

DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-09-29,645

In re: 2426 19th Street, NW, Unit 301

Ward One (1)

CARMEN SALAZAR

Tenant/Appellant

v.

CAROL SUE VARNER & FAIRBAIRN PROPERTIES, LLC

Housing Providers/Appellees

DECISION AND ORDER

June 16, 2015

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

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

I. PROCEDURAL HISTORY

On July 8, 2009 Tenant/Appellant Carmen Salazar (Tenant), resident of 2426 19th St., NW, Unit 301 (Housing Accommodation), filed Tenant Petition RH-TP-09-29,645 (Tenant Petition) with RAD against Carol Sue Varner and Fairbairn Properties, LLC (collectively, Housing Provider). Tenant Petition at 1; Record for RH-TP-09-29,645 (R.) at 11. The Tenant Petition raised the following claims against the Housing Provider:

1. The building where my/our unit is located is not properly registered with the RAD.
2. The rent increase was made while my/our units were not in substantial compliance with DC Housing Regulations.
3. Services and/or facilities provided as part of rent and/or tenancy have been substantially reduced.
4. The landlord (housing provider), manager, or other agent has taken retaliatory action against me/us in violation of Section 502 of the Act.

Id. at 2; R. at 10.

On September 22, 2009, the Housing Provider filed a Motion to Dismiss (Housing Provider's Motion to Dismiss) the Tenant Petition, asserting that the Tenant Petition was barred in its entirety based on the doctrines of "*law of the case, estoppel and res judicata.*" Housing Provider's Motion to Dismiss at 1; R. at 34. A hearing was held on the Housing Provider's Motion to Dismiss on December 18, 2009, and Administrative Law Judge Erika Pierson (ALJ) issued an Order on February 3, 2010 granting in part and denying in part the Housing Provider's Motion to Dismiss. Salazar v. Varner, RH-TP-09-29,645 (OAH Feb. 3, 2010) (Order on Motion to Dismiss) at 1-8; R. at 242-49. The ALJ determined that all of the Tenant's claims arising or occurring prior to January 16, 2009 were barred by the doctrine of *res judicata*, based on a case in the Landlord and Tenant Branch of D.C. Superior Court (2008-

LTB-031200) between the same parties as the instant case. *Id.* at 4-7; R. at 243-46. However, the ALJ concluded that the Tenant could pursue claims arising out of her Tenant Petition during the time period between January 16, 2009, and July 8, 2009, the date that she filed the Tenant Petition.² *Id.* at 7; R. at 243.

A status conference was held on September 7, 2010, and the ALJ subsequently issued a scheduling order on September 8, 2010, with the following instructions to the Tenant:

No later than October 7, 2010, Tenant shall file either (1) an amended petition, setting forth with specificity, the allegations of improper registration, retaliation, housing code violations, and/or reductions in services in [sic] facilities that occurred after January 16, 2009; (2) a motion to substitute or add additional parties pursuant to OAH Rule 2925, accompanied by an amended petition;³ or (3) a motion to dismiss the pending tenant petition. **Failure to comply with this order will result in the tenant petition being dismissed for failure to prosecute.**

Salazar v. Varner, RH-TP-09-29,645 (OAH Sept. 8, 2010) at 1-2; R. at 279-80 (Scheduling Order).

On October 12, 2010, the Housing Provider filed a second Motion to Dismiss the Tenant Petition (Second Motion to Dismiss), based on the Tenant's failure to comply with the ALJ's September 8, 2010 Scheduling Order. Second Motion to Dismiss at 1-2; R. at 303-304. On October 21, 2010, the ALJ issued a Final Order on the Tenant Petition. Carmen Salazar v. Carol Sue Varner, Exectrix [sic], Fairbairn Properties, LLC, RH-TP-09-29,645 (OAH Oct. 21, 2010) (Final Order). R. at 307-312. The ALJ dismissed the Tenant Petition, stating that the Tenant failed to amend the Tenant Petition to include specific allegations that fell within the

² The ALJ also found that the Tenant had vacated the Housing Accommodation on June 22, 2009. Salazar, RH-TP-09-29,645 (OAH Feb. 3, 2010) at 7; R. at 243.

³ The ALJ stated that at the status conference the Tenant requested additional time to determine whether the proper party was named as the Housing Provider. Salazar v. Varner, RH-TP-09-29,645 (OAH Sept. 8, 2010) at 1; R. at 280.

applicable time period, January 16, 2009 through June 22, 2009, and that the Tenant failed to identify a “viable housing provider” after being ordered to do so. Final Order at 5-6; R. at 307-308.

On November 5, 2010, the Tenant filed “Tenants’ [sic] Motion to Reconsider” (Motion to Reconsider). R. 313-83. On November 18, 2010, the Housing Provider filed: (1) “Housing Provider/Respondent’s Opposition to Tenants’ [sic] Motion to Reconsider” (Opposition to Reconsideration), and (2) “Housing Provider/Respondent’s Renewed Motion for Sanctions Against Aroon Roy Padharia, Esq. and to Show Cause Why Said Counsel Should Not Be Held in Contempt of Court and/or Referred to Bar Counsel for Subornation of Perjury” (Motion for Sanctions). R. at 384-92. On December 13, 2010, the Tenant filed a “Response to Housing Provider’s Motion for Sanctions and to Show Cause Why Counsel Should Not Be Held in Contempt of Court and/or Referred to Bar Counsel for Subornation of Perjury.” R. at 400-405.

On August 16, 2011, the ALJ issued a written Order Denying Motion for Reconsideration and Granting Attorney Fees, in which she combined her consideration of both the Tenant’s Motion to Reconsider, and the Housing Provider’s Motion for Sanctions. Salazar v. Varner, RH-TP-09-29,645 (OAH Aug. 16, 2011) (August 16, 2011 Order); R. at 406-15. On August 29, 2011, the Housing Provider filed “Housing Provider/Respondent’s Itemization and Affidavit regarding Attorney’s Fees.” R. at 419-23.

On August 29, 2011, the Tenant filed a notice of appeal (First Notice of Appeal) with the Commission stating the following issues:

1. The Honorable Judge has erred in not applying the evidence to the fact of retaliation.
2. The Honorable Judge erred in denying my due process rights.

3. The Honorable Judge erred in finding that [A]ppellant's motions are frivolous.
4. The Honorable Court erred in granting Attorney's Fees.

First Notice of Appeal at 1.

On August 31, 2011, the ALJ issued an Amended Order Denying Motion for Reconsideration and Granting Attorney's Fees which amended the August 16, 2011 Order solely to include a statement of the parties' appeal rights. Salazar v. Varner, RH-TP-09-29,645 (OAH Aug. 31, 2011) (Order Denying Reconsideration & Granting Attorney's Fees);⁴ R. at 425-35. The ALJ denied the Housing Provider's Motion for Sanctions, stating that while Tenant's counsel "continues to walk a very fine line of legal ethics," the ALJ was unable to identify sufficient information in the documents filed by Tenant's counsel "to make a finding that he committed fraud upon this court and therefore I decline to issue sanctions." Order Denying Reconsideration & Granting Attorney's Fees at 6; R. at 430.

The ALJ also stated the following regarding the Housing Provider's entitlement to an award of attorney's fees:

A presumption of entitlement to attorney fees is created by a prevailing tenant in a rental housing case. A prevailing housing provider however, is not entitled to the same presumption and is entitled to attorney fees only if the court finds that the litigation of the tenant was "frivolous, unreasonable, or without foundation." 14 DCMR [§] 3825; *Tenants of 500 23rd Street, NW v. D.C. Rental Hous. Comm'n*, 617 A.2d 486, 488-89 (D.C. 1992) (holding that because housing provider litigation fails to serve the goals of the attorney's fee provision of the Act, housing provider's [sic] do not enjoy a presumptive entitlement to attorney's fee awards). However, because the legislature did intend to protect housing providers from burdensome litigation having no legal or factual basis, the District of Columbia Court of Appeals has held that attorney fees may be

⁴ Because the August 31, 2011 Denying Reconsideration and Granting Attorney's Fees replaced the August 16, 2011 Order, the Commission will only make reference henceforth to the August 31, 2011 Order Denying Reconsideration and Granting Attorney's Fees.

assessed in favor of a prevailing housing provider when the litigation of tenants is “frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.” *Id.* at 489 [(citing *Christiansburg Garment Co. v. EEOC* 434 U.S. 412 (1978) (analyzing legislative history of counsel fee provision of Title VII of Civil Rights Act of 1964)[)].

In applying fee-shifting statutes to the defending party, the District of Columbia Court of Appeals has adopted the federal standard applied in *Christian[s]burg v. [sic] Garment Co. v. EEOC*, 434 U.S. 412 (*Christian[s]burg* Standard). Under the *Christian[s]burg* Standard, a housing provider is entitled to such fees only if he is a prevailing party and the tenant petition was “frivolous, unreasonable, or without foundation” or the tenant continued to litigate after it clearly became so.”[sic] *Tenants of 500 23rd Street, NW, [sic] v. D.C. Rental Hous. Comm’n [sic]*, 617 A.2d at 490 [(citing *Christiansburg [sic]*, 434 U.S. at 422[)].

I find that Tenant’s petition and continuing filing of motions were frivolous, unreasonable and without foundation. Tenant filed a tenant petition after losing proceedings in the landlord/tenant branch and attempted to litigate the same issues that were adjudicated in the landlord/tenant case. While this alone, [sic] did not make the petition frivolous, Tenant continued to delay the proceeding with continuances after I dismissed her allegations based on the doctrine of *res judicata*. Tenant named Carol Sue Varner as the Respondent/Housing Provider in this case, knowing that she was not the proper party. Tenant had also previously filed a tenant petition wherein she named counsel for Housing Provider, Mark Raddatz, as the Respondent/Housing Provider. Tenant failed to appear for the hearing on that case wherein Mr. Raddatz raised the issue that he was not the proper party. The petition was dismissed with prejudice for Tenant’s failure to appear. Tenant appealed that decision to the Rental Housing Commission where Mr. Raddatz presented evidence that he was not the proper party. The Commission held that Mr. Raddatz was not the property party, but modified the Final order of this administrative court to a dismissal *without prejudice* to allow Tenant the opportunity to file a new petition naming the proper party.⁵ *Salazar v. Raddatz Law Firm*, TP 29,451 (RHC Sept. 4, 2009) [sic].

Tenant, in fact, filed her new petition two months before the Rental Housing Commission issued its decision. A new petition was filed naming Carol Sue Varner, again the incorrect respondent. In September 2010, Tenant finally admitted that Carol Sue Varner was not a Housing Provider as defined in the Act and she was dismissed as a party, leaving no Respondent named. Yet, in a motion for reconsideration, Tenant argues that Ms. Varner retaliated against Tenant in violation of the Rental Housing Act. Tenant was given 30 days to

⁵ The Commission’s review of its decision in Salazar reveals that the tenant petition at issue in that case was dismissed by the Commission *with prejudice*. Salazar, TP 29,451 at 5.

amend the petition with the name of a housing provider and failed to do so resulting in the petition being dismissed. Tenant then sought to reinstate the petition, although she still has identified not [sic] housing provider. Based on the continued frivolous filings of Tenant, I am granting Housing Provider's motion for attorney fees as a prevailing party. Housing Provider shall file an invoice for his fees within 30 days of the mailing of this Order. Housing Provider's filings should be consistent with the requirements of 14 DCMR [§§] 3800 *et. [sic] seq.*

Order Denying Reconsideration & Granting Attorney's Fees at 6-8; R. at 408-410 (emphasis added).

On September 12, 2011, the Tenant filed a second notice of appeal (Second Notice of Appeal), stating the following:

1. The DC Rental Housing Act of 1985 (the Act) provides that tenants have a right to habitable accommodations. I had been a good tenant since 1973, but the housing provider created an incredibly complex situation in order to deter me from exercising my tenant rights. I did my best to explain this situation to the court because I needed to stand up for my rights. The court erred when it labeled my action "frivolous."
2. Under the Act retaliatory action is prohibited when a tenant exercises her tenant rights. The housing provider evicted me when I was less than one month behind in my rent, a fact even the judge noted at the Landlord Tenant Branch of the Superior Court where the housing provider had filed a complaint for possession, and substantial housing code violations still existed. Therefore, the court erred when it failed to recognize the egregious behavior of the housing provider. At best, its failure is a lack of diligent application of the facts. At worst, it is judicial bias.
3. Furthermore, under DC Code §[]42-3505.01 only the housing provider is entitled to possession of the property:
 - a. After Mr. Fairbairn passed away, his companies, of which he was the sole owner, ceased to exist, and Appellee Varner could no long[er] claim to be its property manager. Therefore, Appellee had no standing to file the complaint for possession. The court erred in failing to apply these facts to the issues of retaliation, and its application of *res judicata* in dismissing the petition as without merit.

- b. The building was not properly registered with the Rental Accommodations Division of the Department of Housing and Community Development.
4. The Court of Appeals has ruled in *Wallasey Tenants' Association, Inc. et al v. Carol Sue Varner* (Nos. 03-CV-763 & 03-CV-1037) that an award of attorney's fees is improper when the prevailing party is the defendant. The OAH order directly contradicted the Court of Appeals' decision when it awarded attorney fees to the appellee. The court erred.⁶

Second Notice of Appeal at 1-2.

On March 9, 2012, the ALJ issued an Order Granting Housing Provider's Motion for Attorney's Fees, awarding the Housing Provider \$8,880 in attorney's fees. Salazar v. Fairbairn Props., LLC, RH-TP-09-29,645 (OAH Mar. 9, 2012) (March 9, 2012 Order). The Tenant did not file a notice of appeal following the issuance of the March 9, 2012 Order.

The Commission held a hearing in this matter on July 19, 2012.

II. PRELIMINARY ISSUES

⁶ The Tenant asserts in the First and Second Notices of Appeal, respectively, that the ALJ erred in awarding attorney's fees because, under *Wallasey*, 892 A.2d at 1135, the District of Columbia Court of Appeals (DCCA) determined that "an award of attorney's fees is improper when the prevailing party is the defendant." Second Notice of Appeal at 2; *see also* First Notice of Appeal at 1. The Commission is satisfied that the decision in *Wallasey*, 892 A.2d 1135 is not applicable to this case.

The DCCA, in *Wallasey*, 892 A.2d 1135 addressed an award of attorney's fees under the Tenant Opportunity to Purchase Act (TOPA). The text of the provision at issue in *Wallasey*, 892 A.2d 1135 is as follows: "An aggrieved owner, tenant, or tenant organization may seek enforcement of any right or provision under this chapter through a civil action in law or equity, and, upon prevailing, may seek an award of costs and reasonable attorney fees" D.C. OFFICIAL CODE § 42-3405.03.

Contrary to the Tenant's assertion and under well-established Commission precedent, the Commission only retains jurisdiction to address contested issues under TOPA when the statutory provision at issue under TOPA makes a direct, specific cross-reference to the Act as in the case, for example, of the adjustment of rent levels for qualified elderly tenants under D.C. OFFICIAL CODE § 42-3402.08(b) ("*Rent level* – Any owner of a converted unit shall not charge an elderly tenant rent in excess of the lawful rent at the time of request for a tenant election for purposes of conversion plus annual increases on the basis authorized under the Rental Housing Act.") (emphasis added). *See, e.g., Bower v. Chasleton Assocs.*, TP 27,838 (RHC Mar. 27, 2014); *Taylor v. Bain*, TP 28,071 (RHC June 28, 2005); *Sendar v. Burke*, TP 20,772 (RHC Apr. 6, 1988); *Segal v. Snider Bros. Prop. Mgmt., Inc.*, TP 20,335 (RHC Mar. 11, 1988). The attorney's fee provision in TOPA does not contain any specific reference to the Act. *See* D.C. OFFICIAL CODE § 42-3405.03.

A. Timeliness of the Notices of Appeal

Under the Act and its regulations, the time limit for filing an appeal with the Commission is mandatory and jurisdictional. *See, e.g., Gelman Mgmt. Co. v. Campbell*, RH-TP-09-29,715 (RHC Mar. 11, 2015); *Allen v. L.C. City Vista LP*, RH-TP-12-30,181 (RHC Apr. 29, 2014); *Kuratu v. Ahmed, Inc.*, RH-TP-07-28,985 (RHC Feb. 28, 2014); *Shipe v. Carter*, RH-TP-08-29,411 (RHC Sept. 18, 2012). Under 1 DCMR § 2937.1 (2004), a party has ten (10) days from the issuance of a final decision, not including intervening holidays or weekends, plus five (5) days if the decision was mailed, to file a motion for reconsideration with OAH. 1 DCMR §§ 2811.3, 2811.5 & 2937.1.⁷ Alternatively, under 14 DCMR § 3802.2, a party has ten (10) days from the issuance of a final decision, not including intervening holidays or weekends, plus three (3) days if the decision was mailed to file an appeal with the Commission. 14 DCMR §§ 3802.2 & 3816.3.⁸ If the party files a motion for reconsideration

⁷ 1 DCMR § 2811.3 provides the following, in relevant part: “. . . When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturday, Sundays and legal holidays shall be excluded from the computation”

1 DCMR § 2811.5 provides the following:

Whenever a party has the right or the obligation to do some act within a prescribed period after service of an order or other paper upon the party, and the order or other paper is served by United States mail or third party commercial carrier, five (5) days shall be added to the prescribed period, unless a statute provides otherwise.

1 DCMR § 2937.1 provides the following: “Any party served with a final order may file a motion for reconsideration within ten (10) days of service of that decision.”

⁸ Similarly to the time provisions governing a motion for reconsideration before OAH, the regulations provide that a party has 10 days, not including intervening holidays or weekends, plus three (3) days if the decision was mailed, to file a notice of appeal with the Commission. 14 DCMR §§ 3802.2 & 3816.3.

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

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

with OAH, an ALJ has thirty (30) days to decide the motion, otherwise the motion is denied by operation of law. 1 DCMR § 2937.4-.5.⁹ The time period for filing an appeal with the Commission does not begin to run until the ALJ decides the motion for reconsideration within the thirty (30) day time period, or until such motion is denied by operation of law. 1 DCMR § 2937.6.¹⁰

The Commission's review of the record in this case reveals that the Final Order was issued on October 21, 2010, and was served on the parties by mail. Final Order at 1, 8; R. at 305, 313. Therefore, in accordance with the regulations, the parties had ten (10) days, excluding weekends and holidays, plus five (5) days for mailing, or until November 12, 2010 to file a motion for reconsideration with OAH, or, in the alternative, ten (10) days, excluding weekends and holidays, plus three (3) days for mailing, or until November 9, 2010, to file an appeal with the Commission. 1 DCMR §§ 2811.3, 2811.5 & 2937.1; 14 DCMR §§ 3802.2 & 3816.3. The Tenant filed her Motion to Reconsider on November 5, 2010, within the time period prescribed by the regulations. 1 DCMR § 2937.1; Motion to Reconsider at 1; R. at 383. Thereafter, the ALJ had thirty (30) days, plus five (5) days for mailing, or until December 10, 2010 to act on the Motion to Reconsider, otherwise the motion would be considered denied by operation of law. 1 DCMR § 2937.4-.5.

⁹ 1 DCMR § 2937.4 provides the following: "A motion for reconsideration shall be decided by the Administrative Law Judge within thirty (30) days of its filing."

1 DCMR § 2937.5 provides the following: "If an Administrative Law Judge fails to act upon a motion for reconsideration within the time limit established in section 2937.4, the motion shall be denied by operation of law."

¹⁰ 1 DCMR § 2937.6 provides the following: "If a timely motion for reconsideration of a final order is filed, the time to appeal shall not begin to run until the motion is decided, or denied by operation of law."

The Commission observes that the ALJ failed to take any action on the Motion to Reconsider prior to December 10, 2010, and thus it was denied by operation of law at the close of business on December 10, 2010 under 1 DCMR § 2937.5.¹¹ The ALJ's Order Denying Reconsideration & Granting Attorney's Fees was dated August 31, 2011, more than eight (8) months after the Motion to Reconsider was denied by operation of law under the regulations. 1 DCMR § 2937.4-.5. Therefore, the Commission determines that it was improper for the ALJ to address the Tenant's Motion to Reconsider in the Order Denying Reconsideration & Granting Attorney's Fees, because the Motion to Reconsider had already been denied by operation of law. *Id.*

Because the Motion to Reconsider was denied by operation of law on December 10, 2010, the parties had until December 30, 2010 to file a notice of appeal of the Final Order with the Commission. 1 DCMR § 2937.1; 14 DCMR §§ 3802.2 & 3816.3. The Tenant's First Notice of Appeal was filed on August 29, 2011; her Second Notice of Appeal was filed on September 12, 2011. The Commission determines, based on its review of the record, that neither the First Notice of Appeal, nor the Second Notice of Appeal, were timely with respect to the Final Order. 14 DCMR § 3802.2. Accordingly, the Commission lacks jurisdiction over any allegations of error related to the Final Order, and dismisses issues one (1) through (3) in the First Notice of Appeal, recited *supra* at 4-5, and issues one (1) through (3) in the Second Notice of Appeal, recited *supra* at 7-8, which the Commission in its discretion determines raise

¹¹ The Commission notes that it lacks jurisdiction to hear appeals from the denial of a motion for reconsideration. *See, e.g. Dreyfuss Mgmt., LLC v. Beckford*, RH-TP-07-28,895 (RHC Sept. 27, 2013) (citing *Totz v. D.C. Rental Hous. Comm'n*, 474 A.2d 827, 828 (D.C. 1984)); *Dorchester House Assocs., LLC v. Tenants of 2480 16th St., NW*, RH-SF-09-20,098 (RHC Sept. 18, 2012); *Washington v. A&A Marbury, LLC*, RH-TP-11-30,151 (RHC Dec. 27, 2012) at n.3; *cf.* 14 DCMR § 4013.3 (“[T]he denial of a motion for reconsideration shall not be subject to reconsideration or appeal.”)

allegations of error solely related to the Final Order. *See* Allen, RH-TP-12-30,181; Kuratu, RH-TP-07-28,985; Shipe, RH-TP-08-29,411.

However, the Commission observes issue four (4) in both the First Notice of Appeal and Second Notice of Appeal, respectively, raises an allegation of error regarding the ALJ's award of attorney's fees to the Housing Provider, which was necessarily not addressed in the Final Order, because a request for attorney's fees under the OAH rules is only required to be made under 1 DCMR § 2941.1 after the issuance and service of the Final Order.¹² *See infra* at 13-14. The Commission's review of the record reveals that the First Notice of Appeal and the Second Notice of Appeal were each timely with respect to the ALJ's determination that the Housing Provider was entitled to attorney's fees, since the First Notice of Appeal was filed within ten (10) days after the issuance of the August 16, 2011 Order, and the Second Notice of Appeal was filed within ten (10) days after the issuance of the Order Denying Reconsideration & Granting Attorney's Fees.¹³ 1 DCMR § 2937.1; 14 DCMR § 3802.2 & 3816.3; *see* Prime v. D.C. Dep't of Pub. Works, 955 A 2d 178 (D.C. 2008) (noting that "[a]dministrative tribunals 'must be, and are, given discretion in the procedural decisions made in carrying out their statutory mandate.'") (quoting Ammerman v. D.C. Rental Accommodations Comm'n, 375 A.2d 1060, 1063 (D.C. 1977)); Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC May 22, 2014); KMG Mgmt., LLC v. Richardson, RH-TP-12-30,230 (RHC Jan. 28, 2014).

¹² The Commission notes that, unlike a motion for reconsideration, the regulations do not provide that a motion for attorney's fees may be denied by operation of law. *Compare* 1 DCMR § 2937.5, *with* 1 DCMR § 2941 (recited *infra* at n.15). Therefore, unlike the Motion to Reconsider, *see supra* at 11, the Commission is satisfied that it was permissible for the ALJ to address the request for attorney's fees in the August 31, 2011 Order Denying Reconsideration & Granting Attorney's Fees.

¹³ *See supra* at n.4.

B. Timeliness of the Motion for Attorney's Fees

The Commission notes that, although the Tenant has appealed the merits of the ALJ's determination that the Housing Provider was entitled to an award of attorney's fees, the Commission raises procedural irregularities surrounding the timeliness of the request for attorney's fees as a preliminary matter, under the "plain error" standard. 14 DCMR § 3807.4 ("[R]eview by the Commission shall be limited to the issues raised in the notice of appeal; [p]rovided, that the Commission may correct plain error."); *see, e.g., Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n*, 642 A.2d 1282, 1286 (D.C. 1994); *Doyle v. Pinnacle Realty Mgmt.*, TP 27,067 (RHC Mar. 10, 2015); *Gelman Mgmt. Co. v. Campbell*, RH-TP-09-29,715 (RHC Dec. 23, 2013); *Munonye v. Hercules Real Estate Servs.*, RH-TP-07-29,164 (RHC July 7, 2011).

The Commission's review of an ALJ's decision is governed by 14 DCMR § 3807.1, which provides the following:

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

Under the Act, an ALJ may award "reasonable attorney's fees to the prevailing party" in a tenant petition case. D.C. OFFICIAL CODE § 42-3509.02 (2001).¹⁴ OAH's regulations governing attorney's fees in rental housing cases further specify that a motion for attorney's

¹⁴ D.C. Official Code § 42-3509.02 provides the following: "[t]he Rent Administrator, Rental Housing Commission, or a court of competent jurisdiction may award reasonable attorney's fees to the prevailing party in any action under this chapter, except actions for eviction authorized under § 42-3505.01."

fees must be filed within ten (10) days of service of the Final Order. 1 DCMR § 2941.1; *see also* 1 DCMR § 2941.2; 14 DCMR § 4019.1.¹⁵

Although the time period for filing a motion for attorney’s fees is not “mandatory and jurisdictional” like the time period for filing a notice of appeal, the DCCA has recognized nevertheless that an untimely motion for attorney’s fees may be dismissed. District of Columbia v. Jackson, 878 A.2d 489 (D.C. 2005); Breiner v. Daka, Inc., 806 A.2d 180 (D.C. 2002); *see also*, Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Mar. 11, 2015); Allen, RH-TP-12-30,181; Kuratu, RH-TP-07-28,985. In Jackson, 878 A.2d 489, the DCCA reversed an award of attorney’s fees because of a party’s failure to comply with Super Ct. R. Civ. P. 54(d)(2)(B),¹⁶ which requires a request for attorney’s fees to be filed within 14 days of the entry of judgment. The DCCA noted that there was no evidence in the record that the party seeking fees filed its motion within the statutory time period, that she made any request to enlarge or extend the statutory time limit, that she made any claim such as “excusable neglect” to account for the failure to comply with the time limit, or even that the trial court *sua sponte* attempted to enlarge the time period. Jackson, 878 A.2d at 494. The DCCA concluded that “[w]hile the 14 day period is not jurisdictional, the failure to comply should be sufficient to deny the fee motion, absent some compelling showing of good cause.” *Id.* at 494 n.6

¹⁵ 1 DCMR § 2941.1 provides the following: “All motions for an award of attorney’s fees in rental housing cases shall be filed within ten (10) days of service of the Final Order.”

1 DCMR § 2941.2 provides the following: “The award of attorney’s fees shall be governed by 14 DCMR 4019.”

According to 14 DCMR § 4019.1: “All motions for an award of attorney’s fees shall be filed within ten (10) days after the final decision or order of the Rent administrator is issued.”

¹⁶ Super Ct. R. Civ. P. 54(d)(2)(B) is comparable to the OAH rule providing a time limit to file a motion for attorney’s fees and states, in relevant part, as follows: “[u]nless otherwise provided by statute or order of the Court, the motion must be filed and served no later than 14 days after entry of judgment”

(emphasis added) (quoting 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 54.151 [1] (3d ed. 2000)); *see also* Breiner, 806 A.2d at 185-86 (noting that excusable neglect is permissible ground for delaying filing of motion for attorney's fees under Super Ct. R. Civ. P. 54(d)(2)(B) but requires the court to consider prejudice to the parties, the reasons for delay, the amount and nature of any damage award, and the promotion of the public interest by a fee award).

In reversing the award of attorney's fees, the DCCA cited a number of reasons for requiring the timely filing of motions for attorney's fees including: (1) giving an opposing party sufficient notice of a fee claim before the time for appeal has lapsed; (2) affording a court the opportunity to resolve fee disputes shortly after trial "while the services provided are freshly in mind;" (3) furthering judicial efficiency by clarifying for the parties and the court the contested legal issues "relevant to entitlement to fees that need to be decided as part of the underlying case;" and (4) deterring a party from "pursuing an appeal of questionable merit that might add to the fees eventually awarded." Jackson, 878 A.2d at 492-93.

The Final Order in this case was issued on October 21, 2010; thereafter, the parties had ten (10) days, not including intervening holidays or weekends, plus five (5) days where the Final Order was served by mail, or until November 12, 2010, to file a motion for attorney's fees. 1 DCMR §§ 2811.5 & 2941.2. The Commission's review of the record in this case reveals only one, even arguable request for attorney's fees by the Housing Provider, contained in the Motion for Sanctions filed on November 18, 2010, a week after the deadline for filing a motion for attorney's fees had expired. Motion for Sanctions; R. at 385-89.

The Commission's review of the record in this case contains no evidence that the Housing Provider, the party seeking fees, filed its request for attorney's fees within the

requisite ten (10) day time period for filing under 1 DCMR § 2941.2, that it made any request to enlarge or extend the time limit, that it made any claim such as “excusable neglect” to account for the failure to comply with the time limit, or even that the ALJ *sua sponte* attempted to enlarge the time period for filing a motion for attorney’s fees. *See* Motion for Sanctions; *see also* Jackson, 878 A.2d at 491-94. The Commission notes that the Housing Provider’s failure to request attorney’s fees within the ten (10) day time period frustrated the purposes enumerated by the DCCA in Jackson, 878 A.2d at 491-94, for requiring a timely request for attorney’s fees, such as, for example, providing sufficient notice to the Tenant of a fee claim before the time for appeal has lapsed, and affording the ALJ an opportunity to resolve fee disputes shortly after trial. Jackson, 878 A.2d at 492-93; *see supra* at 15.

The Commission is satisfied based on its review of the record, that the substantial record evidence indicates that the request for attorney’s fees was untimely, and that the ALJ’s failure to dismiss the request for attorney’s fees as untimely was plain error and not in accordance with the regulations. 14 DCMR § 3807.1; Jackson, 878 A.2d at 491-94; *see* 1 DCMR § 2941.1; Breiner, 806 A.2d 180. The Commission thus reverses the ALJ’s award of attorney’s fees to the Housing Provider. 14 DCMR § 3807.1; Jackson, 878 A.2d at 491-94; *see* 1 DCMR § 2941.1; Breiner, 806 A.2d 180.

An additional, but not independent, legal ground for the Commission’s determination of error in the ALJ’s Order Denying Reconsideration & Granting Attorney’s Fees, relates to the request for attorney’s fees appearing solely in the Motion for Sanctions. Motion for Sanctions at 1-5; R. at 385-89. The text that is relevant to the request for attorney’s fees is stated as follows:

NOW COMES Respondent . . . in conformity with DCMR Title 1, § 2814 [2004], to hereby move for sanctions against [Tenant's counsel] hereby . . .

5. That . . . both [Tenant's counsel] and [Tenant] are continuing to commit fraud upon this Court and upon third parties . . . [b]y and through the exhibits to [Tenant's] Motion to Reconsider as well as the text thereof . . .

6. That . . . The only way that these documents could be tendered would be either, a) in a willfully blind attempt to further the agenda of his client in committing fraud on this Court . . . or b) via the submission of documents to this Court that he knows are false, suborning perjury by his client [the Tenant] in conjunction therewith . . .

7. That . . . the time has long past (sic) for [the Tenant and Tenant's counsel] to stop this costly, time-consuming, frivolous and fraudulent pattern of behavior. The relevant applicable [OAH] Rules are [1 DCMR §§ 2814.4-.5] . . .

8. That should this Court grant this Motion, the [Tenant's counsel] will provide this Court with an affidavit and/or bill of costs, within seven (7) days from the date of an Order, for expenses incurred in the drafting and filing all papers in this case, for the investigation into the documents tendered, plus for the time expended in drafting the instant Motion.

See Motion for Sanctions at 1-5; R. at 385-89. As noted *supra* at 4, the Motion for Sanctions was filed contemporaneously with the Housing Provider's Opposition to Reconsideration which simply stated, without more, that the Tenant's Motion to Reconsider was "frivolous, fraudulent and without merit" and made reference to the accompanying Motion for Sanctions. Opposition to Reconsideration at 1; R. at 392.

According to the Motion for Sanctions, the Housing Provider only requested an award of attorney's fees if it prevailed in the Motion for Sanctions. Motion for Sanctions at 4; R. at 386; *see supra* at 17. However, the ALJ awarded attorney's fees to the Housing Provider as the "prevailing party" with respect to the Tenant Petition despite denying the Motion for Sanctions. Order Denying Reconsideration & Granting Attorney's Fees at 8; R. at 408. The record indicates that the ALJ used the conditional request for attorney's fees in the Motion for

Sanctions (which the ALJ denied) as the legal basis for her determination that the Housing Provider was the “prevailing” party regarding the Tenant Petition entitled to attorney’s fees. *See* Order Denying Reconsideration & Granting Attorney’s Fees at 6; R. at 430. The Commission notes that, in the Order Denying Reconsideration & Granting Attorney’s Fees, the ALJ did not provide any legal grounds for, or otherwise explain, the ALJ’s use of the Housing Provider’s conditional request for attorney’s fees in the Motion for Sanctions as the basis for the award of attorney’s fees for all of the proceedings regarding the Tenant Petition. *See* Order Denying Reconsideration & Granting Attorney’s Fees at 6; R. at 430.¹⁷

V. CONCLUSION

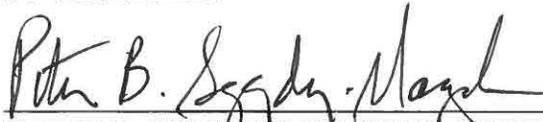
The Commission determines that neither the First Notice of Appeal nor the Second Notice of Appeal were timely-filed with respect to the Final Order, and thus the Commission lacks jurisdiction over any allegations of error related to the Final Order. *See* Allen, RH-TP-12-30,181; Kuratu, RH-TP-07-28,985; Shipe, RH-TP-08-29,411. The Commission further

¹⁷ The ALJ’s failure to dismiss the Housing Provider’s conditional request for attorney’s fees as untimely, or to address her reasoning for granting it solely in the context of the Motion for Sanctions (which was denied), is of particular importance within the context of the remedial purposes of the Act, which are intended “to protect low and moderate income tenants from the economic harm of uncontrolled increases in rents, and to maintain a sufficient stock of affordable rental units for such low and moderate income tenants in the District of Columbia.”¹⁷ D.C. OFFICIAL CODE § 42-3501.02; *see, e.g.,* Goodman v. D.C. Rental Hous. Comm’n, 573 A.2d 1293, 1299-1300 (D.C. 1990); Carmel Partners, Inc. v. Levy, RH-TP-06-28,830, RH-TP-06-28,835 (RHC Apr. 18, 2012); 1773 Lanier Place, N.W., Tenants’ Ass’n v. Drell, TP 27,344 (Sept. 9, 2009); Borger Mgmt., Inc. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009). With particular reference to the attorney’s fees provisions of the Act, the DCCA has characterized their purposes as “to encourage tenants to enforce their own rights, in effect acting as private attorneys general, and to encourage attorneys to accept cases brought under the Rental Housing Act.” Cascade Park Apts. v. Walker, TP 26,197 (RHC Jan. 14, 2005) (quoting Alexander v. D.C. Rental Hous. Comm’n, 542 A.2d 359, 360 (D.C. 1988) and Ungar v. D.C. Rental Hous. Comm’n, 535 A.2d 887, 892 (D.C. 1987)); *see* Goodman, 573 A.2d at 1297, 1299 (D.C. 1990) (observing that “[a] tenant who litigates a meritorious claim under this statutory scheme acts not only on his own behalf, but also as a private attorney general vindicating the rights of persons of low or moderate income to afford remedial housing.”); United Dominion Mgmt Co v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013). Consequently, because the DCCA has determined that the attorney’s fees provision of the Act is very important in furthering its remedial purposes, *see* Cascade Park Apts., TP 26,197, the absence of any explanation by the ALJ regarding the untimeliness of the request or her use of the Motion for Sanctions to award attorney’s for all proceedings related to the Tenant Petition is particularly notable to the Commission when, as here, a housing provider was determined to be the prevailing party in a tenant petition action.

determines that both the First Notice of Appeal and Second Notice of Appeal were timely insofar as they raise allegations of error related to the ALJ's determination that the Housing Provider was entitled to attorney's fees. 14 DCMR § 3807.1; Jackson, 878 A.2d at 491-94; *see* 1 DCMR § 2941.1; Breiner, 806 A.2d 180.

For the foregoing reasons, *see supra* at 13-18, the Commission reverses the ALJ's award of attorney's fees to the Housing Provider.

SO ORDERED.¹⁸



PETER B. SZEGEDY-MASZAK, CHAIRMAN



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."

¹⁸ Under the Act, a majority of the Commission - namely, two (2) Commissioners - constitutes a quorum, and all decisions of the Commission shall be signed by at least two (2) members of the Commission. D.C. OFFICIAL CODE § 42-3502.02(b)(2); 14 DCMR § 3821.1.

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:

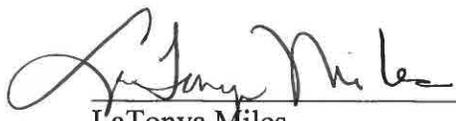
D.C. Court of Appeals
Office of the Clerk
Historic Courthouse
430 E Street, N.W.
Washington, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the **DECISION AND ORDER** in RH-TP-09-29,645 was served by first-class mail, postage prepaid, this **16th day of June, 2015**, to:

Carmen Salazar
P.O. Box 7053
Hyattsville, MD 20787

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