DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

HARRY GURAL,

Tenant/Appellant,

v.

EQUITY RESIDENTIAL MANAGEMENT, L.L.C. and SMITH PROPERTY HOLDINGS VAN NESS L.P.,

Housing Provider/Appellee.

Case No.: 2016 DHCD TP 30,855

3003 Van Ness Street, N.W., Apt. S-707

BRIEF ON APPEAL OF HOUSING PROVIDER/APPELLEE

Housing Provider/Appellee Equity Residential Management, LLC and Smith Property Holdings Van Ness L.P. (collectively, "Housing Provider"), through undersigned counsel, hereby submits its Brief on Appeal.

I. BACKGROUND

The background and procedural history of this case are accurately set forth in the decisions of the Administrative Law Judge dated April 12, 2017 ("April 12 Order") and September 12, 2017 ("September 12 Order").

II. STANDARD OF REVIEW

At the outset, it is important to note that the burden of proof rests upon Appellant in this case to prove each element of his claims pursuant to both the Rental Housing Act of 1985 (the "Act"), D.C. Code § 42-3502.16(g) and the District of Columbia Administrative Procedure Act ("DCAPA") , D.C. Code § 2-509. Appellant must affirmatively prove the facts to support his claims in order to prevail. *Allen v. D.C. Rental Hous. Comm 'n*, 538 A.2d 752, 754 (D.C. 1988).

In this rental housing case, Appellant has the burden of establishing each fact essential to the order by a preponderance of the evidence. 1 DCMR 2932.1. See also D.C. Official Code 2-509(b). "This burden cannot be sustained simply by showing a lack of substantial evidence to support a contrary finding." *Allen*, 538 A.2d at 754. The Commission has no authority to make findings of fact. *See Meier v. District of Columbia Rental Accom. Com., 377 A. 2d 566, 568 (D.C. 1977) and Smith v. D.C. Rental Accommodations Comm., 411 A. 2d 612 (D.C. 1982)* ("Where there is substantial evidence in the record to support the findings of fact and conclusions of law, the decision below must be upheld"). Review by the Rental Housing Commission of a decision is limited to whether the decision is arbitrary, capricious, an abuse of discretion, not in accordance with law, or unsupported by substantial evidence in the record. This is an appellate review standard, rather than an initial decisions standard. D.C. Code §§ 1-1501 et seq., 1-1509(d). *See Meier, supra.* Nor may the Commission consider evidence that does not appear in the record below. [1]

III. ARGUMENT

Appellant spends the vast majority of his brief listing issues, but fails to, even a single time, cite any record evidence to support his positions. He even goes so far as to accuse the Administrative Law Judge of somehow colluding with the Housing Provider in this case, which is not only false, but also serves to demonstrate his lack of credibility and the lack of merit to his arguments. *See Appellant's brief at page 15, Paragraph 4).* Therefore, Housing Provider has no need to address Appellant's unsupportable allegations concerning the facts in this case and will instead rely on the record itself, and turn to its legal arguments.

A. THE RENT CONTROL LAW PERMITS A MAXIMUM RENT CHARGED WHICH EXCEEDS THE AMOUNT ACTUALLY PAID BY A TENANT.

[1] Appellant makes reference multiple times to documents and other matters which were not introduced in the administrative proceeding below and which may not now be considered by the Commission.

The term "rent charged," as used in the Rental Housing Act (the "Act") is not ambiguous. When the Rent Control Amendment Act of 2006 ("Reform Act" or "2006 Amendments") was adopted, the Bill was very clear in stating that wherever the term "rent ceiling" appeared in the Act, it was stricken and the term "rent charged" was inserted in its place. *Enrolled Original, at Section 2 (a)* (identifying sections that "are amended by striking the phrase 'rent ceiling' wherever it appears and inserting the phrase 'rent charged' in its place."). *See also D.C. Code § 42-3502.06, Notes* (Effects of amendments-D.C. Law 16-145, in subsec. (a), inserted the first three sentences; and, in subsecs. (b), (c) and (f)(3), substituted "rent charged" for "rent ceiling").

As a consequence, whatever rent was being charged on the effective date of the Reform Act (August 5, 2006) effectively became the new base rent from which future rent adjustments are to be calculated. Thereafter, increases in the "rent charged" were to be calculated pursuant to the provisions of Section 206 of the Act, starting with Section 206(a). An analysis of that section of the Act demonstrates that there was no intent on the part of the Council to require that rents be re-established periodically at amounts less than the amounts calculated pursuant to the Act. Indeed, until the recent 2018 amendment to the Act by the D.C. Council (discussed below), there was nothing in the Act that required or suggested that a housing provider must re-set the rent charged at a lower amount, nor was there any guidance on how a housing provider would do so.

The term "rent charged" cannot be read in isolation, but must be read together with related provisions of the Act. *See James S. Parreco & Sons v. District of Columbia Rental Housing Commission,* 567 A.2d 43, 49, fn 9 (D.C. 1987). Read together with the other provisions of the Act concerning permitted rent increases, it is clear that the Act does not, in any manner, limit validly calculated increases in the rent charged, simply because the housing provider and tenants agree to lower monthly payment amounts.

Before this case was decided by the ALJ below, Administrative Law Judges repeatedly held that the use of a concession does not invalidate the higher, calculated rent charged for a unit. *Maxwell v. Equity Residential Management, LLC*, 2015-DHCD-TP 30,704 (OAH April 22, 2016); *Pope v. Equity Residential Management, et al*, 2014-DHCD-TP 30,612 (OAH July 8, 2015). In both cases, the Administrative Law Judge ruled that the use of a concession was valid. The language of the concession in those cases was identical to the concession the Appellant agreed to in his Lease. In *Pope,* the Administrative Law Judge ruled:

> In the District of Columbia, rent concessions are also used to offer rent controlled units at or below market value while preserving a higher legal rent level that can be charged later. There are many arguments to be made that such concessions are contrary to the abolishment of rent ceilings. Prior to the Act's amendment in 2005, a Housing Provider was able to reserve future rent increases by increasing the "rent ceiling" for a unit while actually charging a lower rent. The rent ceiling permitted a housing provider to later implement rent increases in amounts that were higher than the annual increase of general applicability. However, there is nothing in the Rental Housing Act that prohibits a housing provider from offering rent concessions as long as the rent charged does not exceed the legally authorized rent that is on file with the Rental Accommodations Division.
>
> It is well established that leases are to be construed as contracts. *Sobelsohn v. Am. Rental Mgmt. Co.,* 926 A.2d 713 (D.C. 2007). This jurisdiction adheres to an "objective" law of contracts, meaning that "the written language embodying the terms of an agreement will govern the rights and liabilities of the parties . . . unless the written language is not susceptible of a clear and definite undertaking." *Id.* at 718. Contracts should "generally be enforced as written, absent a showing of good cause to set it aside, such as fraud, duress, or mistake." *Akassy v. William Penn Apts Ltd P'ship,* 891 A.2d 291, 298 (D.C. *2006)(quoting Camalier & Buckley, Inc., v. Sandoz & Lamberton, Inc.,* 667 A.2d 822, 825 (D.C. 1995). Therefore, a tenant and a housing provider are free to contract to rental terms as long as those terms are not contrary to the law. In this case, Tenant knowingly signed the lease agreeing to pay the lower rent amount as a concession for one year.
>
> Tenant argues that she did not understand that the concession would expire, that Housing Provider falsely advertised the rent for the unit

> at the lower price, and that the paperwork regarding the concession was confusing. These however, are not issues governed by the Rental Housing Act, but amount to a contractual dispute. If Tenant believes she was fraudulently induced into signing the lease, that the terms of the lease are somehow ambiguous, or that there was no meeting of minds, she must seek a remedy through D.C. Superior Court's Civil Division which has the jurisdiction to resolve equitable disputes. The jurisdiction of this administrative court is limited to applying the Rental Housing Act and I find that the rent concession was not in violation of the Rental Housing Act.

In this case, the Parties entered into an agreement that provided Appellant with a concession for the initial oneyear term of his lease. By the express terms of the Lease Agreement, Housing Provider was not obligated to continue providing the concession after the initial lease term expired. *See also In the Matter of Missionary Sisters of the Sacred Heart, III v. N.Y. State Div. of Hous. & Community Renewa*l, 283 A.D.2d 284, 289 (N.Y. App. Div. 1st Dep't 2001) (Concession did not obviate the terms of the lease agreement as it was clear, but the concession permitted the tenant to pay less for a specific period of time); *In the Matter of Century Operating Corp. v. Popolizio*, 60 N.Y.2d 483 (N.Y. 1983). At the conclusion of that initial lease term, Housing Provider voluntarily provided a concession to Appellant, even though it was not contractually part of any agreement. Effective April 1, 2016, Housing Provider ceased providing the voluntary concession to Petitioner.

As discussed in *Pope* and in the April 12 Order, there is no prohibition against an agreement to provide a temporary discount to the rent charged or concession, but limiting the impact of that adjustment to the tenant. The Office of Administrative Hearings and the Rent Administrator have both approved Voluntary Agreements and settlement agreements whereby significant rent increases are imposed on new tenants but not existing tenants through the use of concessions. *See, e.g., In re: Petition for Rent Adjustment based on 70% Voluntary Agreement*, 2012-DHCD-VA 11,016 (OAH June 19, 2012) ("Voluntary Agreements can increase rent

charged for future tenants while providing current tenants with a rent concession."); *In re: Voluntary Agreement Petition for Rent Adjustment WRF 1921 Kalorama Road, LP*, VA No. 08-011 (RAD May 7, 2009), at page 5; *In re: Infinity UIP Kenyon Acquisition*s, LLC, VA 11,001A (RAD January 11, 2011) (citing at page 3 to 14 DCMR 4204.1); *In re Park Manor Joint Venture*, VA 11-020 (RAD March 30, 2012). At the time the events occurred in this case, the use of concessions was permitted by District of Columbia law and the concession merely reduced the monthly payment amount for the Appellant during the concession period. Accordingly, the tenant petition was properly dismissed by the ALJ with prejudice.[2] Housing Provider is aware that the Commission reached a different conclusion in *Fineman v. Smith Property Holdings Van Ness L.P., 2016 DHCD TP 30,842 (RHC January 18, 2018)* ("*Fineman* I") and *Fineman v. Smith Property Holdings Van Ness L.P. 2016 DHCD TP 30,842(RHC March 18, 2018)* ("*Fineman* II") (collectively *"Fineman").* However, *Fineman* is not yet a final decision because it remains on appeal after a decision on remand by the Commission to the ALJ in that case. Additionally, Housing Provider argues that *Fineman* was not correctly decided for multiple reasons, some of which were not addressed in *Fineman,* but are addressed at length below.

A. UNDER THE RENT CONTROL LAW, AS AMENDED BY THE REFORM ACT, THERE CAN EXIST A MAXIMUM RENT CHARGED THAT IS GREATER THAN THE TENANT'S MONTHLY PAYMENT AMOUNT.

Section 206(a) provides in pertinent part that:

> "Except to the extent provided in subsections (b) and (c) of this Section, no housing provider of any rental unit subject to this chapter may charge or collect rent for the rental unit in excess of the amount computed by adding to the base rent not more than all rent increases authorized after September 30, 1985 for the rental unit by

[2] Housing Provider filed with the Rental Accommodations Division both the 2015 and the 2016 Certificates of Notice to RAD of Adjustments in Rent Charged prior to the implementation of the increases. The 2015 Certificate shows that the rent charged for the Unit was increased by 3.4% (from $2,048 to $2,118), effective April 1, 2015 and the 2016 Certificate shows that the rent charged for the Unit was increased by 3.5% (from $2,118 to $2,192), effective April 1, 2016. There is no dispute in this case that the requisite filings were made.

> this chapter, by prior rent control laws and any administrative decision under those laws and by a court of competent jurisdiction." (emphasis supplied)

By use of the terms "in excess of", "authorized", and "by this chapter", the Act makes clear that the rent charged is a maximum amount established by the authorized, calculated, formulaic increases stated in the Act, not what a tenant is asked to pay.

The language of Section 206 clearly establishes that a housing provider may not charge rent in excess of the amount calculated under the formulas contained in the rent control law. In *Fineman I*, the Commission stated: "Similarly, Section 206 of the Act, which formerly established and now abolishes rent ceilings, is also suggestive, though not explicit, that rent stabilization operates by establishing a maximum legal limit and authorizing periodic adjustments to that limit." There is nothing "suggestive" about it. That is, in fact, how the rent control law and Section 206 have always worked. The Commission further stated that: "a maximum legal limit on rent appears to be established by subsection (a)." *Fineman I* at 23-24. Accordingly, Section 206(a) establishes a maximum rent charged amount that may not be exceeded. The Commission recognized that this is how the rent stabilization program continues to operate, and then ignored that fundamental meaning. Thus, the answer to the question "Does the rent control law allow a maximum rent charged that exceeds the amount actually paid by a tenant?" is yes. Nothing in the rent control law prohibits a housing provider from having a tenant pay less than the maximum allowed under the Act, and nothing in the rent control law changes the calculation of rent charged if the housing provider establishes a monthly payment amount that is less than that maximum rent charged which is calculated pursuant to the formulas set forth in the Act. Section 206(b) provides that the CPI adjustment unambiguously is "an adjustment...in the rent charged established by subsection (a) of this section [206]" (emphasis and brackets added). The suggestion that the Act

provides a "use it or lose it" approach for CPI adjustments is not found anywhere in the Act. To the contrary, the subject of section 206 is the maximum limit, not the amount to be paid.

The Commission in *Fineman* also construes Section 901 of the Act as using "the term 'applicable rent' in reference to a maximum rent amount calculated pursuant to the Act, but uses 'rent' in reference to the amount of money actually demanded or received...." *Fineman I* at 25. This demonstrates that the Commission's focus on the term "rent" and a requirement for "demand or receipt" is incorrect. *Fineman I* at 31. The term "rent" and the term "rent charged" are two different concepts in the Act, the latter of which ("rent charged") establishes a maximum calculated increase amount and the former of which ("rent") may be less than the calculated maximum amount. The Commission's painting Section 901 as "unique" (*Fineman I* at 32) is erroneous because, as discussed above, Section 206, the fundamental premise of rent control, also establishes a maximum rent charged amount. There is nothing in the Act which empowers the Rental Housing Commission to disallow or eliminate any differential between the "rent charged" and a lower monthly payment amount which a housing provider and tenant negotiate. To the contrary, upon making the required filings with the Rental Accommodations Division, these statutorily calculated, formulaic increases in rent charged are preserved and vested. *Sawyer Prop. Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96 (D.C. 2005).

This intention is strikingly shown by the draft Committee Print by the Committee of Consumer and Regulatory Affairs dated April 13, 2006. At the bottom of page 5, Subsection (B) reads as follows:

> "(B) Any unimplemented portion of such percentages during the applicable year shall not be carried over to a subsequent year."

Significantly, this language did not appear in the subsequent Committee Prints or the final Reform Act, demonstrating that the concept that increases were "use it or lose it" was rejected.

a. THE ACT DID NOT REQUIRE INCREASES TO BE RECALCULATED ON THE AMOUNT THE TENANT PAYS.

That the meaning of the term "rent charged" refers to the calculation under Section 206 also answers the question of how increases are to be calculated. On its face by its very language Section 206 prescribes a continuing calculation for the rental unit based on additions to the maximum rent under Section 206. In this case, the maximum rent had already been established and "implemented" at the time the Appellant moved into the subject unit. What was then negotiated was the monthly payment amount payable by the Appellant pursuant to a private agreement. There is no other calculation in the Act based on the amount payable by a tenant, nor was there any requirement in the Act at that time that a housing provider do anything other than calculate increases consistent with the provisions of the Act. Likewise, as discussed *supra,* there is no legislative history that supports the concept of doing away with CPI or vacancy adjustments which are properly preserved simply because a housing provider and a tenant negotiate a discount to the calculated rent charged amount.

b. THE COMMISSION IS NOT PERMITTED TO IMPOSE ITS OWN INTERPRETATION ON THE TERM "RENT CHARGED" OR TO SUPPLANT A PRIVATE AGREEMENT THAT DOES NOT VIOLATE THE LAW

At page 22 of *Fineman I*, the Commission states that it finds the statute to be ambiguous as to the definition of the term "rent charged" and ultimately appears to base its conclusions on its "reconciliation" of the ambiguity with the purposes of the Act. The Commission is not empowered to do so. While the Commission decision cites multiple maxims of statutory construction, it recites no maxim which permits it to resolve alleged statutory ambiguities by

speculation.[3] Just as the amendments to the Act in 2006 required action by the Council, any new definition of "rent charged" requires legislative action.

As the Court stated in *James Parreco & Sons v. District of Columbia Rental Housing Commission,* 567 A. 2d 43, 44 (D.C. 1987):

> In the present case, however, the agency has adopted an interpretation of a provision of the statute relating to hardship rent increases which is incompatible with its plain language, and we are not persuaded that a literal construction produces absurd or manifestly unjust results antagonistic to the statutory purposes. Neither the Commission nor this court is authorized to read into an unambiguous statute language that is not there, or to rewrite legislation to make it more "equitable" or "fair." Accordingly, we reverse the Commission's decision and remand for further proceedings.

That being the case, the Commission is bound to follow the method for calculating and determining "rent charged" as it is prescribed in the Act and not (as it attempted to do in *Fineman),* impose its own definition.

Housing Provider has demonstrated that the Commission's interpretation is irreconcilable with Section 206 and 901 of the Act. The Commission's discussion of the vacancy increase exposes the fundamental flaw in the Commission's analysis which is reflected by the following statement at page 22 of *Fineman I*: "Inherently no rent is actually, presently charged, demanded or received as a condition of occupancy of a rental unit while it is vacant." Based on this statement, it is clear that the Commission has read into the Act something that has never been the case and which the Act does not provide after the 2006 Amendments, i.e., the Commission's view that rents are to be adjusted based on the *monthly payment amount established for a tenant* as

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[3] It is particularly noteworthy that the Commission only relies upon the Addendum to the Committee Report – a brief summary of the legislative history – and no other portion of the legislative history, to support its findings. For instance, the Commission states:

- "It does not appear, from the Commission's review of the 2006 Committee Report, that the Council intended the statutory use of rent charged' to function in the same or similar manner as 'rent ceilings." Decision at 28.

opposed to the *rent charged for the unit.* This is simply wrong, as reflected by reviewing the language of Sections 208 (g) and 208 (h) of the Act, which read in pertinent part:

> (g) The amount of rent charged for any rental unit subject to this subchapter shall not be increased until a full 12 months have elapsed since any prior increase; provided, that:
>
> (1) An increase in the amount of rent charged shall not exceed the amount of any single adjustment pursuant to any one section of this subchapter;
>
> (h) Unless the adjustment in the amount of rent charged is implemented pursuant to § 42-3502.10, § 42-3502.11, § 42-3502.12, § 42-3502.14, or § 42-3502.15, an adjustment in the amount of rent charged:
>
> (1) If the unit is vacant, shall not exceed the amount permitted under § 42-3502.13(a); or
>
> (2) If the unit is occupied:
>
> (A) Shall not exceed the current allowable amount of rent charged for the unit, plus the adjustment of general applicability plus 2%, taken as a percentage of the current allowable amount of rent charged; provided, that the total adjustment shall not exceed 10%;
>
> (B) Shall be pursuant to § 42-3502.24, if occupied by an elderly tenant or tenant with a disability; and
>
> (C) Shall not exceed the lesser of 5% or the adjustment of general applicability if the unit is leased or co-leased by a home and community-based services waiver provider.[4] (emphasis added)

Subsection (g)(1) establishes unambiguously that an adjustment in rent charged is on the rental unit itself and may not exceed a single adjustment "pursuant to any one section of this subchapter." Subsection (h) specifically states that the "rent charged" is adjusted for either a vacant or occupied unit, referencing the *rent charged for the unit*, not a *monthly payment amount negotiated by a tenant.*

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[4] As stated above, Section 206 establishes the "rent charged for the rental unit".

Where the housing provider and tenant agree to a concession that is purely a private agreement, not controlled by the provisions of the Act. The rent charged for the rental unit remains the amount calculated pursuant to the Act. The Rent Administrator has never been in the business of administering private agreements. The Monthly Apartment Rent (rent charged) for Appellant's unit, which was calculated consistent with the Act, was included in, and a prominent part of, the contract into which the parties entered, and Appellant's attempt to read it out of the contract is contrary to basic principles of contract law that all provisions included in a contract are to be given meaning. *See Independence Management Co. Inc. v. Anderson Summers*, 874 A. 2d 862 (D.C. 2005). That *Fineman* is contrary to the purpose of the Act is demonstrated further by a prior Commission decision in *Borger Management, Inc., Housing Provider/Appellant v. Dyaz Godfrey And Winchester Van Buren Tenants' Association, Tenants/Appellees*, TP 20,116 (RHC September 4, 1987):

> There are other aids to construction which reinforce our conclusion. *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754-755 (D.C. 1983) One of these is that whenever possible the words of a statute are to be construed to effectuate the legislative purpose and to avoid obvious injustice. Id. The construction proposed by tenants would certainly produce results not in keeping with the statutory purpose. If housing providers were forced to limit rent increases to the amount of a single rent ceiling adjustment within any six month period they would have a strong incentive to immediately raise the rent to the new rent ceiling as soon as the ceiling increase was authorized. The statutory purpose of protecting tenants would not be well served if the present practice was discontinued whereby housing providers frequently postpone raising the rent in response to a ceiling increase, in whole or in part, for business reasons. They do this knowing that the rent may be increased to the new rent ceiling at a later time of their own choosing so long as at least 180 days have elapsed since any prior increase in rent. In the interim, tenants maintain the benefit of the lower existing rents.

Significantly the definition of "rent" was not amended in the Reform Act. Both before and after its passage, the term "rent" is defined to mean: "the entire amount of money, money,

money's worth, benefit, bonus or gratuity demanded, received, or charged by a housing provider..." D.C. Code § 42-3501.03(28). The rent control law has long provided that a housing provider could ask a tenant to pay less than the maximum calculated rent charged amount and not lose the remainder. For example, 14 D.C.M.R. § 4205.3 provided since 1985 (and still provides): "A housing provider may charge as rent for a rental unit an amount less than the authorized rent ceiling [which the 2006 Amendments Act changed to rent charged] without waiving or forfeiting the right to later implement a rent increase...to an amount equal to or less than the authorized rent ceiling [which the 2006 Amendments Act changed to rent charged] ...." (brackets added).

More recently, in the context of a rent-controlled unit under the Rental Housing Act, the Court of Appeals upheld the finding that "[a] discount in the amount of legal rent charged in return for a lease is not illegal. . ." *Wilson v. Rental Housing Commission*, 159 A.3d, 1211, 1214 (D.C. 2017). This holding recognizes that the "rent charged" may exceed the discounted amount a tenant will pay. The Court, unlike the Commission in the present case, found no conflict with the purposes or provisions of the Rental Housing Act.

In its very direct pronouncement on the issue of the negotiation of preferential rents/concessions, the Court of Appeals stated in *Double H. Housing Corp. v. David,* 947 A.2d 38 (D.C. 2008):

> We therefore cannot agree that Double H was precluded from offering to charge David a discounted rent amount if he signed a new lease but charging him a higher monthly rent if he continued his month-to-month tenancy. To hold otherwise would, we think, encroach on the landlord's - and tenant's - "'basic freedom to contract as he will,'" which we have said remains one of the "rather basic rights incident to the ownership of property [that] ought not to be summarily dismissed as obsolete" even under our modern statutory rental housing law. *Goodman v. District of Columbia*

Rental Hous. Comm'n, 573 A.2d 1293, 1297 (D.C. 1990) (quoting *White v. Allan,* 70 A.2d 252, 255 (D.C. 1949)).

It matters not that *Double H Housing Corp.* involved an exempt rental unit. The question was whether anything in the Act prohibits discounts in rent on a rent-controlled unit and, as demonstrated above, the answer is no.

As the court stated in *Missionary Sisters of the Sacred Heart III. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 283 S.D. 2d 264, 724 N.Y.S. 2d 742 (2001), in its common sense analysis of the use of preferential (discounted) rents in New York, which has a long history of rent control:

> Surely, requiring a tenant to pay less than the full legal rent, no matter for how short a term, cannot possibly violate any public policy prohibiting the exaction of "unjust, unreasonable and oppressive rents," especially where the tenant is aware of the concession and the limitation on its duration. Moreover, requiring the tenant to pay a temporarily discounted rent cannot be said to constitute a waiver of a benefit provided by the Code. To hold, as did the DHCR, that any and all agreed upon limited concessions are, in fact, not limited at all but survive to the termination of the tenancy will serve no other purpose but to foreclose any informed landlord from providing such a limited preference, whether such preference inures solely to the benefit of the tenant, or to both the tenant and landlord.

C. FINEMAN MAY ONLY BE APPLIED PROSPECTIVELY.

With respect to the issue of rent overcharges, Appellant's arguments are based largely upon the Commission's ruling in *Fineman I*, which was a ruling of first impression and a departure from prior rulings on the subject of concessions. As a result, the *Fineman* decision may only be applied prospectively and cannot be applied to this case.

As early as 1987, the Commission held in *Tenants of 1709 Capitol Avenue v. 17th & L Street Properties, HP 20,328(RHC December 15, 1987),* when "a quasi-judicial administrative agency, such as this Commission may announce a change in policy direction by rule of

decision…the agency's judgment must be prospective." *Id. at page 5. Fineman* was decided years after this tenant petition was filed and the principles articulated in *Fineman* were never asserted by the Appellant, but rather *sua sponte* by the Commission. Thus Housing Provider never had an opportunity to raise the fact that application of the *Fineman* ruling must be prospective.

Further, to the extent the Commission reinterpreted the law, official notice must be given to all "affected interests" that there has been a change in the agency's construction of the Act through a published revision of the Commission's regulations, or otherwise. *Lightfoot v. District of Columbia*, 355 F.Supp.2d 414 (D.D.C. 2005. That obviously would have made no difference in this case since *Fineman* was decided well after the hearings before the ALJ were conducted in this case. Additionally, as stated above, the *Fineman* decisions are not yet final due to pending appeals filed by both parties. As such, even a prospective application of *Fineman* is inappropriate at this time.

B. A LEGISLATIVE SOLUTION IS REQUIRED TO CHANGE THE ACT.

As Appellant concedes, the D.C. Council enacted the *Rent Charged Definition Clarification Amendment Act of 2018,* which was signed by the Mayor on January 17, 2019, and is expected to become law in March 2019. Notwithstanding the title of the "Amendment Act," it is more than merely a clarification of provisions in the Act; it is a substantive change in the law. The Amendment Act creates a new definition not previously set forth in the Rental Housing Act, i.e., "rent charged" and operates as a wholesale change in the law by adding the words "a tenant must actually pay to the housing provider." Prior to its enactment, "rent charged" was not measured under the Act by what a tenant must actually pay, but rather the calculated amounts that a housing provider "demanded, received or charged." Nor does the title of the Amendment Act

demonstrate that it is merely a clarification of existing law rather than a substantive change in the law. The District of Columbia Court of Appeals has ruled on multiple occasions that laws which include the word "Clarification" in the title are nonetheless substantive changes in the law. *See West End Tenants Association v. George Washington Univ., 640 A.2d 718 (D.C. 1994); Smith v. United States, 68 A. 3d 729,734 (D.C. 2013).* ("Even where the legislature has clarified and defined a phrase left undefined in a previous statute, this court has declined to give deferential treatment to the retroactive expression of intent.") *See also Gersman v. Group Health Ass'n, 975 F. 2d 886 (D.C. Cir. 1992).*

C. APPELLANT FAILED TO PROVE RETALIATION

Housing Provider adopts and incorporates by reference the well-reasoned decision of the Administrative Law Judge in the September 12 Order. It is solely the province of the ALJ to determine the facts and credibility of the witnesses. Her decisions amply set forth both the facts and applicable law supporting her rulings, none of which are refuted by Appellant based on record evidence. *See also Wilson v. Archstone-Communities LLC et al, TP 07-28907(RHC September 25, 2015)*

Furthermore, Appellant has not, and cannot, provide any evidence to demonstrate that Housing Provider singled him out for different treatment from other tenants, or that Housing Provider intentionally violated the Act. The Administrative Law Judge in *Fineman* in her order on remand issued October 2, 2018 eloquently established the basis for imposing a fine for a successful retaliation claim:

> I do not think a fine is appropriate here. In order to impose a fine, I must find that Housing Provider's actions were *willful*. The Act provides that "[a]ny person who willfully . . . (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).

> Willfulness is a factual determination that arises out of a defined legal standard. A determination of willfulness focuses on the actor's knowledge that he is violating the law. *See Miller v. D.C. Rental Hous. Comm'n, 870 A.2d 556, 559 (D.C. 2005)* (holding that a fine may be imposed where the Housing Provider "intended to violate or was aware that it was violating a provision of the Rental Housing Act"); *Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 505 A.2d 73, 76 n.6 (D.C. 1986) (finding that "willfully" implies intent to violate the law and a culpable mental state); *Hoskinson v. Solem*, TP 27,673 (RHC July 20, 2005) at 5 ("'willfully' in § 42-3509.1(b) related to whether or not the person committing the act intended to violate the law").

That Housing Provider's interpretation of the Act was previously upheld in multiple decisions demonstrates that it did not willfully violate the Act.

IV. CONCLUSION

For the foregoing reasons, the decision of the ALJ should be affirmed.

Respectfully submitted,

GREENSTEIN DELORME & LUCHS, P.C.

Dated: March 14 , 2019

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief on Appeal was served on March 14, 2019, by U.S. mail, postage prepaid upon:

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