DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-16-30,855

In re: 3003 Van Ness Street, N.W.
Unit S-707

Ward Three (3)

HARRY GURAL
Tenant/Appellant

v.

EQUITY RESIDENTIAL MANAGEMENT and
SMITH PROPERTY HOLDINGS LP
Housing Providers/Appellees

DECISION AND ORDER

February 18, 2020

SPENCER, CHIEF ADMINISTRATIVE JUDGE: This case is on appeal to the Rental Housing Commission ("Commission") from a final order issued by the Office of Administrative Hearings ("OAH"),[1] based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD"). The applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 -3509.07 (2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501 -510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR chapters 28 & 29 (2016) and 14 DCMR chapters 38-44 (2004), govern these proceedings.

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[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.01 -1831.03(b-1)(1) (2007 Repl.). The functions and duties of RACD were transferred to DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04B (2010 Repl.).

I. PROCEDURAL HISTORY

On August 30, 2016, tenant/appellant Harry Gural ("Tenant"), residing at 3003 Van Ness Street, N.W. ("Housing Accommodation"), filed tenant petition 30,855 ("Tenant Petition") with the RAD against housing providers/appellees Equity Residential Management and Smith Property Holdings, LP (collectively, "Housing Provider"). Tenant Petition at 1-4; R. at Tab 1. In the Tenant Petition, the Tenant alleged that the Housing Providers violated the Act as follows:

1. The rent increase was larger than the increase allowed by any applicable provision of the Act.

2. The Housing Provider did not file the correct rent increase forms with the RAD.

3. The Housing Provider, property manager, or other agent of the Housing Provider has taken retaliatory action against me/us in violation of D.C. OFFICIAL CODE § 42-3505.02 (Supp. 2008).

4. A Notice to Vacate has been served on me/us, which violates D.C. OFFICIAL CODE § 42-3505.01 (Supp. 2008).[2]

Id. at 2-3.

The parties cross-moved for summary judgment, and, on April 12, 2017, Administrative Law Judge M. Colleen Currie ("ALJ") issued an Order Granting in Part and Denying in Part Housing Provider's Motion for Summary Judgment; Denying Tenant's Motion for Partial Summary Judgment; and Granting Tenant's Request to Withdraw One Claim in His Tenant Petition ("Summary Judgment Order"). R. at unmarked part.[3] In the Summary Judgment Order, the ALJ found that the following facts were not in dispute:

1. The Housing Accommodation located at 3003 Van Ness is owned by Smith Property Holdings Van Ness LP and managed by Equity Residential

[2] The Tenant subsequently withdrew claim number 4.

[3] The certified record transmitted to the Commission by OAH contains 36 marked tabs dividing pleadings, orders, and other documents, but a large number of documents are unordered and stacked together with no numbering or division.

Management.

2. The Housing Accommodation is subject to the rent stabilization provisions of the Act.

3. Tenant has resided in unit S707 (the Unit) since at least April 1, 2014.

4. Tenant signed a one-year lease on March 19, 2014 for the Unit for the period April 1, 2014 through March 31, 2015. The "term sheet" of the lease identified two "monthly recurring charges:" "Monthly Apartment Rent" of $2,048 per month and "Monthly Reserved Parking" of $100.

5. The term sheet also identified a "Monthly Recurring Concession" of $278 per month. The term sheet stated: "The Total Monthly Rent shown above will be adjusted by these lease concession amounts." The concession reduced the amount Tenant was obligated to pay to Housing Provider during the term of the lease from $2,048 to $1,870 per month.

6. The lease included a "Concession Addendum." That addendum states in pertinent part:

> You have been granted a monthly recurring concession as reflected on the Term Sheet. The monthly recurring concession will expire and be of no further force and effect as of the Expiration Date shown on the Term Sheet.
>
> Consistent with the provisions of the Rental Housing Act of 1985 (DC Law 6-10) as amended (the Act), we reserve the right to increase your rent once each year. In doing so, we will deliver to you a "Housing Provider's Notice to Tenants of Adjustment in Rent Charged," which will reflect the "new rent charged." If you allow your Lease to roll on a month to month basis after the Expiration Date, your monthly rent will be the "new rent charged" amount that is reflected on the Housing Provider's Notice.
>
> It is understood and agreed by all parties that the monthly recurring concession is being given to you as an inducement to enter into the Lease. You acknowledge and agree that you have read and understand the Lease Concessions provision contained in the Terms and Conditions of your Lease.

7. Through the term of the written lease, Tenant paid $1,870 per month to Housing Provider. This sum equals the "Monthly Apartment Rent" and the "Monthly Reserved Parking" combined, less the "Monthly Concession."

8. Tenant continued to reside in the Unit after the written lease expired on March 31, 2015.

9. On January 15, 2015, Housing Provider provided Tenant with RAD Form 8, "Housing Provider's Notice to Tenants of Adjustment in Rent Charged"

which stated that "your current rent charged" for the Unit would increase from $2,048 to $2,118 (a 3.4% increase), effective April 1, 2015.

10. On January 27, 2015, Housing Provider filed RAD Form 9, "Certificate of Notice to RAD of adjustments in rent charged," with the RAD. The appendix attached to the Certificate listed the Unit and stated that the "prior rent" was $2,048, the increase was $70, the new "rent charged" was $2,118, the percentage increase was 3.4%, and the effective date was April 1, 2015.

11. For the months April 2015 through March 2016, Tenant paid to Housing Provider $1,930 each month, which amount included $100 for reserved parking.

12. On January 15, 2016, Housing Provider gave Tenant another RAD Form 8. This one stated that "rent charged" for the Unit would increase from $2,118 to $2,192 (a 3.5% increase), effective April 1, 2016.

13. On February 2, 2016, Housing Provider filed RAD Form 9 with the RAD. The appendix attached to that Certificate listed the Unit and noted that the "rent charged" was $2,118, the increase was $74, the new "rent charged" was $2,192, the percentage increase was 3.5%, and the effective date was April 1, 2016.

14. Housing Provider agreed to accept $1,895 for monthly apartment rent starting April 1, 2016, provided Tenant sign a one-year lease which identified "Monthly Apartment Rent" as $2,192 and provided for a "Monthly Recurring Concession" of $297.

15. Tenant refused to sign the offered lease.

16. On March 25, 2016, Tenant paid Housing Provider $1,995, which amount included $100 for reserved parking, for the month of April, 2016.

17. On April 27, 2016, Housing Provider filed a complaint for non-payment of rent in the Landlord-Tenant Branch of D.C. Superior Court (the LTB Case). It was assigned case number 2016 LTB 010863.

18. Tenant filed Tenant Petition 30,818 on May 12, 2016 alleging that Smith Properties Holdings Van Ness LP and Equity Property Management violated various provisions of the Act.

19. At the initial hearing in the LTB Case on May 19, 2016, a *Drayton* stay was entered by consent. Additionally, a protective order was signed requiring Tenant to pay $297 per month into the court registry during the pendency of the case.

20. In TP 30,818, Housing Provider filed a motion for summary judgment on June 28, 2016. In his response to that motion, Tenant stated that he wished

to voluntarily dismiss the Petition without prejudice. Presiding Administrative Law Judge Vergeer granted that request and on July 28, 2016, TP 30,818 was dismissed without prejudice.

21. On August 23, 2016, Housing Provider filed a motion to vacate the Drayton stay in the LTB Case.

22. On August 30, 2016, Tenant filed the Tenant Petition in this matter.

23. On September 1, 2016, Housing Provider's motion to vacate the *Drayton* stay was denied and the stay remains in place as of the date of this order.

Id. at 3-6.

The ALJ concluded that the $297 rent increase in April 2016 did not violate the Act and that the Housing Provider's filing of a greater "rent charged" on the RAD form than the Tenant was actually required to pay under the "rent concession" lease was permissible. *Id.* at 18. Accordingly, the ALJ dismissed those claims from the Tenant Petition. The ALJ found that there were material facts in dispute with respect to retaliation and denied the Housing Provider's motion for summary judgment on those claims. *Id.* at 20-21.

An evidentiary hearing was held with respect to the Tenant's retaliation claims on May 22, 23, and 24, 2017. *See* Hearing Transcript ("Tr.") at 1, 75, & 116; R. at unmarked part; Hearing CD (OAH May 22, 2017); Hearing CD (OAH May 23, 2017); Hearing CDs 1-7 (OAH May 24, 2017).[4] On September 12, 2017, the ALJ issued a final order in this case: Gural v. Equity Residential Mgmt., 2016-DHCD-TP 30,855 (OAH Sept. 12, 2017) ("Final Order"); R. at Tab 35. In the Final Order, the ALJ addressed the Tenant's claims that the Housing Provider had retaliated against him in the following ways:

1. Requiring Tenant to sign a written lease in order to obtain a rent concession;

[4] The certified record includes a transcript that does not appear to be official or prepared by a certified reporter. Nonetheless, the Commission has reviewed the audio recordings of the evidentiary hearing and verified the general accuracy of the transcript for all parts cited in this decision and order. For reasons that are unclear, OAH was unable to provide the recordings of the May 24, 2017 portion of the hearing on a single CD or set of audio files.

2. failing to file a 30-day notice to quit before filing the [District of Columbia Superior Court Landlord-Tenant Branch ("LTB")] case;

3. Filing the LTB case;

4. Obtaining a protective order in the LTB case;

5. Assessing late fees;

6. Filing a motion to vacate the Drayton stay in the LTB case accompanied by a proof of service that was false; and

7. Reporting a delinquency in his rental payments to TransUnion.

Id. at 18. The ALJ determined that the statutory presumption of retaliatory action, *see* D.C. OFFICIAL CODE § 42-3505.02(b), applied to each of the acts taken by the Housing Provider, but found that the Housing Provider proved, by clear and convincing evidence, that its motive was not retaliatory or, with respect to the conduct of the Housing Provider's attorney in the course of litigating the LTB case, such actions are not covered by the retaliation provisions of the Act. *Id.* at 18-26.

On September 28, 2017, the Tenant filed a notice of appeal with the Commission ("Notice of Appeal"). The Tenant asserts that the ALJ erred by granting partial summary judgment on his rent increase claims, by denying him the opportunity to directly examine the Housing Provider's witness, Ms. Duvall, and by denying his claims of retaliatory actions in the Final Order. *See* Notice of Appeal at 1-5.

The Tenant filed a brief on March 5, 2019 ("Tenant's Brief"), and the Housing Provider filed a brief on March 14, 2019 ("Housing Provider's Brief"). On March 19, 2019, the Commission held a hearing on this appeal, at which the Tenant appeared *pro se* and the Housing Provider appeared through counsel. Hearing CD (RHC Mar. 19, 2019) at 11:02.

II. ISSUES ON APPEAL

A. Rent Increase – Whether the Act permits the Housing Provider to preserve a higher "rent charged" than the Tenant is actually required to pay

B. Witnesses and Evidence

1. Whether the ALJ erred by quashing the subpoena for Ms. Duvall and not permitting the Tenant to call her as a witness

2. Whether the ALJ erred by limiting the Tenant's presentation of evidence related to his advocacy regarding "concession" leases

C. Claims of Retaliation

1. Whether the ALJ erred in concluding that the Housing Provider did not retaliate against the Tenant with respect to its lease renewal and eviction policies or practices

2. Whether the ALJ erred in concluding that the Housing Provider's attorney's conduct in the LTB case is not covered by the retaliation provisions of the Act

3. Whether the ALJ erred in concluding that the Housing Provider's assessment of late fees and reporting of their nonpayment to a credit agency were not retaliatory

III. DISCUSSION

The Commission's standard of review is found at 14 DCMR § 3807.1 and provides as follows:

> The Commission shall reverse final decisions of the [OAH] 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 [OAH].

The Commission has consistently defined substantial evidence as "such relevant evidence as a reasonable mind might accept as able to support a conclusion." *See* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (D.C. 1994); Waller v. Novo Dev. Corp., RH-TP-16-30,764 (RHC Feb. 15, 2018) at 28. 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 [ALJ].'" Hago v. Gerwirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Feb. 15, 2012) at 6 (citing WMATA v. D.C. Dep't of Emp't Servs., 926 A.2d 140, 147 (D.C. 2007)). When reviewing an ALJ's findings of fact, "the relevant inquiry is whether the [ALJ'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* Waller, RH-TP-16-30,764 at 29. The Commission has consistently held that "credibility determinations are 'committed to the sole and sound discretion of the [ALJ].'" *See, e.g.*, Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 25, 2014); Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) at 32.

"Guiding legal principles" commit the management and conduct of trials or other evidentiary proceedings to the sound discretion of the presiding judge. Bolton v. Crowley, Hoge & Fein, P.C., 110 A.3d 575, 587-89 (D.C. 2015); Petropoulos v. Borger Mgmt., Inc, RH-TP-13-30,343 (RHC July 9, 2019) at 7. However, an error of law or the application of an incorrect legal standard by definition constitutes an abuse of discretion. In re: K.C., 200 A.3d 1216, 1233 (D.C. 2019); Petropoulos, RH-TP-13-30,343 at 11. The Commission will review the ALJ's legal conclusions under the Act *de novo*. United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014).

A. Rent Increase – Whether the Act permits the Housing Provider to preserve a higher "rent charged" than the Tenant is actually required to pay

The ALJ granted summary judgment for the Housing Provider on the Tenant's claims that his rent was increased by more than allowed under the rent stabilization provisions of the Act and that the Housing Provider had filed an incorrect notice of rent adjustment with the RAD, because provisions of the Tenant's lease stated that his rent was one amount (consistently over

$2,000 per month) but that, due to a "monthly recurring concession," he was only required to pay a lower amount (consistently less than $1,900 per month). The ALJ reasoned, and the Housing Provider argues on appeal, that the Act permits a housing provider to preserve a regulated, maximum amount of rent for a rental unit, known in the statute and RAD forms as the "rent charged," while giving a discount to a specific tenant in the actual amount of rent due under the terms of a contract.

The Commission has previously determined that the ALJ's interpretation of the phrase "rent charged" is incompatible with the structure and purpose of the Act, as amended in 2006. Fineman v. Smith Prop. Holdings Van Ness, LP, RH-TP-16-30,842 (RHC Jan. 18, 2018). In Fineman, the Commission found that the Act is ambiguous in its use of the phrase "rent charged" as either a maximum legal rent or the rent actually demanded or received from a tenant. *Id.* at 22-26. This ambiguity arises in part from the Rent Control Reform Amendment Act of 2006 (D.C. Law 16-145; 53 DCR 4889) ("2006 Amendments"), which abolished "rent ceilings" as the primary mechanism of the Act's rent stabilization provisions. *Id.* at 19.

The Commission reviewed the legislative history of the 2006 Amendments, *see* Council of the District of Columbia, Committee on Consumer & Regulatory Affairs, Addendum to the Committee Report, Bill 16-109 "Rent Control Reform Amendment Act of 2006" (2006), and prior decisions of the Commission and the District of Columbia Court of Appeals ("DCCA") explaining the varying uses of "rent," "rent charged," "rent adjustment," and "rent ceiling." *See, e.g.,* Winchester Van Buren Tenants Ass'n v. D.C. Rental Hous. Comm'n, 550 A.2d 51, 53-54 (D.C. 1988). The Commission concluded that the phrase "rent charged" is intended to refer to the rent actually demanded or received from a tenant and that the Act does not permit a housing provider to use the RAD forms to preserve a maximum, legal rent in excess of what is actually

charged. Fineman, RH-TP-16-30,842, at 31-32. Reviewing the lease agreements between the Housing Provider and the tenant in that case, the Commission found no basis in the course of dealings between the parties to treat the higher amount of rent stated in the leases and on the RAD forms as having ever been an actual "condition of occupancy or use of [the] rental unit." *Id.* at 35-36 (quoting D.C. OFFICIAL CODE § 42-3501.03(28) (2012 Repl.) (defining "rent")).

In this case, the Tenant resides at the same Housing Accommodation with the same Housing Provider and an identical concession addendum to his lease (other than the amount of rent) as was at issue in Fineman. The Housing Provider acknowledges that the two cases are not factually distinguishable on this issue. Hearing CD (RHC Mar. 19, 2019) at 11:29. The Housing Provider nonetheless maintains that the Commission's prior interpretation of the Act was erroneous. Housing Provider's Brief at 3-14. The Housing Provider further asserts that Fineman should only be given prospective application to claims arising after January 2018 and that, in any event, because the Commission's decision in Fineman resulted in a remand to OAH, and both parties have appealed from OAH's decision on remand, that case is not "final" and cannot be applied in a separate case. Housing Provider's Brief at 14-15.[5]

The Commission is satisfied that its determinations in Fineman are correct interpretations of the Act and that the statutory interpretation articulated in that case applies here. We start from the principle that "judicial decisions interpreting statutes are "given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.'" Zanders v. Baker, 207 A.3d 1129, 1139 (D.C. 2019) (quoting Harper v. Va. Dep't of Taxation, 509 U.S. 86, 97 (1993)). The Housing Provider's

[5] The Commission notes that the Housing Provider has moved to vacate the Commission's decision in Fineman on the grounds that the case is moot. As of the date of this decision and order, the Commission has not yet acted on that motion or issued a decision on the tenant's appeal of the final order after remand in that case.

arguments in its brief in this case reiterate, without significant difference, the arguments made in its motion for reconsideration of the Commission's decision in Fineman. *See* Fineman v. Smith Prop. Holdings Van Ness, LP, RH-TP-15-30,284 (RHC Mar. 13, 2018) (Order Denying Reconsideration). Moreover, the Commission has subsequently followed that interpretation of the Act in determining that notices provided to a tenant that contain "preserved" rent levels above the actual rent may constitute unlawful demands for rent. Washington v. A&A Marbury, LLC/UIP Prop. Mgmt., RH-TP-11-30,151 (RHC Sept. 28, 2018). To the extent there may be any question of the finality or precedential value of those decisions, which resulted in remands to OAH and have not become ripe for judicial review, the Commission adopts and incorporates here its prior reasoning in the three orders just cited.

The parties also dispute the effect of the recently-enacted Rent Charged Definition Clarification Act of 2018, effective March 13, 2019 (D.C. Law 22-248; 66 DCR 973) ("Clarification Act"). *Compare* Tenant's Brief at 7-8 *with* Housing Provider's Brief at 15-16. The Commission observes that the "general rule . . . is that an appellate court must apply the law in effect at the time it renders its decision." Webb v. D.C. Dep't of Emp't Servs., 204 A.3d 843, 850 (D.C. 2019) (quoting Thorpe v. Hous. Auth. of the City of Durham, 393 U.S. 268, 282 (1969)). That rule may be limited, however, where it interferes with vested rights of a party. *See* Holzsager v. D.C. Alcoholic Bev. Control Bd., 979 A.2d 52, 59-60 (D.C. 2009); Scholtz P'ship v. D.C. Rental Accommodations Comm'n, 427 A.2d 905, 914-18 (D.C. 1981) ("A vested right must be more than a mere expectation based on the anticipated application of existing law.").

The Housing Provider asserts that the Clarification Act is a substantial departure from prior law, thus altering its vested rights. The Commission is satisfied, however, that the Clarification Act does not result in any change in the legal standards that applied to the Housing

Provider from 2006 to 2019. The Clarification Act essentially ratified the Commission's decision in Fineman, which was decided based on the text and history of the 2006 Amendments. *See* Council of the District of Columbia, Committee on Housing & Neighborhood Revitalization, Report on B22-0999, the "Rent Charged Definition Clarification Amendment Act of 2018" at 2 (Nov. 7, 2018) (stating, in its second sentence, that "[t]he bill clarifies the definition of 'rent charged' in a manner consistent with the recent Rental Housing Commission decision in *Fineman v. Smith*, [sic] RH-TP-16-30842, January 18, 2018."). Nothing in the plain language of the Clarification Act unambiguously requires a different result from what the Commission reached in Fineman. *Cf.* 1215 CT, LLC t/a Rosebar Lounge v. D.C. Alcoholic Beverage Control Bd., 213 A.3d 605, 610 (D.C. 2019) (notwithstanding statement in committee report of Council's intent to "clarify and codify the current state of the law in light of [a prior DCCA] decision," legislation contained further provisions clearly establishing additional legal standard). The Housing Provider's argument presupposes that Fineman was decided incorrectly and that the 2006 Amendments allowed preservation of higher rent levels. The Commission, as stated, rejects that position in the absence of a contrary decision from the DCCA. Moreover, the Commission is satisfied that Fineman (or the Clarification Act) may be applied to conduct that occurred before 2019 because the Housing Provider had only "a mere expectation based on the anticipated application of existing law," not a vested right. Scholtz, 427 A.2d at 918.

Accordingly, the Summary Judgment Order is reversed.

B. Witnesses and Evidence

1. Whether the ALJ erred by quashing the subpoena for Ms. Duvall and not permitting the Tenant to call her as a witness

On May 17, 2017, the Wednesday before the start of the evidentiary hearing on Monday, May 22, 2017, the Tenant filed a request for OAH to issue a subpoena to Avis Duvall, an

employee of the Housing Provider, as well as two other witnesses, to appear and testify. That same day, the Housing Provider filed its pre-hearing list of witnesses and exhibits, which named Ms. Duvall as its sole, planned witness.

On May 19, 2017, a subpoena was issued for Ms. Duvall by the Clerk of OAH pursuant to OAH Rule 2934.1, which provides that up to three subpoenas shall be issued to compel testimony relating to housing conditions, repairs, maintenance, and rent increases. On the same day, the Housing Provider moved to quash the subpoena, and the ALJ granted the motion on the grounds that Ms. Duvall was not personally served with the subpoena and that the Tenant's request form was marked, incorrectly, to state that illegal rent increases were an issue in the case, despite the Summary Judgment Order having dismissed those claims. Order Granting Motion to Quash at 1; R. at Tab 26. Nonetheless, Ms. Duvall was called by and testified on behalf of the Housing Provider and cross-examined by the Tenant. Tr. at 118-83.[6] Several times during the Tenant's questioning, the ALJ sustained objections by the Housing Provider that the questions exceeded the scope of the Housing Provider's direct examination. *Id.* at 131-32, 135-37, 162-65, & 171-72;[7] *see also id.* at 184-85 (denying Tenant's request to call Ms. Duvall as a rebuttal witness, after her direct and cross-examination in Housing Provider's case, on same grounds as Order Granting Motion to Quash).[8]

The Commission reviews an ALJ's decision to grant or deny a subpoena for abuse of discretion. *See* Jones v. D.C. Dep't of Emp't Servs., 451 A.2d 295, 297 (D.C. 1982); Bettis v.

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[6] Hearing CD 1 (OAH May 24, 2019) at 6:00 - Hearing CD 6 (OAH May 24, 2017) at 10:45.

[7] Hearing CD 2 (OAH May 24, 2019) at 3:00-5:40, *id.* at 11:20-17:45, *id.* at 1:00:00 - Hearing CD 3 (OAH May 24, 2017) at 1:45, & Hearing CD 4 (May 24, 2017) at 11:00-13:30.

[8] Hearing CD 6 (OAH May 24, 2017) at 10:45-14:45.

Horning Assocs., RH-TP-15-30,658 (RHC July 20, 2018) at 39. The OAH Rules provide, for subpoena requests in rental housing cases, that:

> The Clerk shall issue no more than three subpoenas to the tenant side . . . under subsection 2824.5 to compel . . . [t]he appearance at a hearing of any witnesses, including housing inspectors, with knowledge of conditions, repairs, or maintenance in a party's rental unit or any common areas . . . [or] [t]he production at or before a hearing of all records in a housing provider's possession relating to any rent increases demanded or implemented for a party's rental unit for the three year period immediately before the filing of the petition with the Rent Administrator.

1 DCMR § 2934.1(a). All other subpoena requests "for the appearance of witnesses and production of documents at a hearing shall only be issued by an Administrative Law Judge" and "unless otherwise provided by law or order of an Administrative Law Judge, any request for a subpoena shall be filed no later than five calendar days prior to the hearing." 1 DCMR § 2824.1 & .4 (emphasis added). Once issued by OAH, "[s]ervice of a subpoena for a witness to appear at a hearing shall be made by personally delivering the subpoena to the witness. Unless otherwise ordered by an Administrative Law Judge, service shall be made at least four calendar days before the hearing." 1 DCMR § 2824.7 (emphasis added).

It is unnecessary to determine whether the ALJ erred in quashing the Clerk-issued subpoena for Ms. Duvall for two reasons. First, as to the Tenant's rent increase claims, the ALJ quashed the Tenant's subpoena because OAH Rule 2934.1 limits Clerk-issued subpoenas in rental housing cases to witnesses or documents relating to "rent increases demanded or implemented" or "conditions, repairs, or maintenance" of the housing accommodation. At the time the subpoena was issued, the ALJ had dismissed the Tenant's rent increase claims in the Summary Judgment Order, and the only issues remaining to be heard in this case were the Tenant's retaliation claims. Order Granting Motion to Quash at 1. Because the Commission

now reverses the Summary Judgment Order, the Tenant will have a renewed opportunity on remand to call witnesses in support of his rent increase claims.[9]

Second, as to the Tenant's claims of retaliation, the Commission determines that the ALJ abused her discretion in limiting the Tenant to cross-examination of Ms. Duvall. Despite the procedural irregularities of the Tenant's subpoena request identifying Ms. Duvall as a witness (on which he was entitled to leeway), it is clear from the record that OAH and the Housing Provider had sufficient advance notice that the Tenant intended to call her as a witness during his case-in-chief when he filed and served the subpoena the week before the evidentiary hearing. *See* 1 DCMR § 2924.4 & .7 (filing and service deadlines for subpoenas); *cf.* 1 DCMR § 2821.2 ("At least five (5) calendar days before any evidentiary hearing . . . a party shall serve on all other parties and file with the Clerk . . . [a] list of the witnesses, *other than a party* or a charging inspector, whom the party intends to call to testify[.]" (emphasis added)).[10]

In its Motion to Quash, the Housing Provider "acknowledge[d] that it ha[d] identified Ms. Duvall as a witness for the evidentiary hearing[,]" but asserted that "it is not obligated by the rules of [OAH] to offer Ms. Duvall as a witness on behalf of the [Tenant]." Motion to Quash at 1. To the contrary, under District of Columbia law, a party to litigation is "compellable to give evidence on behalf of any other party to the action or proceeding." D.C. OFFICIAL CODE § 14-

[9] The ALJ also quashed the subpoena because of its improper service upon Ms. Duvall. The Commission notes that a *pro se* litigant should be given the opportunity to correct defects in service, *see* Reade v. Saradji, 994 A.2d 368, 373 (D.C. 2010), and that, in the short window before the scheduled hearing, no such opportunity was given. However, the Commission does not need to address whether this was an abuse of discretion because, as to the rent increase issues, a new hearing is in order and, as to the retaliation claims, Ms. Duvall was available to and did testify at the hearing. For the same reasons, the Commission does not need to address the Tenant's allegation that the quick issuance of the Order Granting Motion to Quash evinces *ex parte* coordination between the ALJ and the Housing Provider.

[10] By contrast, the only notice in the record of the Tenant's intent to call Mr. Fineman and Mr. Janzen appears to be the subpoena request forms filed the same day as the request for Ms. Duvall, but the Housing Provider made no objection to their being called by the Tenant.

301; Wash. Times v. D.C. Dep't of Emp't Servs., 530 A.2d 1186, 1189-90 (D.C. 1987); Abbey v. Jackson, 483 A.2d 330, 335 (D.C. 1984). Although it was not explicitly stated on the Housing Provider's pre-hearing witness list, it was made clear during the evidentiary hearing that Ms. Duvall's testimony was offered as "the corporate representative in this hearing." Tr. at 131-32.[11] Because Ms. Duvall stood in the shoes of the Housing Provider, the Tenant was entitled to call her as a respondent-party witness.

When the Tenant renewed his request to call Ms. Duvall as a witness, the ALJ repeatedly denied his request because she had already ruled on the issue in the Order Granting Motion to Quash. *See* Tr. at 3 & 184-85.[12] However, because Ms. Duvall was already present at the evidentiary hearing as the Housing Provider's witness, there would have been no prejudice to the Housing Provider, inconvenience to Ms. Duvall personally, or harm to the administration of justice by allowing the Tenant to directly examine her, either during his case in chief or during his opportunity for cross-examination after she was called by the Housing Provider. Given a trial judge's "extensive discretion in controlling the examination of witnesses," the ALJ could have, at a minimum, overruled the Housing Provider's objections that the Tenant's questions were outside the scope of direct examination. *See* Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP, 68 A.3d 697, 717 (D.C. 2013) (no abuse of discretion where "the judge explicitly warned [plaintiff] not to hold back from asking any questions necessary to prove his case because the scope of his redirect would be limited").[13] Failing to exercise that discretion to

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[11] Hearing CD 2 (OAH May 24, 2019) at 3:00-5:40.

[12] Hearing CD (OAH May 22, 2017) at 4:43-5:30 & Hearing CD 6 (OAH May 24, 2017) at 10:45-14:45.

[13] The Commission also observes that, although the plaintiff in Pietrangelo was *pro se* and yet the DCCA found no abuse of discretion, the plaintiff there, unlike the Tenant, was himself an attorney who had "deliberately disregarded orders of the trial court and exhibited an attitude of disrespect to the trial judge and the administrative of justice." 68 A.3d at 706-07.

permit a *pro se* party to fully examine the opposing party deprived the Tenant of the ability to "participate effectively in the trial process." *See* Reade, *supra* note 9, 994 A.2d at 373 (quoting Moore v. Agency for Int'l Dev., 994 F.2d 874, 876 (D.C. Cir. 1993)); Wash. Times, 530 A.2d at 1189-90.

Accordingly, on remand the Tenant shall be provided the opportunity to call Ms. Duvall (or another corporate representative of the Housing Provider) as a witness for direct examination on his rent increase claims and his retaliation claims, to the extent the latter are consistent with the remainder of this decision.

2. Whether the ALJ erred by limiting the Tenant's presentation of evidence related to his advocacy regarding "concession" leases

The Tenant's Notice of Appeal asserts that "[t]he ALJ denied the Tenant's efforts to introduce into evidence emails essential to his case that provided evidence of his activities as president of the tenant association and his work against fraudulent 'concession' leases[.]" Notice of Appeal at 4. Somewhat differently, the Tenant's Brief asserts that "[t]he ALJ did not apply the correct standard of proof for retaliation, given [the Tenant's] active record as president of the tenants' association in the preceding period." Tenant's Brief at 14.

A notice of appeal must make a clear and concise statement of errors made by an ALJ, and the party filing the appeal must be "aggrieved" by the ALJ's allegedly erroneous decision. 14 DCMR §§ 3802.1 & 3802.5(c); *see, e.g.,* Siegel v. B.F. Saul Co., RH-TP-06-28,524 (RHC Sept. 9, 2015) at 29-31. An appellant's brief must be limited to the issues raised in his or her notice of appeal. *See* B.F. Saul Prop. Co. v. Nelson, TP 28,519 (RHC Feb. 18, 2016) at 85 ("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'").

In the Final Order, the ALJ concluded that the Tenant had engaged in protected acts under D.C. OFFICIAL CODE § 42-3505.02(b) within six months of all of the allegedly retaliatory acts by the Housing Provider, triggering a presumption of retaliation.[14] Final Order at 17-18. The Tenant therefore has not identified an issue on which he is aggrieved, even if additional evidence of his protected activities would have bolstered his argument, because he ultimately prevailed on the question of whether the statutory presumption should be applied. The Tenant does not identify any other claims of retaliation to which the statutory presumption was not applied.[15] To the extent the burden of proof on rebuttal was allegedly not met, the Tenant's specific claims of error are addressed below.

Accordingly, this issue is dismissed.

C. Claims of Retaliation

In the Final Order, the ALJ concluded that the Housing Provider had not retaliated against the Tenant for his advocacy work and complaints regarding the legitimacy of concession leases under the Rent Stabilization Program. The retaliation provision of the Act, D.C. OFFICIAL CODE § 42-3505.02, provides, in relevant part, as follows:

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

[14] The applicable standards for establishing and rebutting the presumption of retaliation are discussed in detail in the next section of this decision.

[15] The Commission observes that the Tenant attempted to introduce several emails while questioning Ms. Duvall about the decision-making process of the Housing Provider and its employees' knowledge of his advocacy work, and he was prevented from doing so because it was not within the scope of the Housing Provider's direct examination. Tr. at 163-65; Hearing CD 2 (OAH May 24, 2017) at 1:11:30 - Hearing CD 3 (OAH May 24, 2017) at 1:45. It is not entirely clear, but this may be what the Tenant references in his Notice of Appeal. As the Commission has reversed the ALJ's ruling on the scope of the Tenant's questioning of Ms. Duvall, our dismissal of this issue on appeal should not be read to preclude the Tenant, on remand, from questioning Ms. Duvall and confronting her with any particular evidence, to the extent that it is relevant to live issues and not unnecessarily cumulative of other evidence that was already sufficient to trigger the presumption of retaliation.

which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

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

(4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization . . . [.]

The regulations further clarify what constitutes retaliatory action, providing that "'[r]etaliatory action,' is action intentionally taken against a tenant by a housing provider to injure or get back at the tenant for having exercised rights protected by § 502 of the Act." 14 DCMR § 4303.1.

The Commission has consistently explained that the determination of retaliation is a two-step process: first, the ALJ must determine whether a housing provider committed an act that can be considered retaliatory under D.C. OFFICIAL CODE § 42-3505.02(a). *See, e.g.,* Wilson v. D.C. Rental Hous. Comm'n, 159 A.3d 1211, 1218 n.6 (D.C. 2017) (cases of retaliatory action have included "a landlord's repossession of property, failure to repair a fixture, monetary or service-related increase of rent, or the enforcement of previously unenforced lease provisions"); Novak v. Sedova, RH-TP-15-30,653 (RHC Sept. 28, 2018) at 14-15 (discussing severity of action required to establish "harassment, threats, or coercion"). Second, the ALJ must determine whether the housing provider acted with retaliatory intent, which must be presumed if the tenant establishes that the housing provider's conduct occurred within six months of the tenant performing one of the six protected acts listed in D.C. OFFICIAL CODE § 42-3505.02(b). *See, e.g.*, Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012) at 15-17.

If a tenant establishes a presumption of retaliation under D.C. OFFICIAL CODE § 42-3505.02(b), the evidentiary burden shifts to the housing provider to come forward with "clear and convincing" evidence that its actions were not retaliatory, that is, not "intentionally taken . . . to injure or get back the tenant for having exercised" the protected right. 14 DCMR § 4303.1; Gomez v. Independence Mgmt. of Delaware. Inc., 967 A.2d 1276, 1291 (D.C. 2009) (citing Robinson v. Diamond Hous. Corp., 463 F.2d 853, 865 (1972) ("Once the presumption is established, it is then up to the landlord to rebut it by demonstrating that he is motivated by some legitimate business purpose rather than by the illicit motive which would otherwise be presumed."). "Clear and convincing evidence" has been defined by the DCCA as "the evidentiary standard that lies somewhere between a preponderance of evidence and evidence probative beyond a reasonable doubt." In re Estate of Frances Walker, 890 A.2d 216, 223 (D.C. 2006); In re K.A., 484 A.2d 992, 995 (D.C. 1984) (citing Addington v. Texas, 441 U.S. 418, 423 (1979)); Jackson, RH-TP-07-28,898. It "is such evidence as would 'produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established.'" Dawkins v. United States, 535 A.2d 1383, 1384 (D.C. 1988) (citing District of Columbia v. Hudson, 404 A.2d 175, 178 (D.C. 1979)); Jackson, RH-TP-07-28,898.

If the housing provider does not rebut the presumption of retaliation with clear and convincing evidence, an ALJ is required to enter judgment in favor of the tenant.[16] Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005) at 22-23 (upholding determination that housing provider failed to produce clear and convincing evidence that rent increase was not retaliatory

[16] The Tenant's Brief, under the heading "Penalties," states that he "requests $5,000 per incidence of retaliation." Tenant's Brief at 17. For clarity, the Commission notes that civil fines of up to $5,000 may be imposed for *willful* violations of the Act, including willful retaliation, but such fines are payable to the District Government, not to the affected tenant. D.C. OFFICIAL CODE § 42-3509.01(b); *see* Burkhardt v. Klingle Corp., RH-TP-10-29,875 (RHC Sept. 25, 2015) (finding that tenants may litigate such administrative claims without meeting ordinary requirements of standing).

where housing provider testified about increased expenses for the housing accommodation as a whole, but was unable to show that the tenant's rent increase was proportional to the expenses attributable to her unit). Moreover, "when the statutory presumption comes into play, it will not suffice merely to articulate a legitimate, non-retaliatory reason, because the legislature has assigned a substantial burden of proof ('clear and convincing evidence') to the landlord." Gomez, 967 A.2d at 1291 (citing D.C. OFFICIAL CODE § 42-3505.02(b)); *see, e.g.,* Hoskinson v. Solem, TP 27,673 (RHC July 20, 2005) (explaining that clear and convincing evidence to rebut a presumption of retaliation must "extend beyond the defense that a law permitted the alleged retaliatory action" (quoting Redman v. Graham, TP 27,104 (RHC Apr. 30, 2005))); Kornblum v. Charles E. Smith Residential Realty, TP 26,155 (RHC Mar. 11, 2005) (presumption sufficiently rebutted where housing provider testified that it cleaned up tenant's belongings in area outside of storage unit because they presented fire hazard, not in response to tenant's letter objecting to charge of late fee).

Following these legal principles, the Commission addresses the Tenant's issues on appeal related to his specific allegations of retaliation.

1. Whether the ALJ erred in concluding that the Housing Provider did not retaliate against the Tenant with respect to its lease renewal and eviction policies or practices

The Tenant argued before OAH and maintains on appeal that the Housing Provider retaliated against him in several ways by singling him out for treatment that was inconsistent with general policies and practices for dealing with other tenants in the Housing Accommodation: first, that the Housing Provider demanded the Tenant sign a term lease in order to continue paying a concession rate (or that the policy on term leases was changed in response to his advocacy work); second, that the Housing Provider brought a suit for possession after only one under-payment of the rent demanded; third, that the Housing Provider brought the suit based

on a relatively small amount of unpaid rent (*i.e.*, the amount of the disputed rent concession), and fourth, that the Housing Provider brought the suit without providing a 30-day notice to quit (purportedly waived in the Tenant's lease).

The Commission's review of the record reveals substantial evidence with respect to each of these issues, namely, direct and cross-examination testimony by Ms. Duvall.[17] However, the record also shows that the Tenant sought to question Ms. Duvall on several relevant aspects of the Housing Provider's policy- and decision-making, but he was precluded from doing so on the grounds that the lines of questioning were outside the scope of the Housing Provider's direct examination. *See* Tr. at 131-32 & 135-37 (corporate structure & chain of command), 162-65 (policy changes regarding leases), & 171-72 (decision to sue for possession).[18]

The Commission will ordinarily affirm a decision by an ALJ if there is any substantial evidence in the record to support a finding of fact. However, the record before the ALJ must be complete so that the ALJ can weigh the competing evidence. As discussed above, the Tenant was precluded from fully questioning the Housing Provider's party witness, Ms. Duvall. Because "the legislature has assigned a substantial burden of proof ('clear and convincing evidence') to the landlord" to demonstrate "a legitimate, non-retaliatory reason" for a presumptively retaliatory action, beyond the mere legal right to take it, *see* Gomez, 967 A.2d at 1291,[19] the Final Order must be vacated on these issues and the case remanded to allow the

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[17] See also RX 204, an email dated April 1, 2016, less than a month before the LTB case was filed, from the Tenant to Ms. Duvall, with the subject "Equity's rent practices are illegal – **please feel free to sue me**" (emphasis added).

[18] Hearing CD 2 (OAH May 24, 2017) at 3:00-5:40; Hearing CD 2 (OAH May 24, 2017) at 1:00:00 - Hearing CD 3 (OAH May 24, 2017) at 1:45; Hearing CD 4 (May 24, 2017) at 11:00-13:30.

[19] The Tenant also maintains that the statutory requirement for a 30-day notice to quit cannot be waived in a lease. *But see* Diamond Housing Corp. v. Robinson, 257 A.2d 492, 493-94 (D.C. 1969). The Commission does not need to decide whether such a waiver is lawful, however, because, as explained in Gomez, "a retaliatory motive may 'taint' an action that would otherwise be lawful." 967 A.2d at 1290.

Tenant to put on all relevant evidence of the Housing Provider's decision-making before the ALJ can properly weigh the competing evidence and determine if the Housing Provider's evidence meets its burden.

Accordingly, the Final Order is vacated on these issues.

2. Whether the ALJ erred in concluding that the Housing Provider's attorney's conduct in the LTB case is not covered by the retaliation provisions of the Act

In the Final Order, the ALJ denied the Tenant's claims that several acts by the Housing Provider (or its counsel) in the course of litigating its suit for possession in the Superior Court were retaliatory. Final Order at 22-23. The ALJ reasoned that, although D.C. OFFICIAL CODE § 42-3505.02(a) describes potentially retaliatory actions as including suits for possession, that provision should not be interpreted to cover "each act an attorney takes within the context of previously filed cases." *Id.* at 23.

The Tenant asserts in his Notice of Appeal that this decision was erroneous, but he does not address the issue in his brief and did not do so at the Commission's hearing. Therefore, the Commission determines that the Tenant has abandoned this issue on appeal. Moreover, as the ALJ noted, "[t]here is little law directly on point" with respect to this issue, and, given that the ALJ's reasoning does not plainly contradict the statutory language or any prior case law, the Commission will not address it for the first time in the absence of substantial supporting arguments.

Accordingly, this issue is dismissed.

3. Whether the ALJ erred in concluding that the Housing Provider's assessment of late fees, including reporting of their nonpayment to a credit agency, was not retaliatory

The Tenant contends that the ALJ erred in evaluating his claim that the Housing Provider's assessment of late fees was retaliatory, because she failed to consider that late fees

continued to be assessed after the date the Tenant Petition was filed or that the unpaid late fees were reported to a credit agency ("TransUnion").[20] The ALJ found, explicitly crediting Ms. Duvall's testimony, that:

> Housing Provider uses a computer bookkeeping system to keep track of the rental account for each unit in the Housing Accommodation. The system is automatic. Each month it automatically charges the amount of "Monthly Apartment Rent" for an apartment. If the "Monthly Apartment Rent" (less any applicable credits, such as a rent concession) is not paid in full within the appropriate grace period, the system automatically assesses a late fee. Tenant was not singled out; the late fees were assessed without discretion by an automatic computer system. Housing Provider had a legitimate business reason for acting the way it did: in a large housing complex, automation increases efficiency.

Final Order at 24-25.

The Commission notes that, in the Final Order, the ALJ treated the assessment of late fees and the TransUnion reporting as separate claims for retaliation, finding neither to be retaliatory because they were done automatically. *See* Final Order at 24-26. The ALJ also concluded, in the alternative, that the issue of the TransUnion reporting was "not properly before this administrative court" because the Tenant did not become aware that a report had been made until four days after he filed the Tenant Petition. *Id.* at 25 (citing Hawkins v. Jackson, TP 29,201 (RHC Aug. 31, 2009)). Nonetheless, the ALJ did not exclude any evidence of the TransUnion reporting on the grounds that it was created after the Tenant Petition was filed. *See* Final Order at 4 ("Insofar as PX 104 makes it more or less likely that Housing Provider reported a delinquency to the credit agencies, this document is relevant and therefore admissible.").

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[20] Unlike the Tenant's questioning of Ms. Duvall with respect to the Housing Provider's leasing and eviction policies, the ALJ did not limit the Tenant with respect to this issue because it was within the scope of cross-examination. Tr. at 147; Hearing CD 2 (OAH May 24, 2017) at 38:00-39:30. Similarly, we do not understand the Tenant to have alleged or to have sought to introduce evidence that any credit-reporting *policy* was changed in retaliation for his advocacy work. *See* Tr. at 56-60 & 146-49; Hearing CD (OAH May 22, 2017) at 48:00-1:04 & Hearing CD (OAH May 24, 2017) at 37:00-42:10.

The Commission's review of the record shows, and the Tenant maintains on appeal, that the TransUnion reporting was not a separate claim (arguably arising after the filing of the petition) but rather was raised as additional evidence of the circumstances and effects of the assessment of late fees. *See* Tr. at 117 ("The credit rating agency is just a result of the late fees. So they're the same thing. The late fees as we've said . . . the credit happened after the tenant petition but it was a result of the late fees.");[21] Tenant's Brief at 16 ("The ALJ denied this *corroborating* evidence and failed to use it to scrutinize the evidence that the Housing Provider *had already acted against* the Tenant" (emphasis added)). Because the ALJ's analysis was, substantively, essentially the same, *i.e.*, that both actions were not retaliatory because they were done automatically, the Commission is satisfied that any error in treating the TransUnion reporting as a separate claim was harmless.

Whether a housing provider has carried its burden of proving a non-retaliatory basis for its action by clear and convincing evidence is a question of fact, *see* Gomez, 967 A.2d at 1289-90, and the creditability of testimony and weight of evidence is committed to the ALJ as long as there is substantial evidence in the record. *See, e.g.,* Karpinski v. Evolve Prop. Mgmt., LLC, RH-TP-09-29,590 (RHC Aug. 19, 2014). Substantial evidence in the record supports the ALJ's finding that the Housing Provider's computerized records system automatically generated the late fees and the credit reporting. PX 113; Tr. at 127-28.[22] Because the late fees were issued by an automated system, the Commission is satisfied that the ALJ could rationally conclude that the Housing Provider did not act with the purpose of retaliating against the Tenant because of his protected activities.

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[21] Hearing CD 1 (OAH May 24, 2017) at 3:55-4:30.

[22] Hearing CD 1 (OAH May 24, 2017) at 26:45-31:30.

The automatic assessment of the late fees does not necessarily absolve the Housing Provider of *all* liability under the Act if they were unlawfully demanded. *Cf.* Washington, RH-TP-11-30,151 at 16-17 & n.12 (in claim for rent refund, notices of non-payment of rent, based on ledger containing unlawfully high amount of rent, may constitute unlawful demand for amount stated). However, a claim of retaliatory action is primarily a claim about the intent, purpose, or motivation for a housing provider's action. *See* 14 DCMR § 4303.1; Wilson, 159 A.3d at 1218; Gomez, 967 A.2d at 1291 n.19 ("a retaliatory motive is a question of fact"). Ultimately, of course, any computerized or automated system is designed, used, and managed by persons who are capable of acting with retaliatory intent, so the use of such systems does not necessarily preclude a finding of retaliation. Nonetheless, a reasonable fact-finder could determine that the use of an automated system supports a conclusion that the Housing Provider did not have a retaliatory intent when issuing the late fee notices or notifying TransUnion. Therefore, the ALJ was within her discretion in weighing the evidence of retaliatory purpose, and nothing about the TransUnion reporting precluded the ALJ from finding by clear and convincing evidence that the late fees were not assessed as retaliation. *See* Karpinski, RH-TP-09-29,590.

Accordingly, the Final Order is affirmed on this issue.

IV. CONCLUSION

For the foregoing reasons, the Commission reverses the Summary Judgment Order and remands for further proceedings on the Tenant's rent increase claims. The Commission vacates the Final Order in part and remands for further proceedings to provide the Tenant the opportunity to call Ms. Duvall as a witness regarding his retaliation claims arising from the demand to sign a new term lease and the initiation of an action for possession against the Tenant. The Commission dismisses the Tenant's appeal on the issue of the Housing Provider's conduct in

litigating the LTB case. The Commission affirms the Final Order on the issue of whether the late fees imposed by the Housing Provider were retaliatory.

SO ORDERED.

MICHAEL T. SPENCER, CHIEF ADMINISTRATIVE JUDGE

LISA M. GREGORY, ADMINISTRATIVE JUDGE

RUPA RANGA PUTTAGUNTA, ADMINISTRATIVE JUDGE

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 (2012 Repl.), "[a]ny person aggrieved by a decision of the Rental Housing Commission . . . may seek judicial review of the decision . . . by filing a petition for review in the District of Columbia Court of Appeals. Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-16-30,855 was served by first-class mail, postage prepaid, on this **18th day** of **February, 2020,** to:

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