DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-08-29,328

In re: 1307 Congress Street, S.E., Unit 32

Ward Eight (8)

BOHN CORPORATION
Housing Provider/Appellant

v.

LAWRENCE E. ROBINSON
Tenant/Appellee

DECISION AND ORDER

July 2, 2014

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a Final Order issued by the Office of Administrative Hearings (OAH),[1] based on a petition filed in the Housing Regulation Administration (HRA), Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. LAW 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-2-510 (2001 Supp. 2008), and the District of Columbia Municipal Regulations (DCMR), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

[1] The Office of Administrative Hearings (OAH) assumed jurisdiction over tenant petitions from the Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD) pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (Supp. 2005). The functions and duties of RACD were transferred to DHCD by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (Sept. 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (Supp. 2008)).

I. PROCEDURAL HISTORY

On June 16, 2008, Lawrence E. Robinson the tenant (Tenant) of the housing accommodation located at 1307 Congress Street, S.E., Unit 32 (Housing Accommodation), filed Tenant Petition RH-TP-08-29,328 with RAD alleging that housing provider, Bohn Corporation (Housing Provider), committed the following violations of the Act:

1. The rent increase was larger than the increase allowed by any applicable provision of the Act.

2. The landlord (housing provider) did not file the correct rent increase forms with the RAD.

3. 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 1-2; Record for RH-TP-08-29,328 (R.) at 7-8. On November 3, 2008, the Tenant filed an Amended Tenant Petition (Amended Tenant Petition) which was accepted by the Administrative Law Judge (ALJ) Erika L. Pierson on November 5, 2008. *See* Robinson v. Bohn Corp., RH-TP-08-29,328 (OAH Nov. 5, 2008). The Amended Tenant Petition contained the same three (3) claims as the original Tenant Petition, *see supra.*

On December 3, 2008 and January 9, 2009, evidentiary hearings were held before the ALJ. *See* R. at 55, 60. On May 14, 2009, the ALJ issued a final order, Robinson v. Bohn Corp., RH-TP-08-29,328 (OAH May 14, 2009) (Final Order). *See* R. at 61-80. The ALJ made the following findings of fact in the Final Order:[2]

1. Lawrence Robinson has resided in apartment 32 of 1307 Congress Street, SE, in the District of Columbia since May 1971. The building consists of 48 apartments. Ghulum [sic] Sarwar has been the owner of the property

[2] The findings of fact are stated in the same language as found in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

for five years and manages the property under the company name of Bohn Corporation.

2. On October 20, 2006, Tenant submitted an application to DCRA for disabled status. PX 100. As proof of his disabled status, Tenant provided DCRA with a letter from the Social Security Administration approving [the Tenant] for social security benefits. RX 205. Sandra Hawkins, Contact Representative with the Housing Regulation Administration of DCRA, approved Mr. Robinson's application on October 20, 2006, and mailed a copy to Housing Provider. Mr. Sarwar received the application approving Tenant's elderly [sic] status in the mail. Mr. Sarwar filed an objection to Mr. Robinson's elderly [sic] status with the RAD on November 8, 2006 (RX 203) and again on August 19, 2008 (RX 204). The RAD never responded to Housing Provider's objection.

3. At the time Mr. Robinson was approved for elderly [sic] status in October 2006, his rent was $478/month. RX. [sic] 202. However, between October 2006 and October 2007, Mr. Robinson paid only $469/month because he believed he was entitled to the disabled discount for the October 2006 rent increase. *Id.* In October 2007, Mr. Robinson's rent was increased by $16 to $494/month. *Id.* The CPI-W for the rental year 2007 was 3.5%. Between October 2007 and October 2008, Mr. Robinson continued to deduct $16 [sic] from his rent and paid only $485/month.

4. Due to Mr. Robinson's underpayment of rent, on May 28, 2008, Mr. Robinson's rent was $176 in arrears. RX 202. Housing Provider sought possession of the rental unit by filing a complaint for possession in the Landlord Tenant Branch of Superior Court on May 28, 2008. *Id.* The complaint was subsequently dismissed for reasons that are not in the record.

5. On August 13, 2008, Mr. Robinson received a "Notice of Increase in Rent Charged," increasing his rent, effective October 1, 2008, from $494/month to $520/month ($26 increase). PX 101. The notice stated that the increase was based on the 2008 CPI-W increase of 3.4%. *Id.* Mr. Sarwar did not apply the elderly [sic] discount to Tenant's rent because he did not believe that Tenant was 75% disabled, as required by the regulations, and he was awaiting resolution of his appeal of Tenant's disabled status. Since the October 1, 2008, rent increase, Tenant has only been paying Mr. Sarwar $501/month.

6. On December 4, 2008, the Rent Administrator certified that Housing Provider did not file rent increase forms with the RAD for Tenant's October 1, 2008, rent increase. PX 107.

Final Order at 2-4; R. at 77-79 (footnotes omitted).

The ALJ made the following conclusions of law in the Final Order, in relevant part:[3]

. . .[4]

B. Tenant's Disabled Status and Allegation that His Rent was Increased in an Amount Higher than Allowed by Law

1. The Rental Housing Act allows housing providers to increase the rent charged once a year based on the applicable CPI-W, which changes from year to year. D.C. Official Code § 42-3502.02(a)(3) [(2001)]. The Rental Housing Act, effective August 6, 2006, provides:

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

D.C. Official Code § 42-3502.08(h)(2) ([Supp.] 2006) (emphasis added).

2. Therefore, under the Act, a housing provider may increase the rent annually by the applicable CPI-W plus 2%, unless the tenant is elderly or disabled, in which case it may only increase the rent by the CPI-W percentage. The Act defines a "disabled tenant" as "an individual who has a medically determinable physical impairment, including blindness, which prohibits and incapacitates 75% of that person's ability to move about, to assist himself or herself, or to engage in an occupation." D.C. Official Code § 42-3501.06(f)(2)(A) ([Supp.] 2006); 14 DCMR [§] 4299.2 [(2004)].

3. It is undisputed that on October 20, 2006, the RAD approved Mr. Robinson's application for disabled status and Housing Provider was

[3] The conclusions of law are stated in the same language as found in the Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

[4] The Commission omits the ALJ's statement concerning jurisdiction from its recitation of the ALJ's conclusions of law.

aware of the approval. Therefore, after October 20, 2006, Housing Provider was prohibited from increasing Mr. Robinson's rent in an amount higher than the applicable CPI-W percentage.

4. Mr. Sarwar testified that he did not apply the disabled discount to Mr. Robinson because he does not believe that Mr. Robinson is 75% disabled because, according to Mr. Sarwar, although Mr. Robinson walks with a limp, he is able to get around fine. In addition, Mr. Sarwar reviewed Mr. Robinson's social security disability determination letter and determined that because the letter states that Mr. Robinson is not receiving Supplemental Social Security Income ("SSI"), he is not 75% disabled. In applying for disabled status, Mr. Robinson provided DCRA with a letter dated November 18, 2005, addressed to Mr. Robinson from the Social Security Administration, which states:

> Information about Current Social Security Benefits:
>
> > Beginning February 2005, the full monthly social security benefit before any deduction is $950.10.
>
> Information about Supplemental Security Income Payments:
>
> > Beginning October 2003, the current Supplement Security Income Payment is $0.00 . . . . Payments were stopped beginning September 2004.

RX 201.

5. Mr. Sarwar's decision not to apply the disabled discount to Mr. Robinson was flawed for several reasons. First, pursuant to the Act, a tenant is entitled to the disabled discount if approved by the RAD. Housing Provider does not have a role in approving the [T]enant's application. 14 DCMR [§] 4210.49 ("No tenant shall qualify as an elderly or disabled tenant, unless found to be an elderly or disabled tenant by the Rent Administrator."). Sandra Hawkins, Contact Representative with the Housing Regulation Administration, testified that she approved Mr. Robinson's application on October 20, 2006, based on the eligibility letter from the Social Security Administration. Although Housing Provider

correctly exercised his right to file an objection to the approved application, the Rent Administrator's failure to act on the objection did not render the approval void.[5]

6. Housing Provider also erred in interpreting the fact that Mr. Robinson does not receive SSI to mean that Mr. Robinson is not 75% disabled. Ms. Hawkins testified that the RAD does not make an independent medical determination of disability. Rather, [Ms. Hawkins testified that the RAD] relies on medical documentation provided by the applicant and that [the RAD treats] a tenant's eligibility for social security . . . as prima facie proof of eligibility for the disabled discount. Although Ms. Hawkins was not able to articulate why a tenant's eligibility for social security makes him automatically eligible for the disabled exception, the answer is in the Social Security Act. 42 U.S.C. [§] 401 *et seq.*

7. The Social Security Administration ("SSA") pays disability benefits through two programs: the Supplemental Security Income ("SSI") program and the Social Security [D]isability [I]nsurance ("SSDI") program. The SSDI program is an entitlement program (based on taxed earnings of workers) that pays benefits to people who are unable to work because of their disabilities. *See Social Security Administration* [sic] *Pub. No.* 05-11100 (June 2007). By definition, to be eligible for SSDI, an applicant must be "totally and permanently" disabled for any employment. 42 U.S.C. § 401. "Permanent" means that the disability is expected to last at least a year or result in death. *Id.* Mr. Robinson's letter reflects that he is receiving SSDI. Therefore, the SSA determined that Mr. Robinson had a disability that makes him 100% disabled from working. Logically, if Mr. Robinson is 100% disabled under the SSDI requirements, he meets the 75% disabled threshold for the rental housing disabled exception and there was no need to investigate any further. The fact that Mr. Robinson does not receive SSI is not relevant, nor is Mr. Sarwar's observations that Tenant can move about fine. Therefore, after October 20, 2006, Housing Provider was prohibited from increasing Mr. Robinson's rent by more than the applicable CPI-W percentage.

. . .

8. Mr. Robinson first challenges the October 1, 2006, rent increase from $456 to $478 because Housing Provider did not apply the disabled discount. The record reflects that Mr. Robinson's rent was increased on

[5] The Commission's review of the Act and the regulations do not reveal any provision that would not support the ALJ's determination in this conclusion of law.

October 1, 2006, and he was approved for disabled status on October 20, 2006, after the rent increase went into effect. The disabled exception limits the amount by which a housing [p]rovider can increase the rent *after* a tenant is approved for disabled status. The Act does not provide for a rent refund or rent reduction in-between [sic] rent increases. When Mr. Robinson was approved for the disabled discount, his rent was already set at $478 and Mr. Robinson was not entitled to any change in rent at that time. The maximum allowable increase in rent on October 1, 2006, was $28 (CPI-W ($19) plus 2% ($9)). Mr. Robinson's rent increase in the amount of $22 was less than the maximum allowable amount. Because Mr. Robinson determined that he was entitled to the disabled discount as of October 1, 2006, he declined to pay the new rent of $478 and only paid $469/month.

9. Mr. Robinson's rent was next increased on October 1, 2007, from $478-$494. It appears that Housing Provider did in fact apply the elderly discount to the October 1, 2007, increase because the rent was increased by $16 which was 3.5% of the current rent charged ($478). Therefore, Mr. Robinson's rent was increased only by the applicable CPI-W percentage of 3.5%. Mr. Robinson believed that his proper current rent was $469 and therefore between October 1, 2007, and October 1, 2008, Mr. Robinson only paid $485/month in rent ($469 + $16).

10. On August 13, 2008, Mr. Robinson received a notice of increase in rent, effective October 1, 2008, increasing his rent from $494 /month to $520/month. PX 101. Applying the disabled discount, the maximum allowable rent increase on October 1, 2008, was $16 (CPI-W of 3.4% x $494 = $16). Housing Provider increased Tenant's rent by $26, the maximum allowable amount applicable to a non-disabled person. Mr. Sarwar testified that even though he issued the notice of rent increase, Mr. Robinson only paid $501/month in rent and Housing Provider did not ask him to pay the difference. Housing Provider's rent rolls for October and November 2008 reflect that Mr. Robinson paid $501 in rent and had a balance of $250. RX 202.

11. The Rental Housing Act defines "Rent" as the "entire amount of money . . . *demanded, received, or charged* by a housing provider." D.C. Official Code § 42-3501.03(28) (emphasis added). Although Housing Provider arguably accepted a lesser amount of rent, it charged Tenant a rent higher than was allowed by law and issued a notice of rent increase demanding an amount higher than allowed by law. The Act and regulations provide that where it is determined that a housing provider *"knowingly demanded or received rent"* above the maximum allowable

rent, the remedy is a rent refund, treble the amount of the rend [sic] refund, and/or a rent rollback. D.C. Official Code § 42-3509.01(a); 14 DCMR [§] 4217.1. The District of Columbia Court of Appeals has held that a refund is owed for rent demanded in excess of the maximum allowable amount even if the rent was never paid. *See Kapusta v. D.C. Rental Hous. Comm'n*, 704 A.2d 286 (D.C. 1997); *Ashfar v. D.C. Rental Hous. Comm'n*, 504 A.2d 1105, 1108 (D.C. 1986). Accordingly, Tenant is awarded a rent refund as calculated in subsection C below.

C. Tenant's Allegation that Housing Provider Failed to File the Correct Rent Increase Forms with the RAD

12. In order to increase a [t]enant's rent, the Rental Housing Act requires a [h]ousing [p]rovider: (a) provide the tenant with at least 30 days written notice; (b) certify that the unit and common elements are in substantial compliance with the housing regulations; (c) provide the tenant with a notice of rent adjustment filed with the RAD; and *(d) simultaneously file with the RAD, a sample copy of the notice of rent adjustment along with an affidavit of service*. 14 DCMR [§] 4205.4 (emphasis added).

13. Tenant received a notice of rent increase, effective October 1, 2008, on a standard form issued by the RAD. However, the notice did not contain a file stamp from the RAD. On December 4, 2008, the Rent Administrator certified that the registration file for 1307 Congress Street, SE, #32, does not contain rent increase forms for Tenant's October 1, 2008, rent increase. PX 107. Mr. Sarwar acknowledged at the hearing that he did not file the rent increase forms because he was waiting for a response from the RAD regarding his appeal of Mr. Robinson's disabled status. Mr. Sarwar testified that until the issue of Tenant's disabled status was resolved, he did not know whether to increase Tenant's rent by 3.4% or 5.4%. However, Mr. Sarwar did issue Tenant a notice of rent increase effective October 1, 2008, and therefore Mr. Sarwar was required to file that notice with the RAD.

14. The Act and regulations provide that a housing provider who fails to properly implement a rent increase by, among other things, filing the proper rent increase forms with the RAD, forfeits the right to take the increase. 14 DCMR [§§] 4205.4 & 4205.6. As such, the October 1, 2008, rent increase was invalid. Therefore, I will roll back Tenant's rent to $494/month, effective October 1, 2008. In addition, Tenant is awarded a rent refund of $26/month for October, November, and December 2008 and January 2009, for a total refund of $104 plus interest.

D. Tenant's Allegation that his Rent was Increase[d] when his Apartment was not in Substantial Compliance with the Housing Regulations

15. Tenant did not present any evidence regarding the conditions of his apartment and therefore the allegation that his rent was increased while his apartment was not in substantial compliance with the housing regulations is dismissed.

E. Tenant's Allegation that Housing Provider Retaliated Against him in Violation of the Act

16. [The Tenant] testified that Housing Provider retaliated against him by seeking possession of the rental unit in Landlord Tenant court and that someone entered Tenant's apartment without his permission.

17. The Act prohibits a housing provider from taking "any retaliatory action against any Tenants who exercise any right conferred upon the Tenants by this chapter." Retaliatory action includes "any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit . . . or any other form of threat or coercion[.]" D.C. Official Code §[§] 42-3505.02(a) and (d); *see also* 14 DCMR [§] 4303.3. The evidence shows that Housing Provider sought to evict Tenant in May 2008 for nonpayment of rent. PX 102. The Landlord/Tenant complaint for possession states that Tenant failed to pay $167 in rent. *Id.*

18. To prevail on a claim for retaliation, Tenant must show that Housing Provider's actions were provoked by Tenant's exercise of his rights under the Act. The Act also provides that certain actions taken by a housing provider (i.e. eviction) are presumptively retaliatory if they occur within six months of a tenant exercising certain rights enumerated in the Act. D.C. Official Code § 42-3505.02(a). The presumption does not apply here because Tenant did not establish that he exercised any protected rights under the Act within six months of the complaint for possession. The evidence also shows that Tenant, in fact, had failed to pay his full rent. In addition, although Mr. Robinson believes that either Housing Provider entered his apartment or permitted someone to enter his apartment, there is no such evidence.

19. Tenant also alleges that Housing Provider retaliated against him for exercising his right to the disabled discount. However, Tenant's requesting a disabled discount is not listed as a protected act to which a presumption of retaliation is applied. Tenant has failed to prove that Housing Provider retaliated against him for exercising any of his rights under the Rental Housing Act.

Final Order at 4-13; R. at 68-77 (emphasis in original).

On May 22, 2009, the Housing Provider filed a Notice of Appeal (Notice of Appeal) with the Commission, raising the following issues:[6]

1. Admn [sic] Judge gave petitioner legal advice.

2. Appellant has been penalized for events that occurred after the original complaint was filed.

3. Admn [sic] Judge ignored DCRA's testimony.

4. Admn [sic] Judge's decision is based on assumptions and not on evidence.

Notice of Appeal at 1. The Commission held its hearing in this matter on November 3, 2009.[7]

II. ISSUES ON APPEAL[8]

A. Whether the ALJ gave the Tenant legal advice.

B. Whether the Housing Provider has been penalized for events that occurred after the original Tenant Petition was filed.

C. Whether the ALJ's determination that the Tenant is entitled to claim disability status is supported by substantial record evidence.

III. DISCUSSION OF ISSUES

A. Whether the ALJ gave the Tenant legal advice.

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[6] The issues on appeal are stated and numbered in the same language as found in the Housing Provider's Notice of Appeal.

[7] The Commission notes that the Tenant did not appear for the Commission's hearing. *See* Hearing CD (RHC Nov. 3, 2009) at 11:18.

[8] The Commission, in its discretion, has rephrased the issues on appeal to clearly identify the allegations of the ALJ's error(s) in the Final Order. *See, e.g.* Atchole v. Royal, RH-TP-10-29,891 (RHC Mar. 27, 2014); Gelman Mgmt. Co. v. Campbell, RH-TP-06-29,715 (RHC Dec. 23, 2013) at n.16; Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) at n.12; Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013). For the complete language of the Housing Provider's Notice of Appeal, *see supra*. *See also* Notice of Appeal at 1.

The Housing Provider asserts in the Notice of Appeal that the ALJ provided the Tenant with legal advice. Notice of Appeal at 1. The Commission observes that, aside from the one-sentence statement recited above, the Housing Provider did not provide any additional details, factual allegations, or other support related to this claim on appeal. *See* Notice of Appeal at 1. Furthermore, the Commission notes that the Housing Provider did not address this claim at the Commission's hearing. *See* Hearing CD (RHC Nov. 3, 2009). The Commission is unable to determine, based on its review of the record, the nature of the alleged "legal advice," any claim in the Tenant Petition that the legal advice was related to, or any other pertinent details necessary to understand and analyze this issue on appeal. *See* Hearing CD (RHC Nov. 3, 2009); Notice of Appeal at 1.

The Commission has consistently held a notice of appeal must contain a clear and concise statement of the alleged errors in the ALJ's decision. 14 DCMR § 3802.5(b) (2004).[9] *See, e.g.,* King v. McKinney, TP 27,264 (RHC June 17, 2005) at 14-15 (citing Cascade Park Apartments v. Walker, TP 26,197 (RHC Jan. 14, 2005) at 10-11) ("The Commission has repeatedly held that it cannot review issues that do not contain a clear and concise statement of the specific errors in the Rent Administrator's decision."); Voltz v. Pinnacle Mgmt. Co., TP 25,092 (RHC Sept. 28, 2001) at 12 (citing Hampton House N. Tenants Ass'n v. Shapiro, CIs 20,669-20,670 (RHC Feb. 9,

[9] The rule at 14 DCMR § 3802.5(b) provides the following:

> The notice of appeal shall contain the following:
>
> (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 error(s) in the decision of the Rent Administrator.

1998) at 26 (finding that the claim on appeal did not comply with 14 DCMR § 3802.5 because the appellant did not specifically state what "what was arbitrary, capricious, and what conclusions of law were not in accordance with the provisions of the Act," making the claim too vague for review).

The Commission determines in this case that the Housing Provider's statement that the ALJ provided "legal advice" to the Tenant, without additional details identifying the specific "legal advice" at issue, is not sufficient to meet the requirements of 14 DCMR § 3802.5(b). *See* Notice of Appeal at 1. Therefore, the Commission determines that this issue does not present a clear and concise statement of error as required by 14 DCMR § 3802.5(b), and thus this issue is dismissed on appeal. *See* King v. McKinney, TP 27,264 at 14-15; Parreco v. Akassy, TP 27,408 at 10-11; Voltz, TP 25,092 at 12.

B. Whether the Housing Provider has been penalized for events that occurred after the original Tenant Petition was filed.

The Commission notes that, aside from the above-recited sentence, the Housing Provider has not provided any additional details, record evidence, or legal authority in support of this issue in his Notice of Appeal, including any specific alleged penalties that were imposed by the ALJ for events that occurred after the filing of the original Tenant Petition on June 16, 2008. *See* Notice of Appeal at 1. Additionally, the Commission notes that the Housing Provider did not provide any additional details related to this claim at the Commission's hearing. *See* Hearing CD (RHC Nov. 3, 2009).

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 proceedings before the Rent Administrator.

The Commission's review of the record reveals that the Housing Provider did not object during the OAH hearing to any testimony or evidence regarding the time period after the initial Tenant Petition was filed on June 16, 2008, including the Tenant's testimony regarding the October 1, 2008 rent increase and the Tenant's Exhibit 101, the Notice of Increase in Rent Charged effective October 1, 2008. *See* Hearing CD (OAH Dec. 3, 2008) at 2:05-4:10. The Commission has consistently held that it may not review an issue that is raised for the first time on appeal. *See, e.g.,* Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013); Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013). Based on its review of the record, the Commission determines that the Housing Provider failed to object to the introduction of testimony and evidence related to the time period after the initial Tenant Petition was filed, including testimony and evidence related to the October 1, 2008 rent increase, during the OAH proceedings, and thus may not raise such an objection for the first time on appeal. *See* Lenkin Co. Mgmt., 642 A.2d at 1286; Smith Prop. Holdings Five (D.C.) L.P., RH-TP-06-28,794; Barac Co., VA 02-107.

For the foregoing reasons, the Commission affirms the ALJ on this issue.[10]

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[10] In assessing the Housing Provider's Notice of Appeal, the Commission is mindful of the important role that lay litigants play in the Act's enforcement. Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1298-1299 (D.C. 1990); Cohen v. D.C. Rental Hous. Comm'n, 496 A.2d 603, 605 (D.C. 1985). Courts have long recognized that *pro se* litigants can face considerable challenges in prosecuting their claims without legal assistance. Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). The DCCA has noted that "[i]n matters involving pleadings, service of process, and timeliness of filings, pro se litigants are not

C. Whether the ALJ's determination that the Tenant is entitled to claim disability status is supported by substantial record evidence.

The Housing Provider asserts on appeal that the ALJ erred in determining that the Tenant qualified for disability status, under § 42-3502.08(h). *See* Notice of Appeal at 1. In support of this assertion, the Housing Provider states that the ALJ ignored the testimony of the DCRA representative, Sandra Hawkins, and that the Final Order was based on "assumptions and not on evidence." *See id.*

Under the Act, a housing provider is entitled to a rent increase once a year equal to the amount of the adjustment of general applicability. D.C. OFFICIAL CODE § 42-3502.06(b). A rent increase based on the annual adjustment of general applicability is subject to the following limitations, relevant to this case:

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

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always held to the same standards as are applied to lawyers." Padou v. District of Columbia, 998 A.2d 286, 292 (D.C. 2010) (quoting Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d 977, 980 (D.C. 1999), cert. denied, 528 U.S. 1188 (2000)). Nonetheless, "while it is true that a court must construe pro se pleadings liberally . . . the court may not act as counsel for either litigant." Flax v. Schertler, 935 A.2d 1091, 1107 n.14 (D.C. 2007) (quoting Bergman v. Webb, 212 B.R. 320, 321 (Bankr. Fed. App. 1997)).

The Commission observes that, in the absence of any specific description or details regarding the specific nature of the Housing Provider's claim that he had been penalized for events that occurred after the filing of the original Tenant Petition, the Commission is only able to speculate as to the meaning of this issue on appeal. The Commission deems its interpretation of this issue to be reasonable based upon its review of the record of this case. Furthermore, the Commission's role is not to weigh the testimony and substitute itself for the ALJ. *See, e.g.*, Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014); Atchole, RH-TP-10-29,891; Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012).

D.C. OFFICIAL CODE § 42-3502.08(h)(2) (Supp. 2007)[11] (emphasis added). A "disabled tenant" is defined by D.C. OFFICIAL CODE § 42-3502.06(f), as " . . . a person who has: (i) a disability, as defined in section 3(2)(A) of the Americans with Disabilities Act of 1990 . . . 42 U.S.C. § 12102(2)(A) and 29 C.F.R. § 1630.2(g)(1)." D.C. OFFICIAL CODE § 42-3502.06(f)(2)(A)(i). The Americans with Disabilities Act (ADA) defines "disability," in relevant part, as follows:

> (1) Disability. The term "disability" means, with respect to an individual –
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> > (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
> >
> > (B) a record of such an impairment; or
> >
> > (C) being regarded as having such an impairment (as described in paragraph (3)).
>
> (2) Major life activities.
>
> > (A) In general. For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

42 U.S.C. § 12102 (1)-(2) (2012).[12] The term "substantially limits" has been defined by the federal regulations as follows:

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[11] The Commission observes that the D.C. OFFICIAL CODE § 42-3502.08(h)(2) (2001) was amended by the "Rent Control Reform Amendment Act of 2006," D.C. Law 16-145, to include the provision limiting the amount of a rent increase for a "disabled tenant."

[12] The Commission notes that 29 C.F.R. § 1630.2(g)(1) (2008), also referenced in D.C. OFFICIAL CODE § 42-3502.06(f), is virtually identical to 42 U.S.C. § 12102, and provides as follows:

> (g) Disability means, with respect to an individual –
>
> > (1) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> >
> > (2) A record of such an impairment; or

(j) Substantially limits -- (1) The term substantially limits means:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1).[13] *See* Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 196-97 (2002) (interpreting the term "substantial limits" as precluding impairments "that interfere in only a minor way with the performance of manual tasks.").

As stated *supra*, the Commission's standard of review is contained in 14 DCMR § 3807.1 (2004), and requires the Commission to uphold the decision of the ALJ where it is in accordance with the Act and supported by substantial evidence. The Commission is required to give deference to the ALJ's findings, and will not disturb a decision if it rationally flows from the findings of fact and those findings are supported by substantial evidence of record. *See* Selk v. D.C. Dep't. of Emp't. Servs., 497 A.2d 1056, 1058 (D.C. 1985) (citing Washington Post v. District Unemp't. Comp. Bd., 377 A.2d 436, 439 (D.C. 1977); 424 Q Street Ltd. P'ship. v.

> (3) Being regarded as having such an impairment.

[13] The Commission notes that the definition of "substantially limits" was amended by the passage of the ADA Amendments Act of 2008, effective January 1, 2009, after the Tenant Petition was filed in this case, as follows:

> (j) Substantially limits -- (1) The term substantially limits means:
>
> > (i) Unable to perform a major life activity that the average person in the general population can perform; or
> >
> > (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (2009).

Evans, TP 24,597 (RHC July 31, 2000)). "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." Marguerite Corsetti Trust, TP 28,207 at 12 (quoting Hago v. Gewirz, TPs 11,552, 12,085 (RHC Aug. 4, 2011) at 5). *See also* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 (D.C. 1994); Allen v. D.C. Rental Hous. Comm'n, 538 A.2d 752, 753 (D.C. 1988) (citing Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

The Commission's review of the record reveals that the ALJ relied on the following regulation for a definition of "disabled tenant:"

> A tenant who leases and occupies a rental unit, and who proves to the satisfaction of the Rent Administrator that at the time of approval of a petition for capital improvements pursuant to § 210 of the Act, the tenant has the following . . . (a) A medically determinable physical impairment, or blindness, which prohibits and incapacitates seventy-five percent (75%) of that tenant's ability to move about, to assist himself or herself, or to engage in an occupation . . . .

See Final Order at 5; R. at 76 (citing 14 DCMR § 4299.2) (emphasis added). Although 14 DCMR § 4299.2 only refers to "a petition for capital improvements pursuant to § 210 of the Act" for application of the "75%" standard for determining disability, the ALJ did not reference any legal authority or other basis for the use of a regulation related to capital improvement petitions, when analyzing whether the Tenant was a "disabled tenant" for purposes of an adjustment of general applicability under D.C. OFFICIAL CODE § 42-3502.08(h)(2). *See id.*

The Commission determines that the ALJ erred by applying the definition of a "disabled tenant" provided in 14 DCMR §4299.2(a) for several reasons. First, the rent adjustment at issue in this case is an adjustment of general applicability under D.C. OFFICIAL CODE § 42-3502.08(h), not an adjustment based upon a capital improvement petition, as required by 14 DCMR § 4299.2.

Second, the Act's provisions governing adjustments of general applicability, *see supra* at 14, clearly provide that the definition of a "disabled tenant" is found in the ADA provisions, cited *supra*, and the regulations governing adjustments of general applicability do not reference 14 DCMR § 4299.2(a). *See generally* 14 DCMR § 4206. However, the Commission determines that this error is harmless, for the reasons discussed *infra*.[14] The Commission cautions that its finding of harmless error is limited to the specific facts of this case, where the ALJ made a finding of fact that the Tenant was "totally and completely" disabled, based on evidence that the Tenant was receiving Social Security Disability Insurance (SSDI), as explained *infra*. The Commission is satisfied that its decision in this case is consistent with the plain language of 14 DCMR § 4299.2, limiting the application of that regulation to rent adjustments based on capital improvement petitions, and not for any other rent adjustments under the Act. *See* 14 DCMR § 4299.2.

The ALJ explained that the SSA benefit letter, submitted into evidence as part of the Housing Provider's exhibit 201, reflects that the Tenant is specifically receiving SSDI, which, by definition, requires that a recipient be "'totally and permanently' disabled for any employment."

[14] The Commission defines "harmless error" as "an error which is trivial or merely academic and was not prejudicial to the substantive rights of the party assigning it, and in no way affected the final outcome of the case . . ." *See, e.g.,* Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013) 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); 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); Smith v. Joshua, RH-TP-07-28,961 (RHC Feb. 3, 2012) at n.2 (determining that ALJ's misstatement of the date on an electrician's report was harmless); Borger Mgmt. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009) at n. 13 (determining that the ALJ's reference to the housing provider's motion as both a motion to vacate and a motion for reconsideration was harmless error because the Commission's standard of review on appeal is the same for both motions).

Final Order at 7; R. at 74 (citing 42 U.S.C. § 401 *et seq.*).[15] The ALJ further reasoned that if the SSA had determined that the Tenant is "totally and permanently" disabled under SSDI requirements, "he meets the 75% disabled threshold [under 14 DCMR § 4299.2(a)] for the rental housing disabled exception." *See id.*

The Commission is satisfied that it was not error for the ALJ to rely on the Tenant's SSA benefits letter in this case, indicating that he received SSDI benefits, as substantial evidence that the Tenant was "substantially" disabled as required by the ADA. *See* Final Order at 6-7; R. at 74-75. The Commission observes that under the relevant SSDI statute, "disability" is defined as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment" that is of "such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy . . . ." 42 U.S.C. § 423 (d)(1)(A), (2)(A). The Commission determines that it was not an abuse of discretion for the ALJ to find that the SSA's determination

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[15] The relevant SSDI statute provides the following definition of "disability," in relevant part:

> (d) Disability defined.
>
> > (1) The term "disability" means--
> >
> > > (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]
> >
> > > . . .
> >
> > (2) For purposes of paragraph (1)(A) -- physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . .

42 U.S.C. § 423(d).

that the Tenant had an inability to engage in any substantial gainful activity or work (i.e., employment), satisfied the Act's requirement that the Tenant's disability "substantially limits one or more major life activities," under the ADA. *Compare* 42 U.S.C. § 423(d)(2)(A), *with* 42 U.S.C. § 12102 (1)-(2).

Finally, the Commission notes that the Housing Provider has not indicated substantial record evidence that would tend to undermine the ALJ's determination that the Tenant appropriately obtained certification from RAD that he qualified as a "disabled tenant" under the Act, or that the Tenant's disability did not, in fact, substantially limit one or more major life activities, as defined by the ADA. *See* Notice of Appeal. Although the Housing Provider alleged that the ALJ ignored the testimony of Sandra Hawkins, the Commission's review of the record indicates otherwise. *See* Final Order at 6-7; R. at 74-5. To the contrary, the Commission's review of the record indicates that the ALJ relied upon Ms. Hawkins' testimony in reaching her determination that the Tenant was a "disabled tenant" for purposes of the Act.[16] *See id.*

For the foregoing reasons, the Commission is satisfied that the ALJ's determination that the Tenant was entitled to a discount as a "disabled tenant" under D.C. OFFICIAL CODE § 42-3502.08(h)(2), was in accordance with the provisions of the Act, and supported by substantial record evidence. 14 DCMR § 3807.1. The Commission thus affirms the ALJ on this issue.

[16] The Commission's review of the record reveals substantial evidence that the ALJ explained that her determination that RAD had approved the Tenant's application for "disabled tenant" status was based on the testimony of Sandra Hawkins, Contact Representative for RAD, who asserted that the Tenant's application for disabled status was approved based on a benefit eligibility letter from the Social Security Administration (SSA), and that RAD regularly relies on a tenant's eligibility for SSA benefits as proof of qualification as a "disabled tenant" under the Act. *See id.* at 6-7; R. at 74-75. *See also* 14 DCMR § 3807.1.

IV. CONCLUSION

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

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

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

JUDICIAL REVIEW

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

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

CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in RH-TP-07-29,328 was served by first-class mail, postage prepaid, this **2nd day of July, 2014**, to:

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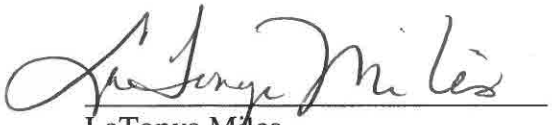

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