.C. OFFICIAL CODE § 42-3505.02,[30] and were explained by the Commission in Karpinski, RH-TP-09-29,590 at 24. The Commission stated:

---

[29] Insofar as the Housing Provider is challenging the ALJ's determination that the Flexible Lease Letter was itself improper, the Commission determines that this issue is hypothetical and calls for an impermissible advisory opinion, where the Commission is satisfied that the ALJ's remarks regarding the Flexible Lease Letter were not essential to her decision that the rent increase was unlawful. Carmel Partners v. Barron, TP 28,510, TP 28,521 & TP 28,526 (RHC Oct. 28, 2014); *see* Fidelity Props., Inc. v. Tenants of 3446 Conn. Ave. N.W., HP 20,355 (RHC Apr. 10, 1995) ("'[c]ourts do not, or at least should not, issue generalized edicts'") (quoting Mims v. Mims, 635 A.2d 320, 325 n.12 (D.C. 1993)).

[30] D.C. OFFICIAL CODE § 42-3505.02 provides:

> (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

> . . . the determination of retaliation is a two-step process: first, the ALJ must determine whether a housing provider committed an act that is considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a); second, for retaliation to be presumed, a tenant has to establish that a housing provider's conduct occurred within six (6) months of the tenant performing one of the six (6) protected acts listed in D.C. OFFICIAL CODE 42-3505.02(b). . . . If a tenant establishes a presumption of retaliation, under D.C. Official Code § 42-3505.02(b), the evidentiary burden shifts to the housing provider to come forward with "clear and convincing" evidence that its actions were not retaliatory.

Id. (citing Jackson, RH-TP-07-28,898); Norwood, TP 27,678 at 7; Smith, TP 27,661.

In Hoskinson v. Solem, TP 27,673 (RHC July 20, 2005), the Commission explained that a housing provider must produce more than just the defense that the law permitted the alleged retaliatory action to rebut the statutory presumption of retaliation. Hoskinson, TP 27,673 at 8 (quoting Redman v. Graham, TP 27,104 (RHC Apr. 30, 2003)). The Commission further explained that "[u]nder the Act, a housing provider who is presumed to have retaliated against a tenant is presumed to have taken an action not otherwise permitted by law unless [they] can meet

---

tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:

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

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

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

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

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

6) Brought legal action against the housing provider.

[their] burden[, by a preponderance of the evidence,] under the statute." Hoskinson, TP 27,673 at 9 (quoting De Szunyogh v. William C. Smith & Co., 04 A.2d 1, 4 (D.C. 1992)) (internal quotations omitted).

In the Final Order, the ALJ determined that the Tenant proved that he was entitled to a presumption of retaliation, under D.C. OFFICIAL CODE § 42-3505.02(b), because the Tenant had complained in writing to the Housing Provider about smoking odors in his apartment within the six months prior to receiving the Flexible Lease Letter, which the ALJ determined was "an action not otherwise permitted by law."[31] Final Order at 26-29; R. at 75-78.

As the Commission has stated previously, it will affirm decisions of the ALJ that are in accordance with the provisions of the Act and supported by substantial record evidence. 14 DCMR § 3807.1. The Commission notes initially that the Housing Provider has not appealed, and thus contested, the ALJ's determination that the Tenant performed one of the six protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b) within the six months prior to receiving the Flexible Lease Letter. *See* Notice of Appeal at 1-3; Brief of Housing Provider at 19-20. Therefore, the Commission will limit its review of this issue to whether the ALJ erred by finding that the Housing Provider failed to rebut the presumption of retaliation by clear and convincing evidence. Karpinski, RH-TP-09-29,590; Norwood, TP 27,678 (RHC Feb. 3, 2005) at 7; Smith, TP 27,661.

Contrary to the Housing Provider's assertion in Issue M, *supra* at 57, the Commission has already affirmed the ALJ's findings that the Housing Accommodation was not an exempt property. *See supra* at 36-42. Additionally, based on its review of the record, the Commission

[31] The Commission reiterates that the ALJ determined that the Flexible Lease Letter was unlawful because it constituted a rent increase while the Housing Provider was not properly registered; the ALJ did not rely on a finding that the Flexible Lease Letter was *per se* unlawful. Final Order at 26-29; R. at 75-78.

has determined that substantial evidence supports the ALJs holding that the rent increase demanded in December 2007 was an illegal rent increase in violation of the Act because the Housing Provider failed to file a registration statement or establish a valid claim of exemption.[32] Accordingly, the Commission is satisfied that the ALJ did not err in determining that neither the Housing Provider's invalid claim of exemption, nor its demand for an illegal rent increase constituted "clear and convincing" evidence to rebut the Tenant's presumption of retaliation. 14 DCMR § 3807.1; Solem, TP 27,673; *see* Karpinski, RH-TP-09-29,590; Norwood, TP 27,678 (RHC Feb. 3, 2005) at 7; Smith, TP 27,661. The Commission affirms the ALJ on this issue.

IV. CONCLUSION

Based on the foregoing, the Commission dismisses issues G, H, I, and J, and affirms the ALJ on issues A, B, C, D, E, F, L, and M.

Regarding issue K, the Commission reverses the ALJ's imposition of $15,000 in fines, and remands to the ALJ for further findings of fact and conclusions of law, and ultimately for a determination regarding whether there is sufficient evidence of "willfulness" to support the imposition of fines. 14 DCMR § 3807.1. The Commission instructs the ALJ on remand to either (1) make specific findings of fact, citing to record evidence or testimony that the Housing Provider's actions were willful, i.e., committed with intent to violate the Act, or (2) if on remand the ALJ determines that the record evidence does not support a conclusion that the Housing Provider's conduct was willful, to issue a revised Final Order omitting the three $5,000 fines. *See* Quality Mgmt., 505 A.2d at 75; Torres, RH-TP-07-29,064 at 20; Lizama, RH-TP-07-29,063; Marguerite Corsetti Trust, RH-TP-06-28,207 at 18. If the ALJ determines that the Housing

[32] Even if the Housing Accommodation was an exempt property, "[t]he retaliation section of the Act applies to exempt, as well as non[-]exempt property." Butler, TP 27,262 at 12 (citing Blakney v. Atlantic Terrace/Winn Mgmt., TP 24,972 (RC Mar. 28, 2002)).

Provider's conduct meets the legal standards for a finding of willfulness, the Commission further instructs the ALJ to be mindful of the prevailing rule in this jurisdiction that the amount of a fine should be in proportion to the seriousness of the offense and any damages awarded as a result of the offense. Dreyfuss Mgmt., LLC, RH-TP-07-28-895; *see* James, 59 A.3d at 1238; One 1995 Toyota Pick-Up Truck, 718 A.2d at 564.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER
(CONCURRING IN THE RESULT)

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

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

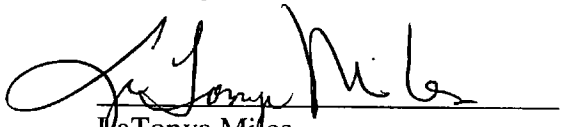
D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
430 E Street, N.W.
Washington, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in RH-TP-08-29,149 was served by first-class mail, postage prepaid, this **10th day of March, 2015**, to:

Richard W. Luchs
Roger D. Luchs
1620 L Street, N.W., Suite 900
Washington, DC 20036-5605

Brady Lutsko
1730 Wharton Street
Pittsburgh, PA 15203



LaTonya Miles
Clerk of Court
(202) 442-8949