DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 28,196

In re: 1408 P Street, N.W.

Ward Two (2)

ESTELLA RICHARDSON
Tenant/Appellant

v.

THE BARAC COMPANY
Housing Provider/Appellee

DECISION AND ORDER

June 24, 2015

McKOIN, COMMISSIONER. This case is on appeal to the Rental Housing Commission (Commission) from the Department of Housing and Community Development (DHCD), Rental Accommodations Division (RAD), based on a petition filed in Department of Consumer and Regulatory Affairs (DCRA), Rental Accommodations and Conversion Division (RACD).[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), 14 DCMR §§ 3800-4499 (1998), govern these proceedings.

[1] The functions and duties of the former RACD were transferred to the RAD pursuant to § 2003 of the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2008 Supp.). An evidentiary hearing on the petition was held by the RACD before the Office of Administrative Hearings (OAH) assumed jurisdiction over rental housing cases pursuant to the OAH Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2007 Repl.).

I. PROCEDURAL HISTORY

On September 9, 2004, Tenant/Appellant Estella Richardson (Tenant), residing at 1408 P Street, N.W., Apartment No. 3 (Housing Accommodation), filed Tenant Petition TP 28,196 (Tenant Petition) against the Housing Provider/Appellee The Barac Company (Housing Provider). The Tenant Petition raised the following claim against the Housing Provider: "The rent increase was larger than the amount which was allowed by any applicable provision of the Rental Housing Emergency [sic] Act of 1985." Tenant Petition at 3; Record (R.) at 12.

A hearing was held on October 28, 2004, before RACD Hearing Examiner Saundra McNair. R. at 21. At the hearing, the Tenant was represented by a student attorney from the D.C. Law Students in Court program, and the Housing Provider was represented by its agent. *Id.* Pursuant to 14 DCMR § 4012.4 (2004), Hearing Examiner Keith Anderson (Hearing Examiner) issued a proposed decision and order based on the record of the case, which became final on May 9, 2008: Richardson v. Barac Co., TP 28,196 (RAD Apr. 21, 2008) (Final Order); R. at 114-24.[2]

The Hearing Examiner made the following findings of fact in the Final Order:[3]

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[2] 14 DCMR § 4012.4 provides: "Pursuant to the written delegation of authority issued under § 3900.3, if the person who renders the decision and order is not the same person who has heard the evidence, then the procedures of D.C. Official Code § 2-509(d) (2001) shall be followed." D.C. OFFICIAL CODE § 2-509(d) provides:

> Whenever in a contested case a majority of those who are to render the final order or decision did not personally hear the evidence, no order or decision adverse to a party to the case (other than the Mayor or an agency) shall be made until a proposed order or decision, including findings of fact and conclusions of law, has been served upon the parties and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to a majority of those who are to render the order or decision, who, in such case, shall personally consider such portions of the exclusive record, as provided in subsection (c) of this section, as may be designated by any party.

The Final Order provided that the parties would have ten (10) days to file exceptions and objections to the proposed order, and that otherwise it would become final on May 9, 2008. Final Order at 9; R. at 116. The Commission's review of the record shows that no exceptions and objections were filed.

[3] The findings of fact are recited here using the same numbering, language, and terms as used by the Hearing Examiner in the Final Order. The Commission observes that several of the "findings of fact," as identified by the Hearing Examiner, are in the nature of legal conclusions.

1. Housing Provider owns and manages the subject property known of record as 1408 P St., NW, Washington, DC 20006.

2. Tenant has resided in unit 3 on the third floor since 1985.

3. Tenant has lived in the building twenty years.

4. Tenant received notice in May 2001, that effective July 1, 2001, her rent would increase $50 from $375 per month to $425 per month.

5. Tenant received notice in May 2002, that effective July 1, 2002, her rent would increase $50 from $425 per month to $475 per month.

6. Petitioner's July 1, 2003, rent increase of $21 was a legal rent increase because it was base[d] upon a prior rent increase that was not timely challenged by the Petitioner.

7. Respondent's July 1, 2004, requested rent increase of $20 was legal because it was built upon a prior rent increase that was not timely challenged by the Petitioner.

8. Petitioner is not entitled to damages because Petitioner failed to timely challenge the rent for 2001.

9. Petitioner has established by [a] preponderance of [the] evidence that she was a rent-paying tenant who has lived in the building 20 years and was acknowledge[d] as a tenant by Respondent and his agent. Therefore, [Petitioner] has standing to challenge rent increases when timely challenged.

10. Petitioner has failed to meet her burden of evidence that Respondent implemented an illegal rent increase.

11. The July 1, 2002, increase was determined to be valid because the Examiner determined the increase to be valid and not in violation of the Rental Housing Act.

Final Order at 7; R. at 118. The Hearing Examiner made the following conclusions of law in the Final Order:[4]

[4] The conclusions of law are recited here using the same numbering, language, and terms as used by the Hearing Examiner in the Final Order. The Commission observes that the Final Order contains substantial legal analysis and conclusions that are not within the section of the Final Order captioned "Conclusions of Law," and the Commission will address that discussion, as relevant, in this Decision and Order.

1. Tenant does have standing as a Tenant in Unit 3, at 1408 P Street, N.W., because the landlord[-]tenant relationship was established when the Housing Provider accepted her rent over a period of 20 years.

2. Tenant failed to establish by a preponderance of evidence that the rent charged exceeded the legally calculated rent ceiling for the Tenant's unit.

3. Tenant is precluded by the three (3) year statute of limitations from challenging the July 1, 2001 adjustment in the rent ceiling and the rent charge[d] for Tenant's unit.

4. The Hearing Examiner concludes as a matter of law that the 2001 rent adjustment was properly implemented and is precluded from challenge by the statute of limitations.

5. As a matter of law, Tenant is estopped from challenging the July 1, 2001[,] rent adjustments filed with the RACD for her unit.

6. Tenant failed to demonstrate by a preponderance of evidence that the Housing Provider violated the Act as claimed in the Petition. Accordingly, all issues are dismissed.

Final Order at 7-8; R. at 117-18.

The Commission observes that, as relevant to this appeal, the Hearing Examiner made the following additional conclusion of law in the Final Order:

> [The Tenant's] contention is that [the Housing Provider] did not provide evidence that the [July 1,] 2002 rent[] adjustment was properly implemented in accordance with D.C. [Official] Code §[§] 42-3502.06 - 42-3502.08 (2001). . . . The [Housing Provider] alleges that the $50 dollar increase was taken from an unimplemented rent [ceiling] adjustment in 1985. There was a moratorium during that period which allowed housing providers to make adjustments to their rents and tenants were given an opportunity to challenge those adjustments during the amnesty period. The [Hearing] Examiner agrees and, accordingly, rejects the [Tenant's] argument that [the Housing Provider] failed to properly perfect and implement its adjustments in the rent ceiling and rent charged since the [sic] 2001. Accordingly, all issues are dismissed.

Final Order at 6; R. at 119.

On May 28, 2008, the Tenant filed a timely notice of appeal of the Final Order with the Commission (Notice of Appeal). The Tenant raises the following issues on appeal:[5]

1. The Hearing Examiner erred in finding that the rent increase taken in 2002 did not exceed increases permitted by law.

2. The Hearing Examiner erred in failing to order a rent rollback to the level of $425 per month, the rate prior to the increase on July 1, 2002, and to award damages.

Notice of Appeal at 1, 3. Tenant then filed her brief in support of the Notice of Appeal on October 8, 2008 (Tenant's Brief). The Housing Provider filed its brief on September 26, 2008 (Housing Provider's Brief), and a Response to Appellant's/Tenant's Brief on October 28, 2008 (Housing Provider's Reply Brief). The Commission held its hearing on October 23, 2008.

II. ISSUES ON APPEAL

1. Whether the Hearing Examiner erred in finding that the rent increase taken in 2002 did not exceed the amount permitted by law.

2. Whether the Hearing Examiner erred in failing to order a rent rollback based on the unlawful increase in rent charged on July 1, 2002, and to award damages.

III. DISCUSSION OF THE ISSUES

1. Whether the Hearing Examiner erred in finding that the rent increase taken in 2002 did not exceed the amount permitted by law.

The Tenant has resided at the Housing Accommodation since December 1985, at which time she was charged $235.00 per month in rent. *See* Final Order at 4, 7; R. at 118, 121. The Tenant alleges in the Tenant Petition that the Housing Provider violated the Act by implementing an adjustment in rent charged on July 1, 2002, that exceeded any amount by which the Housing Provider was lawfully permitted to increase the rent. *See* Tenant Petition at 3; R. at 12; Tenant Notice of Increase of General Applicability (2002 Notice); R. at 5; *see also* Final Order at 7; R.

[5] The Commission recites the issues in the language of the Tenant in the Notice of Appeal.

at 118.[6] In the 2002 Notice, the Housing Provider notified the Tenant of an increase in the rental unit's rent ceiling, and that, effective July 1, 2002, the rent charged would be increased by fifty dollars ($50) per month. *See* 2002 Notice; R. at 5. The 2002 Notice specifically states that the rent ceiling was $666.00, increasing to $683.00, and that the Tenant's rent charged was $425.00, increasing to $475.00. *Id.* In the Final Order, the Hearing Examiner made the following conclusion of law related to the 2002 Notice:

> The [Housing Provider] alleges that the $50 dollar increase was taken from an unimplemented rent [ceiling] adjustment in 1985. There was a moratorium during that period which allowed housing providers to make adjustments to their rents and tenants were given an opportunity to challenge those adjustments during the amnesty period. The [Hearing] Examiner agrees and, accordingly, rejects the [Tenant's] argument that [the Housing Provider] failed to properly perfect and implement its adjustments in the rent ceiling and rent charged since the [sic] 2001.

Final Order at 6; R. at 119.

The Commission's standard of review of the Final Order is contained in 14 DCMR § 3807.1 (2004):

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

The Commission has consistently defined substantial evidence as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (1994); Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014) at 22-23; Jackson v. Peters, RH-TP-12-28,898 (RHC Feb. 3, 2012)

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[6] The Commission notes that, in the Tenant Petition, the Tenant challenged the Housing Provider's implementation of an increase in rent charged on July 1, 2001, also in the amount of fifty dollars ($50). *See* Tenant Petition at 3, 9; R. at 12, 6. In the Final Order, the Hearing Examiner determined that the Tenant's challenge is barred by the Act's statute of limitations, D.C. OFFICIAL CODE § 42-3502.06(e), which provides that no tenant petition may be filed more than three (3) years after the effective date of a rent adjustment. Final Order at 5-6; R. at 119-20. The Tenant does not contest this determination on appeal. *See generally* Notice of Appeal.

at 14; Eastern Savings Bank v. Mitchell, RH-TP-08-29,397 (RHC Oct. 31, 2012) at 11-12; Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012) at 12. Pursuant to the DCAPA, each decision must contain distinct conclusions of law, made with appropriate citation to the relevant statutory provision, regulation, or cases under the Act on which a Hearing Examiner bases his or her decision and which rationally follow from substantial evidence in the record. *See* Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984); Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 27, 2014); Washington v. A&A Marbury, LLC, RH-TP-11-30,151 (RHC Dec. 27, 2012); Hemby v. Residential Rescue, Inc., TP 27,887 (RHC Apr. 16, 2004).

Based on its review of the record, and in consideration of the arguments by each party on appeal, the Commission is not satisfied that the Hearing Examiner's conclusions of law related to the 2002 Notice are supported by substantial evidence and in accordance with the Act. 14 DCMR § 3807.1. Pursuant to the Unitary Rent Ceiling Adjustment Amendment Act of 1992 (Unitary Adjustment Act), D.C. Law 9-191; 39 DCR 9005, § 208(h) of the Act provides:

> (1) One year from March 16, 1993, unless otherwise ordered by the Rent Administrator, each adjustment in rent charged permitted by this section may implement not more than 1 authorized and previously unimplemented rent ceiling adjustment. If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of 1 previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.
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> (2) Nothing in this subsection shall be construed to prevent a housing provider, at his or her election, from delaying the implementation of any rent ceiling adjustment, or from implementing less than the full amount of any rent ceiling adjustment. A rent ceiling adjustment, or portion thereof, which remains unimplemented shall not expire and shall not be deemed forfeited or otherwise diminished.

D.C. OFFICIAL CODE § 42-3502.08(h) (2001).[7] "The Council's purpose in adding subsection (h) [of D.C. OFFICIAL CODE § 42-3502.08] was to stop housing providers from implementing more than one rent ceiling increase at the same time in a single rent [charged] increase, a practice referred to as 'stacking.'" Sawyer Prop. Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 106 (D.C. 2005) (citing Council of the District of Columbia, Committee on Consumer and Regulatory Affairs, Report on Bill 9-305, "Unitary Rent Ceiling Adjustment Amendment Act of 1992," (1992) (Committee Report) at 2.).

The implementing regulations promulgated by the Commission that govern increases in rents charged provide, in relevant part, as follows:

> 4205.2 If the rent for a rental unit on or after the effective date of the Act is less than the authorized rent ceiling for the rental unit, the housing provider, unless otherwise prohibited by the Act, may implement a rent increase to an amount equal to, or less than, the authorized rent ceiling.
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> 4205.3 A housing provider may charge as rent for a rental unit an amount less than the authorized rent ceiling without waiving or forfeiting the right to later implement a rent increase in compliance with § 4205.5 to an amount equal to, or less than, the authorized rent ceiling; provided, that the housing provider has first taken and perfected all prior rent ceiling adjustments which establish the rent ceiling in accordance with §§ 4204.9 and 4204.10.
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> . . .
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> 4205.7 Unless otherwise ordered by the Rent Administrator, each adjustment in rent charged may not exceed the amount of one (1) rent ceiling increase perfected but not implemented by the housing provider.
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> 4205.8 If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of one (1) previously

[7] The Commission notes that D.C. OFFICIAL CODE § 42-3502.08 was substantially revised by the Rent Control Reform Amendment Act of 2006, effective August 5, 2006, D.C. Law 16-145, 53 DCR 4889. The Commission applies the provisions of the Act and regulations that were in effect at the time of the relevant conduct, in this case, the July 1, 2002 rent increase. *See, e.g.*, Bank of Am., N.A. v. Griffin, 2 A.3d 1070, 1076 (D.C. 2010); Dep't of Hous. & Cmty. Dev. – Rental Accommodations Div. v. 1433 T St. Assocs., RH-SC-06-002 (RHC May 21, 2015) at n.19; Barron, TP 28510, 28,521, & 28,526 at n. 10.

unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference.

4205.9 Nothing in the Act or this chapter shall be construed to prevent a housing provider, at the housing provider's election, from delaying for any period of time the implementation of any rent ceiling adjustment or from implementing less than the full amount of any rent ceiling adjustment.

14 DCMR § 4205 (1998) (emphasis added).[8] In sum, a housing provider may only increase a tenant's rent *charged* by an amount less than or equal to the preserved, unimplemented portion of one (1) rent *ceiling* adjustment for the rental unit that has been taken and perfected in accordance with the Act and the applicable regulations. *See, e.g.,* Sawyer, 877 A.2d at 105-08; United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013); Willoughby Real Estate Co., Inc. v. Shuler, TP 28,266 (RHC Nov. 7, 2008); Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Feb. 24, 2006); *see also* 14 DCMR § 4204.9, .10 (1998) (requirement and procedures to take and perfect).[9] Further, the Commission has repeatedly determined that,

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[8] *See* Notice of Final Rulemaking, 45 DCR 684, 688 (Feb. 6, 1998).

[9] The Commission's implementing regulations require a housing provider to take and perfect each rent ceiling adjustment as follows:

4204.9 Except as provided in § 4204.10, any rent ceiling adjustment authorized by the Act and this chapter shall be taken and perfected within the time provided in this chapter, and shall be considered taken and perfected only if the housing provider has filed with the Rent Administrator a properly executed amended Registration/Claim of Exemption Form as required by § 4103.1, and met the notice requirements of § 4101.6.

4204.10 Notwithstanding § 4204.9, a housing provider shall take and perfect a rent ceiling increase authorized by § 206(b) of the Act (an adjustment of general applicability) by filing with the Rent Administrator and serving on the affected tenant or tenants in the manner prescribed in § 4101.6 a Certificate of Election of Adjustment of General Applicability, which shall:

(a) Identify each rental unit to which the election applies;

(b) Set forth the amount of the adjustment elected to be taken, and the prior and new rent ceiling for each unit; and

(c) Be filed and served within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.

although a preserved rent adjustment may be outside the Act's statute of limitations for the purposes of challenging a unit's rent ceiling, a defective rent ceiling adjustment may nonetheless not be used as the basis for implementing a later adjustment in the rent charged, so long as the adjustment in rent charged occurs within the three-year (3-year) limitations period. *See* D.C. OFFICIAL CODE § 42-3502.06(b) (2001); United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 431 (D.C. 2014); Gelman Mgmt., TP 27,995.

The 2002 Notice does not, on its face, identify a preserved rent ceiling adjustment that serves as the basis for implementing a fifty dollar ($50) increase in rent charged. *See* 2002 Notice at 1; R. at 5. The rent ceiling adjustment reflected in the 2002 Notice is only seventeen dollars ($17), and therefore could not form the basis of the fifty dollar ($50) increase in rent charged that was implemented at the same time. *See id.*; *cf.* D.C. OFFICIAL CODE § 42-3502.08(h); 14 DCMR§ 4205.7. The Tenant argues that the Housing Provider did not have any authorized, preserved, and unimplemented rent ceiling increase available that was large enough to support the fifty dollar ($50) increase, and that the increase is therefore illegal. *See* Tenant's Brief at 1-2.

As stated, the Hearing Examiner determined in the Final Order that, in 1985, the time when the Housing Provider asserts it preserved a rent ceiling adjustment of $181.00, there was "a moratorium . . . which allowed housing providers to make adjustments to their rents." Final Order at 6; R. at 119. Based on this determination, the Hearing Examiner "reject[ed] the [Tenant's] argument that the [Housing Provider] failed to properly perfect and implement its adjustments in the rent ceiling and rent charged since the [sic] 2001." Final Order at 6; R. at 119; *see also* Final Order at 7 ("The July 1, 2002 increase was determined to be valid because

the Examiner determined the increase to be valid and not in violation of the Rental Housing Act."); R. at 118.

A Hearing Examiner is required to make conclusions of law that rationally flow from findings of fact supported by substantial evidence in the record. D.C. OFFICIAL CODE § 2-509(e) (2001); 14 DMCR § 3807.1; Perkins, 482 A.2d 401, 402; A&A Marbury, RH-TP-11-30,151. The Commission observes that the Hearing Examiner does not cite to any authority for the existence of a "moratorium" or "amnesty period" in 1985. *See* Final Order at 6; R. at 119. The Commission is also unable to identify from the Hearing Examiner's decision any basis in law for a moratorium in place during the relevant time period or how a moratorium would permit the "stacking" of multiple rent ceiling adjustments after the enactment of the Unitary Adjustment Act. *See* Sawyer, 877 A.2d at 106-07. Additionally, the Commission's review of the record does not reveal any point in time at which the Housing Provider actually argued that a "moratorium" existed.[10]

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[10] The Commission notes that the Final Order, as a whole, comingles findings of fact and conclusions of law, with minimal or no citation to record evidence or applicable law. *See generally* Final Order; R. at 114-24; *see also supra* at n. 3. As the Commission has repeatedly noted, an order that does not separately identify distinct findings of fact "complicates the Commission's review of such an order by requiring the Commission to identify distinct findings of fact and conclusions of law, identify particular findings of fact that support a particular conclusion of law, and to distinguish legal analyses from factual assertions." Barron, TP 28,510, TP 28,521, & TP 28,526; In Re: 70% Voluntary Agreement Application for Rent Level Adjustment 548 7th Street, S.E., VA 08,004 (RHC Dec. 27, 2012) at n. 2 (quoting Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012) at n. 8); Thorpe v. Independence Fed. Sav. Bank, TP 24,271 (RHC Aug. 19, 1999) ("The DCAPA requires the agency to issue a decision and order 'accompanied' by findings of fact and conclusions of law; not a decision and order one has to scour in an effort to identify the findings of fact."). The DCAPA also requires that the elements of the applicable legal standard be systematically applied to the findings of fact on each issue. Perkins, 482 A.2d at 402; Allentruck v. D.C. Minimum Wage & Indus. Safety Bd., 261 A.2d 826, 833 (D.C. 1969); Barron, TP 28,510, TP 28,521, & TP 28,526; A&A Marbury, RH-TP-11-30,151. The Final Order, however, contains little more than legal conclusions with no reasoning given or legal basis readily apparent. *See* Final Order at 7-8; R. at 117-18.

The Commission observes that the Hearing Examiner's failure to follow the basic requirements of an administrative decision in a contested case is an independently sufficient ground to reverse of the Final Order. D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 3807.1; Perkins, 482 A.2d at 402. Nonetheless, in its discretion, the Commission in this Decision and Order addresses the arguments of the parties regarding the lawfulness of the 2002 Notice in order to attempt to decipher the Hearing Examiner's reasoning and to assure that, on remand, the provisions of the Act are applied correctly to the evidence on the record. *See* 14 DCMR § 3807.1.

The Commission's review of the record reveals that the Housing Provider offered evidence of all rent ceiling and rent charged adjustments from August 1985 through May 2004, in the form of Amended Registration Forms and Certificates of Election of Adjustment of General Applicability. *See* Respondent's Exhibit (RX) 1, 3-21; R. at 23, 26-80. The Housing Provider argues that the rent increase in the 2002 Notice was drawn from what remained of an unused portion of a rent ceiling adjustment in 1985 in the amount of $181 and that this is the basis for its $50 increase in 2002. Housing Provider's Brief at 2. However, based on its review of the record, the Commission cannot clearly identify what, if any, substantial evidence or legal standard the Housing Provider relies on to support this argument. 14 DCMR § 3807.1; *see* Shuler, TP 28,266 (housing provider must identify previously perfected but unimplemented rent ceiling adjustment used to increase tenant's rent); Rittenhouse, LLC v. Campbell, TP 25,093 (RHC Dec. 17, 2002).

On appeal, the Housing Provider attaches to its Reply Brief, as Exhibit 1, a chart entitled "Schedule of Rent Ceiling & Rent Charge Increases." Housing Provider's Reply Brief at 5-11 (Rent History Chart).[11] The Rent History Chart displays a summary of the evidence in the record of rent increases between 1985 and 2004, including: the date, the type of increase, the prior and new rent ceiling, the amount of the rent ceiling increase, the prior and new rent charged, the amount of the increase in the rent charged, the amount of any unimplemented rent increase, the adjustment balance from each increase, and a cumulative balance of unimplemented rent ceiling

[11] The Commission's regulations provide that the Commission shall not receive new evidence on appeal. 14 DCMR § 3807.5 (2004). Nonetheless, the Commission is satisfied that the Rent History Chart attached by the Housing Provider to its Reply Brief is an accurate summary of the rent ceilings, rents charged, and rent adjustments reflected in the official documents that were admitted into evidence on the record before the Hearing Examiner. *See* Respondent's Exhibit (RX) 1, 3-21; R. at 23, 26-80; Final Order at 2-4; R. at 121-23. Accordingly, the Commission is satisfied that the Rent History Chart merely memorializes the evidence in the record in a form that does not constitute "new evidence" under 14 DCMR § 3807.5, and the Commission may thus review the Rent History Chart in assessing the Housing Provider's arguments on appeal.

adjustments. *Id.* The Rent History Chart shows, on August 1, 1985, after a vacancy increase, a new rent ceiling of $416, and no other information. *Id.* On December 7, 1985, the Rent History Chart shows a new rent ceiling of $416, a new rent charged of $235, and an "unimplemented rent increase" of $181. *Id.*

The Housing Provider argues that "the difference between the rent ceiling and the rent charged for the rental [unit] in 1985 when [the Tenant] moved in was $181.00. Therefore, at the time of the adoption of the 1985 Act . . . , Plaintiff [sic] had $181.00 in lawful, unimplemented rent increases." Housing Provider's Reply Brief at 2; *see also* Housing Provider's Brief at 2. The Commission, however, cannot find any justification in the Act, regulations, or precedent for the Housing Provider's position that this $181.00 is a preserved, unimplemented rent ceiling adjustment that may be implemented after the enactment of the Unitary Adjustment Act. The Commission observes that the difference at any point in time between a rental unit's rent ceiling and the rent actually charged to a tenant is not the same as a single, taken and perfected, and preserved rent ceiling adjustment. *See* D.C. OFFICIAL CODE § 42-3502.08(h); 14 DCMR § 4200.5 ("A rent ceiling adjustment is any increase or decrease in a rent ceiling that is authorized by the Act, and taken and perfected by the housing provider in accordance with § 4204."); *see, e.g.*, Wilson v. Smith Prop. Holdings Van Ness, RH-TP-07-28,907 (RHC Mar. 10, 2015) (affirming decision that where "there was a rent ceiling increase of 89.0% from $1,337 to $2,445 on [t]enant's unit . . ., effective August 9, 1998," housing provider "had the legal right to raise the rent on [t]enant's unit by up to $1,108 per month"); Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014) (affirming decision where housing provider "was authorized to increase the rent ceiling . . . by $49 from $1,896 to $1,945

. . . [and] preserved that rent ceiling adjustment and elected to implement it on April 1, 2003, increasing rent for that unit by $42 from $1,411 to $1,453").

The Housing Provider relies on 14 DCMR § 4205.8 and .9, *see supra* at 8-9, to argue that it "preserved" the difference between the rent ceiling and rent charged in 1985. *See* Housing Provider's Reply Brief at 2. That argument, however, ignores the key language of the regulations: "If the difference between the rent ceiling and the rent charged for the rental unit consists of all or a portion of one (1) previously unimplemented rent ceiling adjustment, the housing provider may elect to implement all or a portion of the difference." 14 DCMR § 4205.8 (emphasis added). Moreover, this regulation did not exist in 1985, when the Housing Provider claims to have preserved the $181.00 rent ceiling adjustment, but rather implements the Unitary Adjustment Act, effective in 1993. *Compare* 14 DCMR § 4301 (1985); 32 DCR 6752, 6803 (Nov. 22, 1985) (Notice of Emergency Rulemaking),[12] *with* 14 DCMR § 4205 (1998); 45 DCR 684, 688 (February 6, 1998); *see also* Committee Report at 6 (the bill "provides that a housing provider may elect to implement all or a portion of the difference between the rent ceiling and the rent charged if that difference consists of all or a portion of one previously unimplemented rent ceiling adjustment." (emphasis added)).

Further, by the Housing Provider's own admission, the $181.00 difference between the Tenant's initial rent ceiling and rent charged was comprised of multiple, preserved rent ceiling adjustments. *See* Housing Provider's Brief at 2. Specifically, the Housing Provider states:

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[12] The emergency rules promulgated by the Commission to govern the implementation of the Act provided, in relevant part:

> 4301.4 Where the rent charged for a rental unit on the effective date of the Act is less than the then[-]allowable rent ceiling for that unit, unless otherwise prohibited by law, the housing provider may raise the rent for the unit to the allowable rent ceiling effective the next day the rent is due. . . .

32 DCR 6752, 6803 (Nov. 22, 1985).

> [T]he Rental Housing Act of 1985 measured the base rent as the difference between the rent ceiling and the actual rent charged on April 30, 1985, which included "all rent increases authorized by prior rent control laws." [D.C. OFFICIAL CODE § 42-3501.03(4)]. . . . [The rental unit's] "base rent" of $416.00 included unimplemented rent increases authorized and unimplemented under a prior version of the Rental Housing Act. Therefore, at the time of the adoption of the 1985 Act[,] Appellee had $181.00 in lawful, unimplemented rent increases.

Housing Provider's Brief at 2. The Commission notes that the Housing Provider's description of the "base rent" under the Act does not reflect the statutory or regulatory language defining and calculating the base rent. *See* D.C. OFFICIAL CODE § 42-3501.03(4) (2001); 14 DCMR § 4201.1.[13] Rather than being a rent ceiling adjustment in the amount of "the difference between the rent ceiling and actual rent charged," the base rent under the Act was actually established by calculating the maximum rent that could be charged for a unit, *i.e.*, the rent ceiling, due to lawful adjustments under prior rent control laws, as of a fixed date. *Id.*; *see also* D.C. OFFICIAL CODE § 42-3502.06(a).[14]

More significantly, the Commission observes that the Housing Provider, in attempting to clarify its argument, actually further demonstrates its error: it states that the base rent for the

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[13] D.C. OFFICIAL CODE § 42-3501.03(4) provides:

> "Base rent" means that rent legally charged or chargeable on April 30, 1985, for the rental unit which shall be the sum of rent charged on September 1, 1983, and all rent increases authorized for that rental unit by prior rent control laws or any administrative decision issued under those laws, and any rent increases authorized by a court of competent jurisdiction.

14 DCMR § 4201.1 provides:

> The "base rent" for each rental unit covered by the Rent Stabilization Program on the effective date of the Act shall be the rent ceiling for the unit as of April 30, 1985, pursuant to § 103(4) of the Act.

[14] At the time relevant to this appeal, D.C. OFFICIAL CODE § 42-3502.06(a) provided, in relevant part:

> Except to the extent provided in subsections (b) and (c) of this section, no housing provider of any rental unit subject to this chapter may charge or collect rent for the rental unit in excess of the amount computed by adding to the base rent not more than all rent increases authorized after April 30, 1985, for the rental unit by this chapter, by prior rent control laws and any administrative decision under those laws, and by a court of competent jurisdiction.

Tenant's unit in April 1985 was, in fact, $371.00, and was only later increased to $416.00, pursuant to a vacancy increase of twelve percent (12%) (an increase in the amount of $44.56), filed in December 1985 and authorized by § 213(a) of the Act, D.C. OFFICIAL CODE § 42-3502.13(a) (2001).[15] Housing Provider's Reply Brief at 1; *see* RX 1 (Amended Landlord Registration Form dated Aug. 27, 1985); R. at 23. Accordingly, the Commission is not satisfied that Housing Provider has identified any "one (1) rent ceiling increase perfected but not implemented" that is equal to or greater than the fifty dollar ($50) increase in rent charged reflected in the 2002 Notice and challenged by the Tenant. *Cf.* D.C. OFFICIAL CODE § 42-3502.08(h); 14 DCMR § 4205.7.

The Commission observes that the Hearing Examiner failed to identify any substantial evidence in the record that the Housing Provider actually did file a rent ceiling adjustment equal to or greater than fifty dollars ($50) at that time. *Id.*; *see* 14 DCMR § 4204.9, .10. The Final Order notes that RX 1, the Amended Registration Form dated August 27, 1985, R. at 23, was admitted into evidence. *See* Final Order at 3; R. at 122. The Commission is satisfied that the Act, the regulations, and precedent clearly establish the procedures for, first, taking and perfecting and preserving a rent ceiling adjustment, and second, implementing an adjustment in rent charged that is less than or equal to a single, selected rent ceiling adjustment. *See* D.C. OFFICIAL CODE § 42-3502.08(h); 14 DCMR § 4205; Sawyer, 877 A.2d at 105-08; Gelman Mgmt., TP 27,995. For the reasons discussed above, the Commission determines that the

[15] Section 213(a) of the Act, then codified at D.C. CODE § 45-2523(a) (1986 Supp.), provided at the time, in relevant part:

> When a tenant vacates a rental unit on the tenant's own initiative or as a result of a notice to vacate for nonpayment of rent, violation of an obligation of the tenant's tenancy, or use of the rental unit for illegal purpose or purposes as determined by a court of competent jurisdiction, the rent ceiling may, at the election of the housing provider, be adjusted to. . . the rent ceiling which would otherwise be applicable to a rental unit under this act plus 12% of the ceiling once per 12-month period[.]

Hearing Examiner's conclusion that the Amended Registration Form constitutes a lawfully taken and perfected rent ceiling adjustment that was implemented by the 2002 Notice does not rationally follow from substantial evidence and applicable law. D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 3807.1; *see* D.C. OFFICIAL CODE § 42-3502.08(h); 14 DCMR § 4205; Sawyer, 877 A.2d at 105-08; *see also* Grant v. Gelman Mgmt. Co., TP 27,995 (RHC Mar. 30, 2006) (Order on Reconsideration) ("If the housing provider attempts to justify a rent increase using a rent ceiling adjustment that was not perfected, the rent increase cannot stand. It matters not if the rent ceiling adjustment was filed within three years or thirty years of the effective date of the rent increase.").

Accordingly, the Commission reverses the Hearing Examiner's determination that the July 1, 2002, increase in the Tenant's rent charged was valid. 14 DCMR § 3807.1. The Commission remands the Tenant Petition to the Rent Administrator to make findings of fact supported by substantial evidence on the record and conclusions of law that rationally follow from the applicable legal standards of the Act and the implementing regulations on whether the rent charged increase reflected in the 2002 Notice was lawful. D.C. OFFICIAL CODE § 2-509(e); Perkins, 482 A.2d at 402; A&A Marbury, RH-TP-11-30,151. The findings of fact and conclusions of law shall address whether the 2002 Notice implemented less than or all of the unused portion of a single, preserved rent ceiling adjustment that had been previously taken and perfected in accordance with the Act and regulations, specifically identifying the legal basis for the rent ceiling adjustment. D.C. OFFICIAL CODE § 42-3502.08(h); 14 DCMR § 4205; Sawyer, 877 A.2d at 105-08; Shuler, TP 28,266. If a "moratorium" or "amnesty period" is relevant to identifying a preserved rent ceiling adjustment, the Rent Administrator shall fully explain the factual and legal basis for that determination. *Cf.* Final Order at 6; R. at 119.

2. Whether the Hearing Examiner erred in failing to order a rent rollback based on the unlawful increase in rent charged on July 1, 2002, and to award damages.

The Tenant claims that because the Hearing Examiner dismissed all of her claims, a determination was not made as to remedies or damages she should receive for the allegedly illegal 2002 increase in rent charged. Notice of Appeal at 3. The Tenant claims that her rent should be rolled back to the rate of $425 per month, the amount charged prior to the 2002 rent increase, and that she be awarded damages in the amount of at least $8,562, representing rent overpayments from July 2002 to September 2008. *See* Tenant's Brief at 7-8 and Appendix 1.

The Tenant also raises the possibility of treble damages. Notice of Appeal at 3; Tenant's Brief at 8-9. The Tenant contends that the Housing Provider knowingly and in bad faith collected rent in excess of that legally allowed, therefore, treble damages should be awarded, and that the Housing Provider has knowledge of the law and the process for making rent ceiling adjustments because the Housing Provider is a "prominent D.C. commercial real estate company" that has accepted rent from the Tenant for over 20 years. Tenant's Brief at 8-9.

D.C. OFFICIAL CODE § 42-3509.01(a) provides:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, or (2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent charged or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

Because the Commission has determined that the case shall be remanded for the Rent Administrator to make findings of fact and conclusions of law, in accordance with the Act, regulations, and precedent, on whether the 2002 increase in rent charged was lawful, the Commission does not address the question of damages, or their trebling for bad faith, at this

time. *See, e.g.*, Barron, TP 28,510, TP 28,521, and TP 28,526 (where computation of rent refund was not in accordance with the Act, question of bad faith to treble that amount moot on appeal); Hiatt Place P'ship v. Hiatt Place Tenants Ass'n, TP 21,149 ("[Because] there will be a remand on the reduction in services issue, we need not pursue the treble damage question at this time. The question of treble damages can be considered if any damages are awarded after remand."); *see also* Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Jan. 29, 2012) (where case remanded to determine remedy for violation of registration provision of the Act, issue of notice to tenant of reduction in services was moot on appeal). The Hearing Examiner shall determine if the July 1, 2002, increase in rent charged of fifty dollars ($50) was unlawful and whether a rent refund, including treble damages, or a rent rollback should be awarded. If so, the Hearing Examiner shall determine the period of time that should apply for, and the proper amount of, any rent refund or rollback.

The Commission notes that if, on remand, the Rent Administrator finds that the Housing Provider violated the Act by implementing the 2002 rent increase, the Tenant will be entitled to a rent refund only if the rent charged exceeded the lawfully calculated rent ceiling for the rental unit. *See* D.C. OFFICIAL CODE § 42-3509.01(a) (2001);[16] *see, e.g.*, Barron, TP 28,510, TP 28,521, and TP 28,526 (plain error to award refunds not in accordance with the Act); Dreyfuss Mgmt, LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) ("[T]he ALJ may only issue a rent refund for the period [ending] August 4, 2006 if the [adjustment for reduction in services] decreased the rent ceiling to a value below the rent charged, and the Tenants are then only entitled to the difference between the two values."); Kemp v. Marshall Heights Cmty. Dev., TP

[16] The Commission notes that the Rent Control Reform Amendment Act of 2006, effective August 5, 2006, D.C. Law 16-145, 53 DCR 4889, abolished rent ceilings.

24,786 (RHC Aug. 1, 2000) ("The housing provider is liable for a rent refund only if the rent charged is higher than the reduced rent ceiling. Where the rent actually charged is equal to or lower than the reduced rent ceiling, there was no excess rent collected and no refund is required."). A rent rollback, on the other hand, affords a tenant prospective relief by directly altering the terms of an existing lease. Carmel Partners, Inc. d/b/a Quarry II, LLC v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC May 16, 2014); Grayson v. Welch, TP 10,878 (RHC June 30, 1989). Nonetheless, what relief, if any, the Tenant may be entitled to is a question to be determined initially by the Rent Administrator.

Accordingly, the Commission dismisses this issue on appeal without prejudice.

IV. CONCLUSION

For the foregoing reasons, the Commission reverses the Hearing Examiner's determination that the fifty dollar ($50) rent increase on July 1, 2002, lawfully implemented a 1985 rent ceiling adjustment that was allowed by a moratorium during that period. *See* Final Order at 6; R. at 119. The Commission remands the Tenant Petition to the Rent Administrator to make findings of fact supported by substantial evidence on the record and conclusions of law that rationally follow from the application of the legal standards of the Act and the implementing regulations to the facts, regarding whether the rent charged increase reflected in the 2002 Notice was lawful. D.C. OFFICIAL CODE § 2-509(e); Perkins, 482 A.2d at 402; A&A Marbury, RH-TP-11-30,151. The findings of fact and conclusions of law shall address whether the 2002 Notice implemented less than or all of the unused portion of a single, preserved rent ceiling adjustment that had been previously taken and perfected in accordance with the Act and regulations, specifically identifying the legal basis for the rent ceiling adjustment. D.C. OFFICIAL CODE § 42-3502.08(h); 14 DCMR § 4205; Sawyer, 877 A.2d at 105-08; Shuler, TP 28,266. If a

"moratorium" or "amnesty period" is relevant to identifying a preserved rent ceiling adjustment, the Rent Administrator shall fully explain the factual and legal basis for that determination. *Cf.* Final Order at 6; R. at 119. The Rent Administrator is further instructed, in the event that, following remand, it is determined that the 2002 rent increase was unlawful, to further determine the relief that the Tenant is entitled to, based on the provisions of the Act in effect at the time the rent increase was implemented. *See supra* at 19-20; D.C. OFFICIAL CODE § 42-3509.01(a).

SO ORDERED.

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."

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** in TP 28,196 was mailed, postage prepaid, by first class U.S. mail on this 24th **day** of **June, 2015,** to:

Daniel M. Clark
D.C. Law Students in Court
4340 Connecticut Ave., N.W. #100
Washington, DC 20008

Michael E. Brand
Loewinger & Brand, PLLC
471 H Street, N.W.
Washington, DC 20001

LaTonya Miles
Clerk of the Court
(202) 442-8949