DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 28,519

In re: 3133 Connecticut Ave., N.W. Apt. 802

Ward Three (3)

B. F. SAUL PROPERTY COMPANY & THE KLINGLE CORPORATION
Housing Providers/Appellants/Cross-Appellees

v.

BLAKE NELSON & WENDY NELSON
Tenants/Appellees/Cross-Appellants

FINAL DECISION AND ORDER

February 18, 2016

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from an order issued by the Rental Accommodations Division (RAD) of the District of Columbia Department of Housing and Community Development (DHCD), based on a petition filed with the Rental Accommodations and Conversion Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. Official Code §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

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[1] During the pendency of this case, the Office of Administrative Hearings (OAH) assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (RACD) on October 1, 2006, pursuant to § 6(b-1)(1) of the OAH Establishment Act, D.C. Law 16-83, D.C. OFFICIAL CODE § 2-1831.03(b-l)(l) (2012 Repl.). The functions and duties of RACD were transferred to DHCD by § 2003 of the Fiscal Year 2008 Budget Support Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.). Therefore, although this case originated with RACD, it was subsequently transferred to RAD. *See infra* at n.2.

I. PROCEDURAL HISTORY

On January 26, 2006, Tenants/Appellees/Cross-Appellants Blake Nelson and Wendy Nelson (Tenants), residents of 3133 Connecticut Avenue, NW, Apartment 802 (Housing Accommodation), filed Tenant Petition TP 28,519 (Tenant Petition) with DCRA against B.F. Saul Property Company and the Klingle Corporation (collectively, Housing Provider). Tenant Petition at 1-2; Record for TP 28,519 (R.) at 22-23. The Tenant Petition raised the following claims against the Housing Provider:

1. The rent increase was larger than the amount of increase which was allowed by any applicable provision of the Rental Housing Emergency Act of 1985.

2. A proper thirty (30) day notice of rent increase was not provided before the rent increase became effective.

3. The Housing Provider failed to file the proper rent increase forms with the Rental Accommodations and Conversion Division.

4. The rent being charged exceeds the legally calculated rent ceiling for my/our unit(s).

5. The rent ceiling filed with the Rental Accommodations and Conversion Division for my/our unit(s) is improper.

Tenant Petition at 3; R. at 20.

An evidentiary hearing was held in this matter on June 21, 2006. R. at 31. A Proposed Decision and Order was issued on September 24, 2008: Blake J. Nelson & Wendy Nelson v. B.F. Saul Company & The Klingle Corporation, TP 28,519 (RAD Sept. 24, 2008) (Proposed Decision and Order).[2] R. at 861-78. Keith Anderson (Hearing Examiner) made the following findings of fact in the Proposed Decision and Order:[3]

[2] The Commission notes that pursuant to the FY 2008 Budget Support Act of 2007, the RACD was transferred from DCRA to the Department of Housing and Community Development (DHCD), and renamed the Rental

1. The subject housing accommodation, 3133 Connecticut Avenue, NW, is properly registered with RAD.

2. Blake and Wendy Nelson reside in Unit 802 at the subject property and are the Petitioners in this matter.

3. Klingle Corporation owns and B.F. Saul Company manages the subject housing accommodation and are the Respondents in this matter.

4. Respondents filed a[n] RACD Certificate of Election of General Applicability (certificate of election) on January 2, 2002 based on the year 2000 annual CPI-W adjustment with an effective date of February 1, 2002. The certificate of election lists the "Prior Rent Ceiling" for Unit 802 at $1,710[.00], the "New Rent Ceiling" at $1,766.00 and the "New Rent Charge" at $1,761.00. This certificate of election was filed more than three years before the date TP 28,519 was filed on January 26, 2006. PE 1.

5. On January 6, 2003, the rent ceiling on file with RAD for Unit 802 was $1,766.00. The rent charged for Unit 802 was $1,761.00.

6. On January 6, 2003, Respondents filed a certificate of election with RACD based on the year 2002 2.1% CPI-W adjustment, with an effective date of February 1, 2003. The year 2002 2.1% CPI-W adjustment did not become effective unit [sic] May 1, 2003. While the January 6, 2003 certificate of election incorrectly purports to be calculated on the year 2002 2.1% CPI-W adjustment, it is actually calculated based on the year 2001 2.6% CPI-W adjustment, which became effective on May 1, 2002. It lists the "Prior Rent Ceiling" and "New Rent Ceiling" for Unit 802 at [$]1,767.00 and $1,813.00 respectively. The "Prior Rent Charge" and the "New Rent Charge" are both listed at $1,761.00. PE 3, PE 4 & PE 5.

Accommodations Division (RAD). D.C. Law 17-20, 54 DCR 7052 (Sept. 18, 2007) (codified at D.C. OFFICIAL CODE § 42-3502.03a (Supp. 2008)).

The Commission's review of the record reveals that the evidentiary hearing was conducted by Hearing Examiner Johnson, and Hearing Examiner Keith Anderson issued the Proposed Decision and Order, in accordance with D.C. OFFICIAL CODE 2-509(d) (2001), which provides the following:

> 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.

[3] The findings of fact are recited using the language of the Hearing Examiner in the Proposed Decision and Order.

7. The February 3, 2003 effective date for the January 6, 2003 certificate of election falls within 3 years of the January 26, 2006 date that TP 28,519 was filed.

8. The January 6, 2003 certificate of election contained incorrect information. It was also filed with RACD less than 30 days before the February 1, 2003 effective date and far more than 30 days after the May 1, 2002 effective date of the year 2001 2.6% CPI-W adjustment. There is no record evidence that Respondents corrected the errors in the January 6, 2003 filing. Accordingly, the January 6, 2003 certificate of election purporting to implement an annual adjustment of general applicability effective February 1, 2003 was filed improperly.

9. Respondents filed a[n] RACD Amended Registration Form for Unit 802 on July 26, 2003 implementing a vacancy increase using Unit 402 as the substantially identical unit to raise the rent ceiling from $1,813.00 to $3,255.00 and the rent charged from $1,761.00 to $3,255.00.

10. Petitioners incorrectly argued that the Amended Registration Form perfecting the vacancy increase was filed on July 29, 2006 [sic] instead of July 26, 2003, the actual date that appears on the Form. P6. As such, Petitioner's [sic] claim that the property was vacated on June 27, 2003 and that Respondents filed the Amended Registration Form on July 29, 2003, three days beyond the 30 day filing deadline is without merit. Assuming arguendo, that Respondents filed the Amended Registration Form on July 29, 2003, Respondent's [sic] witness, Tanya Marhefka, provided credible testimony that the tenant in 402 had paid rent and had possessory rights to the unit until July 6, 2003; while Petitioners' [sic] testified that the property was vacated on June 27, 2003, they did not state whether the furniture had been moved out prior [to] their visit on July 2, 2003, lending credence to Respondents' position that the tenancy existed until July 6, 2003.

11. Petitioners argued that Unit 402 is unique and not substantially identical to Unit 802 because the two units had[,] at the time Unit 802 was vacated[,] different amenities, were not in comparable condition, and did not have comparable equipment. Record evidence indicates that in June and July 2003 the lobby, façade, doorway and entrance to Unit 402 were under construction and therefore were different in appearance, configuration and physical condition than the same for Unit 802. The carpeting, lighting, artwork and furniture in the lobby area were different. Record evidence also indicates that there is a balcony overlooking the main lobby immediately outside, but not a part of, Unit 402. Testimony of the parties indicates that, while telephone jacks were installed in Unit 402 but missing from Unit 802 in June and July

2003, the telephone jacks had been inadvertently removed by a contractor unbeknownst to Respondents and were installed at a later date.

12. Unit 402 and Unit 802 are located in the same tier in the building and have the same floor plans, square footage and amenities, including the telephone jacks. Unit 402 is subject to Title II of the Act and there is no record evidence that the location in relation to exposure and height has previously determined the rent level for either unit. There is no record evidence that the inside of the two units are not in comparable physical condition.

13. Unit 402 and 802 are both subject to rent control, and are located in the same tier of the building. Exposure and height had no previous bearing on the rent level. There was testimonial proof that they have the same floor plan and amenities, and the only difference[s] in the two units are the physical condition of the entrance doors, façade and lobby areas in front of the units, and the balcony outside Unit 402. Therefore record evidence supports a finding that Unit 402 was substantially identical to Unit 802. Petitioners' claim that the increase should be invalidated on the grounds [sic] that the two units were not substantially comparable is rejected.

14. The rent ceiling adjustment taken on Unit 402 effective March 2001 occurred more than three years prior to the date TP 28,519 was filed with RAD. Petitioners claim that the July 2003 vacancy adjustment is invalid because the March 2001 rent ceiling increase for Unit 402 upon which the vacancy increase was based was invalid. Petitioners' claim is without merit because it relates to a rent adjustment that occurred outside of the three year statute of limitations.

15. It is undisputed that Respondents did not post a true copy of the RACD Amended Registration Form for the July 2003 vacancy adjustment for Unit 802 in a conspicuous place at the housing accommodation or mail a true copy to Petitioners, but rather required Petitioners to seek a copy of pertinent rent increase notices, including the subject Amended Registration Form, located in a binder behind the front desk. HT pp. 61, 63, 64, 100 & 101; PE 25, PE 26. Respondents' posting of a notice in the laundry room of the housing accommodation directing tenants to the binder behind the front desk is rejected as insufficient because the laundry room is not conspicuous – it is located in the basement of the housing accommodation and not all tenants use the laundry room. There was also no testimony as to whether the notice was actually posted in the laundry room, assuming arguendo that it is deemed conspicuous. The fact that the vacancy rent ceiling was listed in the lease agreement signed by Petitioners is of no moment as it does not have a copy of the Amended Registration Form attached or other reference to the whereabouts of the Form.

16. The July 2003 vacancy rent adjustment is invalid because Respondents failed to provide Petitioners with proper notice of the Amended Registration Form filed with RACD on July 25, 2006. Respondents['] failure was not intentional or willful. Respondents placement of the Amended Registration Form and other rent increase notices in a binder located behind the front desk and the listing of the rent increase in the lease agreement clearly suggests that Respondents thought there [sic] alternative procedures were acceptable and complied with the notice requirements, albeit in error, and that there was no intent or evil motive to mislead or defraud Petitioners or RAD, as Petitioners allege.

17. On July 2, 2004, Respondents filed a certificate of election with RACD based on the year 2004 2.9% CPI-W adjustment, with an effective date of August 1, 2004. The year 2004 CPI-W adjustment was 2.7% and did not become effective unit [sic] May 1, 2005, a year after the August 1, 2004 effective date. The July 2, 2004 certificate of election incorrectly purports to be calculated on the year 2004 2.7% CPI-W adjustment, it is actually calculated based on the year 2003 2.9% CPI-W adjustment, which became effective on May 1, 2004. It lists the "Prior Rent Ceiling" and "New Rent Ceiling" for Unit 802 at [$]3,255.00 and $3,349.00 respectively; it lists both the "Prior Rent Charge" and the "New Rent Charge" at $3,225.00. PE 7.

18. The August 1, 2004 effective [date] of the July 2, 2004 certificate of election falls within 3 years of the January 26, 2006 date TP 28,519 was filed.

19. The July 2, 2004 certificate of election contained incorrect information. It was also filed with RACD more than 30 days after the May 1, 2004 effective date of the year 2003 2.9% CPI-W adjustment. There is no record evidence that Respondents corrected the errors in the July 2, 2004 filing. Accordingly, the July 2, 2004 certificate of election purporting to implement a 2004 2.9% annual adjustment of general applicability effective August 1, 2004 was filed improperly.

20. On October 1, 2004, Respondents filed a certificate of election with RACD based on the year 2003 2.9% CPI-W adjustment, with an effective date of November 1, 2004. The year 2003 2.9% CPI-W adjustment became effective unit [sic] May 1, 2004. The October 1, 2004 certificate of election correctly purports to be calculated on the year 2003 2.9% CPI-W adjustment. It lists the "Prior Rent Ceiling" and "New Rent Ceiling" for Unit 802 at $3,349.00; it lists the "Prior Rent Charge" and the "New Rent Charge" at $3,225.00 and $3,349.00 respectively. PE 20.

21. The November 1, 2004 effective date for [the] October 1, 2004 certificate of election falls within 3 years of the January 26, 2006 date TP 28,519 was filed.

22. The October 1, 2004 certificate of election contained incorrect information. It was also filed with RACD more than 30 days after the May 1, 2004 effective date of the year 2003 2.9% CPI-W adjustment. There is no record evidence that Respondents corrected the errors in the October 1, 2004 filing. Accordingly, the October 1, 2004 certificate of election purporting to implement a 2003 2.9% annual adjustment of general applicability effective November 1, 2004 was filed improperly.

23. On June 29, 2005, Respondents filed a certificate of election with RACD based on the year 2004 2.7% CPI-W adjustment, with an effective date of August 1, 2005. The year 2004 2.7% CPI-W adjustment became effective May 1, 2005. The June 25, 2004 [sic] certificate of election correctly purports to be calculated on the year 2004 2.7% CPI-W adjustment. It lists the "Prior Rent Ceiling" and "New Rent Ceiling" for Unit 802 at [$]3,349.00 and $3,439.00 respectively; it lists both the "Prior Rent Charge" and the "New Rent Charge" at $3,349.00. PE 12.

24. The August 1, 2005 effective date of the June 29, 2005 certificate of election falls within 3 years of the January 26, 2006 date TP 28,519 was filed.

25. The June 29, 2005 certificate of election contained incorrect information. The "Prior Rent Charged' [sic] of $3,[34]9.00 on the certificate is wrong; it should read $3,255.00, to be consistent with the erroneous July 2, 2004 certificate of election. The June 29, 2005 certificate was also filed with RACD more than 30 days after the May 1, 2005 effective date of the year 2004 2.7% CPI-W adjustment. There is no record evidence that Respondents corrected the errors in the July 29, 2005 filing. Accordingly, the July 29, 2005 certificate of election purporting to implement a 2004 2.7% annual adjustment of general applicability effective August 1, 2005 was filed improperly. Respondents delivered a[n] RACD Notice of Increase in Rent Ceiling to Petitioners dated June 20, 2006, which listed the current and new rent ceilings at $4,925.00 and $5,085.00 respectively, however, Respondents delivered another Notice dated June 26, 2005 listing the two ceilings at $3,349.00 and $3,439.00, in accordance with the January [sic] 29, 2005 certificate of election. P10, P11 & P12.

26. Respondents' witness David Newcome testified that the reason that the certificates of election filed in 2003, 2004 and 2005 were filed on the dates reflected was the result of an oral agreement reached with the Kennedy Warren Residents Association (KWRA) relating to the construction of the south wing of the Kennedy Warren Apartments which provided for a period of deferral of rent ceiling adjustments, as well as, a period during which rent increases were suspended. Mr. Newcome testified that the agreement also provided for compensation to the tenants for the inconvenience caused by the

construction, however, Petitioners did not allege a rent violation based on the inconvenience caused by the conditions of their tenancy. HT pp 49-55.

27. Respondents reliance on the oral agreement reached with KWRA as the reason why the 2003, 2004 and 2005 certificates of election were filed more than 30 days after Respondents were eligible to take those increases is rejected because record evidence clearly indicates that the certificates of election filed in 2001 and 2002 prior to the agreement were also filed more than 30 days after Respondents were eligible to take those adjustments. P32 & P33. Respondents position is also rejected based on record evidence that the filing and effective dates of the annual adjustments were changed after the end of the oral agreement with KWRA and coincide with [the] expiration of Petitioners' lease agreement. P5, P7, P33, P35 & P36; R1.

28. Respondents are clearly landlords in the rental housing business in the District of Columbia. Knowledge of the rental housing laws are [sic] imputed to Respondents. Therefore, they knew or should have known that implementing rent ceiling increases and increases in the rent charge beyond the deadlines for implementing them and without proper notice constituted violations of the Act. Thus, Respondents knowingly increased the rent ceiling and the rent charged for Petitioners' unit, as previously discussed, in violation of the Act.

29. Respondents willfully increased Petitioners' rent ceiling and rent charged in violation of the Act because they were fully aware that they could not lawfully and unilaterally move filing dates for annual rent ceiling adjustments of general applicability and place an amended registration form for a vacancy rent ceiling adjustment in an inconspicuous place.

30. Respondents did not increase the rent ceiling and rent charged for Petitioners' [unit] in bad faith, as Petitioners alleged. Respondents' actions in moving the filing dates for the annual rent ceiling adjustment and posting the vacancy increase notice in the laundry room do not suggest that Respondents in doing so intended to defraud tenants, misrepresent the rent ceilings and avoid detection by RAD. The fact that Respondents' [sic] left an amended registration form for the vacancy adjustment behind the front desk, posted something in the laundry room purporting to be the amended registration form and filed a copy with RAD defeats the notion that Respondents engaged in fraud, misrepresentation and deceit. The same is true regarding Respondents['] decision to move the filing dates for the annual rent ceiling adjustments. Albeit improperly, Respondents filed the requisite notices with RAD and Petitioners, leaving all interested parties fully aware [of] the rent adjustment procedures for Petitioners.

31. Petitioners are entitled to a refund of rent overcharges. Petitioners paid $3,255.00 per month from August 1, 2003 through November 1, 2004 when

the legally calculated rent charged was $1,761.00. Respondents must refund to Petitioners the difference between the amount paid in rent, $3,244.00, and [the] rent amount that could be legally charged, $1,766.00, which is calculated as $3,255.000 [sic] - $1,766.00 = $1,494.00. The refund for August 1, 2003 through October 31, 2004 is 15 months x $1,494.00 = $22,410.00. Petitioners paid $3,349.00 from November 1, 2004 through October 31, 2005. The difference between the amount [of] rent paid by Petitioners and the legally calculated rent ceiling for that period is $3,349.00 - $1,766 = $1,583.00. The refund amount for that period is $1,583 x 12 = [$]18,996.00. Petitioners paid $3,439.00 from November [1,] 2005 to June [21,] 2006 – the date of the hearing. The difference between the amount of rent paid by Petitioners and the legally calculated rent ceiling for that period is $3,439.00-[$]1,766.00 = $1,673.00. The refund amount for that period is $13,384.00 ($1,673.00 x 8 months).

32. Petitioners are entitled to a total refund for rent overcharges of $54,790.00, not including interest.

33. Petitioners are not entitled to trebled damages.

34. Petitioners are entitled to interest on their refund. Interest is calculated from the date of the violation to the first date of the violation [sic] to the date of the issuance of the decision.

35. The interest refund and interest calculation appears in the chart below.

36. Refund and interest: . . . [4]

37. Petitioners are entitled to interest in the amount of $7,102.00.

38. Petitioners are entitled to rent overcharges in the amount of $54,790.00, plus interest in the amount of $7,102.00, for a total rent refund of $61,892.00.

Proposed Decision and Order at 6-13; R. at 866-73. The Hearing Examiner made the following conclusions of law in the Proposed Decision and Order:[5]

1. Petitioners have demonstrated by a preponderance of the evidence that Respondents failed to provide a proper vacancy rent ceiling increase notice to Petitioners, for the vacancy adjustment effective August 1, 2003, in violation

[4] The Commission omits a recitation of the chart detailing the Hearing Examiner's rent refund and interest calculations. Proposed Decision and Order at 12-13; R. at 866-67.

[5] The Conclusions of law are recited herein using the language of the Hearing Examiner in the Proposed Decision and Order.

of D[.]C[.] Official Code Sect. 42-3502.13 and 14 DCMR Sects. 4207.5 and 4101.6 (2004), by failing to post the amended registration form in a conspicuous place in the housing accommodation.

2. Petitioners failed to demonstrate that Respondents filed the amended registration form perfecting the August 1, 2003 vacancy increase more than 30 days after the property was vacated, pursuant to 14 DCMR Sect. 4103.1(e) (2004).

3. Petitioners failed to demonstrate that the August 1, 2003 vacancy unit [sic] was not based on a unit comparable to Petitioners['], pursuant to D[.]C[.] Official Code Sect. 42-3502.13(b) and 14 DCMR Sect. 4207.4 (2004).

4. Petitioners have demonstrated by a preponderance of the evidence that Respondents failed to provide a proper certificate of election of rent ceiling adjustment of general applicability, in a timely manner, for rent ceiling adjustments effective November 1, 2004 and November 1, 2005 for their unit, in violation of 14 DCMR Sects. [sic] 4204.1 (2004).

5. Petitioners have demonstrated by a preponderance of the evidence that Respondents overcharged Petitioner[s] monthly rent, for increases in the rent charged effective August 1, 2003, November 1, 2004 and November 1, 2004 [sic], in violation of D.C. Official Code Sect. 42-3502.06(a) (2001).

6. Petitioners have demonstrated by a preponderance of the evidence that Respondents knowingly increased the rent ceiling and rent charged for their unit, in violation of the Act, pursuant to D[.]C[.] Official Code Sect. 42-3502.09(a) (2001).

7. Petitioners have demonstrated by a preponderance of the evidence that Respondents willfully increased the rent ceiling and rent charged for their unit, pursuant to D[.]C[.] Official Code Sect. 42-3502.09(b) (2001).

8. Petitioners have not demonstrated by a preponderance of the evidence that Respondents acted in bad faith when they increased the rent ceiling and rent charged for their unit, in violation of the Act, pursuant to D[.]C[.] Official Code Sect. 42-3502.09(a) (2001).

9. Petitioners have demonstrated by a preponderance of the evidence that the legal rent ceiling was[,] and the legal monthly rent charged for their unit is[,] $1,766.00.

10. Petitioners have not demonstrated by a preponderance of the evidence that they are entitled to a trebled rent refund for rent adjustments taken on their units [sic] by Respondents in violation of the Act.

11. Petitioners are entitled to a rent refund for rent overcharges in the amount of $54,790.00 plus interest in the amount of [$]7,102.00, for a total rent refund of $61,892.00, pursuant to D[.]C[.] Official Code Sect[s]. 42-3502.06(a) and [42-]3509.01(a) (2001).

12. Petitioners are entitled to have the monthly rent charged for their unit rolled back to $1,766.00, for Respondents['] improper rent adjustments, pursuant [to] D[.]C[.] Official Code Sect. 42-3509[.01](a) (2001).

13. All other conclusions of law made in this Decision and Order are incorporated by reference in this section of Conclusions of Law.

Proposed Decision and Order at 13-14; R. at 865-66. On October 14, 2008, the Tenants filed twenty-one (21) exceptions and objections (Tenants' Exceptions and Objections) to the Proposed Decision and Order. Tenants' Exceptions and Objections at 1-4; R. at 996-99. The Housing Provider filed six (6) exceptions and objections (Housing Providers' Exceptions and Objections) to the Proposed Decision and Order on October 14, 2008. Housing Provider's Exceptions and Objections at 1-4; R. at 1298-1301.

On March 29, 2010, the Hearing Examiner issued an "Order Denying Exceptions and Objections to September 24, 2008 Decision and Order and Final Decision and Order" (Final Order).[6] The Hearing Examiner made the following findings of fact in the Final Order:

. . .[7]

2. Petitioners request [sic] RAD to reopen the hearing in this matter for the limited purpose of admitting newly discovered evidence that was not reasonably available on or before the June 21, 2006 hearing and to allow examination of agency documents which the Acting Rent Administrator took official notice of in the Proposed Decision and Order. Petitioners argue in

[6] The Commission notes that the Final Order is erroneously date-stamped March 29, 2012. *See* Final Order at 1; R. at 1368. The Commission observes that both parties filed their respective notices of appeal with the Commission in April, 2010, thus leading the Commission to infer that the actual date of the Final Order is March 29, 2010. Neither party alleges that the Final Order was issued in 2012.

[7] The Commission omits a recitation of the Hearing Examiner's findings of fact regarding the Housing Provider's Motion for Extension of Time to Respond to the Proposed Decision and Order. Final Order at 3; R. at 1366.

support of their motion that applicable Regulations allow for newly discovered evidence to be admitted into evidence that demonstrates "fraud, misrepresentation, or other misconduct" on the part of a party, 14 DCMR Sect. 4017, and the taking of official notice of agency documents after a hearing has been concluded allows a party to have the hearing reopened. 14 DCMR Sect. 4009.9; *Florio v. Wyck*, TP 27,878 (RHC July 22, 2005). Petitioners submit that the newly discovered evidence in question demonstrates that Respondents' witnesses David Newcomb and Tanya Marhefka misrepresented the truth when they testified at the hearing and the evidence is therefore relevant to the issue of bad faith conduct by Respondent[s]. Petitioners also submit that the Proposed Decision and Order made rulings on the registration status of the housing accommodation based on documents officially noticed in the RAD Registration File for the subject property, rulings that give the Parties a right to [a] hearing to examine said records. Petitioners identified the newly discovered evidence and officially noticed agency records they wish to have considered at a new hearing in a Summary of Exhibits at page 5 of their Brief. Respondents oppose Petitioners['] request as being an improper attempt to have a new hearing where they can present new arguments in support of those claims which RAD rejected in the Proposed Decision and Order, arguments that Petitioners could have made in the Proposed Decision and Order they filed after the hearing and before the RAD Proposed Decision and Order was issued.

3. RAD rejects Petitioners' request to reopen the hearing to admit newly discovered evidence for the following reasons. First, the registration statement (P38) was the only agency record of which official notice was taken that was considered by RAD in the Proposed Decision [and] Order. The registration statement was used to rule on the registration status of the housing accommodation, which Petitioners correctly note in their exceptions was improper because the registration status of the property was not an issue in this case. RAD will vacate the ruling made on the registration status as being outside the scope of this proceeding and amend the Proposed Decision and Order accordingly. The year 1987-2000 certificates of elections (P39-P52) were not considered in any of the findings or conclusions made in the Proposed Decision and Order, even though these documents are among the records contained [in] the RAD Registration File of which official notice was taken. These agency records have no bearing on this proceeding and, consequently, should not be used as grounds to support a request to reopen the hearing in this case.

4. Second, the tenant/petition complaint and decision and order in TP[ ]28,269 (P53 and P54), the audio recording of the hearing in TP 28,267 (P56), TP 28,270 (P57), the photographs of Unit 402 and Unit 802 (P62-P74) and the Policy Memo (P75) were all available when the June 21, 2006 hearing convened and are not newly discovered evidence. Petitioners['] argument that

they should be admitted via a new hearing as newly discovered evidence because Petitioners had no prior notice of Respondents[']s testimony is rejected. Once the testimony was given and before the hearing adjourned, Petitioners had the opportunity to move for a continuance or to request that the record be held open until such time as they were able to obtain the evidence in question. Petitioners certainly could have secured information regarding the three tenant petitions from RAD records prior to the hearing.

5. Finally, the affidavits of Lee Cohen, Peter Wissoker, Jill Golden, and Zina Greene were not available because they did not exist. Petitioners executed these affidavits post-hearing without first getting approval to do so from the hearing examiner. Again, as with the other evidence aforementioned, Petitioners could and should have made attempts to secure these statements before the June 26, 2006 hearing record closed.

Petitioners' Brief on Exceptions and Objections to the Proposed Decision and Order Issued on September 24, 2008, dated October 14, 2008

6. Petitioners complain in their exceptions to the Proposed Decision and Order (hereinafter Order) that the Order copied, without substantive modification, the Summary of Testimony and Issues Considered authored by counsel for Respondent[s] in his post-hearing submission and resulted in erroneous findings and conclusions.

7. Specifically, Petitioners argued that the Summary of Testimony and Issues Considered sections of the Order were ghostwritten by counsel for Respondents and resulted in the Acting Rent Administrator listing the issues incorrectly; and mistakenly concluding that Respondents' conduct did not constitute bad faith and that Unit 402 and Unit 802 were comparable. Respondents strongly object to Petitioners[']s accusation of ghostwriting as absurd and scandalous in that it implies that the Acting Rent Administrator and Respondents' counsel conspired to secretly publish a rendition of the testimony and issues considered, which Petitioners know did not happen because they received a copy of Respondents' proposed decision and order before the RAD Order was issued. Respondents also argue that Petitioners' objections are redundant, immaterial and impertinent and should be rejected.

8. RAD also takes exception to the ghostwriting allegation and determines that the Order as written does not constitute a violation of Petitioners' fundamental right to a fair trial or is responsible for the findings that Respondents did not act in bad faith or that Unit 402 and Unit 802 are comparable; or any other alleged errors. Obviously, there was no conspiring between the Acting Rent Administrator and Respondents' counsel to write the Summary of Testimony and Issues Considered [s]ections. The Acting Rent Administrator was not the hearing examiner of record or otherwise involved with this matter at the time

the post-hearing document written by Respondents' counsel was filed with RAD. More importantly, while the Summary of Testimony and Issues Considered sections in the Order are taken from Respondents' counsel's proposed decision and order, many of the Findings of Fact and Conclusions of Law were taken directly form [sic] Petitioners['] post-hearing submission and were favorable to Petitioners' case. Petitioners rather curiously omit this fact in their Brief on Exceptions. The decision and order in the *Gelman* case cited by Petitioners regarding ghostwriting orders was adopted by the hearing examiner fully and completely. Here, neither post-hearing decision submitted by the Parties was adopted to the exclusion of the other. While admittedly the Summary of Testimony was only a slightly modified version of Respondents', the Order in its entirety was the product of an evaluation and analysis of the arguments raised by both parties, and resulted in [a] decision favorable to Petitioners, though Petitioners have taken the instant exceptions with each [sic] the rulings favorable and unfavorable.

9. Petitioners are correct in their claim that the Summary of Testimony has errors and that the Issues Considered section omits the issues delineated by the hearing examiner at the start of the hearing. These errors and omissions shall be addressed later in this order.

10. Petitioners' request that RAD re-write the Summary of Testimony using the version proposed in their exception[s] and objections. RAD denies said request and, again, will amend the Order accordingly.

11. Petitioners also claim in their exceptions that the Order failed to find that the vacancy increase in question was invalid because Respondents (a) determined the rent ceiling by improperly stacking three rent ceiling increases; (b) failed to give Petitioners proper notice of the adjustment; (c) erroneously determined the July 2003 "move-out" date for Unit 802; (d) failed to find that the July 2003 Amended Registration Form did not contain a certificate of compliance; [(e)] erroneously determined that unit 402 was substantially identical to unit 802; [(f)] failed to invalidate the rent ceiling for Unit 402; [(g)] failed to invalidate the increase because the housing accommodation was not properly registered; and [(h)] every rent ceiling increase reported by Respondent[s] was invalid.

12. The Order invalidated the July 2003 vacancy increase challenged by Petitioner[s] on the ground that Respondent[s] failed to give Petitioner[s] proper notice of the vacancy increase. RAD affirms its ruling that the Amended Registration Form purporting to perfect the vacancy increase was filed with RAD within the require[d] 30 day period because record evidence does not indicate that the vacancy to [sic] effect more than 30 days prior to July 26, 2003, the actual date that appears on the form.

13. Petitioners are correct in stating that the Order erroneously found that there was record evidence that Unit 402 and Unit 802 had the same floor plan and amenities and that exposure and height had no bearing on the rent level at the time the vacancy adjustment was taken, as there was no testimonial or documentary proof regarding these statements introduced at the hearing. The only evidence submitted on the similarity of the two units was Petitioners' testimony that entrance doors, façade and lobby areas in front of the units were different and Unit 802 had no telephone wiring; and Ms. Marhefka's bald assertion that the two units were comparable and the phone wiring was apparently inadvertently removed from Petitioners' unit. Based on the testimony on record, RAD determines that Petitioners are correct that the preponderance of evidence suggests that the two units were not comparable. The findings and conclusions in the Order that Unit 402 and Unit 802 were substantially comparable are reversed and the Order shall be amended accordingly.

14. Petitioners' allegation that the Order failed to invalidate the vacancy adjustment because the housing accommodation was not properly registered is rejected on the ground that the registration status of the housing accommodation was not at issue in this matter and was improperly considered. Findings and conclusions in the Order concerning registration shall be vacated. RAD finds that all other grounds for invalidating the vacancy adjustment that the Order omitted as alleged by Petitioners are moot and need not be addressed in light of the fact that the adjustment was invalidated on other grounds as previously stated.

15. Petitioners also contend that the Order failed to find that annual CPI-W rent adjustments were invalid because Respondents (a) failed to properly serve Petitioners with a RAD Registration/Claim of Exemption Form; (b) failed to invalidate all increases that were not filed within 30 days of eligibility; (c) failed to establish the lawful rent ceiling for Unit 802 at $1,112.00; and (d) improperly implied that correcting erroneous data on a certificate will validate the certificate.

16. Petitioners' argument based on Respondents' failure to properly serve Petitioners with a RAD Registration/Claim of Exemption Form is denied for reasons aforementioned. The Order invalidated all rent ceiling increases filed within the 3 year statute of limitations that Respondent[s] failed to file within 30 days of the date of eligibility. RAD rejects Petitioners' position that the Order is an error because it improperly implies that correcting erroneous data validates the rent increase notice. The statement or any implication drawn from the statement has no bearing on this case. The statement need not be disturbed. All other grounds for invalidating the CPI-W increases in the rent ceiling and the rent charged taken during the 3 year statutory period stated by

Petitioners are moot and need not be addressed because each adjustment was invalidated in the Order.

17. Petitioners' argument that the Order erred in failing to establish [t]he legal rent ceiling at $1,112.00 instead of $1,766.00 is rejected because no record evidence was proffered during the hearing that established the rent ceiling at $1,112.00.

18. Finally, Petitioners' [sic] challenge the Order on the grounds that it (a) failed to impose treble damages; (b) failed to impose civil fines; (c) failed to cite B.F. Saul Property Company as one of the housing providers; and (d) improperly found that the property was properly registered.

19. RAD has stated previously that the Order improperly found that the property was properly registered, as this issue was not raised at [the] hearing. RAD also agrees with Petitioner[s] that Respondents' willful violation of the Act in this case warrants a civil fine. The Order will also be amended to list B.F. Saul Property Company, not B.F. Saul Company as the management agent/housing provider for the subject property. As to the allege[d] failure of the Order to find that Respondents violated the Act in bad faith, RAD determines that a finding of bad faith to support the imposition of treble damages is unwarranted in this case, notwithstanding the mistaken findings in the Order regarding the testimony of Ms. Marhefka and Mr. Newcomb.

20. Petitioners assert that both Ms. Marhefka and Mr. Newcomb lied on the stand under oath in an attempt to deceive the hearing examiner regarding the validity of the CPI-W and vacancy adjustments in question. Petitioners cite 22 examples of bad faith conduct by the two witnesses in Appendix F to their Brief on Exceptions. Essentially, Petitioners argue through these examples that Mr. Newcomb lied about the oral agreements and written compensation agreement with tenant representatives to move the rent ceiling increase effective dates beyond the eligibility date and Ms. Marhefka lied about the posting of the vacancy notice in the laundry room, as well as, the comparison of Unit 402 and 802. Petitioners, however, failed to establish at the hearing that the witnesses' testimony was untruthful; and Petitioners' attempt to reopen the hearing to admit supporting affidavits and statements has been rejected.

21. Petitioners also assert that the witnesses' failure to properly perfect the rent adjustments was a gross dereliction of duty that warrants a finding of bad faith and the imposition of treble damages. RAD reasserts its position as stated in Findings of Fact 30 and refrains from finding bad faith in this case despite record evidence that Ms. Marhefka was not sure that a notice referring to the vacancy increase or advising tenants that rent increases [sic] notices were available in a binder in the lobby. The decision not to find bad faith is, again,

based on the fact that while Respondents did not file the rent increase notices in question properly, contrary to Petitioners' stance, there [sic] doing so was not intended to defraud or deceive the Agency or the tenants. Respondents filed all rent increase forms with RAD for the CPI-W and vacancy adjustments in question. Petitioners' rent levels were stated on their lease. Petitioners received notices of their CPI-W increased [sic] though they were filed incorrectly. There was no requirement to serve Petitioners with a notice of the vacancy increase as prospective tenants. Furthermore, RAD historically receives CPI-W rent increase notices filed beyond the 30 day eligibility date because it would be impossible to accept every CPI-W increase for every rental unit in the District by the end of the eligibility period. Finally, to issue treble damages in this case would result in an unwarranted windfall for Petitioners' [sic] that is not contemplated or intended by the statute.

Housing Providers' Exceptions and Objections to Proposed Decision and Order of Acting Rent Administer [sic], *dated October 14 2008 and Housing Provider's* [sic] *Motion to Strike Brief on* Exceptions and Objections to the Proposed Decision Issued on September 24, 2008.

22. Respondents challenge the rulings in the Order invalidating the vacancy adjustment, the July 2, 2004 certificate of election and the award of interest. RAD rejects Respondents' challenges on the grounds that the vacancy increase was invalidated due to insufficient evidence that the notice was properly posted and Unit 402 was substantially comparable to Unit 802; the July 2, 2004 certificate was also rejected on the grounds that it was filed beyond the 30 day eligibility date; and it is long standing rent stabilization law [that] the RAD has jurisdiction to award interest on refunds.

23. Respondents['] motion to strike Petitioners' Brief on Exceptions is denied as moot based on the instant Order addressing said Brief.

[24.] All other findings of facts made in this decision and in prior decisions and order[s] consistent with this Order are hereby incorporated by reference into this section of Findings of Fact.

Final Order at 3-8; R. at 1361-66 (emphasis original). The Hearing Examiner made the following conclusions of law in the Final Order:

1. The Summary of Testimony shall be amended to delete the statement that Ms. Marhefka testified that the Units have the same floor plan and amenities and that a notice is posted in the laundry room, a common area of the building. The Issues Considered section shall be amended to include all issues identified by the hearing examiner at the start of the June 21, 2006 hearing.

2. The Order shall be amended to reflect B.F. Saul Property Company as property manager/housing provider instead of B.F. Saul Company.

3. Findings of Fact 12 shall be amended by deleting the statement that Unit 402 and Unit 802 have the same floor plans, square footage and amenities, including telephone jacks.

4. Findings of Fact 13 shall be amended to indicate that Units 402 and 802 were not substantially comparable based on record evidence submitted.

5. Findings of Fact 16 shall be amended to delete the statement that "Respondents failure was not intentional or willful."

6. Findings of Fact 27 shall be amended to insert the word "alleged" before the word "oral" on line one.

7. Findings of Fact 30 shall be amended to delete all references to "posting the vacancy increase notice."

8. All references to the registration status of the housing accommodation are rescinded as being outside the scope of this proceeding.

9. Petitioners' requests to have the Order amended to invalidate the subject CPI-W and vacancy increases on additional grounds; and enter of [sic] finding of bad faith and treble damages are denied as set forth in the section of Findings of Facts above.

10. Respondents' requests to reverse the ruling invalidating the vacancy adjustment and July 2004 CPI-W increase are denied as set forth in the section of Findings of Fact above.

11. Respondents' request to strike Petitioners' Brief on Exceptions is denied as moot.

12. Respondents' [sic] shall be fined $250.00 for each of the four violations of the Act, pursuant to D[.]C[.] Official Code Sect. 42-3509.01(b).

13. All other conclusions of law made in this decision and in prior decisions and order[s] consistent with this Order are hereby incorporated by reference into this section of Conclusions of Law.

Final Order at 8-9; R. at 1360-61.

On April 1, 2010, the Housing Provider filed a timely Notice of Appeal with the Commission; subsequently, on April 9, 2010, the Housing Provider filed a timely Amended Notice of Appeal (Amended Notice of Appeal).[8] The Housing Provider raised the following issues in the Amended Notice of Appeal:[9]

1. The challenge to the Certificate of Election filed on January 6, 2003, is barred by the applicable statute of limitations because the [T]enant [P]etition was not filed until January 26, 2006. The Acting Rent Administrator erred in Finding of Fact No. 8 in the Proposed Decision and Order dated September 24, 2008 by determining that the January 6, 2003, Certificate of Election was improperly filed or could be challenged because it listed an effective date of February 1, 2003, which was within three (3) years of the filing of the [T]enant [P]etition.

2. The Acting Rent Administrator erred in failing to hold that [the] January 2003 filing is consistent with agreements reached between the Klingle Corporation and the Kennedy-Warren Residents Association concerning rent adjustments in the property and that [Tenants] are estopped to challenge the same.

3. The Acting Rent Administrator erred in concluding that the retention of the registration forms in the management office for review by tenants did not meet the notice requirement of the Act, inasmuch as the District of Columbia Court of Appeals has expressly held that such placement does satisfy the requirement of notice to the tenants.

4. The Acting Rent Administrator erred in determining that the [Tenants] did not have notice of the rent ceiling for their unit, and/or that the Hosing [sic] Provider failed to comply with the posting requirements under the Act.

5. In Finding of Fact No. 17 in the Proposed Decision and Order dated September 24, 2008, the Acting Rent Administrator erred in the reading of the Certificate of Election filed on July 2, 2004, as implementing the CPI increase approved by the Rental Housing Commission which became effective on May 1, 2005. The RHC CPI figure was approved to take effect on May 1, 2004,

[8] The Commission notes that the only difference between the Housing Provider's Notice of Appeal and Amended Notice of Appeal was the addition of issue six in the Amended Notice of Appeal.

[9] The issues are recited herein using the language of the Housing Provider's Notice of Appeal.

based on the Consumer Price Index during 2003. The Certificate of Election Form is accurate.

6. The Acting Rent Administrator erred in Conclusion of Law No. 4 in the Proposed Decision and Order dated September 24, 2008, in ruling that certificates of election were not filed in a timely manner.

7. The Rent Administrator has no authority to award interest in Decisions and Order[s]; even assuming he has such authority, the way he calculated interest here was in error.

8. The Acting Rent Administrator erred in how he went about calculating interest on the awards to the [Tenants]. The hearing examiner calculated interested based on § 28-3302(c) at 4% the rate in effect on the date of the proposed Decision. But interest runs in the proposed Decision at a constant rate, from specific dates in 2004, rather than being adjusted for each period that the statutory interest rate on judgment changed. This was improper. The Court's interest rate on judgments changes on a regular basis.

9. The Acting Rent Administrator erred in Conclusion of Law No. 1 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

10. The Acting Rent Administrator erred in Conclusion of Law No. 2 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

11. The Acting Rent Administrator erred in Conclusion of Law No. 2 identified in the March 29, 2010 Order as [Tenants], in their Proposed Decision in [sic] Order concluded that B.F. Saul Company managed the Housing Accommodation. *See, Petitioners' Proposed Decision and Order, Findings of Fact No. 5, page 7.* As a consequence, [Tenants] are judicially estopped from asserting that B.F. Saul Property Company was the property manager.

12. The Acting Rent Administrator erred in Conclusion of Law No. 3 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law that Unit 402 and Unit 802 were not substantially comparable and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

13. The Acting Rent Administrator erred in Conclusion of Law No. 4 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law that Unit 402 and Unit 802 were not substantially comparable and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

14. The Acting Rent Administrator erred in Conclusion of Law No. 5 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

15. The Acting Rent Administrator erred in Conclusion of Law No. 6 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

16. The Acting Rent Administrator erred in Conclusion of Law No. 7 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

17. The Acting Rent Administrator erred in imposing a fine in Conclusion of Law No. 12 identified in the March 29, 2010 Order, as the Order fails to set forth sufficient findings of fact to support the imposition of a fine.

18. The Acting Rent Administrator erred in holding that B.F. Saul Property Company was a housing provider/property manager.

19. The Acting Rent Administrator erred in identifying David Newecome [sic] was [sic] the "Vice President of Respondent B.F. Saul Property Company."

20. The Acting Rent Administrator erred in identifying Tanya Marhefka was [sic] the "General Manager, B.F. Saul Property Company."

21. The Acting Rent Administrator erred in identifying Judy Willis as the "Account Manager, B.F. Saul Property Company."

22. The Acting Rent Administrator erred in identifying Richard Luchs, Esq. as "counsel for B.F. Saul Property Company and Klingle Corporation."

23. The Acting Rent Administrator erred in modifying the Proposed Decision based solely on arguments presented when no new evidence was presented; and he declined to reopen the hearing; and he declined to amend the summary of testimony.

Amended Notice of Appeal at 1-6 (citations omitted).

On April 14, 2010, the Tenants filed a timely Notice of Appeal with the Commission (Tenants' Notice of Appeal), raising the following allegations of error:[10]

1. It was error for the Hearing Examiner to fail to find that Housing Provider violated the Unitary Rent Ceiling Adjustment Amendment Act, D.C. Law 9-191 by stacking three rent ceiling increases in implementing a vacancy rent increase, invalidating the vacancy rent increase.

2. It was error for the Hearing Examiner to fail to find that the [H]ousing [P]rovider failed to give the proper notice of rent increase to Unit 802 Tenants pursuant to 14 DCMR § 4205.4 with respect to a vacancy rent increase, invalidating the vacancy rent increase.

3. It was error for the Hearing Examiner to fail to find that Housing Provider failed to comply with D.C. Code § 42-3502.05(g) and 14 DCMR § 4103.1(e) with respect to a vacancy rent increase, invalidating the vacancy rent increase.

4. It was error for the Hearing Examiner to find a "change date" of July 6, 2003, where no evidence in the record supports the finding and where the erroneous change date invalidates the Amended Registration and the vacancy rent ceiling increase.

5. It was error for the Hearing Examiner to fail to find that the Amended Registration filed during July 2003 for a vacancy rent ceiling increase was invalid because it did not contain a certification of compliance with 14 DCMR § 4103.1(b).

6. It was error for the Hearing Examiner to fail to find that the recent ceiling on Unit 402 was not properly calculated and could not, therefore, form the basis of a valid vacancy rent ceiling increase for unit 802.

7. It was error for the Hearing Examiner to fail to find that Certificates of Election were unperfected and, therefore, nullities, due to Housing Provider's failure to comply with 14 DCMR § 4101.6 as required by 14 DCMR §

[10] The issues are recited herein using the language of the Tenants' Notice of Appeal.

4204.10, rendering the rent ceiling increases in the Certificates of Election nullities as well.

8. It was error for the Hearing Examiner to find that the legally calculated rent was $1,766 when the legally calculated rent could not exceed $1,122 [sic].

9. It was error for the Hearing Examiner to fail to award treble damages.

10. It was error for the Hearing Examiner to make findings of fact regarding the testimony that do not reflect the testimony given at the proceeding or are otherwise not supported by substantial evidence in the record.

11. It was error for the Hearing Examiner to fail to properly calculate damages.

12. In the alternative, it was error for the Hearing Examiner to fail to reopen the hearing and to deny Tenants' motion to reopen the hearing to admit new evidence.

13. Tenants reserve the right to raise any additional errors in Tenants' brief on appeal in this proceeding.

Tenants' Notice of Appeal at 1-3. The Housing Provider filed a brief on September 28, 2012 (Housing Provider's Brief), and the Tenants also filed a brief on September 28, 2012 (Tenants' Brief). The Housing Provider filed a response to the Tenants' Brief on October 12, 2012 (Housing Provider's Responsive Brief); the Tenants filed a response to the Housing Provider's Brief on October 17, 2012 (Tenants' Responsive Brief).

II. PRELIMINARY ISSUE: TENANTS' MOTION TO DISMISS

On September 12, 2008, the Tenants filed "Motion to Dismiss Housing Provider's Appeal or, in the Alternative, to Order Housing Provider to Establish an Escrow Account" (Motion to Dismiss & Establish Escrow Account) with the Commission. The Tenants assert that the Housing Provider's Notice of Appeal should be dismissed because the Housing Provider made a "judicial admission" conceding that the rent levels invalidated by the Hearing Examiner's Proposed Decision and Order and Final Order in this case were unlawful. Motion to

Dismiss & Establish Escrow Account at 3-4. Alternatively, the Tenants seek an order from the Commission requiring the Housing Provider to establish an escrow account in the amount of the rent refunds awarded by the Hearing Examiner. *Id.* The Housing Provider filed an opposition (Housing Provider's Opposition) on October 4, 2012, stating that they have not relinquished the right to receive whatever amount is determined to be the legal rent for the Tenants' unit, through a judicial admission or otherwise, and that the imposition of an escrow account is not appropriate in this case. Housing Provider's Opposition at 2-3.

A. The Motion to Dismiss

The Tenants assert that the Housing Provider's statement in a complaint filed with the D.C. Superior Court's Landlord and Tenant Branch, 25577 LTB 2011, that the rent for the Tenants' unit was $2,415 per month, constitutes a judicial admission that the rent increases invalidated by the Hearing Examiner in this case are unlawful. Motion to Dismiss & Establish Escrow Account at 2-4. It is the Tenants' contention that the Housing Provider's judicial admission regarding their rent level renders the Housing Provider's Notice of Appeal moot. *Id.* at 5.

The Housing Provider contends that they have preserved their right to receive what is ultimately determined to be the legal rent by filing suit in the Landlord and Tenant Branch, and that the requested rent amount in that case does not constitute a "judicial admission" that can be held against them in this appeal. Housing Provider's Opposition at 2.

The Tenants' argument, although phrased as a "judicial admission" issue, appears to actually be an assertion of the doctrine of "collateral estoppel," or "issue preclusion." *See, e.g.,*

United States v. Wight, 839 F.2d193, 195 & n.1 (4th Cir. 1987).[11] Collateral estoppel gives controlling effect to judgments on specific issues litigated in prior cases and "can be invoked against a party where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." Wilson v. Hart, 829 A.2d 511, 514 (D.C. 2003); Burkhardt v. Klingle Corp., RH-TP-10-29,875 (RHC Sept. 23, 2015); Carmel Partners, Inc. v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC May 16, 2014). The District of Columbia Court of Appeals (DCCA) and the Commission have consistently held that collateral estoppel, like the related doctrine of res judicata, must be pleaded and established by the party asserting it. Johnson v. D.C. Rental Hous. Comm'n, 642 A.2d 135, 139 (D.C. 1994); Jonathan Woodner Co. v. Adams, 534 A.2d 292, 296 (D.C. 1987); Burkhardt, RH-TP-10-29,875; Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Mann Family Trust v. Johnson, TP 26,191 (RHC Nov. 21, 2005). Therefore, "[t]o evaluate a claim of

[11] In Wight, the Fourth Circuit Court of Appeals distinguished the two issues as follows:

> As a result of his plea, Wight was incarcerated, was fined $10,000, and was assessed federal income tax penalties of $22,820. The government continued its pursuit of Wight by filing this civil action in October, 1985, seeking [civil damages.] The government moved for summary judgment against Wight, asserting collateral estoppel on the basis of the criminal information and the plea agreement in the earlier criminal action. After a hearing on the government's motion, the district court granted partial summary judgment for $70,107, the amount appearing in the criminal information. [n.1]
>
> [n.1] The district court based its grant of partial summary judgment on the concept of "judicial admission," which was, in this case, a misnomer for collateral estoppel. If viewed as a judicial admission, the plea agreement would have served only evidentiary purposes and would not have been binding upon the court. *See* Enquip, Inc. v. Smith-McDonald Corp, 655 F.2d 115, 118 (7th Cir. 1981). In this case, it is evident that the court below actually relied upon collateral estoppel in its ruling. The government proceeded upon a collateral estoppel theory; the court questioned both parties on the issue-preclusive effect of the plea agreement.

839 F.2d at 195 & n.1.

preclusion, the trier of fact must 'have before it the exhibits and records involved in the prior cases[.]'" Johnson, 642 A.2d at 139 (quoting Block v. Wilson, 54 A.2d 646, 648 (D.C. 1947)).

The Commission has consistently held that its review is limited to claims raised before RAD, and it will not consider new claims or new evidence on appeal. 14 DCMR § 3807.5;[12] Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Burkhardt, RH-TP-10-29,875; Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-29,149 (RHC Mar. 10, 2015). The Commission observes that, even though the Housing Provider's complaint in the Landlord and Tenant Branch was filed in 2011, prior to the issuance of the Final Order, the Tenants did not introduce any evidence of the Superior Court action at the hearing before the Hearing Examiner, such as exhibits or records from the Superior Court adjudication in 25577 LTB 2011, that include the statement alleged to constitute an judicial admission. Accordingly, the Commission determines that the Tenants' claim on appeal that the Housing Provider is bound by a judicial admission made in the Landlord and Tenant Branch is dependent upon new evidence that cannot be considered by the Commission for the first time on appeal. 14 DCMR § 3807.5; Wight, 839 F.2d at 195 & n.1; Lenkin Co. Mgmt., 642 A.2d at 1286; Burkhardt, RH-TP-10-29,875; Lutsko, RH-TP-08-29,149.

For the foregoing reasons, the Commission denies the Tenants' motion to dismiss.

B. The Motion to Establish an Escrow Account

The Tenants explain that they are seeking to have the Housing Provider deposit the amount of rent refunds awarded to them by the Hearing Examiner in an escrow account in order to protect their interests, in the same manner that the Housing Provider's interests are protected

[12] 14 DCMR § 3807.5 provides as follows: "The Commission shall not receive new evidence on appeal."

by payments being made by the Tenants into the court registry of the D.C. Superior Court, pursuant to a protective order. Motion to Dismiss & Establish Escrow Account at 6.

The Housing Provider asserts that, because the Hearing Examiner's rent refund order is not "final" for purposes of enforcement, the establishment of an escrow account would be inappropriate as a means of protecting the Tenants' interests. Housing Provider's Opposition at 4.

The Commission notes that its rules only require the establishment of an escrow account where a party is requesting a stay of the enforcement of a decision of the Rent Administrator that orders the payment of money. 14 DCMR § 3802.10.[13] Moreover, the Tenants have not provided any justification for the establishment of an escrow account, such as, for example, a belief that they Housing Provider will be unable to pay the rent refunds. Motion to Dismiss & Establish Escrow Account at 5-6. The only basis provided for the escrow account is the Tenants' belief that if they have to pay their rent into the D.C. Superior Court's registry, then the Housing Provider should have to also pay the rent refunds ordered by the Hearing Examiner into a court-monitored account. *Id.* The Commission is not persuaded, where it is not required by the regulations, that this is a reasonable basis for requiring the establishment of an escrow account. *See* 14 DCMR § 3802.10. Therefore, the Commission denies the Tenants' motion to establish an escrow account.

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[13] 14 DCMR § 3802.10 provides the following:

> Any party appealing a decision of the Rent Administrator which orders the payment of money may stay the enforcement of such decision by establishing an escrow account or purchasing a supersedeas bond which complies with the requirements of § 3806 within five (5) days of filing the notice of appeal."

For the foregoing reasons, the Commission denies the Tenants' Motion to Dismiss & Establish Escrow Account.

II. HOUSING PROVIDER'S ISSUES ON APPEAL[14]

A. The challenge to the Certificate of Election filed on January 6, 2003, is barred by the applicable statute of limitations because the [T]enant [P]etition was not filed until January 26, 2006. The Acting Rent Administrator erred in Finding of Fact No. 8 in the Proposed Decision and Order dated September 24, 2008 by determining that the January 6, 2003, Certificate of Election was improperly filed or could be challenged because it listed an effective date of February 1, 2003, which was within three (3) years of the filing of the [T]enant [P]etition.

B. The Acting Rent Administrator erred in concluding that the retention of the registration forms in the management office for review by tenants did not meet the notice requirement of the Act, inasmuch as the District of Columbia Court of Appeals has expressly held that such placement does satisfy the requirement of notice to the tenants.

C. The Acting Rent Administrator erred in determining that the [Tenants] did not have notice of the rent ceiling for their unit, and/or that the Hosing [sic] Provider failed to comply with the posting requirements under the Act.

D. The Acting Rent Administrator erred in Conclusion of Law No. 1 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

E. The Acting Rent Administrator erred in Conclusion of Law No. 7 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

F. The Acting Rent Administrator erred in Conclusion of Law No. 3 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having

[14] The Commission, in its discretion, has re-ordered the Housing Provider's issues on appeal for ease of discussion and to group together issues that involve the application and analysis of common facts and legal principles. *See, e.g.*, Tenants of 2300 & 2330 Good Hope Rd., S.E. v. Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015) at n.15; Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 28, 2014); Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014) at n.10. Issues A through W herein, correspond to issues 1, 3, 4, 9, 16, 12, 13, 2, 15, 6, 5, 7, 8, 17, 14, 10, 11, 18, 19, 20, 21, 22, and 23, respectively, in the Housing Provider's Notice of Appeal.

sufficient support for the Conclusion of Law that Unit 402 and Unit 802 were not substantially comparable and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

G. The Acting Rent Administrator erred in Conclusion of Law No. 4 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law that Unit 402 and Unit 802 were not substantially comparable and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

H. The Acting Rent Administrator erred in failing to hold that [the] January 2003 filing is consistent with agreements reached between the Klingle Corporation and the Kennedy-Warren Residents Association concerning rent adjustments in the property and that [Tenants] are estopped to challenge the same.

I. The Acting Rent Administrator erred in Conclusion of Law No. 6 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

J. The Acting Rent Administrator erred in Conclusion of Law No. 4 in the Proposed Decision and Order dated September 24, 2008, in ruling that certificates of election were not filed in a timely manner.

K. In Finding of Fact No. 17 in the Proposed Decision and Order dated September 24, 2008, the Acting Rent Administrator erred in the reading of the Certificate of Election filed on July 2, 2004, as implementing the CPI increase approved by the Rental Housing Commission which became effective on May 1, 2005. The RHC CPI figure was approved to take effect on May 1, 2004, based on the Consumer Price Index during 2003. The Certificate of Election Form is accurate.

L. The Rent Administrator has no authority to award interest in Decisions and Order[s]; even assuming he has such authority, the way he calculated interest here was in error.

M. The Acting Rent Administrator erred in how he went about calculating interest on the awards to the [Tenants]. The hearing examiner calculated interested based on § 28-3302(c) at 4% the rate in effect on the date of the proposed Decision. But interest runs in the proposed Decision at a constant rate, from specific dates in 2004, rather than being adjusted for each period that the statutory interest rate on judgment changed. This was improper. The Court's interest rate on judgments changes on a regular basis.

N. The Acting Rent Administrator erred in imposing a fine in Conclusion of Law No. 12 identified in the March 29, 2010 Order, as the Order fails to set forth sufficient findings of fact to support the imposition of a fine.

O. The Acting Rent Administrator erred in Conclusion of Law No. 5 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

P. The Acting Rent Administrator erred in Conclusion of Law No. 2 identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

Q. The Acting Rent Administrator erred in Conclusion of Law No. 2 identified in the March 29, 2010 Order as [Tenants], in their Proposed Decision in [sic] Order concluded that B.F. Saul Company managed the Housing Accommodation. *See, Petitioners' Proposed Decision and Order, Findings of Fact No. 5, page 7.* As a consequence, [Tenants] are judicially estopped from asserting that B.F. Saul Property Company was the property manager.

R. The Acting Rent Administrator erred in holding that B.F. Saul Property Company was a housing provider/property manager.

S. The Acting Rent Administrator erred in identifying David Newecome [sic] was [sic] the "Vice President of Respondent B.F. Saul Property Company."

T. The Acting Rent Administrator erred in identifying Tanya Marhefka was [sic] the "General Manager, B.F. Saul Property Company."

U. The Acting Rent Administrator erred in identifying Judy Willis as the "Account Manager, B.F. Saul Property Company."

V. The Acting Rent Administrator erred in identifying Richard Luchs, Esq. as "counsel for B.F. Saul Property Company and Klingle Corporation."

W. The Acting Rent Administrator erred in modifying the Proposed Decision based solely on arguments presented when no new evidence was presented; and he declined to reopen the hearing; and he declined to amend the summary of testimony.

III. TENANTS' ISSUES ON APPEAL

A. It was error for the Hearing Examiner to fail to find that Housing Provider violated the Unitary Rent Ceiling Adjustment Amendment Act, D.C. Law 9-191 by stacking three rent ceiling increases in implementing a vacancy rent increase, invalidating the vacancy rent increase.

B. It was error for the Hearing Examiner to fail to find that the [H]ousing [P]rovider failed to give the proper notice of rent increase to Unit 802 Tenants pursuant to 14 DCMR § 4205.4 with respect to a vacancy rent increase, invalidating the vacancy rent increase.

C. It was error for the Hearing Examiner to fail to find that Housing Provider failed to comply with D.C. Code § 42-3502.05(g) and 14 DCMR § 4103.1(e) with respect to a vacancy rent increase, invalidating the vacancy rent increase.

D. It was error for the Hearing Examiner to find a "change date" of July 6, 2003, where no evidence in the record supports the finding and where the erroneous change date invalidates the Amended Registration and the vacancy rent ceiling increase.

E. It was error for the Hearing Examiner to fail to find that the Amended Registration filed during July 2003 for a vacancy rent ceiling increase was invalid because it did not contain a certification of compliance with 14 DCMR § 4103.1(b).

F. It was error for the Hearing Examiner to fail to find that the recent ceiling on Unit 402 was not properly calculated and could not, therefore, form the basis of a valid vacancy rent ceiling increase for unit 802.

G. It was error for the Hearing Examiner to fail to find that Certificates of Election were unperfected and, therefore, nullities, due to Housing Provider's failure to comply with 14 DCMR § 4101.6 as required by 14 DCMR § 4204.10, rendering the rent ceiling increases in the Certificates of Election nullities as well.

H. It was error for the Hearing Examiner to find that the legally calculated rent was $1,766 when the legally calculated rent could not exceed $1,122 [sic].

I. It was error for the Hearing Examiner to fail to award treble damages.

J. It was error for the Hearing Examiner to make findings of fact regarding the testimony that do not reflect the testimony given at the proceeding or are otherwise not supported by substantial evidence in the record.

K. It was error for the Hearing Examiner to fail to properly calculate damages.

L. In the alternative, it was error for the Hearing Examiner to fail to reopen the hearing and to deny Tenants' motion to reopen the hearing to admit new evidence.

M. Tenants reserve the right to raise any additional errors in Tenants' brief on appeal in this proceeding.

IV. STANDARD OF REVIEW

The Commission's standard of review is provided in 14 DCMR § 3807.1 (2004) and provides the following:

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

See, e.g., Tenants of 2480 16th St., NW v. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Sept. 25, 2015); Siegel v. B.F. Saul Co., RH-TP-06-28,524 (RHC Sept. 9, 2015); Wilson v. Smith Prop. Holdings Van Ness, RH-TP-07-28,907 (RHC Mar. 10, 2015). The Commission has consistently defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See, e.g.,* Tenants of 2480 16th St., NW, RH-SF-09-20,098; Sheikh v. Smith Prop. Holdings Three (DC) LP, RH-TP-12-30,279 (RHC July 29, 2015); Richardson v. Barac Co., TP 28,196 (RHC June 24, 2015). The Commission will review legal questions raised by a hearing examiner's interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. *See* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. Co. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-103 (D.C. 2005)); Sheikh, RH-TP-12-30,279.

The Commission has consistently held that "credibility determinations are 'committed to the sole and sound discretion of the hearing examiner.'" *See, e.g.,* Tenants of 2480 16th St., NW, RH-SF-09-20, 098; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708; Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014). When assessing the hearing examiner's credibility determinations, "the relevant inquiry is whether the [hearing] examiner's decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence." Gary v. D.C. Dep't of Emp't Servs., 723 A.2d 1205, 1209 (D.C. 1998); *see* Tenants of 2480 16th St., NW, RH-SF-09-20,098; Notsch, RH-TP-06-28,690. Where the Commission determines that substantial evidence exists to support a hearing examiner's findings, "even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [hearing] examiner.'" Boyd v. Warren, RH-TP-10-29,819 (RHC June 5, 2013) (quoting Hago v. Gerwirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Feb. 15, 2012)); *see* Tenants of 2480 16th St., NW, RH-SF-09-20,098; Siegel, RH-TP-06-28,524; Karpinski v. Evolve Prop. Mgmt., LLC, RH-TP-09-29,590 (RHC Aug. 19, 2014).

V. DISCUSSION OF HOUSING PROVIDER'S ISSUES

A. The challenge to the Certificate of Election filed on January 6, 2003, is barred by the applicable statute of limitations because the [T]enant [P]etition was not filed until January 26, 2006. The Acting Rent Administrator erred in Finding of Fact No. 8 in the Proposed Decision and Order dated September 24, 2008 by determining that the January 6, 2003, Certificate of Election was improperly filed or could be challenged because it listed an effective date of February 1, 2003, which was within three (3) years of the filing of the [T]enant [P]etition.

The Housing Provider argues on appeal that the Tenants' challenge to the Certificate of Election of Adjustment of General Applicability (Certificate of Election) filed on January 6,

2003, increasing the rent ceiling for the Tenants' unit based on the 2002 CPI-W,[15] was barred by the Act's statute of limitations. Housing Provider's Notice of Appeal at 1-2; Housing Provider's Brief at 4-12. The Housing Provider reasons that, because the Certificate of Election was filed with RACD[16] more than three years prior to the filing of the Tenant Petition on January 26, 2006, any challenge to the rent ceiling increase contained in the Certificate of Election is barred by the Act's three-year statute of limitations. Housing Provider's Notice of Appeal at 1-2; Housing Provider's Brief at 4-12.

The Tenants contend in response that the Housing Provider failed to timely take and perfect the rent ceiling increase contained in the 2003 Certificate of Election, and therefore the rent ceiling increase is "void *ab initio* and my never be used as the lawful basis of a rent adjustment."[17] Tenants' Responsive Brief at 5.

In the Proposed Decision and Order, the Hearing Examiner found that the effective date of the 2003 Certificate of Election, February 3, 2003, fell within the three years prior to the January 26, 2006 filing date of the Tenant Petition, and therefore was within the statute of limitations period under the Act. Proposed Decision and Order at 7; R. at 872.

The Act's statute of limitations is contained at D.C. OFFICIAL CODE § 42-3502.06(e) (2001), and provides the following:

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[15] "CPI-W" stands for the "Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers." *See* D.C. OFFICIAL CODE § 42-3502.06(b).

[16] *See supra* at p. 2 n.2.

[17] The Commission notes that the Tenants' assertion that the Housing Provider's failure to properly take and perfect the 2003 Certificate of Election, and thus it is void *ab initio*, is relevant to the validity of the 2003 CPI-W rent celing adjustment; however, it is not relevant to the determination of whether the effective date of the 2003 CPI-W rent ceiling adjustment occurred within the three years prior to the filing of the Tenant Petition, and was thus within the Act's statute of limitations in this case. *See* D.C. OFFICIAL CODE § 42-3502.06(e); Tenants' Responsive Brief at 5.

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment[.]

The DCCA has consistently held that "[t]he primary rule of statutory construction is that the intent of the legislature is to be found in the language which it has used." James Parreco & Son v. D.C. Rental Housing Comm'n, 567 A.2d 43, 46 (D.C. 1989); *see also* Dorchester House Assocs. Ltd. P'ship, 938 A.2d at 702; Am. Rental Mgmt .Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014). Therefore, a statute or regulation will be given its plain meaning so long as that does not produce absurd results or results that contradict the legislative or regulatory scheme as a whole. Parreco, 567 A.2d at 46; Columbia Plaza Tenants' Ass'n v. Columbia Plaza, LP, 869 A.2d 329, 332 (D.C. 2005); Chaney, RH-TP-06-28,366 & RH-TP-06-28,577.

Under the plain language of D.C. OFFICIAL CODE § 42-3502.06(e), the Commission is satisfied that when a tenant is directly challenging the validity of a rent ceiling adjustment, the statute of limitations begins to run on the effective date of the rent ceiling adjustment. *See* 14 DCMR § 4214.8;[18] Greene v. Urquilla, TP 27,604 (RHC Jan. 14, 2005) (affirming hearing examiner's consideration of rent ceiling adjustments with effective dates less than three years prior to the filing of the tenant petition); *cf.* United Dominion Mgmt. Co. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013) *aff'd sub nom* United Dominion Mgmt. Co., 101 A.3d 426 (holding that when a tenant is challenging a rent charged adjustment based on a faulty rent ceiling adjustment, the "effective date" of the rent ceiling adjustment for purposes of the Act's statute of

[18] 14 DCMR § 4214.8 provides the following: "Except as provided in § 4215 for base rent challenges, a tenant petition filed under this section shall be filed within three (3) years of the effective date of the adjustment."

limitations is the date that the rent ceiling adjustment is implemented through an adjustment in the rent charged).[19]

The Commission's review of the record reveals substantial evidence to support the Hearing Examiner's finding that the effective date of the rent ceiling adjustment reflected in the January 6, 2003 Certificate of Election was February 1, 2003—namely, the Certificate of Election itself, which contains a stated "effective date" of February 1, 2003. PX 3; R. at 129. Additionally, the Commission is satisfied that substantial evidence supports the Hearing Examiner's finding that the February 1, 2003, effective date was within the three years prior to the filing of the Tenant Petition on January 26, 2006. Tenant Petition at 1; R. at 23. Accordingly, where the effective date of the 2003 Certificate of Election was within three years of the filing of the Tenant Petition, the Commission determines that the Hearing Examiner's conclusion, that a challenge to the rent ceiling adjustment contained therein was not barred by the Act's statute of limitations, was in accordance with the Act. D.C. OFFICIAL CODE § 42-3502.06(e); 14 DCMR §§ 3807.1 & 4214.8; Dorchester House Assocs. Ltd. P'ship, 938 A.2d at 702; Parreco, 938 A.2d at 46; Greene, TP 27,604. Satisfied that the Hearing Examiner's determination is supported by substantial evidence and in accordance with the relevant provisions of the Act, the Commission affirms the Hearing Examiner on this issue.

[19] The Commission held that the scenario in Hinman, RH-TP-06-28,728, only applied in the instance where a tenant was challenging a rent charged adjustment that had occurred within the three year period prior to the tenant petition, and was allegedly based on an invalid rent ceiling adjustment that had occurred more than three years prior to the filing of the tenant petition. Hinman, RH-TP-06-28,728 at 23. This case is distinguishable from Hinman, RH-TP-06-28,728 for two reasons. First, in Hinman, RH-TP-06-28,728, the tenant was not seeking, nor was he awarded, a rollback of the rent ceiling; here, the Tenants are directly challenging the rent ceiling adjustment for the purpose of attaining a rollback to the rent ceiling. *Compare* Hinman, RH-TP-06-28,728 at 2-4, *with* Tenant Petition at 3; R. at 20. Second, in Hinman, RH-TP-06-28,728, the rent charged adjustment was within the three year statute of limitations, while the rent ceiling adjustment was beyond the statute of limitations; here, the record evidence indicates that both the rent charged adjustment and the rent ceiling adjustment were within the three-year statute of limitations. *Compare* Hinman, RH-TP-06-28,728 at 3, *with* PX 3; R. at 129.

B. The Acting Rent Administrator erred in concluding that the retention of the registration forms in the management office for review by tenants did not meet the notice requirement of the Act, inasmuch as the District of Columbia Court of Appeals has expressly held that such placement does satisfy the requirement of notice to the tenants.

C. The Acting Rent Administrator erred in determining that the [Tenants] did not have notice of the rent ceiling for their unit, and/or that the Hosing [sic] Provider failed to comply with the posting requirements under the Act.

D. The Acting Rent Administrator erred in Conclusion of Law No. 1[20] identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

E. The Acting Rent Administrator erred in Conclusion of Law No. 7 identified in the March 29, 2010 Order,[21] and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.[22]

The Housing Provider states that the testimony of Tanya Marhekfa, the General Manager of the Housing Accommodation, contradicted the Hearing Examiner's finding that notice of the Amended Registration Form for the July 2003 vacancy rent ceiling increase was not posted at the Housing Accommodation. Housing Provider's Notice of Appeal at 2-3, 5; Housing Provider's

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[20] Conclusion of Law No. 1 in the Final Order provides the following:

> The Summary of Testimony shall be amended to delete the statement that Ms. Marhefka testified that the Units have the same floor plans and amenities and that a notice is posted in the laundry room, a common area of the building. The Issues Considered section shall be amended to include all issues identified by the hearing examiner at the start of the June 21, 2006 hearing.

Final Order at 8; R. at 1361.

[21] Conclusion of Law No. 7 in the Final Order provided as follows: "Findings of Fact 30 [in the Proposed Decision and Order] shall be amended to delete all references to "posting the vacancy increase notice." Final Order at 8; R. at 1361.

[22] The Commission, in its discretion, will combine its discussion of issues B through E because it observes that these issues raise substantially similar contentions—namely whether the Hearing Examiner erred in his determination that the Housing Provider failed to properly post notice of the vacancy increase. Housing Provider's Notice of Appeal at 2-3, 5; *see, e.g.*, Wilson, RH-TP-07-28,907; Bower v. Chastleton Assocs., TP 27,838 (RHC Mar. 27, 2014); Barac Co. v. Tenants of 809 Kennedy St., VA 02-107 (RHC Sept. 27, 2013).

Brief at 13. The Housing Provider asserts that Ms. Marhefka testified that a notice was posted in the laundry room of the Housing Accommodation informing residents that registration documents were available for review in the Housing Accommodation's management office. *Id.*

The Hearing Examiner determined in the Proposed Decision and Order that the Housing Provider did not post a copy of the Amended Registration Form for the July 2003 vacancy increase in a conspicuous place at the Housing Accommodation. Proposed Decision and Order at 8; R. at 871. The Hearing Examiner found that the Housing Provider's practice of posting a notice in the laundry room of the Housing Accommodation directing residents to a binder in the management office was insufficient, because the record did not reflect that all tenants use the laundry room. *Id.* Furthermore, the Hearing Examiner found that there was no testimony that a notice was actually posted in the laundry room. *Id.* Finally, the Hearing Examiner found that listing the rent ceiling on the Tenants' lease was not sufficient to satisfy the notice requirements of the Act for a vacancy rent ceiling increase, because the lease did not contain a copy of the Amended Registration Form. *Id.*

Under the Act, a housing provider may increase the rent ceiling when a tenant vacates a unit. D.C. OFFICIAL CODE § 42-3502.13(a).[23] In order to "take and perfect" a vacancy rent ceiling adjustment, the housing provider must comply with the provisions set forth in 14 DCMR § 4204.9, which provides the following:

> 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 Registration/Claim of Exemption Form as required by § 4103.1, and met the notice requirements of § 4101.6.

[23] D.C. OFFICIAL CODE § 42-3502.13(a) provides in relevant part as follows: "When a tenant vacates a rental unit . . . the rent ceiling may, at the election of the housing provider, be adjusted[.]"

Additionally, a housing provider must satisfy the notice requirements of 14 DCMR § 4101.6, which provide as follows:

> Each housing provider who files a Registration/Claim of Exemption form under the Act shall, prior to or simultaneously with the filing, post a true copy of the Registration/Claim of Exemption form in a conspicuous place at the rental unit or housing accommodation to which it applies, or shall mail a true copy to each tenant of the rental unit or housing accommodation.

The Commission's review of the record reveals substantial evidence to support the Hearing Examiner's finding that there was no evidence that any notice was actually posted at the Housing Accommodation to inform tenants that registration documents could be obtained in the management office. *See* Hearing Tape 2 (RACD June 21, 2006) at 978. Ms. Marhekfa testified at the RACD hearing that records of registration documents were maintained in the "business office" of the Housing Accommodation." *Id.* When asked whether there was any notification posted in the Housing Accommodation notifying tenants that registration documents are available for review, Ms. Marhefka testified as follows:

> I believe we have something down in the laundry room. They're so cumbersome because there are books and books of data that we make them available to people, but we don't have papers scattered all over the building because there are so many of them.

Id. The Commission's review of the record does not indicate that any photographs or other evidence was submitted supporting or elaborating on Ms. Marhefka's statement that there was "something down in the laundry room." In contradiction of Ms. Marhefka's testimony, both Tenants testified that they never saw any notice posted in the Housing Accommodation regarding a vacancy increase or registration statement. Hearing Tape 1 (RACD June 21, 2006) at 2680-2907, 3066-3282.

The Commission is satisfied that, even though the record contains the testimony of Ms. Marhekfa regarding the posting of the notice in the laundry room, the testimony of the Tenants to the contrary reasonably supports the Hearing Examiner's finding that no notice informing tenants that the Amended Registration Form for the 2003 vacancy increase in the Tenants' unit was actually posted in the laundry room of the Housing Accommodation prior to or simultaneously with the filing of the Amended Registration Form. *Id.* at 2680; Hearing Tape 2 (RACD June 21, 2006) at 978. The Commission will not overturn the Hearing Examiner's credibility determination in favor of the Tenants' testimony that no notice was posted regarding the 2003 vacancy increase at the Housing Accommodation, even if the record contains substantial evidence to the contrary. 14 DCMR § 3807.1; Boyd, RH-TP-10-29,819; *see* Tenants of 2480 16th St., NW, RH-SF-09-20,098; Siegel, RH-TP-06-28,524; Karpinski, RH-TP-09-29,590. Furthermore, the DCCA gives considerable deference to the interpretation of the Commission of the statutes it administers and the regulations it promulgates. Dorchester House Assocs. Ltd. P'ship, 938 A.2d at 702; *see* Hinman, RH-TP-06-28,728; *see also* Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28-895 (RHC Sept. 27, 2013); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013).

Accordingly, the Commission affirms the ALJ on these issues.

F. The Acting Rent Administrator erred in Conclusion of Law No. 3[24] identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law that Unit 402 and Unit 802 were not substantially comparable and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

[24] Conclusion of Law No. 3 in the Final Order provides the following: "Findings of Fact 12 shall be amended by deleting the statement that Unit 402 and Unit 802 have the same floor plans, square footage and amenities, including telephone jacks." Final Order at 8; R. at 1361.

G. The Acting Rent Administrator erred in Conclusion of Law No. 4[25] identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law that Unit 402 and Unit 802 were not substantially comparable and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.[26]

In issues F and G, the Housing Provider asserts that the Hearing Examiner erred by determining that the 2003 vacancy increase was invalid because the Tenants' unit was not comparable to unit 402, the unit that the Housing Provider listed on the Amended Registration Form as the basis for the vacancy rent ceiling increase. Housing Provider's Notice of Appeal at 4; Housing Provider's Brief at 16-18. The apparent relief requested by the Housing Provider is a determination that the 2003 vacancy rent ceiling adjustment reflected in an Amended Registration Form filed on July 26, 2003 Certificate of Election is effective or valid, thereby reversing the Hearing Examiner. *Id.*

The Commission notes that, in light of its disposition of issues B through E, affirming the Hearing Examiner's determination that the July 26, 2003 vacancy rent ceiling increase was invalid because the Housing Provider failed to give proper notice of the increase, the Housing Provider's issues F and G, challenging the same 2003 vacancy rent ceiling increase on alternative grounds, are rendered moot. *See* BLACK'S LAW DICTIONARY at 1029-30 (8th ed. 2004) (defining "moot" as "[h]aving no practical significance; hypothetical or academic"); *see*

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[25] Conclusions of Law No. 4 in the Final Order provides the following: "Findings of Fact 13 shall be amended to indicate that Units 402 [sic] and Unit 802 were not substantially comparable based on the record evidence submitted." Final Order at 8; R. at 1361.

[26] The Commission, in its discretion, will combine its discussion of issues F through G because it observes that these issues raise substantially similar contentions—namely whether the Hearing Examiner erred in his determination that the 2003 vacancy increase was invalid because the Tenants unit, 802, was not substantially comparable to unit 402. Housing Provider's Notice of Appeal at 4; *see, e.g.*, Wilson, RH-TP-07-28,907; Bower, TP 27,838; Barac Co., VA 02-107.

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); Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005) (dismissing issue as moot where there was no further relief the Commission could grant). The Commission observes that, because the 2003 vacancy increase is invalid on other grounds, there is not additional relief available to the Housing Provider based on issues F and G. *See* Kuratu, RH-TP-07-28,985; Oxford House-Bellevue, TP 27,582. Accordingly, the Commission dismisses these issues on appeal.

H. The Acting Rent Administrator erred in failing to hold that [the] January 2003 filing is consistent with agreements reached between the Klingle Corporation and the Kennedy-Warren Residents Association concerning rent adjustments in the property and that [Tenants] are estopped to challenge the same.

I. The Acting Rent Administrator erred in Conclusion of Law No. 6[27] identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.[28]

The Housing Provider disputes the Hearing Examiner's invalidation of CPI-W rent ceiling increases, because the delayed filing of the Certificates of Election taking the CPI-W rent ceiling increases was the result of agreements reached between the Kennedy Warren Residents Association (KWRA) and the Housing Provider. Housing Provider's Notice of Appeal at 2, 4-5. The Housing Provider states that unrebutted testimony from David Newcome directly contradicts

[27] Conclusions of Law No. 6 in the Final Order provides as follows: "Findings of Fact 27 shall be amended to insert the word 'alleged' before the word 'oral' on line one." Final Order at 8; R. at 1361.

[28] The Commission, in its discretion, will combine its discussion of issues H through I because it observes that these issues raise substantially similar contentions—namely whether the Hearing Examiner erred in his determination that an oral agreement between the parties did not affect the validity of CPI-W rent adjustments. Housing Provider's Notice of Appeal at 2, 4-5; *see, e.g.*, Wilson, RH-TP-07-28,907; Bower, TP 27,838; Barac Co., VA 02-107.

the Hearing Examiner's findings regarding the existence of an oral agreement. Housing Provider's Brief at 12.

The Tenants refute the Housing Provider's characterization of Mr. Newcome's testimony, and assert that it was rebutted, and that Mr. Newcome was unable to provide any details of the alleged oral agreement. Tenants' Responsive Brief at 24.

In the Proposed Decision and Order, the Hearing Examiner stated that Mr. Newcome had testified that the Housing Provider delayed filing the Certificates of Election for the 2003, 2004, and 2005 CPI-W rent ceiling increases by more than thirty days after the Housing Provider was first eligible to take the increases because of an oral agreement between the KWRA and the Housing Provider. Proposed Decision and Order at 10; R. at 869. The Hearing Examiner rejected the Housing Provider's reliance on an oral agreement to delay the filing of the Certificates of Election, because the record evidence indicated a pattern of delayed filings by the Housing Provider unrelated to the oral agreement; for example, prior to the oral agreement, the Housing Provider had delayed filing Certificates of Election in 2001 and 2002. *Id.*

The DCCA has held that in order to be enforceable, an oral contract requires an agreement to all material terms and "an objective manifestation of the parties' intent to be bound" by the agreement. *See, e.g.,* Strauss v. NewMarket Global Consulting Grp., LLC, 5 A.3d 1027, 1032 (D.C. 2010); Kramer Assocs. v. Ikam, Ltd., 888 A.2d 247, 251 (D.C. 2005); Duffy v. Duffy, 881 A.2d 630, 633 (D.C. 2005); New Econ. Capital, LLC v. New Mkts. Capital Grp., 881 A.2d 1087, 1094 (D.C. 2005).[29] The DCCA has explained that the "material terms" of a contract as those "'necessary for the parties to understand how they are expected to perform the

[29] The DCCA has held that the existence of an enforceable oral agreement is a question of law that will be reviewed by an appellate court *de novo.* Strauss, 5 A.3d at 1032; Kramer Assocs., 888 A.2d at 251; Duffy, 881 A.2d at 633.

contract[.]'" Strauss, 5 A.2d at 1033 (quoting Duffy, 881 A.2d at 636); Dyer v. Bilaal, 983 A.2d 349, 358 (D.C. 2009); Tauber v. Quan, 938 A.2d 724, 730 (D.C. 2007). The burden is on the party asserting the existence of an oral agreement to prove that an enforceable agreement exists. Strauss, 5 A.3d at 2033; Kramer Assocs., 888 A.2d at 252; New Econ. Capital, LLC, 881 A.2d at 1094.

The Commission's review of the record reveals that Mr. Newcome, Vice President of Apartment Management for the Housing Provider, testified that the Housing Provider entered into an oral agreement with the KWRA in 2002 or 2003, that the Housing Provider would not file Certificates of Election taking CPI-W rent ceiling increases until "February of that year . . . and actually pushed it back 30 or 60 days in order to make that filing." Hearing Tape 1 (RACD June 21, 2006) at 2043-2155. Mr. Newcome stated that a memo had been sent to the KWRA acknowledging that they would postpone filings, but the memo was not available to be entered into evidence at the RACD hearing. *Id.* at 2186-2234. When asked on cross-examination "what specifically was said by whom that led you to believe there was an agreement," Mr. Newcome testified that "I don't have recall of numerous committee meetings from 2003 regarding specific language." *Id.* at 2307-2352. Mr. Newcome also conceded that although meeting notes had been taken during the discussion, they were not available to enter into evidence at the RACD hearing. *Id.* at 2307-2392.

The Commission is satisfied based on its review of the record, that substantial record evidence supports the Hearing Examiner's determination that the Housing Provider failed to meet its burden of proving the material terms of the oral agreement as well as the parties' intent to be bound by the agreement. *See, e.g.,* Strauss, 5 A.3d at 1032; Kramer Assocs., 888 A.2d at 251; Duffy, 881 A.2d at 633; New Econ. Capital, LLC, 881 A.2d at 1094. The only evidence

produced by the Housing Provider regarding the details of the oral agreement was the general testimony of Mr. Newsome. *See generally*, Hearing Tapes 1-2 (RACD June 21, 2006). Specifically, the Housing Provider did not introduce evidence regarding the material terms of the agreement including the effective date of the agreement, whether the agreement allowed the delayed filing of Certificate of Election only for that one year following the agreement, or in perpetuity, and whether the KWRA had the authority to bind all of the tenants in the Housing Accommodation, including the Tenants in this case, who were not living at the Housing Accommodation prior to February 2003. *See id.* at 2043-2541; *see also* Strauss, 5 A.2d at 1033; Dyer, 983 A.2d at 358; Tauber, 938 A.2d at 730.

Moreover, the Commission observes that the Act provides a means for tenants and housing providers to enter into agreements that would allow for rent ceiling increases outside of the normal constraints of the rent stabilization program: a voluntary agreement. *See* D.C. OFFICIAL CODE § 42-3502.15(a).[30] Mr. Newcome testified here that although the tenants and the Housing Provider were negotiating a voluntary agreement at the time of the oral agreement, the decision to postpone filing Certificates of Election was not part of any voluntary agreement. *See* Hearing Tape 1 (RACD June 21, 2006) at 2067-2155.

Based on the foregoing, the Commission determines that substantial evidence in the record supports the Hearing Examiner's determination that the Housing Provider failed to carry its burden to prove the existence of a valid oral agreement regarding the delayed filing of Certificates of Election to take CPI-W rent ceiling adjustments. 14 DCMR § 3807.1; *see* Strauss,

[30] D.C. OFFICIAL CODE § 42-3502.15(a) provides the following: "Seventy percent or more of the tenants of a housing accommodation may enter into a voluntary agreement with the housing provider: (1) to establish the rent ceiling[.]"

5 A.3d at 1032; Kramer Assocs., 888 A.2d at 251; Duffy, 881 A.2d at 633; New Econ. Capital, LLC, 881 A.2d at 1094; *see also* Hearing Tape 1 (RACD June 21, 2006) at 2043-2541.

The Commission affirms the Hearing Examiner on this issue.

J. The Acting Rent Administrator erred in Conclusion of Law No. 4 in the Proposed Decision and Order dated September 24, 2008, in ruling that certificates of election were not filed in a timely manner.[31]

The Housing Provider asserts that the Hearing Examiner erred in finding that the 2003, 2004, and 2005, Certificates of Election taking CPI-W rent ceiling increases, were filed more than 30 days after the Housing Provider was first eligible to take the increases, because the late filing dates of the Certificates of Election were authorized under the DCCA's decision in Sawyer, 877 A.2d 96. Housing Provider's Notice of Appeal at 2; Housing Provider's Brief at 12-13.

The Hearing Examiner made the following findings of fact regarding the Certificates of Election filed in 2003, 2004, and 2005:

> 6. On January 6, 2003, [Housing Provider] filed a certificate of election with RACD based on the year 2002 2.1% CPI-W adjustment, with an effective date of February 1, 2003 . . . . While the January 6, 2003 certificate of election incorrectly purports to be calculated on the year 2002 2.1% CPI-W adjustment, it is actually calculated based on the year 2001 2.6% CPI-W adjustment, which became effective on May 1, 2002 . . . .
>
> 8. The January 6, 2003 certificate of election contained incorrect information. It was also filed with RACD less than 30 days before the February 1, 2003 effective date and far more than 30 days after the May 1, 2002 effective date of the year 2001 2.6% CPI-W adjustment. There is no record evidence that

[31] The Commission notes that the Housing Provider's issue J, asserting that the Hearing Examiner erred in invalidating the 2003, 2004, and 2006 CPI-W rent ceiling increases is not mooted out based on the Commission's determination in issues H and I, *supra* at 40-44, because if the Commission determines that, despite the lack of a valid oral agreement to delay the filing of Certificates of Election, the 2003, 2004, and 2005 Certificates of Election were nevertheless timely filed on an alternative basis, the Housing Provider could be entitled to relief such as a reversal of the Hearing Examiner's determination that the 2003, 2004, and 2005 CPI-W rent ceiling increases were invalid. *See* BLACK'S LAW DICTIONARY at 1029-30; *see also* Kuratu, RH-TP-07-28,985; Oxford House-Bellevue, TP 27,583.

[Housing Provider] corrected the errors in the January 6, 2003 filing. Accordingly, the January 6, 2003 certificate of election purporting to implement an annual adjustment of general applicability effective February 1, 2003 was filed improperly . . . .

17. On July 2, 2004, [Housing Provider] filed a certificate of election with RACD based on the year 2004 2.9% CPI-W adjustment, with an effective date of August 1, 2004. The year 2003 CPI-W adjustment was 2.7% and did not become effective unit [sic] May 1, 2005, a year after the August 1, 2004 effective date. The July 2, 2004 certificate of election incorrectly purports to be calculated on the year 2004 2.7% CPI-W adjustment, it is actually calculated based on the year 2003 2.9% CPI-W adjustment, which became effective on May 1, 2004 . . . .

19. The July 2, 2004 certificate of election contained incorrect information. It was also filed with RACD more than 30 days after the May 1, 2004 effective date of the year 2003 2.9% CPI-W adjustment. There is no record evidence that [Housing Provider] corrected the errors in the July 2, 2004 filing. Accordingly, the July 2, 2004 certificate of election purporting to implement a 2004 2.9% annual adjustment of general applicability effective August 1, 2004 was filed improperly . . . .

23. On June 29, 2005, [Housing Provider] filed a certificate of election with RACD based on the year 2004 2.7% CPI-W adjustment, with an effective date of August 1, 2005. The year 2004 CPI-W adjustment became effective May 1, 2005. The June 25, 2004 certificate of election correctly purports to be calculated on the year 2004 2.7% CPI-W adjustment . . . .

25. . . . The June 29, 2005 certificate was also filed with RACD more than 30 days after the May 1, 2005 effective date of the year 2004 2.7% CPI-W adjustment . . . . Accordingly, the July [sic] 29, 2005 certificate of election purporting to implement a 2004 2.7% annual adjustment of general applicability effective August 1, 2005 was filed improperly.

Proposed Decision and Order at 6-7, 9-10; R. at 869-70, 872-73.

The Act provides the following regarding the annual general adjustment of applicability:

On an annual basis, the Rental Housing Commission shall determine an adjustment of general applicability in the rent ceiling . . . . The adjustment shall be equal to the change during the previous calendar year, ending each December 31, in the Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the previous calendar year . . . . A housing provider may not implement an

> adjustment of general applicability . . . for a rental unit within 12 months of the effective date of the previous adjustment of general applicability.

D.C. OFFICIAL CODE § 42-3502.06(b). A housing provider must take and perfect the CPI-W adjustment as follows:

> [B]y 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.

14 DCMR § 4104.10. The Commission has held, and the DCCA has affirmed, that generally, a housing provider is first eligible to take a CPI-W adjustment on the date that the adjustment becomes effective, i.e., May 1 of each year.[32] Sawyer, 877 A.2d at 104; *see also* Ayers v. Landow, TP 21,273 (RHC Oct. 4, 1990); *cf.* Chaney, RH-TP-06-28,366 & RH-TP-06-28,577.

The Commission is unable to distinguish the facts of this case, from those in Sawyer. 877 A.2d 96. In Sawyer, the DCCA affirmed the Commission's determination that CPI-W rent ceiling adjustments taken 1997, 1998, and 1999, eleven months, eleven months, and two months, respectively, after the May 1 effective dates were invalid. *Id.* at 105-109. Although the DCCA stated in dicta[33] that there may be circumstances under which a housing provider will not be

[32] The CPI-W adjustment is published annually in the D.C. Register with an effective date of May 1. *See, e.g.*, 62 D.C. Reg. 2201-2203 (Feb. 13, 2015); 61 D.C. Reg. 1378-80 (Feb. 14, 2014); 60 D.C. Reg. 1866-68 (Feb. 15, 2013).

[33] "Dicta" is the plural of "dictum," and is defined in relevant part as "[a]n opinion by a court on a question that is . . . not essential to the decision." BLACK'S LAW DICTIONARY 485 (8th ed. 2004).

eligible to take a CPI-W adjustment within thirty days after May 31, the DCCA neither elaborated on such a potential exception, nor applied it to the facts in Sawyer. *Id.* at 104 n.5.

Nonetheless, the Commission has addressed the Sawyer exception recently in Chaney. RH-TP-06-28,366 & RH-TP-06-28,577. In that case, the Commission's review of the record revealed that the housing provider had filed the 2000 Certificate of Election on May 31, 2000—thirty days after they were first eligible to file the adjustment on May 1, 2000. *Id.* at 35. The following year, the Commission determined that the housing provider was not eligible to take a CPI-W adjustment until twelve months after the previous adjustment, or until May 31, 2001. *Id.* Accordingly, the 2001 CPI-W adjustment filed on June 15, 2001, was filed within thirty days after the housing provider was first eligible to take the adjustment. *Id.*

The Commission observes that the facts in Chaney where the housing provider demonstrated that the delayed filing schedule for Certificates of Election was based on the provision of the Act preventing a housing provider from taking a CPI-W adjustment less than twelve months after the previous CPI-W adjustment differ markedly from the facts in this case. *Compare* Chaney, RH-TP-06-28,366 & RH-TP-06-28,577, *with* Proposed Decision and Order at 6-7, 9-10; R. at 869-70, 872-73. In this case, the Commission notes that the only explanation provided by the Housing Provider for filing the 2002, 2003, and 2004 Certificates of Election more than thirty days after the Housing Provider was first eligible was that the Housing Provider believed that there was an agreement with the KWRA to delay such filings. *See* Hearing Tape 1 (RACD June 21, 2006) at 2043-2541. As the Commission has previously determined, *see supra* at 42-46, the Housing Provider failed to prove either the existence of a valid oral agreement to delay the filing of Certificates of Election, or that such an agreement is a valid method for circumventing the Act's requirements that Certificates of Election be filed within thirty days

after a housing provider is first eligible to take a CPI-W adjustment. *See* Strauss, 5 A.3d at 1032; Kramer Assocs., 888 A.2d at 251; Duffy, 881 A.2d at 633; New Econ. Capital, LLC, 881 A.2d at 1094. Finally, unlike in Chaney, the Housing Provider in this case failed to provide any evidence that the delayed filings were predicated on any provision of the Act, such as the requirement that a housing provider only take one CPI-W adjustment within a twelve month period. *See* Hearing Tape 1 (RACD June 21, 2006) at 2043-2541.

The Commission's review of the record reveals substantial evidence to support the Hearing Examiner's findings that the Housing Provider filed the Certificates of Election for the 2002, 2003, and 2004 CPI-W adjustments on January 6, 2003, July 2, 2004, and June 29, 2005, respectively. *See* Petitioner's Exhibit (PX) 3 (Jan. 6, 2003, Certificate of Election); PX 7 (July 2, 2004, Certificate of Election); PX 12 (June 29, 2005, Certificate of Election); R. at 108, 117, 129. Moreover, the Commission's review of the record supports the Hearing Examiner's determination that each of the three Certificates of Election were filed more than thirty days after the Housing Provider was first eligible to file them on May 1 of each year. 14 DCMR § 4104.10; Sawyer, 877 A.2d at 104; Ayers, TP 21,273; *see* PX 3; PX 7; PX 12; R. at 108, 117, 129.

Accordingly, where the Commission's review of the record reveals that the Hearing Examiner's determination that the 2002, 2003, and 2004, CPI-W adjustments were invalid is in accordance with the Act and supported by substantial evidence, the Commission affirms the Hearing Examiner on this issue. D.C. OFFICIAL CODE § 42-3502.06(b); 14 DCMR §§ 3807.1 & 4104.10; Sawyer, 877 A.2d at 104; Ayers, TP 21,273; *cf.* Chaney, RH-TP-06-28,366 & RH-TP-06-28,577.

K. In Finding of Fact No. 17 in the Proposed Decision and Order dated September 24, 2008, the Acting Rent Administrator erred in the reading of the Certificate of Election filed on July 2, 2004, as implementing the CPI increase approved by the Rental Housing Commission which became effective on May 1, 2005. The RHC CPI figure was approved to take effect on May 1, 2004, based on the Consumer Price Index during 2003. The Certificate of Election Form is accurate.

The Housing Provider asserts that the Hearing Examiner erred in invalidating the 2003 CPI-W adjustment based on incorrect information on the Certificate of Election form. Housing Provider's Notice of Appeal at 2. The apparent relief sought by the Housing Provider would be validating the 2003 CPI-W adjustment, thereby reversing the Hearing Examiner's determination. *Id.*

The Commission notes that, in light of its disposition of issue J, affirming the Hearing Examiner's invalidation of the 2002, 2003, and 2004 CPI-W adjustments because the Certificates of Election were filed more than thirty days after the Housing Provider was first eligible to take the adjustment, the Housing Provider's issue K, challenging an alternative basis for invalidating the 2003 CPI-W adjustment is rendered moot. *See* BLACK'S LAW DICTIONARY at 1029-30 (8th ed. 2004) (defining "moot" as "[h]aving no practical significance; hypothetical or academic"); *see also* Kuratu, RH-TP-07-28,985 (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); Oxford House-Bellevue, TP 27,583 (dismissing issue as moot where there was no further relief the Commission could grant).

Even if the Commission determined that the Housing Provider's contention that the certificate of election form corresponding to the 2003 CPI-W adjustment was accurate, the Commission observes that there is still no relief available to the Housing Provider because the Commission affirmed the Hearing Examiner's determination that the Housing Provider filed the

Certificate of Election for the 2003 CPI-W rent ceiling adjustment more than thirty days after it was first eligible to do so. *See* Kuratu, RH-TP-07-28,985; Oxford House-Bellevue, TP 27,583; BLACK'S LAW DICTIONARY at 1029-30; *see also supra* at 46-50.

Accordingly, the Commission dismisses this issue as moot.

L. The Rent Administrator has no authority to award interest in Decisions and Order[s]; even assuming he has such authority, the way he calculated interest here was in error.

The Commission has consistently upheld the Rent Administrator's authority to award interest in cases arising under the Act, based on 14 DCMR § 3826.1.[34] Gelman Mgmt. Co. v. Grant, TP 27,995, TP 27,997, TP 27,998, TP 28,002, & TP 28,004 (RHC Aug. 19, 2014) (stating that the Commission "has long recognized the [Rent Administrator's] authority to award interest under 14 DCMR § 3826.1"); Schauer v. Assalaam, TP 27,084 (RHC Dec. 31, 2002) (affirming hearing examiner's award of simple interest on a rent refund); H.G. Smithy Co. v. Arieno, TP 23,329 (RHC Aug. 7, 1998) (holding that the hearing examiner had the authority to award interest); Handy v. Littleford, TP 11,930 (RHC Nov. 26, 1986) (rejecting landlord's contention that the Rent Administrator lacks the authority to award interest). Where the Housing Provider has not offered any statutory, regulatory, or case law authority to support its contentions on this issue, the Commission is guided by, and relies upon, its extensive precedent cited above, and thus affirms the Hearing Examiner on this issue. 14 DCMR §§ 3807.1, 3826.1; Grant, TP 27,995, TP 27,997, TP 27,998, TP 28,002, & TP 28,004; Schauer, TP 27,084; H.G. Smithy Co., TP 23,329; Handy, TP 11,930.

M. The Acting Rent Administrator erred in how he went about calculating interest on the awards to the [Tenants]. The hearing examiner calculated interested based on § 28-3302(c) at 4% the rate in effect on the date of the

[34] 14 DCMR § 3826.1 is recited *infra* at 77-78.

proposed Decision. But interest runs in the proposed Decision at a constant rate, from specific dates in 2004, rather than being adjusted for each period that the statutory interest rate on judgment changed. This was improper. The Court's interest rate on judgments changes on a regular basis.

The Housing Provider states on appeal that the Hearing Examiner erred by imposing a fixed rate of interest on the rent refunds awarded to the Tenants, rather than a fluctuating rate of interest. Housing Provider's Notice of Appeal at 3; Housing Provider's Brief at 14 (citing Jerome Mgmt. v. D.C. Rental Hous. Comm'n, 682 A.2d 178 (D.C. 1998)).

The Commission observes that the DCCA affords an agency great deference in the interpretation of its own regulations. *See, e.g.,* Felicity's, Inc. v. D.C. Bd. of Appeals & Review, 851 A.2d 497 (D.C. 2004) ("this court . . . will 'uphold the agency's interpretation of its own procedural regulations unless that interpretation is clearly wrong'") quoting Waste Mgmt. of Md., Inc. v. D.C. Bd. of Zoning Adjustment, 775 A.2d 1117, 1122 (D.C. 2001))); Draude v. D.C. Bd. of Zoning Adjustment, 527 A.2d 1242, 1247 (D.C. 1987) ("'it is an established maxim of review that an agency's interpretation of its administrative regulations is to be given great deference'" (quoting Sheridan-Kalorama Neighborhood Council v. D.C. Bd. of Zoning Adjustment, 411 A.2d 959, 961 (D.C. 1979))). Furthermore, the Commission is given discretion in the procedural discretions made "in carrying out [its] statutory mandate." Prime v. D.C. Dep't of Pub. Works, 955 A.2d 178 (D.C. 2008) (quoting Ammerman v. D.C. Rental Accommodations Comm'n, 375 A.2d 1060, 1063 (D.C. 1977)); *see also* Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC May 22, 2014); KMG Mgmt., LLC v. Richardson, RH-TP-12-30,230 (RHC Jan. 28, 2014).

In Jerome, the DCCA explained that under D.C. OFFICIAL CODE § 28-3302(c),[35] "the interest rate fluctuates unless good cause is shown." 682 A.2d at 186. However, the Commission notes that the DCCA's decision in Jerome, was decided under the regulations in effect prior to the enactment of 14 DCMR § 3826.3 in 1998. Prior to the enactment of 14 DCMR § 3826.3, interest in cases arising under the Act was governed entirely by D.C. OFFICIAL CODE § 28-3302(c), which provides for a fluctuating rate of interest. However, the plain language[36] of 14 DCMR § 3826.3, in effect during the pendency of this case, specifies that the interest rate for cases arising under the Act shall be the rate under D.C. OFFICIAL CODE § 28-3302(c) on the date of the decision.[37] *See* Dias v. Perry, TP 24,379 (RHC July 30, 2004) (stating that the use of fluctuating interest rates was repealed by 14 DCMR § 3826.3)); *see also* Rittenhouse LLC v. Campbell, TP 25,093 (RHC Dec. 17, 2002) (reversing the use of a fluctuating interest rate in favor of a fixed interest rate). Moreover, the Commission has previously rejected the contention that the interest rate should be fluctuating rather than fixed. *See* Barron, TP 28,510, TP 28,521 & TP 28,526.

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[35] D.C. OFFICIAL CODE § 28-3302(c) provides in relevant part as follows:

> The rate of interest on judgments and decrees, where the judgment or decree is not against the District of Columbia, or its officers, or its employees acting within the scope of their employment or where the rate of interest is not fixed by contract, shall be 70% of the rate of interest set by the Secretary of the Treasury pursuant to section 6621 of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2744; 26 U.S.C. § 6621), for underpayments of tax to the Internal Revenue Service, rounded to the nearest full percent, or if exactly 1/2 of 1%, increased to the next highest full percent[.]

[36] The literal and ordinary meaning of the plain language of the statute or regulations controls its interpretation. Parreco, 567 A.2d at 46; Carillon House, LP v. Carillon House Tenants Ass'n., CI 20,666 and CI 20,686 (RHC June 16, 2000) at 7 (citing Guerra v. District of Columbia, 501 A.2d 786, 789 (D.C. 1985)); *see* Sheikh, RH-TP-12-30,279.

[37] 14 DCMR § 3826.3 provides as follows: "[t]he interest rate imposed on rent refunds . . . shall be the judgment interest rate used by the Superior Court of the District of Columbia pursuant to D.C. OFFICIAL CODE § 28-3302(c) (2001), on the date of the decision."

Accordingly, given the language of the relevant regulations, 14 DCMR § 3826.3, the Commission's longstanding precedent upholding the use of a fixed interest rate, as well as the considerable discretion afforded to the Commission in its interpretation of the Act, the Commission determines that the Hearing Examiner's application of a fixed interest rate to the award of rent refunds in this case was in accordance with the Act. 14 DCMR §§ 3807.1 & 3826.3; Dias, TP 24,379; *see also* Rittenhouse LLC, TP 25,093. Thus, the Hearing Examiner is affirmed on this issue.

N. The Acting Rent Administrator erred in imposing a fine in Conclusion of Law No. 12 identified in the March 29, 2010 Order, as the Order fails to set forth sufficient findings of fact to support the imposition of a fine.

O. The Acting Rent Administrator erred in Conclusion of Law No. 5[38] identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.[39]

The Housing Provider contends that there is no evidence in the record to support a finding of any willful violation of the Act, and the imposition of fines. Housing Provider's Notice of Appeal at 4-5; Housing Provider's Brief at 19-20 (citing Miller v. D.C. Rental Hous. Comm'n, 870 A.2d 556 (D.C. 2005)).

In the Proposed Decision and Order, the Hearing Examiner concluded that the Housing Provider's failure to provide the Tenants with proper notice of the 2003 vacancy adjustment was not intentional or willful. Proposed Decision and Order at 8; R. at 871. However, the Hearing

[38] Conclusion of Law No. 5 in the Final Order provides as follows: "Findings of Fact 16 shall be amended to delete the statement that "Respondents failure was not intentional or willful." Final Order at 8; R. at 1361.

[39] The Commission, in its discretion, will combine its discussion of issues N and O because it observes that these issues raise substantially similar contentions—namely whether the Hearing Examiner erred in imposing a fine against the Housing Provider. Housing Provider's Notice of Appeal at 3-5; *see, e.g.*, Wilson, RH-TP-07-28,907; Bower, TP 27,838; Barac Co., VA 02-107.

Examiner later concluded that the Housing Provider willfully took the 2003 vacancy adjustment, and the CPI-W rent ceiling adjustments in 2003, 2004, and 2005. *Id.* at 10; R. at 869. The Hearing Examiner explained as follows: "[the Housing Provider was] fully aware that [it] could not lawfully and unilaterally move filing dates for annual rent ceiling adjustments of general applicability and place an amended registration form for a vacancy rent ceiling adjustment in an inconspicuous place." *Id.* In the Final Order, the Hearing Examine fined the Housing Provider "$250 for each of the four violations of the Act." Final Order at 9; R. at 1360.

The provision of the Act providing for civil fines is D.C. OFFICIAL CODE § 42-3509.01(b), which provides:

> Any person who willfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $ 5,000 for each violation.

D.C. OFFICIAL CODE § 42-3509.01(b). The Commission and the DCCA define willfully as "a more culpable mental state than the term 'knowingly.'" *See* Miller, 870 A.2d at 559; Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 505 A.2d 73, 75 n.6 (D.C. 1986); Washington Cmtys. v. Joyner, TP 28,151 (RHC Dec. 12, 2005) (determining that the term "willfully" addresses an intention to violate the law); Quality Mgmt., Inc., 505 A.2d at 75 n.6; s*ee also* Recap v. Powell, TP 27,042 (RHC Dec. 19, 2002) (stating that the term "willfully" requires an intention to violate the Act); Ratner Mgmt. Co. v. Tenants of Shipley Park, TP 11,613 (RHC Nov. 4, 1988) (explaining that the Act places a heavier burden under D.C. OFFICIAL CODE § 42-3509.01(b) of showing that a housing provider's conduct was "intentional, or deliberate, or the product of a conscious choice"). To find willfulness, and thus impose a fine on a party, the

hearing examiner must make specific findings of fact that "the housing provider intended to violate the Act or at least knew that it was doing so, from which the intent to do so could be inferred." Miller, 870 A.2d at 559; *see also* Ahmed, Inc. v. Torres, RH-TP-07-29,064 (RHC Oct. 28, 2014) at 20; Beckford, RH-TP-07-28-895.

The Commission observes that "a landlord is imputed to have knowledge of a reasonably prudent man involved in the business of renting properties in the District of Columbia." *See* Williams v. Thomas, TP 28,530 (RHC Sept. 27, 2013) at n.19; 1773 Lanier Place, N.W., Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009); Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005). The Commission concurs with the Hearing Examiner that knowledge of the Act is imputed to the Housing Provider, and the Housing Provider knew or should have known that filing Certificates of Election more than thirty days after the date they were first eligible to take a CPI-W rent ceiling adjustment was a violation of the Act. *See* Williams, TP 28,530 at n.19; Drell, TP 27,344; Smith, TP 27,661; Proposed Decision and Order at 10; R. at 869. Having determined that the Housing Provider knew or should have known that the CPI-W rent ceiling adjustments constituted violations of the Act, the Commission also concurs with the Hearing Examiner that the Housing Provider's intent to violate the Act can be inferred. Miller, 870 A.2d at 559; *see also* Torres, RH-TP-07-29,064 at 20; Beckford, RH-TP-07-28-895; Proposed Decision and Order at 10; R. at 869. Therefore, the Commission determines that the Hearing Examiner's conclusion that the Housing Provider willfully violated the Act by filing Certificates of Election more than thirty days after the date they were first eligible to take a CPI-W rent ceiling adjustment was in accordance with the provisions of the Act. D.C. OFFICIAL CODE § 42-3509.01(b); 14 DCMR § 3807.1; *see* Miller, 870 A.2d at 559; Torres, RH-TP-07-29,064 at 20; Beckford, RH-TP-07-28-895; Williams, TP 28,530 at n.19; Drell, TP 27,344; Smith, TP 27,661.

The Commission affirms the Hearing Examiner's fine of $250 each for the CPI-W increases taken in 2003, 2004, and 2005 (for a total of $750).

However, the Commission cannot affirm the $250 fine related to the 2003 vacancy increase. Although the Hearing Examiner concluded in one part of the Proposed Decision and Order that the Housing Provider was fully aware that it could not place the 2003 vacancy increase notice in an inconspicuous place, earlier in the Proposed Decision and Order the Hearing Examiner made the following findings to the contrary:

> [Housing Provider's] placement of the Amended Registration Form and other rent increase notices in a binder located behind the front desk [sic] and the listing of the rent increase in the lease agreement clearly suggests that [Housing Provider] thought there [sic] alternative procedures were acceptable and complied with the notice requirements [of the Act.]

Proposed Decision and Order at 8; R. at 871. The Commission's review of the record reveals substantial evidence to support the Hearing Examiner's finding that the Housing Provider believed that maintaining rent increase notices in a binder in the business office at the Housing Accommodation, and listing the rent ceiling in tenants' lease agreements complied with the Act's notice requirements. *See* Respondent's Exhibit (RX) 1 at 1; R. at 158; Hearing Tape 2 (June 21, 2006) at 842-1375. Accordingly, the Commission determines that the Hearing Examiner's conclusion that the Housing Provider willfully failed to provide proper notice of the 2003 vacancy increase did not flow rationally from the related findings of fact, and was not supported by substantial record evidence, and reverses the Hearing Examiner on this issue. D.C. OFFICIAL CODE § 42-3509.01(b); 14 DCMR § 3807.1. The Commission vacates the $250 fine for the 2003 vacancy increase.

P. The Acting Rent Administrator erred in Conclusion of Law No. 2[40] identified in the March 29, 2010 Order, and the supporting Findings of Fact, by not having sufficient support for the Conclusion of Law and failing to make sufficient findings of fact to support the conclusion reached. There is not substantial evidence in the record to support the Conclusion of Law.

Q. The Acting Rent Administrator erred in Conclusion of Law No. 2 identified in the March 29, 2010 Order as [Tenants], in their Proposed Decision in [sic] Order concluded that B.F. Saul Company managed the Housing Accommodation. *See, Petitioners' Proposed Decision and Order, Findings of Fact No. 5, page 7.* As a consequence, [Tenants] are judicially estopped from asserting that B.F. Saul Property Company was the property manager.

R. The Acting Rent Administrator erred in holding that B.F. Saul Property Company was a housing provider/property manager.

S. The Acting Rent Administrator erred in identifying David Newecome [sic] was [sic] the "Vice President of Respondent B.F. Saul Property Company."

T. The Acting Rent Administrator erred in identifying Tanya Marhefka was [sic] the "General Manager, B.F. Saul Property Company."

U. The Acting Rent Administrator erred in identifying Judy Willis as the "Account Manager, B.F. Saul Property Company."

V. The Acting Rent Administrator erred in identifying Richard Luchs, Esq. as "counsel for B.F. Saul Property Company and Klingle Corporation."[41]

The Housing Provider asserts in issues P through V, that the Hearing Examiner erred in the Final Order by adding B.F. Saul Property Company as a housing provider in this case. Housing Provider's Notice of Appeal at 3-5. In support, the Housing Provider states that the Tenants never identified B.F. Saul Property Company as a housing provider/respondent. *See*

[40] Conclusion of Law No. 2 in the Final Order provides as follows: "The [Proposed] Order shall be amended to reflect B.F. Saul Property Company as property manager/housing provider instead of B.F. Saul Company." Final Order at 8; R. at 1361.

[41] The Commission, in its discretion, will combine its discussion of issues P through V because it observes that these issues raise substantially similar contentions—namely whether the Hearing Examiner erred naming B. F. Saul Property Company as a housing provider. Housing Provider's Notice of Appeal at 3-5; *see, e.g.,* Wilson, RH-TP-07-28,907; Bower, TP 27,838; Barac Co., VA 02-107.

Housing Provider's Brief at 16. Instead, the Tenant Petition and all other filings made by the Tenants only identified B.F. Saul Company and Klingle Corporation as the Housing Providers. *Id.*

In opposition, the Tenants assert that there was ample evidence in the record to support a finding that B.F. Saul Property Company was a manager of the Housing Accommodation, specifically the Tenants' lease agreement. Tenants' Responsive Brief at 43-44 (citing RX 1).

In the Final Order, the Hearing Examiner stated the following in response to the Tenants' objection that the Proposed Decision and Order failed to cite B.F. Saul Property Company as a housing provider: "[t]he [Proposed] Order will . . . be amended to list B.F. Saul Property Company, not B.F. Saul Company as the management agent/housing provider for the subject property." Final Order at 7; R. at 1362.

Under the DCAPA, all parties to a contested case are entitled to notice of the hearing. D.C. OFFICIAL CODE § 2-509(a);[42] *see, e.g.,* Highland Park Apartments v. Sutton, RH-TP-09-29,593 (RHC Sept. 27, 2013); Knight-Bey v. Henderson, RH-TP-07-28,888 (RHC Jan. 8, 2013); Hiatt Place, LLC v. Tenants of 3228 Hiatt Place, N.W., CI 20,780 (RHC Mar. 24, 2006). The following regulations govern the substitution or addition of parties to a pending case:

> 3906.2 If it appears to the Rent Administrator that the identity of the parties has been incorrectly determined, the Rent Administrator may substitute or add the correct parties on his or her own motion.
>
> 3906.3 No substitution or addition of parties may occur unless all necessary parties are provided an opportunity to file written arguments in support of or opposition to a motion for substitution or addition of parties.

14 DCMR § 3906.

[42] D.C. OFFICIAL CODE § 2-509(a) provides in relevant part as follows: "In any contested case, all parties thereto shall be given reasonable notice of the afforded hearing by the Mayor or the agency, as the case may be."

Two housing providers were named in the Tenant Petition: B.F. Saul Property Company, and Klingle Corporation. Tenant Petition at 1; R. at 22. The Commission's review of the record reveals that the Tenant Petition was never amended to substitute B.F. Saul Company for B.F. Saul Property Company, nor was any motion made by any of the parties to substitute B.F. Saul Company for B.F. Saul Property Company. At the hearing, although one of the witnesses for the Housing Provider, Tanya Marhefka, identified herself as an employee of B.F. Saul Company, there was never any motion made to substitute B.F. Saul Company for B.F. Saul Property Company. *See generally* Hearing Tapes 1-2 (RACD June 21, 2006). Moreover, the Commission observes that several of the documents admitted into evidence indicated that B.F. Saul Property Company was a housing provider:[43] for example, the Tenants' lease agreement stated that B.F. Saul Property Company was an agent of Klingle Corporation, the owner of the Housing Accommodation, and multiple Notices of Increase in Rent Ceiling and Notices of Increase in Rent Charged issued to the Tenants contained the name B.F. Saul Property Company in the letterhead at the top of the notice. *See* PX 10, PX 11, PX 16, PX 18, PX 21; Respondent's Exhibit (RX) 1.

Most importantly, the Commission observes that no motion was made by any of the parties, or by the Hearing Examiner to substitute B.F. Saul Company for B.F. Saul Property Company (the housing provider named in the Tenant Petition). Accordingly, the Commission agrees with the Hearing Examiner that it was error to name B.F. Saul Company in the Proposed Decision and Order, where B.F. Saul Company was never given notice of the original hearing, or an opportunity to file a written argument regarding its substitution as a party to this Tenant

[43] The Act defines a housing provider as: "a landlord, an owner, lessor, sublessor, assignee, or their agent, or any other person receiving or entitled to receive rents or benefits for the use or occupancy of any rental unit within a housing accommodation within the District." D.C. OFFICIAL CODE § 42-3501.03(15).

Petition. D.C. OFFICIAL CODE § 2-509(a); *see, e.g.,* Highland Park Apartments, RH-TP-09-29,593; Knight-Bey, RH-TP-07-28,888; Hiatt Place, LLC, CI 20,780. Therefore, the Commission determines that the Hearing Examiner's correction to the case caption in the Final Order, removing B.F. Saul Company and inserting B.F. Saul Property Company, was in accordance with the provisions of the Act and the DCAPA, and supported by substantial record evidence. D.C. OFFICIAL CODE § 2-509(a); 14 DCMR § 3807.1; *see, e.g.,* Highland Park Apartments, RH-TP-09-29,593; Knight-Bey, RH-TP-07-28,888; Hiatt Place, LLC, CI 20,780.

Accordingly, the Hearing Examiner is affirmed on this issue.

W. The Acting Rent Administrator erred in modifying the Proposed Decision based solely on arguments presented when no new evidence was presented; and he declined to reopen the hearing; and he declined to amend the summary of testimony.

The Housing Provider asserts that the Hearing Examiner erred by including the following statement in the Final Order: "All other findings of fact made in this decision and in prior decisions and order consistent with this Order are hereby incorporated by reference into this section of Findings of Fact." Housing Provider's Brief at 21 (citing Final Order at 8; R. at 1361). The Housing Provider contends that without any specific reference to a particular decision and order, this statement is "woefully inadequate to satisfy the DCAPA" and requires reversal of the Final Order, presumably in its entirety. *Id.*

In defense of the Final Order, the Tenants explain that the Hearing Examiner's statement indicates that the Proposed Decision and Order and the Final Order together constitute the determinations of the Hearing Examiner. Tenants' Responsive Brief at 53. The Tenants contend that, to the extent that the Final Order did not modify the Proposed Decision and Order, the

findings of fact and conclusions of law in the Proposed Decision and Order were incorporated by reference into the Final Order. *Id.*

The DCAPA provides that:

> Every decision and order adverse to a party to the case . . . shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence.

D.C. OFFICIAL CODE § 2-509(e). Thus, an agency is required to show the basic facts upon which it has relied in reaching a decision. Citizens Ass'n of Georgetown, Inc. v. D.C. Zoning Comm'n, 402 A.2d 36, 42 (D.C. 1979); Barron, TP 28,510, TP 28,521, & TP 28,526; Collins v. Peter N.G. Schwartz Mgmt. Co., TP 23,571 (RHC Feb. 10, 2000). The elements of the applicable legal standard must be systematically applied to the findings of fact on each issue. Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984); Allentruck v. D.C. Minimum Wage & Indus. Safety Bd., 261 A.2d 826, 833 (D.C. 1969); Washington v. A&A Marbury, RH-TP-11-30,151 (RHC Dec. 27, 2012).

The Commission observes that the Hearing Examiner made findings of fact in the Proposed Decision and Order on each contested issue, supported by record evidence, including the testimony given and exhibits submitted at the RACD hearing. Proposed Decision and Order at 6-13; R. at 866-73; *see* D.C. OFFICIAL CODE § 2-509(e); Citizens Ass'n of Georgetown, Inc., 401 A.2d at 42; Barron, TP 28,510; Collins, TP 23,571. Additionally, the Hearing Examiner made conclusions of law on each contested issue, that applied the applicable legal standards to the findings of fact. Proposed Decision and Order at 13-14; R. at 865-66; *see* Perkins, 482 A.2d at 402; Allentruck, 261 A.2d at 833; Washington, RH-TP-11-30,151.

In the Final Order, the Hearing Examiner systematically addressed each of the exceptions and objections raised by the parties.[44] Final Order at 4-8; R. at 1361-65. Next, he specifically identified the portions of the Proposed Decision and Order that were being amended by the Final Order. Final Order at 8-9; R. at 1360-61. In light of the fact that all of the findings of fact and conclusions of law were not amended by the Final Order, the Hearing Examiner stated that any unaltered findings of fact and conclusions of law from the Proposed Decision and Order would be incorporated by reference into the Final Order. *Id.*

The Commission is satisfied that the Hearing Examiner did not violate the DCAPA merely by including a statement in the Final Order incorporating by reference any unaltered findings of fact and conclusions of law from the Proposed Decision and Order. *See* D.C. OFFICIAL CODE § 2-509(e); Perkins, 482 A.2d at 402; Citizens Ass'n of Georgetown, Inc., 401 A.2d at 42; Allentruck, 261 A.2d at 833; Barron, TP 28,510; Washington, RH-TP-11-30,151; Collins, TP 23,571. Instead, the Commission is satisfied based on its review of the entirety of both the Proposed Decision and Order and the Final Order that the Hearing Examiner made findings of fact on each contested issue that were supported by record evidence, and conclusions of law that applied the relevant provisions of the Act systematically to the findings of fact. *See* D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 3807.1; Perkins, 482 A.2d at 402; Citizens Ass'n of Georgetown, Inc., 401 A.2d at 42; Allentruck, 261 A.2d at 833; Barron, TP 28,510; Washington, RH-TP-11-30,151; Collins, TP 23,571. Accordingly, the Commission determines that the Hearing Examiner's Proposed Decision and Order and Final Order were in accordance

[44] *See supra* at 3 n.2.

with the DCAPA, and thus affirms the Hearing Examiner on this issue.[45] *See* D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 3807.1; Perkins, 482 A.2d at 402; Citizens Ass'n of Georgetown, Inc., 401 A.2d at 42; Allentruck, 261 A.2d at 833; Barron, TP 28,510; Washington, RH-TP-11-30,151; Collins, TP 23,571.

VI. DISCUSSION OF TENANTS' ISSUES

A. It was error for the Hearing Examiner to fail to find that Housing Provider violated the Unitary Rent Ceiling Adjustment Amendment Act, D.C. Law 9-191 by stacking three rent ceiling increases in implementing a vacancy rent increase, invalidating the vacancy rent increase.

B. It was error for the Hearing Examiner to fail to find that the [H]ousing [P]rovider failed to give the proper notice of rent increase to Unit 802 Tenants pursuant to 14 DCMR § 4205.4 with respect to a vacancy rent increase, invalidating the vacancy rent increase.

C. It was error for the Hearing Examiner to fail to find that Housing Provider failed to comply with D.C. Code § 42-3502.05(g) and 14 DCMR § 4103.1(e) with respect to a vacancy rent increase, invalidating the vacancy rent increase.

D. It was error for the Hearing Examiner to find a "change date" of July 6, 2003, where no evidence in the record supports the finding and where the erroneous change date invalidates the Amended Registration and the vacancy rent ceiling increase.

E. It was error for the Hearing Examiner to fail to find that the Amended Registration filed during July 2003 for a vacancy rent ceiling increase was invalid because it did not contain a certification of compliance with 14 DCMR § 4103.1(b).

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[45] The Commission notes that it has found that a hearing examiner's incorporation by reference of sections of a proposed decision and order into a final order can be a violation of the DCAPA. *See, e.g.*, Barron, TP 28,510, TP 28,521, & TP 28,526; Grant, TP 27,995, TP 27,997, TP 27,998, TP 28,002, & TP 28,004. However, unlike this case where the Hearing Examiner specifically identified every portion of the Proposed Decision and Order that was being altered by the Final Order, the Commission has found that incorporation by reference violates the DCAPA where the hearing examiner fails to indicate what precisely is being incorporated from the previous order. *Compare* Final Order at 4-9; R. at 1360-65, *with* Barron, TP 28,510, TP 28,521, & TP 28,526 (determination that incorporation by reference constituted error where the Commission was unable to determine exactly what was being incorporated); Grant, TP 27,995, TP 27,997, TP 27,998, TP 28,002, & TP 28,004 (finding error where Acting Rent Administrator indicated that findings that were not in conflict with the final order were incorporated by reference).

F. It was error for the Hearing Examiner to fail to find that the recent ceiling on Unit 402 was not properly calculated and could not, therefore, form the basis of a valid vacancy rent ceiling increase for unit 802.[46]

The Commission notes that, in light of its disposition of the Housing Provider's issues B through E, *supra* at 37-40, affirming the Hearing Examiner's determination that the 2003 vacancy increase was invalid because the Housing Provider failed to give proper notice of the increase, there is no additional relief available to the Tenants based on their issues A through F proposing alternative bases for the invalidation of the vacancy increase, and thus these issues are rendered moot. *See* BLACK'S LAW DICTIONARY at 1029-30 (8th ed. 2004); *see also* Kuratu, RH-TP-07-28,985; Oxford House-Bellevue, TP 27,583. Accordingly, the Commission dismisses these issues on appeal.

G. It was error for the Hearing Examiner to fail to find that Certificates of Election were unperfected and, therefore, nullities, due to Housing Provider's failure to comply with 14 DCMR § 4101.6 as required by 14 DCMR § 4204.10, rendering the rent ceiling increases in the Certificates of Election nullities as well.

In issue G, the Tenants assert that the Hearing Examiner erred by failing to find that the 2003, 2004, and 2005 Certificates of Election were invalid because the Housing Provider failed to properly post or serve the Certificates of Election in violation of the Act. Tenants' Notice of Appeal at 2 (citing 14 DCMR §§ 4101.6 & 4204.10); Tenants' Brief at 22-27.

The Commission notes that, in light of its disposition of the Housing Provider's issue J, *supra* at 46-50, affirming the Hearing Examiner's determination that the 2003, 2004, and 2005 CPI-W rent ceiling adjustments were invalid because the Housing Provider failed to timely file

[46] The Commission, in its discretion, will combine its discussion of the Tenants' issues A through F because it observes that these issues raise substantially similar contentions—namely whether the Hearing Examiner erred in failing to recognize alternative bases for invalidating the 2003 vacancy rent ceiling adjustment. Tenants' Notice of Appeal at 1-2.

the corresponding Certificates of Election, there is no additional relief available to the Tenants based on their issue G proposing an alternative basis for the invalidation of the CPI-W rent ceiling adjustments, and thus these issues are rendered moot. *See* BLACK'S LAW DICTIONARY at 1029-30 (8th ed. 2004); *see also* Kuratu, RH-TP-07-28,985; Oxford House-Bellevue, TP 27,583. Accordingly, the Commission dismisses this issue on appeal.

H. It was error for the Hearing Examiner to find that the legally calculated rent was $1,766 when the legally calculated rent could not exceed $1,122[sic].

The Tenants contend that the Hearing Examiner's determination that the "lawful rent" for their unit was $1,766 per month was not supported by the record. Tenants' Notice of Appeal at 2; Tenants' Brief at 36. Instead, the Tenants assert that the maximum lawful rent for their unit was $1,710, and that there was no valid rent ceiling increase or rent charged increase to $1,766. Tenants' Brief at 36-37 (citing PX 1). In opposition, the Housing Provider maintain that the Tenants' claim that their rent ceiling is lower than $1,766 is barred by the statute of limitations. Housing Provider's Responsive Brief at 3.

In the Proposed Decision and Order, the Hearing Examiner determined that the 2005 CPI-W rent ceiling increase, the 2004 CPI-W rent ceiling and rent charged increases, the 2003 vacancy rent ceiling and rent charged increases, and the 2003 CPI-W rent ceiling increase were invalid. Proposed Decision and Order at 6-10; R. at 869-73. The Hearing Examiner found that the 2002 CPI-W increase, filed on January 2, 2002, was filed more than three years before the date on which the Tenant Petition in this case was filed (January 26, 2006), and thus the Hearing Examiner made no findings on whether the 2002 CPI-W increase was valid or invalid. *Id.* at 6; R. at 873.

The Hearing Examiner concluded that the Tenants demonstrated that the legal rent ceiling for their unit was $1,766, and the legal rent charged was $1,761. *Id.* at 11; R. at 868. The Hearing Examiner calculated a rent refund based on the difference between the amount paid in rent, and the "rent amount that could be legally charged," i.e., the rent ceiling, $1,766. *Id.* In the Final Order, the Hearing Examiner rejected the Tenants' contention that the legal rent ceiling for their unit was $1,112 instead of $1,766, "because no record evidence was proffered during the hearing that established the rent ceiling at $1,112.00." Final Order at 6; R. at 1363.

The Commission notes initially that, in accordance with the DCAPA, "the proponent of a rule or order shall have the burden of proof." D.C. OFFICIAL CODE § 2-509(a). Accordingly, as the proponents of the Tenant Petition, it was the Tenants' burden to prove the legal rent ceiling and rent charged levels for their unit. *Id.*

As the Commission explained previously, *supra* at 33-36, a tenant has three years from the effective date of a rent adjustment to challenge that adjustment. D.C. OFFICIAL CODE § 42-3502.06(e); 14 DCMR § 4214.8; Hinman, RH-TP-06-28,728; Greene, TP 27,604. The Commission notes that in this case, the Tenant Petition was filed on January 26, 2006. Tenant Petition at 1; R. at 23. Accordingly, the Tenants could challenge any rent ceiling increase or rent charged increase with an effective date within the three years prior to January 26, 2006, or back until January 26, 2003. D.C. OFFICIAL CODE § 42-3502.06(e); 14 DCMR § 4214.8; Hinman, RH-TP-06-28,728; Greene, TP 27,604.

Under the penalties provision of the Act, any person who demands rent in excess of the maximum allowable rent, "shall be held liable . . . for the amount by which the rent exceeds the

applicable rent ceiling." D.C. OFFICIAL CODE § 42-3509.01(a);[47] *see, e.g.,* Richardson, TP 28,196 (holding that the tenant was only entitled to a rent refund if the rent charged exceeded the lawfully calculated rent ceiling); Barron, TP 28,510, TP 28,521, & TP 28,526 (determining that the hearing examiner committed plain error by awarding rent refunds where the rent charged did not exceed the lawful rent ceiling).

Here, the 2002 CPI-W increase referenced by the Tenants in their brief on appeal, PX 1, that purportedly supported a finding of a rent ceiling lower than $1,766, had an effective date of February 1, 2002 – nearly four years prior to the filing of the Tenant Petition, and outside of the statute of limitations in this case. PX 1 at 1-3; R. at 145-47; *see* D.C. OFFICIAL CODE § 42-3502.06(e); 14 DCMR § 4214.8; Hinman, RH-TP-06-28,728; Greene, TP 27,604. Accordingly, the Commission affirms the Hearing Examiner's determination in the Proposed Decision and Order that he could not make any findings of fact regarding the validity of the 2002 CPI-W increase because it was beyond the statute of limitations.[48] *See* Proposed Decision and Order at 6; R. at 873; *see also* D.C. OFFICIAL CODE § 42-3502.06(e); 14 DCMR § 4214.8; Hinman, RH-TP-06-28,728; Greene, TP 27,604.

The Commission's review of the record reflects that the 2003 CPI-W increase was the first rent adjustment invalidated by the Hearing Examiner after the start of the statute of limitations period on January 26, 2003. *See* Proposed Decision and Order at 6-11; PX 3; R. at 129, 868-73. Accordingly, the legal rent ceiling and rent charged levels for the Tenants are the

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[47] D.C. OFFICIAL CODE § 42-3509.01(a) is recited *infra* at 71-72.

[48] The Commission notes that this case is distinguishable from Hinman, RH-TP-06-28,728, where the Commission allowed a tenant to challenge a rent charged adjustment that occurred within three years of the filing of the tenant petition based on an improper rent ceiling adjustment that had occurred more than years prior to the filing of the Tenant Petition. Here, the Commission's review of the record does not reveal any evidence that the 2003 CPI-W rent ceiling increase formed the basis of a corresponding increase in rent charged that occurred within the three years prior to the filing of the Tenant Petition. *See, e.g.,* PX 1 at 1-3; R. at 145-47.

levels that were in effect, according to the substantial record evidence, prior to the 2003 CPI-W increase. D.C. OFFICIAL CODE § 42-3509.01(a); *see, e.g.,* Richardson, TP 28,196; Barron, TP 28,510, TP 28,521, & TP 28,526. The Commission agrees with the Hearing Examiner that the substantial record evidence indicates that the rent ceiling and rent charged levels in effect for the Tenants' unit prior to the 2003 CPI-W increase, were the levels indicated on the 2002 certificate of election. Proposed Decision and Order at 11; R. at 868; *compare* PX 3, R. at 129 (2003 Certificate of Election), *with* PX 1, R. at 147 (2002 Certificate of Election). The Commission's review of the record also reveals substantial record evidence indicating that prior to the 2003 CPI-W increase, the rent ceiling for the Tenants' unit was $1,766, and the rent charged for the Tenants' unit was $1,761. *See* Proposed Decision and Order at 6, 11; R. at 868, 873; PX 1; PX 3; R. at 129, 147.

Finally, the Commission affirms the Hearing Examiner's determination that the Tenants' rent refund should be the difference between the amount of rent that the Tenants were paying, and the legal rent ceiling. D.C. OFFICIAL CODE § 42-3509.01(a); *see, e.g.,* Richardson, TP 28,196; Barron, TP 28,510, TP 28,521, & TP 28,526. The Commission rejects the Tenants' assertion that the Hearing Examiner erred by calculating rent refunds based on the legal rent ceiling amount, $1,766, rather than the legal rent charged amount, $1,761. *See* Tenants' Brief at 36-37.

Where the Commission is satisfied that the Hearing Examiner's decision was in accordance with the provisions of the Act and supported by substantial evidence, as described above, the Commission affirms the Hearing Examiner on this issue.[49] D.C. OFFICIAL CODE §§ 2-

[49] The Commission notes that the Tenants have provided no legal interpretation of the Act, case precedent, or other support for, nor does the Commission's review of the record reveal any evidence supporting, their contention that

509(a) & 42-3509.01(a); 14 DCMR § 3807.1; *see, e.g.,* Richardson, TP 28,196; Barron, TP 28,510, TP 28,521, & TP 28,526.

I. It was error for the Hearing Examiner to fail to award treble damages.

The Tenants assert that the Hearing Examiner's findings supporting his decision to not award the Tenants treble damages were not supported by substantial record evidence. Tenants' Brief at 41. In opposition, the Housing Provider maintains that witnesses at the RACD hearing presented a "valid explanation" for how rent increases had been calculated, and why certain filings had been deferred, and that there was no evidence in the record that the Housing Provider intended to violate the Act. Housing Provider's Responsive Brief at 6.

The Hearing Examiner made the following findings of fact regarding treble damages in the Proposed Decision and Order:

> Respondents did not increase the rent ceiling and rent charged for Petitioners' [sic] in bad faith, as Petitioners allege. Respondents' actions in moving the filing dates for the annual rent ceiling adjustment and posting the vacancy increase notice in the laundry room do not suggest that Respondents in doing so intended to defraud tenants, misrepresent the rent ceilings and avoid detection by RAD. The fact that Respondents' [sic] left an amended registration form for the vacancy adjustment behind the front desk, posted something in the laundry room purporting to be the amended registration form and filed a copy with RAD defeats the notion that Respondents engaged in fraud, misrepresentation and deceit. The same is true regarding Respondents['] decision to move the filing dates for the annual rent ceiling adjustments. Albeit improperly, Respondents filed the requisite notices with RAD and Petitioners, leaving all interested parties fully aware [of] the rent adjustment procedures for Petitioners.

Proposed Decision and Order at 11; R. at 868.

The penalties provision of the Act, located at D.C. OFFICIAL CODE § 42-3509.01(a), provides in relevant part as follows:

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their legally calculated rent could not exceed $1,122 (as asserted in their Brief) or $1,112 (as asserted in the exception and objections to the Hearing Examiner).

> 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 . . . shall be held liable by the Rent Administrator . . . for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith)[.]

D.C. OFFICIAL CODE § 42-3509.01(a).

The Commission has consistently held that an award of treble damages under the Act requires the application of a two-prong test: "first, there must be a determination that the housing provider acted knowingly; and second, the housing provider's conduct must be 'sufficiently egregious' to warrant a finding of bad faith. Palmer v. Clay, RH-TP-13-30,431 (RHC Oct. 5, 2015) (quoting Grant, TP 27,995, 27,997, 27,998, 28,002, & 28,004); Notsch, RH-TP-06-28,690 (quoting Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013)); *see also* Drell, TP 27,344; Smith, TP 27,661. A finding of bad faith must be based on specific findings of fact that "demonstrate a higher level of culpability," such as "a deliberate refusal to perform without a reasonable excuse and/or manifest[ed] dishonest intent, sinister motive, or heedless disregard of duty." Palmer, RH-TP-13-30,431 (quoting Notsch, RH-TP-06-28,690); Lizama, RH-TP-07-29,063; Drell, TP 27,344.

The Commission's review of the record reveals substantial record evidence to support the Hearing Examiner's determination that the Housing Provider's conduct in failing to properly post notice of the vacancy increase, and in delaying the filing of Certificates of Election, was not "sufficiently egregious" to constitute bad faith. Proposed Decision and Order at 11. R. at 868. For example, the Commission observes the following evidence in the record that supports the Hearing Examiner's determination that the Housing Provider did not act in bad faith: (1) Ms. Marhekfa's testimony that registration documents and certificates of election are maintained in the business office at the Housing Accommodation, and her belief that there was a notice in the

laundry room of the Housing Accommodation directing tenants that the documents are available for review; (2) Mr. Newcome's testimony that he believed there was a valid oral agreement with tenants at the Housing Accommodation that permitted the Housing Provider to delay filing Certificates of Election; (3) CPI-W rent ceiling increase notices were served on the Tenants. *See* Hearing Tape 1 (RACD June 21, 2006) at 2100-2155; Hearing Tape 2 (RACD June 21, 2006) at 978-1016; PX 7 (July 2, 2004 Certificate of Election) at 1-2; R. at 116-17; PX 12 (June 29, 2005 Certificate of Election) at 1-2; R. at 107-108.

As the Commission stated previously "credibility determinations are 'committed to the sole and sound discretion of the hearing examiner.'" *See, e.g.,* Tenants of 2480 16th St., NW, RH-SF-09-20,098; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708; Notsch, RH-TP-06-28,690. Where the Commission has determined that substantial evidence exists to support the Hearing Examiner's decision, even substantial evidence to the contrary does not permit the Commission to overturn the Hearing Examiner's decision. Boyd, RH-TP-10-29,819 (quoting Hago, RH-TP-08-11,552 & RH-TP-08-12,085); *see* Tenants of 2480 16th St., NW, RH-SF-09-20,098; Siegel, RH-TP-06-28,524; Karpinski, RH-TP-09-29,590.

In accordance with the foregoing, the Commission affirms the Hearing Examiner on this issue.

J. It was error for the Hearing Examiner to make findings of fact regarding the testimony that do not reflect the testimony given at the proceeding or are otherwise not supported by substantial evidence in the record.

The Tenants assert on appeal that the Hearing Examiner erred in making findings of fact that "do not reflect the testimony given" or that were not supported by substantial record evidence. Tenants' Notice of Appeal at 2. The Commission notes that the Tenants did not identify any specific testimony that contradicted the findings of fact, or any specific findings of

fact that were not supported by substantial record evidence. *Id.* Moreover, the Commission observes that the Tenants' Brief does not provide additional details for this claim on appeal. *See* Tenants' Brief at 63-64. Instead, the Tenants' Brief focuses solely on the Tenants' accusation that the "Summary of Testimony" and "Issues Considered" sections of the Proposed Decision and Order were "lifted wholesale . . . from Housing Provider's Proposed Decision and Order."[50] *Id.* at 63. The Tenants did not identify any testimony in their Brief that contradicted the Hearing Examiner's findings of fact, or any findings of fact that were unsupported by substantial evidence. *Id.* at 63-64.

The Commission's long-standing precedent requires that issues on appeal contain a "clear and concise statement of the alleged error(s)" in the lower court's decision. 14 DCMR § 3802.5(b); *e.g.*, Tenants of 2300 & 2330 Good Hope Rd., SE, CI 20,753 & CI 20,754; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708; Bohn Corp. v. Robinson, RH-TP-08-29,328 (RHC July 2, 2014); Barac Co., VA 02-107. The Commission will dismiss issues that are "vague, overly broad, or do not allege a clear and concise statement of error." Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (dismissing the following issue as too vague for review: "[w]hether the ALJ erred in applying [the Act's statute of limitations]"); Bohn Corp., RH-TP-08-29,328 (dismissing housing provider's contention that the ALJ gave the tenant legal advice where the

[50] The Commission notes that the Tenants' allegation that portions of the Proposed Decision and Order were taken from the Housing Provider's proposed decision and order, was raised for the first time in the Tenants' Brief and was not raised in the Tenants' Notice of Appeal. *Compare* Tenants' Notice of Appeal, *with* Tenants' Brief at 63. The Commission lacks jurisdiction over issues that were not raised in a timely-filed notice of appeal. 14 DCMR § 3807.4; Frye & Welch Assocs., P.C. v. D.C. Contract Appeals Bd., 664 A.2d 1230, 1233 (D.C. 1995); Joyner v. Jonathan Woodner Co., 479 A.2d 308, 312 (D.C. 1984); Burkhardt v. B.F. Saul Co., RH-TP-06-28,708. Moreover, the Hearing Examiner addressed this contention in the Final Order, stating that "while the Summary of Testimony and Issues Considered sections . . . are taken from [Housing Provider's] proposed decision and order, many of the Findings of Fact and Conclusions of Law were taken directly form [sic] [Tenants'] post-hearing submission[.]" Final Order at 5; R. at 1364. The Hearing Examiner explained that neither of the parties' post-hearing submissions was adopted to the exclusion of the other. *Id.* The Commission's review of the record does not provide evidentiary support for a determination that the Hearing Examiner did not appropriately consider the respective proposed decisions and orders from the Housing Provider and the Tenants.

housing provider failed to provide any additional details concerning the alleged advice given); Barac Co., VA 02-107 (finding issue stating the Hearing Examiner used the wrong burden of proof was too vague for review).

The Commission determines that the Tenants' statement of issue J on appeal, *supra*, is vague, overly broad, and does not contain a clear and concise statement of the alleged error(s) in either the Proposed Decision and Order or the Final Order. 14 DCMR § 3802.5(b); *e.g.*, Tenants of 2300 & 2330 Good Hope Rd., SE, CI 20,753 & CI 20,754; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708; Bohn Corp., RH-TP-08-29,328; Barac Co., VA 02-107. Therefore, the Commission dismisses this issue on appeal.

K. It was error for the Hearing Examiner to fail to properly calculate damages.

The Tenants provides the following three bases for how the Hearing Examiner erred in his calculation of damages: (1) the Hearing Examiner erred by improperly allowing the Housing Provider to credit the rent refunds towards the Tenants' future rent; (2) the Hearing Examiner erred by calculating the damages based on the incorrect rent rollback amount; and (3) the Hearing Examiner erred by failing to update the calculation of interest to include the interest that accrued during the time between the Proposed Decision and Order and the Final Order. Tenants' Brief at 62-63.

1. Whether the Hearing Examiner erred by improperly allowing the Housing Provider to credit the damages towards the Tenants' rent.

In the Proposed Decision and Order, the Hearing Examiner stated the following regarding payment of the Tenants' rent refund: "Respondents shall pay the refund to Petitioners within 30 days of this Decision and Order or credit this amount towards Petitioner's rent[.]" Proposed Decision and Order at 15; R. at 864 (emphasis added).

The penalties provision of the Act provides that where a housing provider charges more rent than the maximum allowable rent for a rental unit, the Rent Administrator may award rent refunds and/or a rent rollback. D.C. OFFICIAL CODE § 42-3509.01. Similarly, the regulations provide that rent refunds and rent rollbacks are available remedies where a housing provider charges more than the maximum allowable rent. 14 DCMR § 4217.1.[51] Neither the Act's penalties provision, nor the corresponding regulations authorize the hearing examiner to order a housing provider to credit a rent refund towards a tenant's rent, rather than paying it directly to the tenant.[52] *See* D.C. OFFICIAL CODE § 42-3509.01; 14 DCMR § 4217.1.

Accordingly, the Commission determines that the Hearing Examiner's order that the Housing Provider could either pay the refund to the Tenants or credit the refund amount towards their future rent was not in accordance with the Act, and reverses the Hearing Examiner on this issue. *See* D.C. OFFICIAL CODE § 42-3509.01; 14 DCMR § 4217.1; Proposed Decision and Order at 15; R. at 864. The Housing Provider is hereby ordered to pay the rent refunds to the Tenants directly. *See* D.C. OFFICIAL CODE § 42-3509.01; 14 DCMR § 4217.1.

However, the Commission further determines that this was merely harmless error.[53] The Commission's review of the record reveals no evidence, nor have the Tenants alleged, that the

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[51] 14 DCMR § 4217.1 provides in relevant part as follows: "Where . . . a housing provider knowingly demanded or received rent above the rent ceiling . . . the Rent Administrator . . . shall invoke the following types of relief: (1) A rent refund; and . . . (c) A rent rollback[.]"

[52] The Commission notes that nothing prevents the parties from privately agreeing, such as in a settlement agreement, that rent refunds will be paid through a credit offsetting the tenant's future rent payments.

[53] The Commission has previously defined "harmless error" as "an error which was not prejudicial to the substantive rights of the party assigning it, and in no way affected the final outcome of the case." Karpinski, RH-TP-09-29,590 (determining that ALJ's failure to determine whether services and facilities were "related" services and facilities, as those terms are defined by the Act, was harmless because the tenant's claim failed on other grounds); *see also* Young v. Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012) at n.5 (determining that hearing examiner's failure to include ex parte communication in the record was harmless error where the Commission was satisfied the hearing examiner did not consider the communication in the final order); Jackson v. Peters, RH-TP-12-28,898 (RHC Feb. 3,

Housing Provider has actually attempted to satisfy the Hearing Examiner's order by crediting the rent refunds towards their rent payments. *See* Tenants' Notice of Appeal; Tenants' Brief.

2. Whether the Hearing Examiner erred by calculating the damages based on the incorrect rent rollback amount.

The Commission observes that it has already addressed this issue, *supra* at 67-71, affirming the Hearing Examiner's calculation of the rent refund by calculating the difference between the amount of rent the Tenants' paid, and the legal rent ceiling of $1,766. D.C. OFFICIAL CODE § 42-3509.01(a); *see, e.g.,* Richardson, TP 28,196; Barron, TP 28,510, TP 28,521, & TP 28,526.

3. Whether the Hearing Examiner erred by failing to update the calculation of interest to include the interest that accrued during the time between the Proposed Decision and Order and the Final Order.

In the Proposed Decision and Order, the Hearing Examiner determined that the Tenants were entitled to interest on the rent refund, calculated from the date of the violation to the date of the issuance of the decision. Proposed Decision and Order at 11; R. at 868. The Hearing Examiner used the interest rate applicable on the date the Proposed Decision and Order was issued, and calculated the interest through the date of the Proposed Decision and Order. *Id.* at 12-13; R. at 866-67. The Hearing Examiner did not include any alterations or additions to the calculation of interest in the Final Order. *See* Final Order at 1-11; R. at 1358-68.

The Act's regulations provide the following guidance regarding the imposition of interest:

> 3826.1 The Rent Administrator or the Commission may impose simple interest on rent refunds[.]

2012) at n.21 (deciding that ALJ's statement that the tenant could not appeal an order was harmless error where the Commission exercised jurisdiction over the appeal by accepting the filing of the tenant's notice of appeal.)

> 3826.2 Interest is calculated from the date of the violation . . . to the date of the issuance of the decision.
>
> 3826.3 The interest rate imposed on rent refunds . . . shall be the judgment interest rate used by the Superior Court of the District of Columbia pursuant to D.C. OFFICIAL CODE § 28-3302(c) (2001), on the date of the decision.

14 DCMR § 3826.1-.3; *see* 14 DCMR § 4217.3.[54]

A proposed decision and order is, by its definition, not a final order (*see supra* at pp. 2-3 n.2); the Proposed Decision and Order in this case was not incorporated into a final order until the Hearing Examiner issued the Final Order. *See* Final Order at 9; R. at 1360. The Commission, in its discretion, interprets the reference to "date of the issuance of the decision" in 14 DCMR § 3826.2, and "date of the decision" in 14 DCMR § 3826.3, to refer to the date of the issuance of the final decision. 14 DCMR § 3826.2-.3; *see* Hinman, RH-TP-06-28,782 (citing Sawyer, 877 A.2d at 102-103) ("[t]he DCCA has provided the Commission with considerable deference and discretion in its interpretation of the Act"). The Commission agrees with the Tenants that under the Act's regulations, the Hearing Examiner's failure to calculate interest through the date of the Final Order was not in accordance with the Act, and constituted error. 14 DCMR §§ 3807.1 & 3826.2; *see* Hinman, RH-TP-06-28,782.

Additionally, as a matter of plain error,[55] the Commission determines that the Hearing Examiner's calculation of interest based on the interest rate in effect on the date of the Proposed Decision and Order, rather than the interest rate in effect on the date of the Final Order was not

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[54] 14 DCMR § 4217.3 provides the following: "When the Rent Administrator imposes a rent refund . . . interest shall be calculated on the rent refund . . . in accordance with § 3826 of these rules."

[55] The Commission's review is typically limited to the issues raised in a notice of appeal, but it may always correct for "plain error." 14 DCMR § 3807.4; Lenkin Co. Mgmt., 642 A.2d at 1286; Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984); Doyle v. Pinnacle Realty Mgmt., TP 27,067 (RHC Mar. 10, 2015) (plain error in determination of identity of parties represented by tenant association); Washington, RH-TP-30,151 (plain error to make findings of fact based on settlement agreement not admitted into evidence, to deny tenant opportunity to present supporting evidence, and to fail to make findings of fact and conclusions of law on each contested issue).

in accordance with the Act and constituted error. 14 DCMR §§ 3807.1 & 3826.3. The D.C. Superior Court provides a listing of the current and past judgment interest rates on its website. *See* D.C. Super. Ct. "Judgment Interest Rates," http://www.dccourts.gov/internet/documents/InterestRateSchedule.pdf (accessed Dec. 8, 2015) (Superior Court Interest Rate Schedule). In relevant part, the D.C. Superior Court Interest Rate Schedule provides the following:

January 1, 2008 to March 31, 2009	4% per annum
April 1, 2009 to December 31, 2010	3% per annum

Id.

Accordingly, the Commission reverses the Hearing Examiner determination that the applicable interest rate was 4%, the rate in effect on the date of the Proposed Decision and Order. *Compare* Superior Court Interest Rate Schedule, *with* Proposed Decision and Order at 12-13; R. at 866-67. The Commission vacates the Hearing Examiners calculation of the total interest due to the Tenants because it was not calculated at the correct interest rate, and because it was not calculated through the date of the Final Order. 14 DCMR § 3826.2-.3; *see* Hinman, RH-TP-06-28,782.

Pursuant to 14 DCMR § 3826.1, the Commission is authorized to issue an award of interest. The Commission, based on the undisputed findings of facts in the record, the Hearing Examiner's calculation of the rent refund amount, affirmed *supra* at 67-71, and the Hearing Examiner's determination of the first date of the violation, awards the Tenants $8,571 in interest on their rent refund, based on the calculations shown in the table below:

Month and Year of Overcharge[56]	Monthly Overcharge Amount[57]	No. of Months Overcharge Held	Annual Interest Rate	Monthly Interest Rate	Interest Factor	Interest ($)
Aug. 2003	$1494.00	79	3%	0.0025	0.1975	$299
Sept. 2003	$1494.00	78	3%	0.0025	0.195	$295
Oct. 2003	$1494.00	77	3%	0.0025	0.1925	$291
Nov. 2003	$1494.00	76	3%	0.0025	0.19	$288
Dec. 2003	$1494.00	75	3%	0.0025	0.1875	$284
Jan. 2004	$1494.00	74	3%	0.0025	0.185	$280
Feb. 2004	$1494.00	73	3%	0.0025	0.1825	$276
Mar. 2004	$1494.00	72	3%	0.0025	0.18	$273
Apr. 2004	$1494.00	71	3%	0.0025	0.1775	$269
May 2004	$1494.00	70	3%	0.0025	0.175	$265
June 2004	$1494.00	69	3%	0.0025	0.1725	$261
July 2004	$1494.00	68	3%	0.0025	0.17	$258
Aug. 2004	$1494.00	67	3%	0.0025	0.1675	$254
Sept. 2004	$1494.00	66	3%	0.0025	0.165	$250
Oct. 2004	$1494.00	65	3%	0.0025	0.1625	$247
Nov. 2004	$1583.00	64	3%	0.0025	0.16	$257
Dec. 2004	$1583.00	63	3%	0.0025	0.1575	$253
Jan. 2005	$1583.00	62	3%	0.0025	0.155	$249
Feb. 2005	$1583.00	61	3%	0.0025	0.1525	$245
Mar. 2005	$1583.00	60	3%	0.0025	0.15	$241
Apr. 2005	$1583.00	59	3%	0.0025	0.1475	$237
May 2005	$1583.00	58	3%	0.0025	0.145	$233
June 2005	$1583.00	57	3%	0.0025	0.1425	$230
July 2005	$1583.00	56	3%	0.0025	0.14	$226
Aug. 2005	$1583.00	55	3%	0.0025	0.1375	$222
Sept. 2005	$1583.00	54	3%	0.0025	0.135	$218
Oct. 2005	$1583.00	53	3%	0.0025	0.1325	$214
Nov. 2005	$1673.00	52	3%	0.0025	0.13	$222
Dec. 2005	$1673.00	51	3%	0.0025	0.1275	$217

[56] The Commission notes that the month and year of the overcharge begins with the start of the Tenants' lease agreement, and continues through the date of the evidentiary hearing, as determined by the Hearing Examiner. *See* Proposed Decision and Order at 11-13; R. at 866-68.

[57] The monthly overcharge amount represents the difference between the amount of the Tenants' rent charged and the legal rent ceiling, as determined by the Hearing Examiner. *See* Proposed Decision and Order at 11-13; R. at 866-68.

Jan. 2006	$1673.00	50	3%	0.0025	0.125	$213
Feb. 2006	$1673.00	49	3%	0.0025	0.1225	$209
Mar. 2006	$1673.00	48	3%	0.0025	0.12	$205
Apr. 2006	$1673.00	47	3%	0.0025	0.1175	$201
May 2006	$1673.00	46	3%	0.0025	0.115	$197
June 2006	$1673.00	45	3%	0.0025	0.1125	$192
TOTAL						**$8,571**

L. In the alternative, it was error for the Hearing Examiner to fail to reopen the hearing and to deny Tenants' motion to reopen the hearing to admit new evidence.

The Tenants assert that the Hearing Examiner erred by denying their "Motion to Reopen the Hearing to Admit Newly Discovered Evidence" (Motion to Reopen the Hearing). Tenants' Notice of Appeal at 3. The Tenants explain that the Hearing Examiner took official notice of the contents of the RAD registration file for the Housing Accommodation without providing the Tenants with the opportunity to put on evidence at a hearing regarding the contents of the registration file. Tenants' Brief at 65. Additionally, the Tenants contend that the Hearing Examiner should have reopened the record to admit newly discovered evidence. *Id.* at 66.

The Housing Provider contends that the Tenants failed to establish when they discovered their new evidence, and why it could not have been discovered prior to the hearing. Housing Provider's Responsive Brief at 5. Additionally, the Housing Provider maintains that the decision whether to reopen the record lies within the "sound discretion of the hearing examiner," and that discretion was not abused in this instance. *Id.*

The Hearing Examiner addressed the Tenants' Motion to Reopen the Hearing in the Final Order. *See* Final Order at 3-4; R. at 1365-66. The Hearing Examiner explained that although he had taken official notice of the RAD registration file for the Housing Accommodation, the only document contained in the file that he considered in the Proposed Decision and Order was the

registration statement for the Housing Accommodation. *Id.* at 4; R. at 1365. He went on to explain that, as the registration status of the property was not an issue in the case, his consideration of the registration statement was improper, and he vacated his findings of fact regarding the registration status of the Housing Accommodation. *Id.* Finally, the Hearing Examiner stated that the remaining records in the registration file had no bearing on the case, and should not be used as grounds to reopen the hearing. *Id.*

Regarding the request to reopen the record to admit new evidence, the Hearing Examiner determined that the "newly discovered evidence" presented by the Tenants, including the tenant petition and decision and order in TP 28,269, the audio recordings of the hearings in TP 28,267 and TP 28, 270, the photographs of Unit 402 and Unit 802, and the "Policy Memo," had all been available at the time of the June 21, 2006 hearing, and were not newly discovered evidence. *Id.* He explained that the Tenants had an opportunity at the close of the hearing to request a continuance or request that the record be held open in order to allow them additional time to obtain evidence in rebuttal to the testimony provided by the Housing Provider's witnesses. *Id.* The Hearing Examiner conceded that affidavits presented by the Tenants in their Motion to Reopen the Hearing had not been available prior to the July 21, 2006 hearing, because they were executed after the hearing date. *Id.* However, the Hearing Examiner found that the Tenants could have obtained the affidavits prior to the hearing, and should have done so. *Id.*

First, the Commission determines that the Hearing Examiner did not err by taking official notice of the contents of the RAD registration file for the Housing Accommodation. Under the

14 DCMR § 4007.1(f),[58] the Hearing Examiner may take official notice of landlord registration files. In accordance with the DCAPA, where official notice has been taken, parties are only afforded an opportunity to show the contrary of any facts that were relied upon by the Hearing Examiner. D.C. OFFICIAL CODE § 2-509(b).[59] Here, the Hearing Examiner explained in the Final Order that the only document in the RAD registration files that he relied upon was the registration statement – a document which the Hearing Examiner concluded in the Final Order was ultimately irrelevant to the claims in the Tenant Petition. Final Order at 4; R. at 1365. Moreover, the Commission's review of the record reveals substantial evidence to support the Hearing Examiner's determination that the registration statement was irrelevant to the claims raised in the Tenant Petition; namely, the Tenant Petition itself does not include a claim for improper registration. 14 DCMR § 3807.1; Tenant Petition at 3; R. at 20,

Accordingly, the Commission is satisfied that the Hearing Examiner complied with the requirements of the DCAPA when taking official notice of the Housing Accommodation's registration files, and because he did not rely on any facts contained therein for his conclusions regarding the claims in the Tenant Petition, he was not required to provide the parties with an opportunity to contest the facts contained therein. D.C. OFFICIAL CODE § 2-509(b); 14 DCMR § 3807.1; *see* Tenant Petition at 3; R. at 20.

Second, the Commission is satisfied that the Hearing Examiner correctly applied the standard for admitting "newly discovered evidence" after the close of the evidentiary record.

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[58] 14 DCMR § 4007.1(f) provides in relevant part the following: "The record of a proceeding at RACD shall consist of the following: . . . (f) Landlord registration files . . . found in the public record of which the Rent Administrator took official notice[.]"

[59] D.C. OFFICIAL CODE § 2-509(b) provides in relevant part as follows: "Where a decision of the Mayor or any agency in a contested case rests on official notice of a material fact not appearing in the evidence in the record, any party to such case shall on timely request be afforded an opportunity to show the contrary."

"Newly discovered evidence" has been described as "evidence that by due diligence could not have been discovered" prior to the hearing date. *See, e.g.,* 14 DCMR §§ 4013.1(d) & 4017.1(a);[60] Terrell v. Estrada, TP 22,007 (RHC June 25, 1991); *see also* D.C. Super. Ct. Civ. R. 60(b).[61] The Commission's review of the record reveals substantial evidence to support the Hearing Examiner's determination that the "newly discovered evidence" proffered by the Tenants in their Motion to Reopen the Hearing had been available at the time of the June 21, 2006, RACD hearing. Final Order at 4; R. at 1365. For example, the tenant petition in TP 28,269 was filed on January 31, 2005, the decision and order in TP 28,269 was issued on April 27, 2005, and the "Policy Memo" was dated October 1988. PX 53, PX 54, PX 75; R. at 1015, 1025, 1230-48. Additionally, the Commission's review of the affidavits submitted by the Tenants after the RACD hearing confirms the Hearing Examiner's finding that, although the affidavits were dated after the hearing, the Tenants failed to explain why the evidence contained in the affidavits could not have been discovered prior to the hearing. Final Order at 4; R. at 1365; *see, e.g.,* PX 55, PX 58, PX 59; R. at 1207, 1216, 1229. Specifically, the affidavits contain specific statements in response to the testimony given by the Housing Provider's witnesses at the RACD hearing; the Tenants have given no reason why the affiants were not called as witnesses

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[60] 14 DCMR § 4013.1(d) provides in relevant part as follows: "Any party . . . may file a motion for reconsideration . . . only in the following circumstances: . . . (d) If the existence of newly discovered evidence which could not have been discussed prior to the hearing date has been discovered."

14 DCMR § 4017.1(a) provides in relevant part as follows: "On motion . . . the Rent Administrator may relieve a party from a final judgment, order, or proceeding for the following reasons: (a) . . . newly discovered evidence that by due diligence could not have been discovered in time to move for reconsideration under § 4013[.]"

[61] D.C. Super Ct. Civ. R. 60(b) provides in relevant part as follows:

> On motion and upon such terms as are just, the Court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)[.]"

to rebut the testimony at the RACD hearing. *See, e.g.,* PX 55 at 2-7, PX 58 at 1-3, PX 59 at 2-5; R. at 1197-1207, 1212-16, 1227-29.

For the foregoing reasons, the Commission determines that the Hearing Examiner's denial of the Tenants' Motion to Reopen Hearing was supported by substantial record evidence, and was not arbitrary, capricious, or an abuse of discretion. 14 DCMR §§ 3807.1, 4013.1(d) & 4017.1(a); Terrell, TP 22,007 (RHC June 25, 1991); *see also* D.C. Super. Ct. Civ. R. 60(b). Accordingly, the Commission affirms the Hearing Examiner on this issue.

M. Tenants reserve the right to raise any additional errors in Tenants' brief on appeal in this proceeding.

Review by the Commission is limited to the issues raised in the notice of appeal. 14 DCMR § 3807.4; *see* Killingham v. Wilshire Inv. Corp., TP 23,881 (RHC Sept. 30, 1999) at 10. The applicable regulation at 14 DCMR § 3802.7,[62] grants to the parties the right to file briefs in support of their positions, and the Commission has noted that it is appropriate for parties to use the brief as a means of developing issues raised in the notice of appeal. Killingham, TP 23,881 at 10. Nonetheless, the use of the brief as a means of advancing issues that were not raised in the notice of appeal "exceeds the permissible scope of the . . . brief." *Id.; see* Frye & Welch Assocs., P.C., 664 A.2d at 1233; Joyner, 479 A.2d at 312; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708.

In the Tenants' Notice of Appeal, the Tenants stated the following for issue M: "Tenants reserve the right to raise any additional errors in Tenants' brief on appeal in this proceeding." Tenants' Notice of Appeal at 3. The regulations limit the Commission's review to the issues raised in the Tenants' Notice of Appeal, and it is therefore not within the Commission's jurisdiction to review any errors raised that were not first asserted in a timely

[62] 14 DCMR § 3802.7 provides the following: "Parties may file briefs in support of their position within five (5) days of receipt of notification that the record in the matter has been certified."

notice of appeal. 14 DCMR § 3807.4; *see* Frye & Welch Assocs., P.C., 664 A.2d 1233; Joyner, 479 A.2d 312; Killingham, TP 23,881. Accordingly, this issue is dismissed. *See* 14 DCMR § 3807.4; Killingham, TP 23,881; Burkhardt v. B.F. Saul Co., RH-TP-06-28,708.

VII. CONCLUSION

The Commission denies the Tenants' Motion to Dismiss & Establish Escrow Account. *See supra* at 23-28.

The Commission reverses the Hearing Examiner's determination that the Housing Provider willfully failed to provide proper notice of the 2003 vacancy increase, and vacates the $250 fine for the 2003 vacancy increase. *See supra* at 55-58.

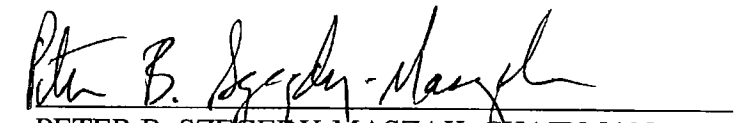
The Commission dismisses the Housing Provider's issues F, G, and K, and the Tenants' issues A, B, C, D, E, F, G, J, and M. *See supra* at 40-42, 51-52, 65-67, 73-75, 85-86.

The Commission reverses the Hearing Examiner's order that the Housing Provider could either pay the refund to the Tenants or credit the refund amount towards the rent was not in accordance with the Act, and reverses the Hearing Examiner on this issue. *See supra* at 75-76. The Housing Provider is hereby ordered to pay the rent refunds, in the amount ordered by the Hearing Examiner and consistent with the determinations in this Decision and Order, to the Tenants directly. *See id.*

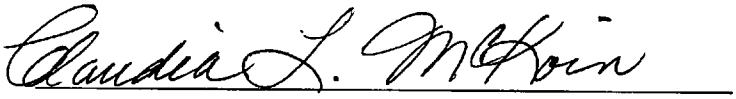
The Commission reverses the Hearing Examiner determination that the applicable interest rate was 4%, the rate in effect on the date of the Proposed Decision and Order. *See supra* at 77-79. The Commission vacates the Hearing Examiners calculation of the total interest due to the Tenants because it was not calculated at the correct interest rate, and because it was not calculated through the date of the Final Order. *See supra* at 78-79. The Commission awards the Tenants $8,571 in interest on their rent refund. *See supra* at 77-81.

Based on the foregoing the Commission affirms the Hearing Examiner on all other issues raised on appeal.

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
Historic Courthouse
430 E Street, N.W.
Washington, DC 20001
(202) 879-2700

CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

I certify that a copy of the **FINAL DECISION AND ORDER** in TP 28,519 was served by first-class mail, postage prepaid, this **18th day of February, 2016**, to:

Blake and Wendy Nelson
509 Raeburn Lane
Farragut, TN 37934

Carol S. Blumenthal
Blumenthal & Cordone, PLLC
1700 17th St., NW #301
Washington, DC 20009

Richard W. Luchs
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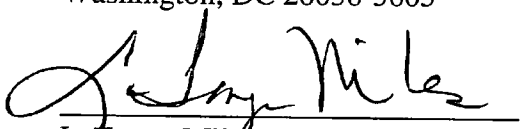
Washington, DC 20036-5605



LaTonya Miles
Clerk of Court
(202) 442-8949