DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-12-28,898
(formerly RH-TP-07-28,898)[1]

490 M Street, S.W., Unit W106

Ward Six (6)

ROBIN Y. JACKSON
Tenant/Appellant

v.

THEOFANIS "FRANK" PETERS
Housing Provider/Appellee

DECISION AND ORDER

September 27, 2013

SZEGEDY-MASZAK, CHAIRPERSON. This case is on appeal to the Rental Housing Commission (Commission) from a decision and order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the Rental Accommodations and Conversion Division (RACD), Housing Regulation Administration (HRA), of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA).[2] 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), and the District of Columbia Municipal Regulations (DCMR), 1

[1] The Commission observes that, on remand, the ALJ altered the case number in this matter from RH-TP-07-28,898 to RH-TP-12-28,898.

[2] The Office of Administrative Hearings (OAH) assumed jurisdiction over tenant petitions from RACD pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01, -1831.03(b-1)(1) (Supp. 2005). The functions and duties of RACD in DCRA were transferred to the Department of Housing and Community Development (DHCD) by the Fiscal Year Budget Support Act of 2007, D.C. Law 17-20, 54 DCR 7052 (September 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (2001 Supp. 2008).

DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY[3]

On February 20, 2007, Tenant/Appellant, Robin Y. Jackson (Tenant), residing at 490 M Street, S.W., Unit # W106 (Housing Accommodation), filed Tenant Petition RH-TP-07-28,898 (Tenant Petition) with RACD, claiming that the Housing Provider/Appellee, Theofanis "Frank" Peters (Housing Provider), violated the Act as follows: retaliatory action was directed against the Tenant by the Housing Provider for exercising the Tenant's rights in violation of D.C. OFFICIAL CODE §§ 42-3505.02(a)-(b) (2001). Tenant Petition at 5; R. at 27.

On April 25, 2007, the Tenant filed an Amended and Supplemental Tenant Petition (hereinafter "Amended Tenant Petition"), claiming that the Housing Provider illegally back-dated a rent increase notice, unreasonably increased the rent from $1,250 per month to $1,550 per month, and further retaliated against the Tenant by filing a "baseless" eviction action, in response to her pending Tenant Petition and her refusal to change the OAH hearing date. Amended Tenant Petition at 1-2; R. at 101-102. On June 5, 2007, the ALJ held a hearing on the Tenant Petition. OAH Hearing CD June 5, 2007. R. at 248-49. On December 30, 2008, the ALJ issued her Final Order: Jackson v. Peters, RH-TP-07-28,898 (OAH Dec. 30, 2008) (Final Order). R. at 301-324.

In the Final Order, the ALJ found that the Tenant had failed to prove any of the allegations in her Tenant Petition, specifically that she had not sustained her burden of proof to

[3] The complete procedural history prior to the ALJ's Final Order After Remand is contained in the Commission's February 3, 2012 Decision and Order: Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012).

establish that the Housing Provider had directed retaliatory action against her, under D.C. OFFICIAL CODE § 42-3505.02(b) (2001). *See* Final Order at 19; R. at 306.

On January 21, 2009, the Tenant filed a Notice of Appeal (hereinafter "Notice of Appeal") claiming that the ALJ erred in holding that substantial evidence in the record supported the determination that the Housing Provider did not improperly retaliated against the Tenant under D.C. OFFICIAL CODE §§ 42-3505.02(a)-(b). Notice of Appeal at 1-2. On June 11, 2009, the Commission held its (first) appellate hearing.

On August 18, 2011, the Commission issued an initial Decision and Order, in which it affirmed the ALJ's Final Order: Jackson, RH-TP-07-28,898 (RHC Aug. 18, 2011) (Initial Decision and Order). The Commission determined that substantial evidence in the record supported the ALJ's conclusions of law that the Housing Provider had not illegally retaliated against the Tenant in violation of D.C. OFFICIAL CODE §§ 42-3505.02(a)-(b) (2001) on the four (4) grounds stated in the Notice of Appeal. *See id.* at 8-18.

On September 6, 2011, the Tenant filed Petitioner/Appellant's Motion for Reconsideration (hereinafter "Motion for Reconsideration") with the Commission pursuant to 14 DCMR § 3823.1 (2004), claiming, *inter alia*, that the Commission had failed to maintain a tape recording of its hearing. Motion for Reconsideration at 1-2. On September 21, 2011, the Commission granted the Tenant's Motion for Reconsideration under 14 DCMR § 3820.1 (2004), and ordered a new hearing to be held. *See* Jackson, RH-TP-07-28,898 (RHC Sept. 21, 2011) (Order on Motion for Reconsideration). On December 8, 2011, the Commission held its (second) appellate hearing in this appeal.

On February 3, 2012, the Commission issued a second Decision and Order, Jackson, RH-TP-07-28,898 (RHC Feb. 3, 2012) (Second Decision and Order), again determining that

substantial evidence in the record supported the ALJ's conclusions of law that the Housing Provider had not illegally retaliated against the Tenant in violation of D.C. OFFICIAL CODE §§ 42-3505.02(a)-(b) (2001). *See* Jackson, RH-TP-07-28,898 (RHC Feb. 3, 2012). However, the Commission remanded the case to the ALJ for the purpose of issuing revised findings of fact and conclusions of law, because the Commission determined that the ALJ had failed to indicate how she had applied her findings of fact to the applicable legal standards in order to reach her conclusions of law. *See id.* at 16-21.

On August 17, 2012, the ALJ issued a Final Order After Remand, Jackson, RH-TP-12-28,898 (OAH Aug. 17, 2012) (Final Order After Remand). In the Final Order After Remand, the ALJ made the following Findings of Fact:[4]

A. Leasing the Unit

1. Housing Provider is a shareholder in Tiber Island, located at 490 M Street, S.W., where he had executed a Proprietary Lease for apartment W106, a cooperative apartment unit in the building.

2. This unit is located over open exterior space adjacent to the building lobby.

3. On June 30, 2003, Housing Provider and Tenant entered into a "Tiber Island Cooperative Homes, Inc. Apartment Sublease Agreement" (Tenant/Petitioner Exhibit ("PX") 100), whereby Tenant sublet apartment W106 from Housing Provider for one year commencing July 1, 2003, at a monthly rent of $1,200.

4. In signing the sublease, tenant acknowledged that the housing unit was exempt from the rent stabilization provisions of the Rental Housing Act.

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[4] The Commission notes that the findings of fact are recited herein using the same language and paragraph numbers as the ALJ in the Final Order After Remand.

The Commission further observes that the findings of fact contained in the Final Order are nearly identical to the findings of fact contained in the Final Order After Remand, except that in the Final Order After Remand the ALJ has created additional paragraphs within the findings of fact (but using the same language), has numbered each paragraph, and has inserted section headings. *Compare* Final Order After Remand, *with* Final Order. Where the language of the findings of fact in the Final Order After Remand differs from the Final Order, the Commission has noted it herein.

5. The sublease provided (PX 100), in pertinent part, as follows:[5]

7. MAINTENANCE.

* * *

Tenant shall prompt [sic] report to the Landlord any problems requiring repairs or replacement beyond general maintenance. Tenant shall order all necessary repairs or replacements only from the Landlord. Tenant agrees that any repairs or requests for service ordered on or about the Premises without the prior approval from Landlord shall be paid for by Tenant. Tenant shall be responsible for any repair or replacement of property, equipment, or appliances made necessary due to the negligence by acts of commission or omission of Tenant, his family, guests, employees, or invitees. Landlord may consider the failure of Tenant to maintain Premises in accordance with Tenant's responsibilities agreed to herein as a breach of this Agreement and may elect to terminate this Agreement.

8. CARPETS. In order to keep sound transmission to a minimum level, and for the protection of the floors, the Tenant shall, at Tenant's own expense, promptly cover at least 80% of the gross floor area of said Premises with carpets or rugs and pads.

15. MAINTENANCE OF THE PREMISES.

* * *

The Tenant shall promptly report to the Landlord and to the Corporation any defect, damage, malfunction or breakage in the premises, building structure, equipment or fixtures. Except in cases of an emergency nature, the Tenant shall not order repairs on or about the Premises without prior approval from the Landlord. The Tenant will be held solely responsible for any damage to the premises or any repairs made necessary due to negligent acts of commission or omission of the Tenant, his family, guests, agents, employees, trades people, or other persons. The Tenant shall pay for all such damage and repairs.

27. WAIVER. No waiver by the landlord of a breach by the Tenant of any term or condition of this Sublease shall operate or be construed as a waiver of the term or condition itself, or any subsequent or continuing breach thereof, or of any other term or condition of this Sublease. Acquiescence in a default shall not operate as a waiver of that default, even where the acquiescence continues for an extended period of time.

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[5] In the Final Order After Remand, the ALJ inserted the citation to "PX 100" in this finding of fact. *Compare* Final Order After Remand at 5; R. at 379, *with* Final Order at 3; R. at 322.

6. Tenant also received a copy of a "Tiber Island Cooperative Homes, Inc. Sublease Application Procedures" document (PX 101), which contained essentially identical language to Provision 7 in the sublease, requiring a tenant to promptly report to the landlord (rather than the maintenance staff of the cooperative) any problems requiring repairs or replacement beyond general maintenance.[6]

B. Building Maintenance Procedures

7. Tiber Island has a maintenance staff for the building, responsible for building functions such as heating, air conditioning, electrical and plumbing (flooding). For these services, tenants directly contact the staff of the cooperative. For all other services, tenants are to contact their landlords to make arrangements for work to be done.

8. Tiber Island charges the landlords for services for which the cooperative is not directly responsible.

9. Tenant usually called or visited the reception desk regarding maintenance issues, rather than contacting Housing Provider.

10. The staff at the desk filled out Maintenance Orders for all requests. If the service is within the scope of work of the maintenance staff, the Maintenance Order is given to a maintenance man, who completes the work, fills out time and materials information and signs off on the Maintenance Order.

11. Maintenance Orders for completed or disapproved work are maintained in Tiber Island's file for the particular unit.[7]

12. If the request is for maintenance work outside of that work which is within the Cooperative's responsibility, a tenant is generally advised to call his/her landlord to make payment arrangements for that service. On occasion, a staff person may have made the call to the landlord to request approval for the work and the charge.

C. Dispute over Increasing the Rent

13. A dispute arose in 2005 over Housing Provider's attempt to raise Tenant's rent.

14. Housing Provider filed an action in the Superior Court of the District of Columbia Landlord Tenant Branch and Tenant filed a Tenant Petition (TP 28,451) with the

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[6] In the recitation of this finding of fact in the Final Order After Remand, the ALJ deleted the word "Exhibit," which had appeared before the term "PX 101," in the Final Order. *Compare* Final Order After Remand at 6; R. at 378, *with* Final Order at 4; R. at 321.

[7] In the Final Order, this sentence was stated as follows: "Maintenance Orders are maintained in Tiber Island's file for the particular unit, whether disapproved or for completed work." *See* Final Order at 5; R. at 320.

Department of Consumer and Regulatory Affairs' Housing Regulation Administration.

15. The parties settled both those matters with a settlement agreement entered into on May 31, 2006.[8] Housing Provider/Respondent Exhibit ("RX") 204.

16. Among other terms, the parties agreed that the housing unit was exempt from rent control, that Tenant's rent would be $1,250 per month, and that Housing Provider would not seek to increase that rent amount before May 31, 2007.

D. Building-wide Window Replacement Project

17. In 2006, Tiber Island had a window replacement project ongoing.

18. On June 8, 2006, Tiber Island notified occupants of the West Tower, including Tenant, that the second phase of the project – replacing the picture window above the convector unit in the living room – would begin on June 12, 2006. RX 200.

19. The notice advised Tenant that her unit scheduled for window replacement on June 15, 2006.

20. The notice also informed residents that the work area needed to be cleared, that residents were responsible for the removal of drapes and vertical blinds (in bold face type) and that there would be a $50 charge if Tiber Island maintenance staff were requested to remove or reinstall the blinds. *Id.* Further, the notice advised residents that the schedule might change due to weather.

21. On June 12, 2006, Tiber Island notified occupants of the West Tower, including Tenant, of a delay in the schedule. RX 201. The notice advised Tenant that her unit was scheduled for June 16, 2006. All other information contained in the prior notice remained the same. These notices went only to the occupants, not to the owners of units.

E. Window Blinds

22. Tenant's key was "red-flagged," meaning that maintenance men could not enter the unit without her prior approval.[9]

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[8] The Commission observes that in the Final Order, the ALJ stated that the Settlement Agreement was entered into on March 31, 2006. *See* Final Order at 5; R. at 220. Based on its review of the record, the Commission is satisfied that the correct date of the Settlement Agreement is May 31, 2006. *See* Housing Provider's Exhibit 204; R. at 385.

[9] The Commission observes that in the Final Order, the ALJ omitted the word "her" from this sentence in the findings of fact. *See* Final Order at 6; R. at 319.

23. On or after June 16, 2006, the blinds were removed and the living room window replaced in Tenant's unit. It was up to Tenant to reinstall the blinds or make arrangements to have them reinstalled for the $50 fee.

24. On November 17, 2006, Tenant made a request for three maintenance items: reinstall the blinds, replace the ball in the toilet, and fix drywall that had been knocked out in a Tiber Island pipe replacement project.

25. Geraldine Williams, an administrative assistant for Tiber Island, filled out Maintenance Order No. 5170. RX 202.

26. Tim Clark, a maintenance man, fixed the toilet on November 20, 2006. He also told Tenant that there would be a charge to reinstall the blinds located above the living room picture window.

27. Ken, the Chief Engineer, noted on the Maintenance Order that Tenant was to call Judy Tyrrell [sic], the General Manager, about the blinds and drywall. *Id.*

28. Tenant never contacted Ms. Tyrell on those issues.

29. Some time thereafter, Ms. Williams contacted Housing Provider about the Tenant's outstanding request to reinstall the blinds in Tenant's unit and the charge for Tiber Island's maintenance staff to do the reinstallation.

30. Until that time, Housing Provider was not aware that the blinds had been taken down. He tried to reach Ms. Tyrell who was away.

31. On January 10, 2007, Housing Provider went to the cooperative to speak to Ms. Tyrell.

32. Housing Provider then learned that the cooperative's Board of Directors had determined that a charge would be assessed for removing or reinstalling drapes or blinds for the window replacement project, as the cooperative did not want to be responsible for mishandling a tenant's or owner's expensive drapes and blinds.

33. During the discussion, Ms. Tyrell agreed that Tenant's blinds would be reinstalled without charge.

34. After Tenant approved the reinstallation of the blinds, Ms. Tyrell arranged for maintenance man Tim Clark to reinstall the blinds on January 16, 2007.[10]

F. Lease Violations

[10] The Commission observes that the ALJ stated this sentence in the Final Order as follows: "After contact with Tenant to get her approval, Ms. Tyrell arranged for maintenance man Tim Clark to reinstall the blinds on January 16, 2007." *See* Final Order at 7; R. at 218.

a. Lack of Sufficient Floor Covering

35. Housing Provider accompanied the maintenance men when they went to Tenant's unit. He had not been in the unit since he leased it to Tenant in June 2003.

36. Housing Provider had heard that Tenant was not keeping the unit clean.

37. When Housing Provider entered Tenant's unit, he observed that it was full of boxes and other items so that there was no place to move.

38. Tenant asked for a few days to clean the apartment. Housing Provider returned a few days later. The boxes had been removed.

39. When Housing Provider was in the unit on January 16, 2007, he noted that there was no carpeting, only a few rugs and runners scattered around the unit.

40. The 17 foot by 12 foot living room should have had at least an 11 foot by 15 foot rug; the four foot by five foot alcove should have had at least a four foot by four foot rug; the 17 foot by 10 foot dining room should have had at least a 15 foot by nine foot rug; and the 16 foot by 12 foot bedroom should have had at least an 14 foot by 11 foot rug.

41. Housing Provider also observed numerous plants on metal stands with no rugs under the plant stands, so that overflowing water could leak directly on the parquet floors.

42. Housing Provider did not discuss the issue of the lack of sufficient floor covering with Tenant at any time.

43. While in the Unit during March 2007 for replacement of the vertical blinds (see section F.b. below), Housing Provider took photographs of the conditions of the apartment. RX 205a-205i.

44. The photographs reveal that the apartment had no rugs or carpets under any furniture legs and little in the way of floor covering elsewhere. In addition there were numerous plants on metal stands and others directly on the floor.

b. Vertical Blinds

45. Housing Provider also discovered that two slats on the vertical blinds covering the balcony door were on the floor.

46. Tenant told Housing Provider that the cord to control the blinds had broken through normal use.

47. In checking the blinds, Housing Provider determined that the cord had not broken but would no longer open and close the blinds, that the gears to operate the openings of the blinds had been jammed and that two slats had broken off.

48. Housing Provider informed Tenant that this was not normal wear and tear and that replacement of the balcony door vertical blinds was her responsibility.

49. After determining that the balcony door vertical blinds could not be repaired, Housing Provider and maintenance man Timothy Clark went to Tenant's unit to measure for new blinds.

50. Mr. Clark did not hear Housing Provider speak to Tenant in an angry tone while he was in the unit.

51. Housing Provider purchased a replacement set of vertical blinds for the balcony door and made arrangements with Tenant to have the blinds installed on March 7, 2007.

52. Thereafter, Housing Provider asked Ms. Tyrell to prepare an invoice reflecting the cost of the vertical blinds and the labor charge for the maintenance men to install the new blinds, which took some time as the new holes had to be drilled into the concrete to hang these blinds.

53. It was not unusual for owners to ask management staff to prepare such invoices to bill their tenant.

54. On March 30, 2007, Housing Provider provided a letter to Tenant asking for payment of $383 for replacement of the broken blinds, stating that he determined that the condition of the blinds "is not due to normal wear and tear but rather to misuse."

55. Housing Provider attached Maintenance Order No. 5599 reflecting the purchase price of $308 and $75 in labor charges. PX 103.

G. Notice to Correct or Vacate

56. On January 24, 2007, accompanied by Doug Patience, the Tiber Island Assistant Manager, Housing Provider put a 30-Day Notice to Correct or Vacate under Tenant's door for her violation of Paragraph 8 of her July 1, 2003, lease which required her to have 80% of the gross floor area covered with carpet or rugs and pads and giving her until February 22, 2007, to correct the problem. PX 105.

57. The Notice also stated that the property was exempt, that a claim of exemption had been filed with RACD, and provided Housing Provider's exemption number.

58. Tenant called Housing Provider and told him to speak to his attorney. After Housing Provider consulted with Ms. Blumenthal, his attorney, Housing Provider placed a second identical 30-Day Notice to Correct or Vacate under Tenant's door on January 26, 2007, for her violation of Paragraph 8 of her July 1, 2003 lease and giving her until February 28, 2007, to correct the problem. PX 106.

H. The Tenant Petition

59. On February 20, 2007, Tenant filed her tenant petition alleging that a delay in reinstalling the blinds for the living room picture window, Housing Provider's statement to her that she was responsible for the damage to the balcony door vertical blinds, and that the 30-Day Notice to Correct or Vacate (when she had had the same amount of floor covering since she moved in) were retaliation for her having filed a Tenant Petition in 2005.

60. The Settlement Agreement entered into by the parties to resolve Tenant Petition 28,451 on May 31, 2006, allowed Housing Provider to raise Tenant's rent after May 31, 2007. RX 204.

61. On or about April 24, 2007, Housing Provider hand-delivered on April 20, 2007 notice to Tenant stating that he would be raising her monthly rent to $1,550 effective June 1, 2007. PX 109.

62. Housing Provider based the rent increase on: having had no increase in the rent since 2004, his increased expenses for the unit; and the market value of other units in the same building due to its convenient location near the new DC baseball stadium.

63. On April 25, 2007, Tenant filed an Amended and Supplemental Tenant Petition alleging that Housing Provider had hand-delivered a "Back-dated Rent Increase Notice" to her on "Tuesday, May 24, 2007," and that this was a further example of retaliation after she had opposed Housing Provider's April 20, 2007, request for her consent to a continuance of the evidentiary hearing in this matter. Tenant requested that this administrative court assess the maximum penalty for Housing Provider's retaliation and nullify the rent increase.

64. Again confusing dates and documents, on May 2, 2007, Tenant sent Housing Provider a letter purporting to address Housing Provider's March 30, 2007, letter regarding the request that she pay for the new balcony door blinds and their installation, while acknowledging receipt of the April 20, 2007 (rent increase) letter. PX 104.

65. Tenant took pictures of her unit approximately two weeks before the June 5, 2007, evidentiary hearing. PX 102 (1-31). These pictures continue to show the few scattered rugs that were present when Housing Provider took pictures on

March 7, 2007, and continue to show numerous plants on metal stands or sitting directly on the parquet floor.

Final Order After Remand at 4-14; R. at 370-86 (footnotes omitted).

The ALJ made the following conclusions of law in the Final Order After Remand:[11]

. . .[12]

B. Applicability of the Rental Housing Act to Housing Provider

1. The parties agreed that Housing Provider is exempt from the rent stabilization provisions of the Rental Housing Act, D.C. OFFICIAL CODE §§ 42-3502.05(f) through 42-3502.19 [(2001),] (except § 42-3502.17). *See* D.C. OFFICIAL CODE § 42-3502.05(a) [(2001)]. However, the exemption does not extend to retaliation which are [sic] contained in Subchapter V of the Rental Housing Act. *See* D.C. OFFICIAL CODE § 42-3502.05(a) (limiting the exemption to certain portions of Subchapter II of the Rental Housing Act). *See Butler v. Toye*, TP 27,262 (RHC Dec. 2, 2004) at 12 ("The retaliation section of the Act applies to exempt, as well as nonexempt property."). Therefore, a remedy is available to Tenant if Housing Provider engaged in prohibited retaliation against her. The remedy is the imposition of a civil fine of up to $5,000, payable to the District of Columbia, if there was a willful violation of the retaliation provision. D.C. OFFICIAL CODE § 42-3509.01 [(2001)]; *Negley v. Hubley*, TP 27,175 (RHC Aug. 26, 2004) at 14, FN 7 [sic] (remedy for retaliation is a fine; the penalty provisions of the Rental Housing Act that govern rent refunds do not apply to exempt housing providers).

C. Tenant's Allegations that Housing Provider Retaliated Against Tenant in Violation of the Rental Housing Act.

2. Tenant's petition alleges that Housing Provider retaliated against her by: (1) disapproving and delaying action on her request to reinstall blinds removed during a Tiber Island window replacement project, 2) charging her to replace balcony door blinds she contended were damaged by normal use, and 3) issuing a 30-day Notice to Correct or Vacate for insufficient floor covering. Tenant added

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[11] The Commission notes that the conclusions of law are recited herein using the same language as the ALJ in the Final Order After Remand, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

The Commission further observes that in the Final Order After Remand, the ALJ added language to a number of her conclusions of law, in response to the Commission's February 3, 2012 Decision and Order. The Commission has underlined any portion of the conclusions of law that did not appear in the Final Order, and appeared for the first time in the Final Order After Remand. *Compare* Final Order After Remand at 15-27; R. at 354-69, *with* Final Order at 11-19; R. at 206-214.

[12] The Commission has omitted from the recitation of the ALJ's conclusions of law the ALJ's statement concerning jurisdiction. *See* Final Order After Remand at 15; R. at 369.

a fourth allegation in an amended petition filed April 25, 2007, alleging that Housing Provider also retaliated against her by increasing her rent.

3. The Rental Housing Act prohibits a housing provider from taking "any retaliatory action against any Tenants who exercise any right conferred upon the Tenants by this chapter." Retaliatory action includes "any action or proceeding not otherwise permitted by law which . . . would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience . . . ." D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)]; *[s]ee also* 14 DCMR [§] 4303.3 [(2004)] ("Retaliatory action shall include . . . (b) Any action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of a tenant, harass the tenant, reduce the quality or quantity of service.").

4. The determination of retaliatory action requires a two step analysis, which is outlined in the provisions of the Rental Housing Act. The first step is to determine whether a housing provider committed an act that is considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)]. A 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 § 42-35058.02(a) [(2001)]. In this case, the Housing Provider sought to have Tenant pay for damaged balcony door blinds, cover 80% of the floor with carpeting or rugs as required by her sublease and pay a rent increase of $300 effective June 1, 2007, which was not inconsistent with a previously entered settlement agreement.

5. Second, for retaliation to be presumed, a tenant has to establish that the housing provider's conduct occurred within six months of the tenant performing one of the six protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b) [(2001)]. If so, the statute by definition applies, the housing provider is presumed to have taken "an action not otherwise permitted by law," and retaliation is presumed. *See Borger Mgmt. Inc.*, [sic] *v. Miller*, TP-27,445 [sic] (RHC Mar. 4, 2004) at 7 (*citing Youssef v. United Mgmt. Co., Inc.*, 683 A.2d 152, 155 (D.C. 1996)). The burden then shifts to the housing provider to come forward with clear and convincing" evidence that its actions were not retaliatory. *See Youssef*, 683 A.2d at 155.

6. Throughout her filings leading up to the hearing as well as during the evidentiary hearing in this matter, Tenant, as an attorney, consistently misstated when events happened. She asserted in filings in April 2007 that events had happened in May or August 2007. Her testimony repeatedly contained inaccurate dates that confused her presentation considerably. Additionally, she continued to focus on various incidents and behavior by Housing Provider that she alleged had occurred during the proceedings on her prior Tenant Petition, resulting in her attribution of nefarious conduct to Housing Provider for any action he took, which she could not establish and which was irrelevant to this proceeding.

Housing Provider's Alleged Refusal to Reinstall Blinds

7. As her first instance of retaliation, Tenant claimed Housing Provider refused to approve the reinstallation of the blinds removed during the June 2006 picture window replacement. Tenant failed to establish the presumption that Housing Provider retaliated against her because she did not establish that Housing Provider's refusal to have blinds installed was a retaliatory act, or that Tenant performed one of the six protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b) [(2001)] within six months of Housing Provider's action.

8. First, Tenant's allegation that Housing Provider purportedly refused to rehang window blinds does not meet the definition of "retaliatory action" under D.C. OFFICIAL CODE § 42-3505.02(a) as a decrease in maintenance services, an increase in tenant obligations, or as an undue inconvenience. Tenant alleged that although the parties settled her prior Tenant Petition on May 31, 2006, Housing Provider became angry at the Hearing Examiner handling that matter and continued to take his anger out on her thereafter. Tenant contended that from the time the prior matter settled in May 2006, Housing Provider started dragging his feet in allowing repairs to her housing unit, including refusing to approve reinstallation of the blinds. Tenant asserted that in late August 2006 she went to the reception desk and made a request for the blinds to be reinstalled, and that she was soon told that Housing Provider had disapproved the request. Tenant presented no evidence that her service request was in writing or witnessed by another person. No record of this request exists. The only record regarding a request to have the blinds rehung is from November 2006.

9. Tenant testified that the Tiber Island staff must have thrown the request away when Housing Provider disapproved it. However, no evidence in the record exists to corroborate this testimony. Furthermore, I do not find this testimony credible because Tenant repeatedly mixed up when events occurred and could not provide consistent testimony regarding dates of events. The November Maintenance Order regarding the request to rehang the blinds is consistent with the testimony of Housing Provider's witnesses. These witnesses testified that because of the fee to reinstall the picture window blinds, as described in the notices to the tenants

regarding the window replacement project, the maintenance staff would not reinstall the blinds without approval by Ms. Tyrell or payment of the fee.

10. Maintenance man Timothy Clark testified credibly that he told Tenant the reason he was not reinstalling the blinds on November 20, 2006, when he completed one of the other requested tasks on the November 17, 2006 Maintenance Order, was because of the fee. Tenant was directed to speak with Ms. Tyrell, but never did so. I find Housing Provider's testimony regarding the timeline of events more plausible and credible. Housing Provider testified that he first learned of the request to reinstall the blinds when he received a telephone call, sometime after November 20, 2006, from Geraldine Williams of Tiber Island's administrative staff (and his denial that Tenant ever called him about this issue), and that only when he spoke to Ms. Tyrell in January did he learn the specifics regarding the fee for reinstalling the blinds. Housing Provider's prompt arrangement for the work to be done suggests that he did respond within a reasonable amount of time and was not delaying or holding up repairs. I find that the evidence in the record indicates that Housing Provider responded to this issue in a timely manner. For these reasons, I find this allegation does not meet the definition of a "retaliatory action" as a decrease in maintenance services, an increase in tenant obligations, or as an undue inconvenience. D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)].

11. Second, this alleged retaliatory action by the Housing Provider did not occur within six months of Tenant's filing date of her prior Tenant Petition (in 2005) as required by D.C. OFFICIAL CODE § 42-3505.02(b) [(2001)]. Rather here, the evidence of record is that Tenant first made a maintenance request regarding these blinds on November 17, 2006, more than six months after Tenant's prior Tenant Petition. Judy Tyrell, the Tiber Island General Manager, testified persuasively that all maintenance requests are kept in the files pertaining to the unit, whether approved or disapproved, and that there had been no request by Tenant prior to November.

12. Tenant failed to establish that Housing Provider retaliated by not having the blinds reinstalled until January 2007, because Tenant failed to make a prima facie showing that Housing Provider took a "retaliatory action" against her, or that she exercised, within six months, any of the enumerated acts protected pursuant to the D.C. OFFICIAL CODE § 42-3505.02(a)-(b) [(2001)].

Replacement Cost of Blinds

13. Tenant alleges that Housing Provider improperly charged her the cost of replacing damaged blinds located over the balcony door. Tenant alleged Housing Provider retaliated against her when he billed her for the cost of replacing the blinds that she contended stopped working due to "normal wear and tear." I find this request is not retaliation because it does not meet the definition of "retaliatory action" under the Rental Housing Act as an "improper increase of the financial obligation." D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)].

14. Housing Provider testified that he was in the housing unit for the first time since Tenant took occupancy in 2003 on January 16, 2007, for the reinstallation of the picture window blinds. While there, he saw two slats from the balcony door blinds on the floor. Upon investigation, he discovered that these slats did not just come off the track, but had been broken off. Further inspection revealed that the mechanism to move the slats had been jammed. While both Tenant and Housing Provider provided pictures of the balcony door blinds, none of the pictures provided sufficient information to make any independent determination of the situation.

15. Nevertheless, the specificity of Housing Provider's testimony on this issue outweighed Tenant's generalized statements. Tenant's vague testimony failed to establish that the blinds had been broken due to normal wear and tear. Accordingly, I find this allegation does not meet the definition of "retaliatory action" under D.C. OFFICIAL CODE § [42-]3505.02(a) [(2001)] as the Housing Provider's improper increase of Tenant's financial obligation under the maintenance provision of the sublease. The sublease provisions only placed liability on Housing Provider for ordinary wear and tear. Tenant was responsible for any repair or replacement of property made necessary due to Tenant's negligence. Since I find Housing Provider's testimony that the slats had been broken off more credible than Tenant's denial, I find that Housing Provider did not violate the sublease agreement by demanding payment from Tenant for her negligent act regarding the balcony door blinds and thus did not commit a retaliatory act under D.C. OFFICIAL CODE § [42-]3505.02(a) [(2001)].

16. Further, I do not find credible Tenant's statement that Housing Provider had become outraged when he saw the broken slats, gestured in her face and screamed at her that she was going to have to pay for the damage. Although, Housing Provider did tend to be curt with Tenant when she cross-examined him during the hearing, I find Housing Provider's defense for this reaction credible. Housing Provider explained that his interactions with the Tenant, in the hearing or otherwise, were not personal reactions, but simply the cost of doing business. Tenant has failed to establish that Housing Provider's demand that she pay for the replacement balcony door blinds was either unreasonable or retaliation as defined in the Rental Housing Act.

Notice to Correct or Vacate

17. The third instance of Housing Provider's alleged retaliation was when Housing Provider issued a 30 day Notice to Correct or Vacate for insufficient floor covering. Only after visiting the housing unit for the first time since Tenant occupied the unit in 2003, did Housing Provider subsequently serve Tenant with a written Notice to Correct or Vacate on January 24, 2007, and again on January 26, 2007, for her failure to comply with the lease provision requiring that 80% of the gross floor area of the housing unit be covered with carpeting or rugs.

18. This allegation does not meet the definition of "retaliatory action" under D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)] as illegally seeking to recover possession of a rental unit, an increase of a tenant obligation, an undue inconvenience, or as a form of "harassment/coercion or as a threat to terminate a tenancy without cause" because Housing Provider's Notice simply sought to enforce a requirement in the sublease regarding sufficient floor coverage. Even without the specifics of Housing Provider's measurements, it is clear from Tenant's photographs alone that nowhere near 80% of the gross (not merely the exposed) floor surface was covered.

19. Tenant's defense was that she has had the same amount of floor covering since she first occupied the housing unit, and since this unit is over open space, the lack of floor covering should not bother anyone. This defense does not cure Tenant's failure to comply with a provision of the sublease. The sublease provides no qualification as to when a Tenant must cover 80% of the floor; it simply requires that the Tenant cover 80% of the floor, regardless of where the apartment is located.

20. Further, Housing Provider served the Notices to Correct or Vacate a week after he inspected the housing unit and first became aware of the problem with the lack of adequate floor coverings. The evidence in the record indicates that Housing Provider sent Tenant the Notices to Correct or Vacate at this time because it was the first time he became aware of the issue, not because he was acting in retaliation against Tenant.

21. For these reasons, I find that Housing Provider's Notices to Correct or Vacate were not acts of retaliation, but rather an attempt by Housing Provider, as a lessee himself with obligations to Tiber Island, to ensure that the housing unit continued to meet the requirements of his master lease and of Tenant's sublease. Tenant has failed to establish that Housing Provider's Notices to Correct or Vacate were retaliatory under the Rental Housing Act.

June 1, 2007 Rent Increase Notice

22. In her amended Tenant Petition, filed April 25, 2007, Tenant raised a fourth act of alleged retaliation – that Housing Provider had "[o]n Tuesday, May 24, 2007, . . . left a back-dated written notice advising that he was raising [her] rent, effective June 1, 2007, from $1,250.00 to $1,550.00." This allegation does not meet the definition of "retaliatory action" under D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)] as an unlawful rent increase because Tenant and Housing Provider had a Settlement Agreement which both confirmed that Housing Provider was exempt from the rent stabilization provisions of the Rental Housing Act (thus freeing him from any rent increase limitations), and allowed for a rent increase as of June 1, 2007. The evidence establishes that the rent increase notice was actually served on April 24, 2007, giving Tenant more than 30 days written notice. In addition,

Housing Provider provided unrefuted evidence showing that he had collected the same rent from Tenant since 2004, that his expenses for the unit had increased, and that he had become aware that the market value of other units in the same building had increased significantly due to the proximity to the new DC baseball stadium.

23. I do not find this rent increase to be a retaliatory act, because it was a lawful rent increase, and Tenant failed to establish how this legal rent increase was an act of retaliation. Tenant contended that Housing Provider had back-dated the rent increase notice to April 20, 2007, the day she had been contacted by Housing Provider's counsel, seeking Tenant's consent to a continuance of the evidentiary hearing in this matter, to which Tenant had declined to consent. Tenant presented only unfounded assertions that Housing Provider's motivation for increasing her rent was to retaliate against her because she did not consent to the continuance.

24. Tenant failed to make a prima facie showing that this rent increase was illegal or motivated by her Tenant Petition, because she failed to submit any corroborating evidence that would support this claim. Further, Tenant failed to prove that Housing Provider increased the rent because she would not consent to the continuance. Tenant did not submit any evidence that corroborates her testimony regarding Housing Provider's intent. Additionally, I do not find Tenant's testimony on this issue to be credible because Tenant repeatedly misstated dates of events related to this issue. Not only did Tenant fail to show how the rent increase was retaliatory, but Housing Provider made credible counter arguments as to why he increased Tenant's rent when he did.

25. Housing Provider submitted unrefuted evidence indicating that he took this legal rent increase because he had not increased Tenant's rent since 2004, his expenses had increased and that the market value of the unit had increased since this time. Additionally, the fact that Housing Provider raised the rent at the earliest time that the Settlement Agreement allowed does not establish an improper motive; rather it was based on the fact that he had foregone a rent increase for three years, due to the terms of the Settlement Agreement. For these reasons, I find that the 2007 rent increase is not a retaliatory act as defined by the Rental Housing Act.

[D. Conclusion]

26. As noted above, the Rental Housing Act prohibits a housing provider from retaliating against tenants who exercise any of the six protected acts enumerated in the statute. D.C. OFFICIAL CODE § 42-3505.02(b) [(2001)]. To prevail on a claim for retaliation, Tenant must show that Housing Provider's actions were provoked by Tenant's exercise of her rights under the Act. The Act also provides that certain actions taken by a housing provider are presumptively retaliatory if they occur within six months of a tenant exercising certain rights enumerated in the Act. D.C. OFFICIAL CODE § 42-3505.02(a) [(2001)].

27. For the reasons explained above, I find that Tenant has not sustained her burden of proof to establish that Housing Provider directed retaliatory action against Tent for exercising any rights under the Rental Housing Act. The evidence shows that Housing Provider was exempt from the rent stabilization provisions of the Rental Housing Act which Tenant did not challenge. The presumption of retaliation does not apply to any of Tenant's allegations because Tenant failed to make a *prima facia* [sic] showing that the Housing Provider took retaliatory actions against the Tenant. Moreover, even if the presumption did apply, Tenant has not established a link between any exercise of these rights and the timing of the rehanging of the window blinds, Housing Provider's decision to charge Tenant for damage to the door blinds, to enforce the floor covering provision of the sublease or to increase the rent as permitted in the Settlement Agreement of an earlier filed Tenant Petition. I further conclude that, even if the presumption applied in this case, there is clear and convincing evidence that Housing Provider's acts were not retaliatory.

28. Tenant has failed to prove any of the allegations in her original Tenant Petition or amended Petition. D.C. OFFICIAL CODE § 42-3505.02(a)-(b) [(2001)]. Given the testimony of the witnesses, the exhibits admitted into evidence, and the record as a whole, I dismiss all issues in this Tenant Petition.

Final Order After Remand at 15-27 R. at 354-69 (footnotes omitted). On August 30, 2012, the Tenant filed "Tenant/Appellant's Appeal of Final Order After Remand" (Tenant's Appeal After Remand), in which she asserted that the ALJ erred in the Final Order After Remand by:[13]

1. Asserting that there is nothing in the RHC's "authorizing statute or regulations which would permit it to remand [the] matter to [her] tribunal to require [a] non-substantive, stylistic revision["] (FOAR, p. 4). In fact, the RHC's remand instructions were for substantive reasons, and the remand is authorized under 14 DCMR § 3822.

2. Incorrectly concluding that the matter was remanded simply because she used "a narrative in the findings of fact rather than [the RHC's] preferred style of numbered findings . . ." (FOAR, p.4) when, as summarized above, the remand was for substantive reasons.

3. Revising her findings of fact regarding the Tenant's retaliation claims while asserting that she was only making stylistic changes. For example, the entire section concerning "Replacement Cost of Blinds" in the FOAR (pp. 21-22) has been revised to have a different tenor and contains a new finding that it was

[13] The Commission has recited the Tenant's statement of errors in the same language in which they appear in the Tenant's Appeal After Remand.

actually the Tenant's negligence that caused the blinds to be damaged which, in turn, supposedly justified the Housing Provider's demand for payment. In contrast, [the] Final Order has no finding of negligence (pp. 16-17). Obviously, adding this conclusion is no mere stylistic change since the ALJ's original Final Order (p. 16) merely concludes that the "Housing Provider's testimony as to the damage outweighed Tenant's generalized statements."

4. Mistakenly asserting that the Tenant does not have a right to new consideration or appeal, and dismissing the matter with prejudice because the "remand [was] only for stylistic revisions and not new findings of fact or conclusions of law . . ." (FOAR, p. 27, footnote 8).

See Tenant's Appeal After Remand at 2-3 (footnotes omitted). The Commission held a hearing on this matter on September 5, 2013.

II. ISSUES ON APPEAL[14]

A. Whether the ALJ erred in asserting that the Commission was not authorized to remand this case for amendments to the findings of fact and conclusions of law, in order to ensure that they comply with the DCAPA.

B. Whether the ALJ erred by incorrectly concluding that the matter was remanded simply because she did not use the Commission's preferred formatting (i.e., numbered paragraphs) in her findings of fact.

C. Whether the ALJ erred by revising her findings of fact regarding the Tenant's retaliation claims while asserting that she was only making stylistic changes.

D. Whether the ALJ erred by mistakenly asserting that the Tenant does not have a right to new consideration or appeal after the issuance of the Final Order After Remand.

III. DISCUSSION OF THE ISSUES ON APPEAL

A. Whether the ALJ erred in asserting that the Commission was not authorized to remand this case for amendments to the findings of fact and conclusions of law, in order to ensure that they comply with the DCAPA.

[14] The Commission, in its discretion, has recast the issues on appeal, consistent with the Tenant's language in the Notice of Appeal, but stated in a manner that identifies clearly the Tenant's claims of error on appeal, and omits any supporting argument. *See. e.g.*, Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8; Levy v. Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835 (RHC Mar. 19, 2012) at n.9. For the complete language of the Tenant's Appeal After Remand, *see supra* at 19-20.

B. Whether the ALJ erred by incorrectly concluding that the matter was remanded simply because she did not use the Commission's preferred formatting (i.e., numbered paragraphs) in her findings of fact.

C. Whether the ALJ erred by revising her findings of fact regarding the Tenant's retaliation claims while asserting that she was only making stylistic changes.

The Commission observes that the Tenant's first three issues in the Appeal After Remand (*see supra*), address remarks made by the ALJ in the "Procedural History" section of the Final Order After Remand, questioning the Commission's jurisdiction under the Act to issue the Second Decision and Order remanding this case to the ALJ for alterations to the Final Order's findings of fact and conclusions of law. *See* Final Order After Remand at 2-4. *See also* Tenant's Appeal After Remand at 2-3. Based on its review of the record and the Appeal After Remand, the Commission is satisfied that these issues do not assert any claim of error related to the merits of this case, the ALJ's findings of fact, or the ALJ's conclusions of law as they relate to the claims raised in the Tenant Petition. *See* Final Order After Remand at 2-4. *See also* Tenant's Appeal After Remand at 2-3. The Commission is further satisfied that the ALJ's remarks in the "Procedural History" section of the Final Order were unrelated to her consideration of the claims in the Tenant Petition, and were not prejudicial to the Tenant's substantial rights nor did they in any way affect the final outcome of the case.[15] *See, e.g.* Young v. Vista Mgmt., TP 28,635 (RHC

[15] The Commission notes that the language objected to by the Tenant in the Appeal After Remand is the following:

> Since the Rental Housing Commission affirmed the determination that Housing Provider did not engage in illegal retaliatory action under the Rental Housing Act, this administrative court does not see anything in the Commission's authorizing statute or regulations which would permit it to remand this matter to this tribunal to require this non-substantive, stylistic revision, when the December 30, 2008, Final Order contained the properly articulated legal standards and substantial evidence in the record to support the conclusions reached.
>
> Since this was the Commission's first instance of such a remand, below is an attempt to satisfy the Commission's request for a stylistic rewrite of the December 30, 2008, Final Order; however we will decline to do so in the future without some showing of the Commission's authority to order OAH to do such stylistic rewrites.

Sept. 18, 2012) at n.5; Smith v. Joshua, RH-TP-07-28,961 (RHC Feb. 3, 2012) at n.2; Harris v. Wilson, TP 28,197 (RHC July 12, 2005).

The Commission's jurisdiction under the Act is to decide appeals from decisions of the Rent Administrator and of the administrative law judges of OAH.[16] D.C. OFFICIAL CODE §§ 42-3502.02(a)(2), -3502.16(h) (2001).[17] The Commission's standard of review has been incorporated from the language of the DCAPA, *see* D.C. OFFICIAL CODE § 2-510(a)(3) (2001),[18] and provides as follows:

See Final Order After Remand at 4; R. at 380.

[16] *See supra* at 1 n.2, describing the transfer of RACD's functions and duties to OAH.

[17] D.C. OFFICIAL CODE § 42-3502.02(a)(2) (2001), provides:

> (a) The Rental Housing Commission shall: . . . (2) Decide appeals brought to it from decisions of the Rent Administrator [or OAH], including appeals under the Rental Accommodations Act of 1975, the Rental Housing Act of 1977, and the Rental Housing Act of 1980.

D.C. OFFICIAL CODE § 42-3502.16(h) (2001), provides:

> . . . An appeal from any decision of the Rent Administrator [or an ALJ] may be taken by the aggrieved party to the Rental Housing Commission . . . [who] may reverse, in whole or in part, any decision of the Rent Administrator [or an ALJ] . . .or it may affirm, in whole or in part, the Rent Administrator's [or ALJ's] decision . . . .

[18] D.C. OFFICIAL CODE § 2-510 (2001), provides:

> (a) Any person suffering a legal wrong, or adversely affected or aggrieved, by an order or decision of the Mayor or an agency in a contested case, is entitled to a judicial review thereof in accordance with this subchapter . . . . [T]he review by the Court of administrative orders and decisions shall be in accordance with the rules of law which define the scope and limitations of review of administrative proceedings. Such rules shall include, but not be limited to, the power of the Court: . . .
>
> (3) To hold unlawful and set aside any action or findings and conclusions found to be:
>
> (A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) Contrary to constitutional right, power, privilege, or immunity;
>
> (C) In excess of statutory jurisdiction, authority, or limitations or short of statutory jurisdiction, authority, or limitations or short of statutory rights;

> 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 [or ALJ].

14 DCMR § 3807.1 (2004). Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See, e.g.,* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (D.C. 1994); Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012); Ahmed, Inc., RH-TP-28,799; Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012).

According to D.C. OFFICIAL CODE § 42-3502.16(g) (2001): "[a]ll petitions filed under this section, all hearings held relating to the petitions, and all appeals taken from decisions of the Rent Administrator [or an ALJ] shall be considered and held according to the provisions of this section and Title I of the District of Columbia Administrative Procedure Act . . . ." All hearings under the Act must be conducted in accordance with the procedures for contested cases set forth in the DCAPA, at D.C. OFFICIAL CODE §§ 2-501-510 (2001). *See* 14 DCMR § 4000.2 (2004).[19] The DCAPA defines a "contested case" as a "proceedings before the Mayor or any agency in which the legal rights, duties, or privileges of specific parties are required by any law (other than this subchapter), or by constitutional right, to be determined after a hearing before the Mayor or before an agency." *See* D.C. OFFICIAL CODE § 2-502(8) (2001). A contested case hearing is

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> (D) Without observance of procedure required by law, including any applicable procedure provided by this subchapter; or
>
> (E) Unsupported by substantial evidence in the record of the proceedings before the Court . . . .

[19] 14 DCMR § 4000.2 (2004) provides the following: "[a]ll hearings shall be conducted in accordance with the procedures for contested cases set forth in the D.C. Administrative Procedure Act, D.C. OFFICIAL CODE §§ 2-501 et seq. (2001)."

understood to mean a "trial-type hearing," which is "implicitly required by either the organic act or constitutional right." *See* Richard Milburn Pub. Charter Alt. High Sch. v. Cafritz, 798 A.2d 531, 538-39 (D.C. 2002); Chevy Chase Citizens Ass'n v. D.C. Council, 327 A.2d 310, 314 (D.C. 1974).

Furthermore, in order to satisfy the requirements of the DCAPA, an ALJ's decision must (1) "state findings of fact on each material, contested issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." *See* Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984). *See also* Butler-Truesdale v. Aimco Props., LLC, 945 A.2d 1170, 1171-72 (D.C. 2008); Washington v. A&A Marbury, Inc., RH-TP-11-30,151 (RHC Dec. 27, 2012); Ahmed, Inc., RH-TP-28,799; Falconi v. Abusam, RH-TP-07-28,879 (RHC Sept. 28, 2012).

In accordance with the foregoing, the Commission is satisfied that it had jurisdiction under the Act to issue its Second Decision and Order on February 3, 2012, remanding this case to the ALJ to amend the findings of fact and conclusions of law in compliance with the requirements of the DCAPA. D.C. OFFICIAL CODE §§ 2-509-10; 42-3502.02(a)(2), -3502.16(g)-(h) (2001). *See* Cafritz, 798 A.2d at 538-39; Perkins, 482 A.2d at 402. Thus, the Commission determines that these three (3) issues raised by the Tenant in the Appeal After Remand have no merit, and they are dismissed.

D. Whether the ALJ erred by mistakenly asserting that the Tenant does not have a right to new consideration or appeal after the issuance of the Final Order After Remand.

The Commission observes that the Tenant's fourth issue in the Appeal After Remand alleges that the ALJ erred by concluding that the Tenant did not have reconsideration or appeal rights arising out of the Final Order After Remand. *See* Appeal After Remand at 4. *See also*

Final Order After Remand at 27 n.8. The Commission notes that the ALJ stated in a footnote on the final page of the Final Order After Remand the following: "[b]ecause this remand was only for stylistic revisions and not new findings of fact or conclusions of law, this Final Order After Remand does not provide new reconsideration or appeal rights."[20] *See* Final Order After Remand at 27 n.8 (emphasis added).

The Commission determines that the ALJ's conclusion that the Tenant did not have reconsideration or appeal rights was arbitrary, capricious and not in accordance with the provisions of the Act. 14 DCMR § 3807.1 (2004). *See* D.C. OFFICIAL CODE § 42-3502.16(h) (2001). The Commission observes that OAH regulations provide that "[e]very appealable order shall include a statement of appeal rights." 1 DCMR § 2830.1 (2011). Under the Commission's regulations, a final order is an appealable order. *See* 14 DCMR § 3802.1 (2004). The District of Columbia Court of Appeals (DCCA) has defined a "final order" as an order that "disposes of the entire case on the merits . . . leaving nothing for the court to do but execute the judgment." *See* Burtoff v. Burtoff, 390 A.2d 989, 991 (D.C. 1978) (citing McBryde v. Metro. Life Ins. Co., 221 A.2d 718 (D.C. 1966). *See also, e.g.,* Landise v. Mauro, 927 A.2d 1026, 1029 n.5 (D.C. 2007) (quoting McAteer v. Lauterbach, 908 A.2d 1168, 1169 n.1 (D.C. 2006)); Judith v. Graphic Commc'ns Int'l Union, 727 A.2d 890, 891 (D.C. 1999) (quoting Am. Fed'n of Gov't Emp. v. Koczak, 439 A.2d 478, 480 (D.C. 1981)). The Commission notes that, not only did the ALJ title the order as a "final order," but the Commission is also satisfied that the Final Order After Remand (like the ALJ's original "Final Order"), "disposed of the entire case on the merits" (albeit with non-material adjustments to the wording or the language used by the ALJ in the

[20] The Commission observes that the ALJ did not provide any basis under the Act, its regulations, the DCAPA, or relevant caselaw for her assertion that the Tenant did not have reconsideration or appeal rights arising from the Final Order After Remand. *See* Final Order After Remand at 27 n.8.

findings of fact and conclusions of law), and thus was a final, appealable order. *See* Final Order After Remand. *See also* Landise, 927 A.2d at 1029 n.5; Judith, 727 A.2d at 891; Burtoff, 390 A.2d at 991.

Nevertheless, the Commission is satisfied that the ALJ's error was harmless,[21] insofar as the Commission has exercised its jurisdiction over this case by accepting the filing of the Tenant's Appeal After Remand as an appeal of a final order, holding a hearing, and issuing its Decision and Order on the Appeal After Remand. *See, e.g.* Young, TP 28,635 at n.5; Smith, RH-TP-07-28,961 at n.2; Harris, TP 28,197. Moreover, the Commission notes that the Tenant maintains the right to appeal this Decision and Order to the DCCA, as described *infra* at 27. D.C. OFFICIAL CODE § 42-3502.19 (2001); 14 DCMR § 3821.5 (2004).[22] The Commission thus dismisses this issue on appeal.

[21] 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.,* Young, TP 28,635 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 nto consider the communication in the final order); Smith, RH-TP-07-28,961 at n.2 (determining that ALJ's misstatement of the date on an electrician's report was harmless); Borger Mgmt. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009) at n.13 (determining that the ALJ's reference to the housing provider's motion as both a motion to vacate and a motion for reconsideration was harmless error because the Commission's standard of review on appeal is the same for both motions).

[22] 14 DCMR § 3821.5 (2004) provides the following:

> Any person or class of persons aggrieved by a final decision of the Rental Housing Commission may obtain judicial review of the final decision by filing a petition for review in the District of Columbia Court of Appeals.

III. CONCLUSION

For the foregoing reasons, the Commission dismisses the Tenant's Appeal After Remand.[23]

SO ORDERED.

PETER B. SZEGEDY-MASZAK, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

MARTA W. BERKLEY, COMMISSIONER

[23] In assessing the Appeal After Remand, 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 can face considerable challenges in prosecuting their claims without legal assistance. Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). 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. 1997)). As the 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 at 979 (quoting Dozier v. Ford Motor Co., 702 F.2d 1189, 1194 (D.C. Cir. 1993)).

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
430 E Street, N.W.
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** was mailed, postage prepaid, by first class U.S. mail on this **27th** day of September, 2013 to:

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