

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-09-29,590

In re: 815 Maryland Avenue, N.E., Unit B-3

Ward Six (6)

CAROLINE C. KARPINSKI

Tenant/Appellant

v.

EVOLVE PROPERTY MANAGEMENT, LLC

Housing Provider/Appellee

DECISION AND ORDER

August 19, 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 May 13, 2009, Caroline Karpinski the tenant (Tenant) of the housing accommodation located at 815 Maryland Avenue, N.E., Unit B-3 (Housing Accommodation), filed Tenant Petition RH-TP-09-29,590 (Tenant Petition) alleging that housing provider, Evolve Property Management, LLC (Housing Provider), violated the Act as follows:

1. The rent increase was made while my/our units were not in substantial compliance with DC Housing Regulations;
2. Services and/or facilities provided as part of rent and/or tenancy have been substantially reduced; and
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-09-29,590 (R.) at 25-6.

An evidentiary hearing was held on October 6, 2009 before Administrative Law Judge (ALJ), Louis Burnett. *See* R. at 48. On September 14, 2010, the ALJ issued a final order, Caroline C. Karpinski v. Evolve Property Management, LLC, RH-TP-09-29,590 (OAH Sept, 14, 2010) (Final Order). *See* R. at 49-71. The ALJ made the following findings of fact in the Final Order:²

1. On March 30, 1992, Tenant entered into a lease agreement to lease the Housing Accommodation, a basement apartment in a 27 unit apartment building (the "Building"). On December 29, 2003, Tenant sent a letter to Housing Provider requesting information about her security deposit. Tenant inquired as to the location of her security deposit and the interest rate for each six month period during 2003. PX 109. Tenant did not receive a response from Housing Provider to this inquiry.
2. On May 1, 2006, Housing Provider increased the monthly rental payment to \$545 and on June 1, 2009, increased Tenant's rent to \$571 a month. RX 201. Throughout the tenancy, the Housing Provider furnished ice and snow

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.

removal, monthly pest control services, and maintenance of the common areas.

3. The Housing Provider engaged an independent contractor to provide pest control in the Building and distributed a Pest Control Preparation Guide (the "PCP Guide") to the Building tenants. PX 104. The PCP Guide provides steps tenants are to follow before any scheduled pest control treatment in their apartments. Among other things, tenants are directed to empty all kitchen cabinets and drawers. In the event a tenant fails to adequately prepare their unit for a scheduled treatment without notifying the Housing Provider, the PCP Guide states that the Housing Provider will perform emergency preparations in that tenant's unit and charge the tenant \$50 for this service.

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

1. Icy Conditions

4. On February 12, 2008, after weather forecasts the previous day had predicted freezing rain, widespread icy conditions existed throughout the District. Late that day, the Tenant slipped and fell on the icy walkway outside the Housing Accommodation and suffered an injury. PX 101 and PX 102. Tenant contacted Jeff Prince, a co-owner of the Housing Provider, to report the incident, and he advised her to spread sand and salt on the walkway. Shortly after this conversation, Mr. Prince called Tenant and advised that the phone number she had called was a personal phone line, and that she should call a different number to report problems. He also advised her to call an ambulance if she was injured. Although the Housing Provider did not take any action to immediately abate the icy conditions, due to warmer weather, the ice melted the following day. Tenant deducted \$60.96 from her April 2008 rent and \$19.86 from the June 2008 rent for the medical expenses associated with her injury that were not covered by insurance. PX 103. The Housing Provider did not object to these deductions.

2. Maintenance of Common Areas

5. In May 2008, the basement hallway in the apartment complex flooded after a heavy rain. Tenant left a message on the property manager's voice mail advising of the flooding; however, she did not receive a response to her call. The carpet in the hallway remained wet for several days after the flooding, thus posing potential concerns as well as the inconvenience of walking on wet carpets. Housing Provider installed new drains shortly after the flooding and has since removed the carpeting and replaced it with tile.
6. Beginning in October 2008, the Housing Provider's employees frequently failed to vacuum dust, dirt and debris from the carpet in the hallway accessing

Petitioner's apartment. On November 3, 2008, and November 27, 2008, Tenant advised the Housing Provider of this problem. PX 105. Thereafter, the hallway cleaning was inconsistent, with two weeks or more sometimes elapsing between cleanings. On May 9, 2009, the Housing Provider's employees vacuumed the upstairs but not the basement common areas servicing Tenant's unit. Tenant contended that the lack of cleaning was a persistent problem but, other than May 9, 2009, was unable to provide specific dates that the Housing Provider failed to clean the hallways or identify the duration of this condition.

3. Electrical Outage

7. On the morning of April 5, 2009, the electricity to the building in which Tenant's apartment is located went out. Tenant testified that when she left her unit, the exit signs in the common area hallway were not functioning. She did not indicate how long this deficiency lasted.

4. Pest Control Services

8. Housing Provider scheduled its contractor to perform monthly pest control services and required residents to adequately prepare their kitchen areas for treatment. Adequate preparation included emptying kitchen cabinets and cleaning countertops. PX 104. After performing routine pest control, the Housing Provider's contractor notified tenants by leaving a doorknob tag advising them that its contractor had serviced their units.
9. On October 14, 2008, after the Housing Provider scheduled a treatment, Tenant did not find the usual doorknob tag. Additionally, the doors to her kitchen cabinets remained as she had left them earlier in the day. As a result, she believed that the Housing Provider had failed to provide scheduled pest control services and deducted \$50 from her November 2008 rent payment for its failure to service her unit. PX 105 and 106. Tenant's rationale for deducting this amount was that it was identical to the fee the Housing Provider imposed on tenants for failing to prepare their apartments for scheduled pest control treatments.

B. Retaliation

1. Notices of Past Rent Due (Tenant's Deduction From Rent)

10. After the Tenant's deduction of \$50 from her November rent payment, the following correspondence between the parties ensued:
 - On November 12, 2008, Housing Provider sent Tenant a notice of past rent due in the amount of \$50, for her unapproved deduction. PX 105 (p.2).

- On November 17, 2008, Tenant sent a letter notifying Housing Provider of the failure to service her unit. PX 105.
- Housing Provider sent a notice to pay rent or quit on November 17, 2008. PX 106 (p.3).
- On November 22, 2008, Tenant sent Housing Provider a letter explaining the reasons for her deduction, and a check for \$50 for the unpaid rent. PX 106.
- Tenant did not receive a response to her November 17, 2008 or November 22, 2008 letters.

2. Notice of Past Rent Due (Charges for Tenant's Failing to Prepare Her Unit For Pest Control Treatment)

11. On the afternoon of February 10, 2009, Tenant returned to her unit and found a doorknob tag notifying her that her unit had received pest control treatment. The notice specified a \$50 charge for failing to prepare her apartment for pest control treatment. PX 107. Tenant admitted that she had not prepared her unit for pest control treatment and that Housing Provider typically charged this amount to [t]enants for neglecting this preparation; however, she did not receive notification of the scheduled pest control visit. Tenant testified that after the contractor's pest control treatment in her apartment, her kitchen cabinets had been emptied, with the contents "scattered haphazardly over the countertops." The following correspondence between the parties then ensued:

- On April 1, 2009, Tenant sent Housing Provider a letter stating that Housing Provider had failed to give her notice of the scheduled pest control visit and that she did not owe the \$50 penalty. PX 108.
- On April 6, 2009, Housing Provider sent Tenant a first notice of rent past due in the amount of \$100, for failure to pay the \$50 pest control penalty and a \$50 late fee. The notice advised Tenant that a failure to pay these amounts could result in eviction. PX 110.
- Housing Provider sent Tenant a second notice of past rent due on April 20, 2009. The notice demanded payment of the \$100 and threatened termination of the lease and eviction for non-payment. PX 113.

- On May 5, 2009, Housing Provider sent Tenant a third notice of past due rent demanding payment of the \$100 and again advising of possible eviction. PX 115.
- After receiving this notice, Tenant confirmed with her bank that Housing Provider had cashed her May rent payment of \$545 (and a check for \$9.00 for a new toilet seat). Tenant advised Housing Provider of this fact.
- Thereafter, Housing Provider sent Tenant monthly notices of past due rent in the reduced amount of \$50, for failing to prepare her apartment for the pest control treatment. PX 116 and PX 118.
- On May 28, 2009, Tenant sent Housing Provider a letter stating that she had consulted with the D.C. Office of the Tenant Advocate and had been advised that she did not owe the \$50 penalty. PX 117.

12. Tenant testified that she believed that the Housing Provider's attempts to collect the \$50 through its letters sent on April 6, 2009, April 20, 2009, and May 5, 2009, were designed to intimidate her and to retaliate against her for her refusal to pay the \$50 penalty. Tenant also claimed that Housing Provider's act of clearing her kitchen cabinets and moving the contents to her countertops "with deliberate chaotic intent" was intended to harass her so that she would move out of the Housing Accommodation.

Final Order at 3-8; R. at 64-9 (footnotes omitted).

The ALJ made the following conclusions of law in the Final Order:³

...⁴

B. Tenant's Claims Concerning an Improper Rent Increase

1. The first claim asserted in the [T]enant [P]etition is that the Housing Provider charged an improper rent increase while the unit was not in substantial compliance with the District of Columbia Housing Regulations. The Rental Housing Act prohibits a housing provider from implementing a rent increase unless the "rental unit and the common

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.

elements are in substantial compliance with the housing regulations.”
D.C. Official Code § 42-3502.08(a)(1)(A) [(2001)].

2. Here, the uncontested evidence demonstrates that (1) the icy conditions on the walkway ended the day after Tenant’s accident on February 12, 1008; (2) the May 2008 flooding in the basement complex was abated several days afterwards; (3) cleanliness of the hallway common areas was allegedly an issue on May 9, 2009, but Tenant could not identify any specific dates thereafter that the hallways were not maintained; (4) the exit signs in the common area were not operable on April 5, 2008; and (5) after the alleged lapse of pest control service on October 14, 2008, the Housing Provider resumed treatments.
3. The Housing Provider increased Respondent’s monthly rental payment to \$545 on May 1, 2006, and on June 1, 2009, increased Tenant’s rent to \$571 a month. Although Tenant contends that icy conditions at the Housing Accommodation violated the housing code at various times between these two dates, there is no evidence that the building was not in substantial compliance with the Housing Regulations at the time the Housing Provider implemented the 2009 rent increase.
4. Because Tenant did not present evidence that the Housing Provider imposed a rent increase during the time that the Housing Accommodation was in “substantial violation” of housing regulations, Tenant failed to prove this claim.

C. Tenant’s Services and Facilities Claims

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

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

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

6. The Act defines [“related] services[”] as “services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse.” D.C. Official Code § 42-3501.03(27). The reduction of services provision of the Act “was drafted to ensure that housing providers provide services required by [the] D.C. Housing Code.” *Cascade Park Apts. v. Walker*, TP-26,197 (RHC January [sic] 14, 2005) at 22 (citing *Shapiro v. Comer*, TP-21,742 (RHC August [sic] 19, 1993) at 20). “Substantial compliance with the housing code” means the absence of any substantial housing violations. Certain violations are presumed to be substantial under the rental housing regulations, including frequent lack of hot water, lack of sufficient heat, defective toilet facilities, infestation of insects or rodents, and inadequate ventilation of interior bathrooms. 14 DCMR [§] 4216.2 [(2004)].
7. To establish a claim for reduction in services and facilities, a [t]enant “must present competent evidence of the existence, duration, and severity of the reduced services.” *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 11 (citations omitted). The tenant must establish that: 1) an eliminated item was a related service or facility; 2) the service was reduced and not promptly restored with a reduction in rent; 3) the housing provider had knowledge (notice) of the reduction; and 4) the reduction was substantial. *Parreco v. Akassy*, TP 27,408 (RHC Dec. 8, 2003) at 15, *rev’d on other grounds*, 885 A.2d 327 (D.C. 2005).
8. The Tenant’s services and facilities reduction claims primarily concerned the common amenities to her unit. Chief among these was her uncontested claim that after a freezing rain on February 12, 2008, the Housing Provider failed to remove ice from the sidewalk accessing her apartment, even though it had previously furnished snow removal services in the common areas. Weather forecasts had predicted freezing rain, but the only evidence of actual notice to the Housing Provider that the ice had not been removed, was Tenant’s call to Housing Provider’s owner late in the day on February 12th. By the next day, warmer weather eliminated the need for the Housing Provider to take action.
9. Tenant testified that she slipped and fell in the common area sustaining an injury that required medical attention; however the injury itself is not compensable in this proceeding. Rather, in determining tenant damages for a loss of services, courts have weighed the impact of the service reductions on a premises’ value. *Jarvins v. First National [sic] Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970). In considering whether the Housing Provider’s failure to remove ice from

the sidewalk constitutes a substantial reduction in services, it must be noted that the service reduction existed only for a day, and in fact less than a day from the time the Housing Provider had notice of it. Although Tenant testified that she encountered ice on the walkway to her apartment, she did not present evidence to establish what additional portion of the common area, if any, was similarly affected. Moreover, Tenant did not present any evidence regarding the impact that this limited reduction in services had on her use of her premises. In view of these circumstances, I conclude that Tenant failed to prove by [a] preponderance that the Housing Provider's failure on February 12, 2008, to remove the ice, constituted a substantial reduction in services. D.C. Official Code § 2-509(b) (tenant bears the burden of proof under the DCAPA); *see also Jarvis*, 428 F.2d 1071 [sic] at 1082 n.63 (noting that one or two minor violations standing alone which do not affect habitability are de minimis and would not entitle the tenant to a reduction in rent”).

10. Tenant also testified regarding inadequate maintenance in the common areas, including intermittent dust, dirt and debris on the carpet in the hallway accessing her apartment. Although the Tenant contended that the lack of cleaning was persistent, she was only able to identify May 9, 2009, as the date that the Housing Provider failed to clean the hallways. She was also unable to identify the period of time that this condition existed on the premises. As a result, the Tenant failed to establish the duration or severity of these conditions.
11. Similarly, Tenant testified that on April 5, 2009, the electricity to the apartment building was out and that when she left her unit, the exit signs in the common area hallway were not functioning. Tenant provided no evidence as to how long the electricity or the exit signs failed to function, again failing to establish the duration of this condition.
12. In May 2008, the basement hallway in the apartment complex servicing her unit flooded after a heavy rain. Tenant testified that the carpet in the hallway remained wet for several days after the flooding, and posed a potential sanitation concern as well as an inconvenience. Although Tenant identified the date that the condition first occurred, her reference to “several days” fails to specify the duration of this condition. Other than a vague reference to a potential sanitation concern and inconvenience, Tenant did not establish how the damaged carpet affected her. For example, she did not assert that the wet carpet was unavoidable, pervasive, or otherwise interfered in any material way with her use of the hallway.
13. With respect to her unit, Tenant's sole complaint involved Housing Provider's alleged failure to provide pest control services on October 14, 2008, after a treatment had been scheduled that day. Had the failure to

provide this service resulted in an infestation of insects or rodents, a substantial reduction of services might be proven. 14 DCMR [§] 4216.2. Yet, Tenant did not claim that the alleged lack of one pest control treatment had this or any other affect. Accordingly, this reduction, if it occurred, was not substantial. *Parreco v. Akassy*, TP 27,408 (RHC Dec. 8, 2003).

14. Because Tenant did not establish either that the service reductions were substantial or their duration and severity, I conclude that Tenant failed to prove this claim.

D. Tenant's Claims of Retaliation

15. Tenant asserts that Housing Provider took retaliatory action against her for exercising her rights under the Rental Housing Act. "Retaliatory action" under the Act is a term of art. The Act provides:

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.

D.C. Official Code § 42-3505.02(a)[.]

16. Ordinarily, it is the tenant's burden to prove retaliation because, as noted previously, the tenant bears the burden of proof under the DCAPA. D.C. OFFICIAL CODE § 2-509 (b). But the Rental Housing Act shifts the burden of proof to the housing provider in situations where the housing provider acts within six months of certain tenant activities.

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

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

(2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the official 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 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 * * * [sic]

(6) Brought legal action against the housing provider.

D.C. Official Code § 42-3505.02(b).

17. Tenant contends that the Housing Provider initiated retaliatory acts under the Rental Housing Act because she complained about cleaning and pest control. She asserts that in November 2008, the Housing Provider sent letters demanding that she pay the \$50 she had deducted from the November monthly rent due to the Housing Provider's alleged failure to provide pest control that month. Tenant also claims that the Housing Provider sent demands for payment of \$100 in April 2009, because Respondent failed to pay a \$50 pest control penalty and a \$50 late fee and that these demands constituted harassment. Finally, Tenant alleges that Housing Provider, while treating her unit for pests, cleared out her kitchen cabinets and moved the cabinets' contents to her countertops in a "chaotic" manner. She maintained that by this action, the Housing Provider intended to harass her so that she would move out of the Housing Accommodation.

1. The November Demand Letters

18. The Housing Provider sent its November 2008 demand letters within six months after Tenant complained in writing about conditions that could constitute housing code violations, arguably triggering the presumption of retaliation under the Act. Notwithstanding this fact, I find that Housing Provider has rebutted any presumption of retaliation by clear and convincing evidence. Clear and convincing evidence has been described by the District of Columbia Court of Appeals as “evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.” *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418, 426 n.7 (D.C. 2006) (quoting *In re Dortch*, 860 A.2d 346, 358 (D.C. 2004)). I conclude that Housing Provider has rebutted any inference of retaliation that may arise under the Act based upon the following:

- (i) In October 2008, the [T]enant believed that the Housing Provider had failed to provide scheduled pest control services and without prior discussion or consent, deducted \$50 from her November 2008 rent payment for Housing Provider’s alleged failure to service her unit.
- (ii) Tenant’s rationale for deducting this amount was that it was identical to the fee that the Housing Provider imposed on tenants for failing to prepare their apartments for scheduled pest control treatments; however, Tenant did not establish any contractual or legal justification for her unilateral decision to pay less than the monthly rental that was then due.
- (iii) The Housing Provider, through its correspondence, sought only payment of the unpaid rent.
- (iv) The Housing Provider’s owner testified credibly that he believes that his contractor treated Tenant’s apartment at the time of the scheduled pest control services in October 2008.

19. I therefore find by clear and convincing evidence that the Housing Provider sent the November letters not in retaliation for Tenant’s exercise of any rights under the Rental Housing Act, but because the [T]enant unilaterally reduced her November rent without any legal or contractual justification. The Housing Provider believed that he was entitled to payment of the entire monthly rental and therefore had a non-retaliatory reason for sending letters demanding payment.

2. The Contents From The Kitchen Cabinets

20. Leaving the contents of the kitchen cabinets in disarray is not among the actions that the Rental Housing Act presumes to be retaliatory. Thus, Tenant must prove by a preponderance of the evidence that this was a retaliatory act. Although Tenant did not receive notice of the pest control treatment that precipitated this incident, there was no evidence that the Housing Provider planned or intended this omission. Similarly, there is no evidence that the person “chaotically” moving the items, presumably the Housing Provider’s contractor, did so at the Housing Provider’s behest. It is at least as plausible that whoever moved the cabinets’ contents acted carelessly rather than in furtherance of an intentional plan to harass the Tenant. As Tenant acknowledged in her testimony, emptying the contents of kitchen cabinets in preparation for pest control treatments was a standard Housing Provider procedure. Although scattering items “haphazardly over the countertops” while implementing this procedure may have been thoughtless and discourteous, Tenant presented no evidence that this action was retaliatory.

3. The April Demand Letters

21. Tenant contends that the Housing Provider demanded a \$100 payment in April 2009 because she complained about cleaning and the failure to provide pest control services in November, 2008. The evidence establishes that Tenant requested these services in November 2008. Thus, these requests were not within the six months preceding Housing Provider’s payment demands. No presumption therefore arises under the Rental Housing Act that the Housing Provider’s letters were retaliatory.
22. The Housing Provider sent the Tenant demands for payment of \$100 in April 2009 because she refused to pay a \$50 pest control penalty imposed when she failed to prepare her unit for a scheduled pest control treatment. The additional \$50 that the Housing Provider demanded consisted of a \$50 fee for the late payment of Tenant’s rent. The Housing Provider voluntarily withdrew its demand for the late fee after Tenant provided it with confirmation that her bank had cashed her check for the April 2009 monthly rent.
23. The Housing Provider’s PCP Guide provides that in the event a tenant fails to adequately prepare his or her unit for a scheduled treatment, the Housing Provider will perform emergency preparations in that tenant’s unit and charge the tenant \$50 for this service. This policy applies to all Building tenants, not just Tenant/Petitioner. The Housing Provider sent the April letters not in retaliation for Tenant’s exercise of any rights under

the Rental Housing Act, but because the [T]enant refused to pay the \$50 preparation penalty. Tenant may not be liable for this charge if she did not receive notice of the scheduled treatment; however, the Housing Provider believed this amount was due and therefore had a non-retaliatory reason for sending letters demanding payment.

24. I therefore conclude that [T]enant has failed to establish that the Housing Provider's actions were retaliatory.

D. [sic] Tenant Did Not Establish A Viable Claim Against Housing Provider For Failing To Respond To Her Inquiry About Her Security Deposit

25. The Housing Regulations require a housing provider to deposit all monies paid by tenants for security deposits in an interest bearing escrow account established and held in trust in a financial institution in the District of Columbia insured by a federal or state agency for the sole purposes of holding such deposits or payment. 14 DCMR [§] 308.3. The regulations further require a housing provider to notify tenants where the security deposits are held by posting a notice in the lobby of the building and the rental office. 14 DCMR [§] 308.7.

26. The evidence in this case established that on December 29, 2003, Tenant sent a letter to Housing Provider inquiring as to the location of her security deposit and the interest rate for each six month period during 2003. Tenant did not receive a response from Housing Provider to this inquiry. Aside from significant statute of limitation [sic] issues raised by this claim, Tenant did not establish that the relevant information was not posted as required under the Regulations, but rather than the Housing Provider failed to respond to her letter. Tenant thus did not establish a violation of the Regulations.

27. Additionally, it must be noted that the Regulations do not provide a remedy for a Housing Provider's failure to post the notice in the lobby, only a remedy for a housing provider's failure to place the monies in an interest bearing account. *See* 14 DCMR [§] 308.7 (requiring posting of a notice in the lobby) and 14 DCMR [§] 311.2 (providing that a housing provider shall be liable to the Rent Administrator or Commission for the amount of interest owed, or treble that amount, for failure to pay interest). OAH has no jurisdiction to compel disclosure of the information Tenant has requested.

Final Order at 9-21; R. at 51-53.

On September 27, 2010, the Tenant filed a Notice of Appeal (Notice of Appeal) with the Commission, raising the following issues:⁵

1. “Substantial reduction in service” (Order p.12, line 6) is determined by the effect on the Tenant who suffered injury. Judge misconstrued the meaning of “substantial,” conflating it with “duration.”
2. Judge’s findings are incorrect as a matter of law, Tenant providing evidence of enduring lack of maintenance of common areas, Sept.1-Nov.3, 2008: PX 105, PX 106. (Order p.13)
3. Judge’s findings do not correspond to evidence of endurance, avoidability, discomfort, re years of floods in basement and in Tenant’s unit in the past, damage to carpet and furniture; Management ignoring Tenant’s alert to coming storm. “Several days” (Order p.13) does specify duration.
4. Judge’s findings do not correspond to Tenant’s oral testimony of past mice infestation, to damage to Tenant’s property, with 3 year lapse, 2005-2008, before monetary recovery, reestablishing substantial, enduring and severe service reduction estab. Case No. RH-TP-09-28954.
5. Judge excluded items offered in evidence: Tenant’s repayment of \$50.00 Nov. 22, 2008, withheld from November 2008 rent, PX 106 (Order p.17), and 4 harrassing [sic] letters, May 5 & 18, June 15 [sic], July 10, 2009, for rent payment already made: PX 117, PX 118.

Notice of Appeal at 1. The Commission held its hearing in this matter on April 10, 2012.

II. ISSUES ON APPEAL⁶

- A. Whether the ALJ erred in determining that the Tenant failed to prove her claim of a substantial reduction in services and/or facilities.

⁵ The issues on appeal are stated and numbered in the same language as found in the Tenant’s Notice of Appeal.

⁶ 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 Tenant’s Notice of Appeal, *see supra*. *See also* Notice of Appeal at 1.

The Commission addresses the Tenant’s first four issues from the Notice of Appeal, each related to the claim of reductions in services and/or facilities, in its discussion of issue A. The Commission addresses the Tenant’s fifth issue from the Notice of Appeal, related to her claim of retaliation, in its discussion of issue B.

- B. Whether the ALJ erred in determining that the Tenant failed to prove her claims of retaliation, related to rent demand letters in November 2008, May 2009, June 2009, and July 2009.

III. DISCUSSION OF ISSUES

A. **Whether the ALJ erred in determining that the Tenant failed to prove her claim of a substantial reduction in services and/or facilities.**

The Tenant asserts on appeal that the ALJ made several errors in evaluating her claim of substantial reductions in services and/or facilities. *See* Notice of Appeal. The Tenant posited that the question of whether a substantial reduction has occurred “is determined by the effect on the [t]enant who suffered [the] injury,” and that it was error for the ALJ, in considering the claimed reduction based on ice on the sidewalk of the Housing Accommodation, to determine the substantiality of the reduction based on its duration. *See id.* The Tenant also asserted that the ALJ’s findings do not correspond to the evidence presented by the Tenant at the OAH hearing that reductions in the common areas, specifically a lack of maintenance and flooding, were “enduring” in the Housing Accommodation for a lengthy period of time. *See id.* Finally, the Tenant asserts that the ALJ failed to consider evidence in the record of a substantial, enduring reduction in services due to a past mice infestation. *See id.*

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 has held that the burden of proof is on the tenant when asserting a claim of reduction of services under the Act. *See* Atchole, RH-TP-10-29,891; Pena v. Woynarowsky,

RH-TP-06-28,817 (RHC Feb. 3, 2012). *See also* D.C. OFFICIAL CODE § 2-509(b) (2001);⁷ Wilson v. KMG Mgmt., LLC, RH-TP-11-30,087 (RHC May 24, 2013); Barnes-Mosaid v. Zalco Realty, Inc., RH-TP-08-29,316 (RHC Feb. 24, 2012); Stancil v. Davis, TP 24,709 (RHC Oct. 30, 2000). The Commission will uphold an ALJ's decision where it is supported by substantial evidence; where substantial evidence exists to support the ALJ's findings, even "the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute [its] judgment for that of the examiner." WMATA v. D.C. Dep't of Emp't Servs., 926 A.2d 140, 147 (D.C. 2007). *See* Young v. D.C. Dept. of Emp't Servs., 865 A.2d 535, 540 (D.C. 2005); Atchole, RH-TP-10-29,891; Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012); Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011); Turner v. Tscharner, TP 27,014 (RHC June 13, 2001) at 11. The Commission will not substitute its judgment of the evidence for that of the ALJ who had direct opportunity to assess witness testimony and credibility, as well as other evidence introduced by the parties. *See* WMATA, 926 A.2d at 147; Atchole, RH-TP-10-29,891; Marguerite Corsetti Trust, RH-TP-06-28,207; Hago, RH-TP-08-11,552 & RH-TP-08-12,085.

In assessing the Tenant's Notice of Appeal, the Commission is mindful of the important role that lay litigants play in the Act's enforcement. *See, e.g.*, Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1298-99 (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, such as the Tenant in this case, can face considerable challenges in prosecuting their claims without legal assistance.

⁷ D.C. OFFICIAL CODE § 2-509(b) provides, in relevant part, the following: "In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof"

See Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). Nonetheless, “while it is true that a court must construe *pro se* pleadings liberally . . . the court may not act as counsel for either litigant.” See Flax v. Schertler, 935 A.2d 1091, 1107 n.14 (D.C. 2007) (quoting In re Webb, 212 B.R. 320, 321 (Bankr. Fed. App. 1987)). As the District of Columbia Court of Appeals (DCCA) has asserted, a *pro se* litigant “cannot generally be permitted to shift the burden of litigating his case to the courts, nor to avoid the risks of failure that attend his decision to forego expert assistance.” See Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d 977, 979 (D.C. 1999) (quoting Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1993)).

A tenant may seek relief under the Act where an “unauthorized reduction in services or facilities related to the rental unit” has occurred. 14 DCMR § 4214.4(d) (2004).⁸ A landlord is not permitted to reduce services “required by law or the terms of a rental agreement” that were previously provided to the tenant in connection with the use and occupancy of a rental unit without decreasing the rent to “reflect proportionally the value of the change in services.” D.C. OFFICIAL CODE §§ 42-3501.03(27), -3502.11.⁹

⁸ 14 DCMR § 4214.4(d) reads as follows:

The tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, complain of and request appropriate relief for any other violation of the Act including, but not limited to, the following: . . .

(d) Any unauthorized reduction in services or facilities related to the rental unit not permitted by the Act or authorized by order of the Rent Administrator.

⁹ The Act’s provision governing reduction of related services states the following:

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

The Commission has previously stated that a tenant must satisfy a three-prong test in order to successfully pursue a claim of reduction or elimination of services. *See, e.g., Kuratu v. Ahmed, Inc.*, RH-TP-07-28,895 (RHC Dec. 27, 2012); *Pena*, RH-TP-06-28,817; *1773 Lanier Place, N.W., Tenants' Ass'n v. Drell*, TP 27,344 (Aug. 31, 2009); *Davis v. Madden*, TP 24,983 (RHC Mar. 28, 2002); *Ford v. Dudley*, TP 23,973 (RHC June 3, 1999). First, a tenant must provide evidence that a substantial elimination or reduction in a related service occurred, and the fact-finder must find that a substantial elimination or reduction in a related service occurred; second, a tenant must establish the duration of the reduction in services; finally, a tenant must show that the housing provider had knowledge of the alleged reduction in services. *See Pena*, RH-TP-06-28,817; *Ford*, TP 23,973. If a tenant fails to prove any one of the three elements, the entire claim will fail. *See Pena*, RH-TP-06-28,817. The Commission has explained that the determination of whether a reduction is “substantial” is “a function of the ‘degree of loss;’ the degree of loss ‘is substantiated by the length of time that the tenants were without service.’” *Drell*, TP 27,344 (quoting *Newton v. Hope*, TP 27,034 (RHC May 29, 2002)).

D.C. OFFICIAL CODE § 42-3502.11 (Supp. 2007). The Act defines a “related facility” as follows:

“Related facility” means any facility, furnishing, or equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit, including any use of a kitchen, bath, laundry facility, parking facility, or the common use of any common room, yard, or other common area.

D.C. OFFICIAL CODE § 42-3501.03(26). The Act defines a “related service” as follows:

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

D.C. OFFICIAL CODE § 42-3501.03(27).

Furthermore, the Commission has determined that an ALJ may fix the dollar value of a reduction in services and/or facilities without expert testimony or other direct testimony on the dollar value of the reduction, once the tenant has established the existence, duration, and severity of the reduction. *See, e.g., Smith Prop. Holdings Five (D.C.) L.P.*, RH-TP-06-28,794; *Drell*, TP 27,344; *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005).

In the section of the Final Order analyzing the Tenant's reduction in services claims, the ALJ explained that a tenant "must present competent evidence of the existence, duration, and severity of the reduced services." *See* Final Order at 11; R. at 61 (quoting *Jonathan Woodner Co.*, TP 27,730). After discussing each of the claimed reductions, the ALJ determined that the Tenant failed to prove, by a preponderance of the evidence, that any of the claimed conditions constituted a substantial reduction in related services and/or facilities under the Act. *See id.* at 11-14; R. at 58-62. In the Final Order, the ALJ stated the following for each of the claimed reductions:

9. . . . In considering whether the Housing Provider's failure to remove ice from the sidewalk constitutes a substantial reduction in services, it must be noted that the service reduction existed only for a day, and in fact less than a day from the time the Housing Provider had notice of it Moreover, Tenant did not present any evidence regarding the impact that this limited reduction in services had on her use of her premises. In view of these circumstances, I conclude that Tenant failed to prove by [a] preponderance that the Housing Provider's failure on February 12, 2008, to remove the ice, constituted a substantial reduction in services.
10. Tenant also testified regarding inadequate maintenance in the common areas, including intermittent dust, dirt and debris on the carpet in the hallway accessing her apartment. Although the Tenant contended that the lack of cleaning was persistent, she was only able to identify May 9, 2009, as the date that the Housing Provider failed to clean the hallways. She was also unable to identify the period of time that this condition existed on the premises. As a result, the Tenant failed to establish the duration or severity of these conditions.

11. Similarly, Tenant testified that on April 5, 2009, the electricity to the apartment building was out and that when she left her unit, the exit signs in the common area hallway were not functioning. Tenant provided no evidence as to how long the electricity or the exit signs failed to function, again failing to establish the duration of this condition.
12. In May 2008, the basement hallway in the apartment complex servicing her unit flooded after a heavy rain. Tenant testified that the carpet in the hallway remained wet for several days after the flooding, and posed a potential sanitation concern as well as an inconvenience. Although Tenant identified the date that the condition first occurred, her reference to “several days” fails to specify the duration of this condition. Other than a vague reference to a potential sanitation concern and inconvenience, Tenant did not establish how the damaged carpet affected her. For example, she did not assert that the wet carpet was unavoidable, pervasive, or otherwise interfered in any material way with her use of the hallway.
13. With respect to her unit, Tenant’s sole complaint involved Housing Provider’s alleged failure to provide pest control services on October 14, 2008, after a treatment had been scheduled that day. Had the failure to provide this service resulted in an infestation of insects or rodents, a substantial reduction of services might be proven Yet, Tenant did not claim that the alleged lack of one pest control treatment had this or any other affect. Accordingly, this reduction, if it occurred, was not substantial

Final Order at 12-14; R. at 58-60 (citations omitted) (emphasis added).

The Commission observes that the ALJ failed to make any determination of whether each of the alleged conditions constituted a reduction in a related service or a related facility, as those terms are defined under the Act. *See* Final Order at 12-14; R. at 58-60. However, the Commission is satisfied that this omission constituted harmless error,¹⁰ because even if the ALJ

¹⁰ 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*, RH-TP-12-28,898 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

had found that the alleged conditions constituted reductions in related services and/or related facilities under the Act, the ALJ determined that the Tenant failed to prove each element of the three-prong test, namely the existence of a substantial reduction, the duration of the reduction and that notice was given to the housing provider. *See, e.g., Kuratu*, RH-TP-07-28,895; *Pena*, RH-TP-06-28,817; *Drell*, TP 27,344; *Davis*, TP 24,983; *Ford*, TP 23,973.

Moreover, the Commission is satisfied, based on its review of the record, that the ALJ's determinations that the Tenant failed to carry her burden of proof with respect to each of the alleged reductions in services, *see supra* at 20-21, is supported by substantial record evidence, including the testimony and exhibits that were submitted into evidence at the OAH hearing.¹¹ 14

reconsideration was harmless error because the Commission's standard of review on appeal is the same for both motions).

¹¹ For example, regarding the ice on the sidewalk of the Housing Accommodation, the ALJ supported his determination that the Tenant failed to prove the substantiality of this reduction with his findings that the reduction occurred for at most one (1) day. *See* Final Order at 4, 12; R. at 60, 68. The Commission observes that this finding corresponds to the uncontroverted testimony of the Tenant at the OAH hearing that the icy conditions occurred on the sidewalk of the Housing Accommodation on Tuesday, February 12, 2008, and that by the afternoon of the following day, the ice had melted and the sidewalk was merely wet. *See* Hearing CD (OAH Oct. 6, 2009) at 10:06-10:20.

Similarly, the Commission is satisfied that the ALJ's determination that the Tenant failed to prove the relevant time period that the Housing Provider failed to adequately clean the common areas is supported by the testimony at the OAH hearing. In particular, the Commission notes that the ALJ specifically asked the Tenant to specify a date that the problem began, and the Tenant replied that she couldn't specify a particular date. *See* Hearing CD (OAH Oct. 9, 2009) at 10:52-11:03.

The ALJ's finding that the Tenant failed to prove the duration of the reduction related to the functioning of the exit signs is supported by the Commission's review of the record. The Tenant testified that on April 5, 2009, the electricity went out in the Housing Accommodation, and she noted that "there was no emergency light glowing at the back door." *See* Hearing CD (OAH Oct. 9, 2009) at 11:07-11:08. The Commission's review of the record reveals no testimony regarding the duration of this condition. *See id.*

The Commission notes that the ALJ's determination that the only evidence offered by the Tenant regarding the duration of the flooding in the hallway outside of her unit was that it lasted "several days," is supported by the Commission's review of the evidence at the OAH hearing. *See* Hearing CD (OAH Oct. 9, 2009) at 10:51-10:52 (in response to the ALJ's question regarding how long the flooding lasted, the Tenant answered "several days").

Finally, the Commission notes that the Tenant's uncontroverted testimony supports the ALJ's determination that the alleged failure to provide pest control services on October 14, 2008, did not result in an infestation of rodents or insects. *Hearing CD (OAH Oct. 9, 2009) at 10:45.*

DCMR § 3807.1. *See generally* Hearing CD (OAH Oct. 9, 2009). Accordingly, based on the foregoing, the Commission determines that the ALJ's determinations regarding the Tenant's claims of substantial reductions in services and/or facilities were in accordance with the Act and supported by substantial record evidence, and thus the ALJ is affirmed on this issue. 14 DCMR § 3807.1.

B. Whether the ALJ erred in determining that the Tenant failed to prove her claims of retaliation, related to rent demand letters in November 2008, May 2009, June 2009, and July 2009.

The Tenant asserts on appeal that the ALJ erred in determining that she failed to prove her claims of retaliation, because the ALJ failed to consider certain record evidence, including evidence of the Tenant's repayment on November 22, 2008 of the \$50.00 that had been withheld from her November 2008 rent payment, in addition to four (4) letters demanding rent that the Tenant alleges had already been paid, dated May 5, 2009, May 18, 2009, June 16, 2009,¹² and July 10, 2009, respectively. *See* Notice of Appeal at 1 (citing PX 106, 117-18).

The relevant provision of the Act, governing claims of retaliation, provides as follows:

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

¹² The Commission notes that the Tenant cited a letter dated June 15, 2009 in her Notice of Appeal; however, the Commission's review of the record reveals that the letter from the Housing Provider to the tenant demanding rent in June, 2009, was dated June 16, 2009. *See* PX 118 at 2; R. at 100.

- (b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:
- a. 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;
 - b. 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;
 - c. 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;
 - d. Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
 - e. 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
 - f. Brought legal action against the housing provider.

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

The Commission has consistently explained that 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). *See, e.g., Jackson v. Peters*, RH-TP-07-28,898 (RHC Feb. 3, 2012); Smith,

RH-TP-07-28,961 at n.4. 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.¹³ *See, e.g., Smith v. Christian*, TP 27,661 (RHC Sept. 23, 2005) (upholding determination that housing provider failed to produce clear and convincing evidence that rent increase was not retaliatory where housing provider testified about increases expenses for the housing accommodation as a whole, but was unable to show that the tenant’s rent increase was proportional to the expenses attributable to her unit); *Hoskinson v. Solem*, TP 27,673 (RHC July 20, 2005) (explaining that clear and convincing evidence to rebut a presumption of retaliation must “extend beyond the defense that a law permitted the alleged retaliatory action” (quoting *Redman v. Graham*, TP 27,104 (RHC Apr. 30, 2005))); *Kornblum v. Charles E. Smith Residential Realty*, TP 26,155 (RHC Mar. 11, 2005) (affirming finding that housing provider rebutted the presumption of retaliation with clear and convincing evidence where housing provider testified that it cleaned up tenant’s belongings in the area outside of her storage unit because it presented a fire hazard, not in response to tenant’s letter objecting to a late fee charged to her account).

As stated previously, the Commission will uphold the ALJ’s decision where it is not based upon arbitrary action, capricious action, or an abuse of discretion, and is accordance with the provisions of the Act and supported by substantial evidence. 14 DCMR § 3807.1. The Commission has consistently stated that its role is not to “weigh the testimony and substitute

¹³ “Clear and convincing evidence” has been defined by the DCCA as “the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt.” *In re Estate of Frances Walker*, 890 A.2d 216, 223 (D.C. 2006); *In re K.A.*, 484 A.2d 992, 995 (D.C. 1984) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)); *Jackson*, RH-TP-07-28,898. It “is such evidence as would ‘produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.’” *Dawkins v. United States*, 535 A.2d 1383, 1384 (D.C. 1988) (citing *District of Columbia v. Hudson*, 404 A.2d 175, 178 (D.C. 1979)); *Jackson*, RH-TP-07-28,898.

ourselves for the trier of fact who heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony.” *See, e.g., Notsch v. Carmel Partners, LLC*, RH-TP-06-28,690 (RHC May 16, 2014); *Atchole*, RH-TP-10-29,891; *Kuratu*, RH-TP-07-28,985.

Based on its review of the record, the Commission determines that the evidence allegedly ignored by the ALJ is related to two separate and distinct incidents. The first incident arose when the Tenant’s withheld \$50 from her November, 2008 rent due to a failure to provide scheduled pest control services, and is related to the Tenant’s claim in the Notice of Appeal that the ALJ ignored evidence that she repaid the \$50 on November 22, 2008, discussed *infra* at 26-28. The second incident arose when the Housing Provider charged the Tenant \$50 for a failure to prepare her unit properly for scheduled pest control services on February 10, 2009, and is related to the Tenant’s claim in the Notice of Appeal that the ALJ ignored rent demand letters dated May 5, 2009, May 18, 2009, June 16, 2009 and July 10, 2009, respectively, discussed *infra* at 28-32.

1. Whether the ALJ erred by failing to consider the Tenant’s repayment of the \$50 that had been withheld from her November, 2008 rent payment.

The ALJ found that the Housing Provider sent the Tenant two letters, dated November 12, 2008, and November 17, 2008, respectively, demanding that the Tenant pay past due rent in the amount of \$50. *See* Final Order at 6; R. at 66 (citing PX 105). The ALJ determined that the Housing Provider’s November 2008 letters were sent to the Tenant within six (6) months of the Tenant complaining in writing about conditions that could constitute housing code violations, thus triggering the presumption of retaliation under D.C. OFFICIAL CODE § 42-3505.02(b). *See id.* at 16; R. at 56. Nevertheless, the ALJ found that the Housing Provider successfully rebutted the presumption of retaliation with clear and convincing evidence that the November 2008 letters

were not retaliatory. *See id.* (citing Lumpkins v. CSL Locksmith, LLC, 911 A.2d 418, 426 n.7 (D.C 2006)). The ALJ's finding was based on the following, as stated in the Final Order:

- (i) In October 2008, the [T]enant believed that the Housing Provider had failed to provide scheduled pest control services and without prior discussion or consent, deducted \$50 from her November 2008 rent payment for Housing Provider's alleged failure to service her unit.
- (ii) Tenant's rationale for deducting this amount was that it was identical to the fee that the Housing Provider imposed on tenants for failing to prepare their apartments for scheduled pest control treatments; however, Tenant did not establish any contractual or legal justification for her unilateral decision to pay less than the monthly rental that was then due.
- (iii) The Housing Provider, through its correspondence, sought only payment of the unpaid rent.
- (iv) The Housing Provider's owner testified credibly that he believes that his contractor treated Tenant's apartment at the time of the scheduled pest control services in October 2008.

Final Order at 16-17; R. at 55-56. The ALJ concluded that the Housing Provider sent the two November 2008 demand letters because the Tenant "unilaterally reduced her November rent," and because the Housing Provider believed that it was entitled to payment of the entire month's rent, and not for any retaliatory reason. *See id.* at 17; R. at 55.

Based on its review of the record, the Commission determines that the ALJ's conclusion that the Housing Provider rebutted the presumption of retaliation by clear and convincing evidence, by demonstrating that the November 2008 demand letters were an attempt to collect unpaid rent, and thus not retaliatory, was not arbitrary, capricious, or an abuse of discretion, and is supported by the record evidence. 14 DCMR § 3807.1. The Commission is satisfied that the ALJ appropriately applied the "clear and convincing" evidence standard to the record evidence in compliance with D.C. OFFICIAL CODE § 42-3505.02 (a)-(b), and that the evidence in the record

supports the ALJ's determination. *See, e.g.,* Smith v. Christian, TP 27,661; Hoskinson, TP 27,673; Kornblum v. Charles E. Smith Residential Realty, TP 26,155.

For example, the Tenant testified at the OAH hearing that she deducted \$50 from her November 2008 rent payment due to her belief that the Housing Provider had failed to provide scheduled pest control treatment in her unit. *See* Hearing CD (OAH Oct. 6, 2009) at 10:29. Additionally, the Tenant testified that she deducted the \$50 amount from her rent without informing the Housing Provider in advance that she would be withholding rent. *See id.* The Commission's review of the record reveals that the two November, 2008 letters from the Housing Provider indicate that the Housing Provider was requesting \$50 in unpaid rent: the same amount that the Tenant admitted she withheld from her November, 2008 rent payment. *See* PX 105 at 2; PX 106 at 3; R. at 80, 83. The Commission's review of the record also does not reveal any evidence that the Tenant's withholding of \$50 was involuntary, was not unilateral, or was in any way based upon her interpretation of any provision of the Act. *Id.*

Although the Tenant asserts on appeal that the ALJ failed to consider her subsequent payment of the \$50 on November 22, 2008, the Commission observes that the repayment occurred after the Housing Provider sent the November 2008 demand letters on November 12, 2008 and November 17, 2008, respectively, and therefore the Commission is satisfied that the repayment was not relevant to whether the November 2008 demand letters were retaliatory. *See* Notice of Appeal at 1; PX 105 at 2; PX 106 at 1-3; R. at 80-83. Thus, where the Commission's review of the record reveals that the ALJ's finding that the Housing Provider rebutted the presumption of retaliation by clear and convincing evidence is supported by the record and was not arbitrary, capricious or an abuse of discretion, the Commission affirms the ALJ on this issue. 14 DCMR § 3807.1. *See* WMATA, 926 A.2d at 147; Young, 865 A.2d at 540; Atchole, RH-TP-

10-29,891; Marguerite Corsetti Trust, RH-TP-06-28,207; Hago, RH-TP-08-11,552 & RH-TP-08-12,085; Turner, TP 27,014 at 11.

2. Whether the ALJ erred in failing to consider May 2009, June 2009, and July 2009 rent demand letters in regard to the Tenant's claim of retaliation.

The Tenant asserts on appeal that the ALJ erred in determining that she failed to prove her claims of retaliation, because the ALJ failed to consider four (4) letters demanding rent that the Tenant alleges had already been paid, dated May 5, 2009, May 18, 2009, June 16, 2009, and July 10, 2009, respectively.¹⁴ See Notice of Appeal at 1 (citing PX 106, 117-18).

The Commission's review of the record reveals that, as part of her testimony regarding the claim of retaliation, the Tenant offered into evidence four letters from the Housing Provider demanding unpaid rent in the amount of \$100 or \$50, respectively, as follows: (1) PX 115, May 5, 2009 Third Notice of Past Due Rent, sent from the Housing Provider to the Tenant demanding the payment of \$100; (2) PX 117, May 18, 2009, Notice to Pay Rent or Quit, from the Housing Provider to the Tenant demanding the payment of \$100; (3) PX 118, June 16, 2009, Notice to Pay Rent or Quit, from the Housing Provider to the Tenant demanding the payment of \$50; and (4) PX 116, July 10, 2009, Second Notice of Past Due Rent, sent from the Housing Provider to the Tenant demanding the payment of \$50. See R. at 94-102. The Commission observes that each of these four (4) letters was admitted into evidence by the ALJ at the OAH hearing. Hearing CD (OAH Oct. 6, 2009) at 11:31-11:34, 11:41-11:44.

The Commission's review of the record additionally reveals that the Housing Provider testified that the \$100 demanded from the Tenant in the May 5, 2009 and May 18, 2009 letters

¹⁴ The Commission notes that although both allegations of retaliation arise out of the provision of (or failure to provide) pest control services, the Tenant's allegation of retaliation related to the May 5, 2009, May 18, 2009, June 16, 2009 and July 10, 2009 rent demand letters is separate and distinct from the allegation of retaliation related to rent demand letters sent in November, 2008. See *supra* at 26-28.

consisted of a \$50 penalty for failing to prepare her unit for pest control treatment on February 10, 2009, and a \$50 late fee. Final Order at 18; R. at 54; Hearing CD (OAH Oct. 6, 2009) at 12:31-12:37. The Housing Provider later withdrew his demand for the \$50 late fee, and the June 16, 2009 and July 10, 2009 letters only demanded the \$50 penalty for the Tenant's failure to prepare her unit for pest control treatment. Final Order at 18-19; R. at 53-54; Hearing CD (OAH Oct. 6, 2009) at 12:31-12:37. The Tenant contended that she did not owe the Housing Provider anything for failing to prepare her unit for pest control treatment, because the Housing Provider had not informed her in advance that her unit was scheduled for pest control treatment on February 10, 2009. Hearing CD (OAH Oct. 6, 2009) at 10:35-10:44.

The Commission notes that the ALJ made the following findings of fact in the Final Order related to the May, June, and July rent demand letters:

11 ...

- On May 5, 2009, Housing Provider sent Tenant a third notice of past due rent demanding payment of the \$100 and again advising of possible eviction. PX 115.

...

- Thereafter, Housing Provider sent Tenant monthly notices of past due rent in the reduced amount of \$50, for failing to prepare her apartment for the pest control treatment. PX 116 and PX 118.

...

12. Tenant testified that she believed that the Housing Provider's attempts to collect the \$50 through its letters sent on April 6, 2009, April 20, 2009, and May 5, 2009, were designed to intimidate her and to retaliate against her for her refusal to pay the \$50 penalty. Tenant also claimed that Housing Provider's act of clearing her kitchen cabinets and moving the contents to her countertops "with deliberate chaotic intent" was intended to harass her so that she would move out of the Housing Accommodation.

Final Order at 8; R. at 64 (emphasis added). The Commission's review of the Final Order reveals that the ALJ did not make any findings of fact regarding the May 18, 2009 letter demanding the payment of \$100, nor did the ALJ make any conclusions of law addressing the May 5, 2009, May 18, 2009, June 16, 2009, or July 10, 2009 letters within the specific context of the Tenant's claim of retaliation. Final Order at 7-8, 14-19; R. at 53-58, 64-65.

As stated previously, the Commission's standard of review is contained at 14 DCMR § 3807.1, and provides that the Commission shall reverse an ALJ's decision which the Commission finds to contain conclusions of law not in accordance with the Act, or findings of fact unsupported by substantial evidence.

The DCAPA contains the following requirements for an ALJ's final order:

Every decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by an in accordance with the reliable, probative, and substantial evidence. A copy of the decision and order accompanying findings and conclusions shall be given by the Mayor or the agency, as the case may be, to each party or to his attorney of record.

D.C. OFFICIAL CODE § 2-509(e).

Based on its review of the record, the Commission determines that the Final Order was not in accordance with the DCAPA, because the ALJ failed to make findings of fact and conclusions of law on each contested issue, namely, whether the letters from the Housing Provider to the Tenant dated May 5, 2009, May 18, 2009, June 16, 2009, or July 10, 2009 constituted retaliatory action as claimed by the Tenant because of their alleged intimidation or harassment of the Tenant for failure to pay a \$50 penalty for the Tenant's failure to prepare her

unit for pest control treatment.¹⁵ *See id.*; Final Order at 7-8, 14-19; R. at 53-58, 64-65. Where the ALJ fails to demonstrate a full and reasoned consideration of all the material facts and issues in a case, the Commission is unable to perform its review function. 14 DCMR § 3807.1. *See, e.g., Butler-Truesdale v. Aimco Props., LLC*, 954 A.2d 1170, 1171 (D.C. 2008) (“When an agency has failed to consider and resolve each contested issue of material fact, we have remanded the case back to the agency for further proceedings”); *Branson v. D.C. Dep’t of Emp’t Servs.*, 801 A.2d 975, 979 (D.C. 2002) (explaining that the DCCA cannot “assume that an issue has been considered . . . when there is no discernible evidence that it has.” (quoting *Washington Times v. D.C. Dep’t of Emp’t Servs.*, 724 A.2d 1212, 1221 (D.C. 1999))). *See also Parsons v. D.C. Bd. of Zoning Adjustment*, 61 A.3d 650, 654 (D.C. 2013) (Schwelb, J., concurring) (stating the DCCA can only perform its review function where an agency “discloses the basis of its order by an articulation with reasonable clarity of its reasons for the decision.” (quoting *Dietrich v. D.C. Bd. of Zoning Adjustment*, 293 A.2d 470,473 (D.C. 1972))).

Therefore, in accordance with the foregoing, the Commission remands this issue to the ALJ for further findings of fact and conclusions of law regarding whether the letters from the Housing Provider to the Tenant dated May 5, 2009, May 18, 2009, June 16, 2009, or July 10, 2009 constituted retaliatory action, in accordance with D.C. OFFICIAL CODE § 42-3505.02. D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 3807.1. *See, e.g., Parsons*, 61 A.3d at 654; *Butler-Truesdale*, 954 A.2d at 1171; *Branson*, 801 A.2d at 979. The Commission instructs the ALJ to first consider whether the Tenant raised a presumption of retaliation, and, if so, to next consider

¹⁵ As part of this claim by the Tenant, the Commission also notes that the ALJ failed to address the Tenant’s contention that she did not owe the Housing Provider any fee for failing to prepare her unit for pest control treatment, because the Housing Provider had not informed her in advance that her unit was scheduled for pest control treatment on February 10, 2009. *See supra* at 30.

whether the Housing Provider rebutted the presumption of retaliation by clear and convincing evidence. D.C. OFFICIAL CODE § 42-3505.02.

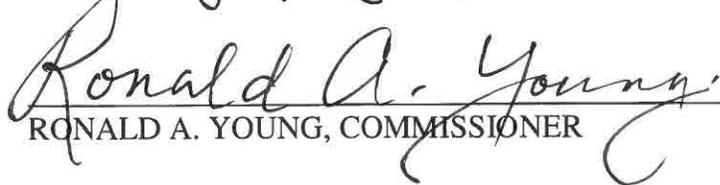
IV. CONCLUSION

The Commission remands to the ALJ for further findings of fact and conclusions of law regarding whether the letters from the Housing Provider to the Tenant dated May 5, 2009, May 18, 2009, June 16, 2009, or July 10, 2009 constituted retaliatory action, in accordance with D.C. OFFICIAL CODE § 42-3505.02. The ALJ is also requested to make findings of fact and any conclusions of law regarding the Tenant's claim that she did not owe the Housing Provider any fee for failing to prepare her unit for pest control treatment, because the Housing Provider had not provided her prior notice of the date on which pest control treatment had been scheduled for her unit. The ALJ is affirmed on all other issues.

SO ORDERED



PETER B. SZEGEDY-MASZAK, CHAIRMAN



RONALD A. YOUNG, 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:

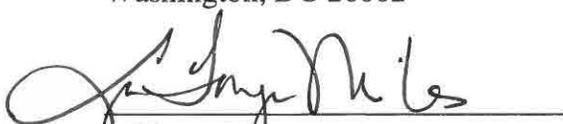
D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
430 E Street, N.W.
Washington, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in RH-TP-09-29,590 was served by first-class mail, postage prepaid, this **19th day of August, 2014**, to:

Caroline C. Karpinski
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Washington, DC 20002-5383

Evolve Property Management
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LaTonya Miles
Clerk of Court
(202) 442-8949