DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-06-28,668

In re: 3133 Connecticut Ave., N.W., Unit 115

Ward Three (3)

KENNETH A. MAZZER, et al.
Tenants/Appellants

v.

B.F. SAUL PROPERTY COMPANY, et al.
Housing Providers/Appellees

DECISION AND ORDER

September 26, 2014

SZEGEDY-MASZAK, CHAIRMAN. This case is on appeal to the Rental Housing Commission (Commission) from a final order issued by the Office of Administrative Hearings (OAH) based on a petition filed in the Rental Accommodations and Conversion Division (RACD), Housing Regulation Administration (HRA), of the District of Columbia Department of Consumer and Regulatory Affairs (DCRA).[1] The applicable provisions of the Rental Housing Act of 1985 (Rental Housing Act), D.C. LAW 6-10, D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501- 2-510 (Supp. 2008), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), and 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

---

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

I. PROCEDURAL HISTORY

On June 19, 2006, Tenant/Appellant Kenneth Mazzer (Tenant), residing at unit 115 of 3133 Connecticut Ave., N.W. (Housing Accommodation), filed Tenant Petition RH-TP-06-28,668 (Tenant Petition) with the RACD, claiming that the Housing Provider/Appellee, B.F. Saul Property Company (Housing Provider), violated the Act as follows:

> (1) The Housing Provider failed to file the proper rent increase forms with the Rental Accommodations and Conversion Division;
>
> (2) The rent ceiling filed with the Rental Accommodations and Conversion Division for my/our unit(s) is improper; and
>
> (3) Services and/or facilities provided in connection with the rental of my/our unit(s) have been substantially reduced.

Tenant Petition at 1-4; Record for RH-TP-06-28,668 (R.) at 7-10. The petition also complains that "several adjustments to rent ceiling and rent charged have been improperly taken/implemented." *Id.* at 3; R. at 8.

On June 4, 2007, Tenant Kenneth Mazzer filed a motion to amend the Tenant Petition to add his wife, Wendy Tiefenbacher, as a party to the action. R. at 64-78.[2] On August 12, 2008, the Tenants filed a motion for discovery and two motions for summary disposition. On May 22, 2009, the Tenants filed a motion to add Klingle Corporation and B.F. Saul Company as housing providers. R. at 808-19.

On September 9-10, 2009, Administrative Law Judge Jennifer Long (ALJ) held a hearing on this matter. See Hearing CDs (OAH Sept. 9-10, 2009). During the hearing, the ALJ granted the motion to add Klingle Corporation and B.F. Saul Company as housing providers to this

[2] Hereinafter, Tenants/Appellants Kenneth Mazzer and Wendy Tiefenbacher will be referred to, collectively, as the "Tenants."

action.[3] See Hearing CD (OAH Sept. 9, 2009). The ALJ denied the Tenants' discovery requests and their motions for summary disposition. See Hearing CD (OAH Sept. 9, 2009). The Housing Providers made an oral motion to dismiss the claims in the tenant petition, which the ALJ partially granted. See Hearing CD (OAH Sept. 10, 2009).

On September 30, 2010, the ALJ issued a final order, Mazzer v. B.F. Saul Prop. Co., RH-TP-06-28,668 (OAH Sept. 30, 2010) (Final Order). The ALJ made the following findings of fact in the Final Order:[4]

1. Kenneth Mazzer and Wendy Tiefenbacher moved into the Kennedy Warren Apartments located at 3133 Connecticut Avenue, NW, unit 115 in May 1996.

2. Klingle Corporation owns the Kennedy Warren Apartments located at 3133 Connecticut Avenue, NW.

3. B.F. Saul Company is the manager of the property located at 3133 Connecticut Avenue, NW.

4. The [T]enants received rent increase notices for the three rent increases that were effective on November 1, 2004, November 1, 2005, and May 1, 2006.

5. The [T]enants did not introduce the rent increase notices for the rent increases that were effective on November 1, 2004, November 1, 2005, or May 1, 2006.

6. The [T]enants did not offer oral or documentary evidence of the amount of the rent charged prior to the rent increase on November 1, 2004, November 1, 2005, or May 6 [sic], 2006.

7. The [T]enants did not introduce evidence of the amount of the rent increase on November 1, 2004, or the amount of the rent November 1, 2005.

---

[3] Hereinafter, Housing Providers/Appellants B.F. Saul Property Company, Klingle Corporation and B.F. Saul Company will be referred to, collectively, as the "Housing Providers."

[4] The ALJ's Findings of Fact are recited herein using the language of the ALJ in the Final Order.

8. The [T]enants did not present oral or documentary evidence of the duration of services or facilities that were purportedly reduced or eliminated.

9. The [T]enants did not claim the [H]ousing [A]ccommodation was not properly registered when they filed the [T]enant [P]etition.

10. The [T]enants did not allege a permanent elimination of services and facilities when they filed the [Tenant] [P]etition.

11. The [T]enants did not claim that the substantial housing code violations existed when the rent was increased November 1, 2004, November 1, 2005, or May 6 [sic], 2006.

12. The [T]enants did not offer oral or documentary evidence to show that any rent ceiling adjustments taken between June 19, 2006 and June 19, [2003] were improper.

13. Tanya Marhefka served as the Vice President of Residential Properties for B.F. Saul Company since June 2009. She was the Assistant Vice President and General Manager for the Klingle Company at the Kennedy Warren Apartments from November 2000 until June 2009.

14. The [H]ousing [P]roviders gave the [T]enants notice that Certificates of Election and Amended Registration Forms were available in the management office under the care and supervision of Tanya Marhefka. The notice was displayed in the laundry rooms and in or near the elevator.

15. The [H]ousing [P]roviders posted the Amended Registration form dated March 16, 2006, in the laundry room on March 17, 2006. RX 212[.] This is the same document as PX 149.

16. Certificate of Election of Adjustment of General Applicability date-stamped February 3, 2003 with an effective date of March 1, 2003 reflecting that the rent ceiling for unit 115, the [T]enants' unit, was $1472. RX 202[.]

17. The District of Columbia Department of Transportation was doing construction on the Klingle [Valley] bridge just north of the [H]ousing [A]ccommodation in the fall of 2006 and it was an ongoing long project. They started work early in the morning and on Saturdays and Sundays.

18. Ms. Marhefka received noise complaints from residents of the building concerning the bridge construction and asked tenants to contact DDOT.

19. Ms. Marhefka was not aware of any citations or communications from the Government of the District of Columbia concerning noise caused by construction at the Kennedy Warren.

20. The related services and facilities provided in connection with the [T]enants' rent were a cooking range, refrigerator, elevator, exterminator, [and] coin operated washer and dryer. There were no other related services and facilities.

21. There was no restaurant in the Kennedy Warren when Ms. Marhefka began working there in 2000.

22. The south lounge is still located in the [H]ousing [A]ccommodation.

23. The north lounge is part of the KW Club which is a private piano bar for residents.

24. Public storage is an open area where the tenants can store boxes and trucks. It is locked but it is one large open area. The public storage is free for tenants.

25. Private storage was in individual areas that the tenants could rent for a fee.

26. On August 21, 2006, the [H]ousing [P]roviders sent Tiefenbacher and Mazzer a notice to quit the private storage unit / men's lounge on the first floor of the [H]ousing [A]ccommodation that the [T]enants rented for a fee.

27. Daily trash removal and onsite laundry services and these services were never eliminated [sic].

28. There is a fitness facility at the [H]ousing [A]ccommodation, but the tenants have always had to pay a fee and sign an agreement to use the fitness facility. Wendy Tiefenbacher and Kenneth Mazzer paid these fees to use the fitness facility.

29. Storage facilities were not included in the rent.

Final Order at 19-21; R. at 1311-1313.

The ALJ made the following conclusions of law in the Final Order:[5]

[5] The Commission notes that the ALJ's conclusions of law were contained in two separate sections of the Final Order: (1) a section titled "Discussion," and (2) a section titled "Conclusions of Law." Final Order at 5, 21; R. at

III. Discussion

A. Motion to Dismiss Claims

1. When the court convened the hearing, the [T]enants presented evidence on the claims raised in the [Tenant] [P]etition. They also attempted to introduce evidence on claims that were not raised in the [Tenant] [P]etition, and they introduced numerous documents that were not relevant to their claims. At the conclusion of the [T]enants' evidence on all of their claims, the [H]ousing [P]roviders indicated that they had no questions on cross-examination and moved to dismiss the [Tenant] [P]etition, because the [T]enants failed to introduce any evidence to support their claims. They argued that the [T]enants offered no competent evidence to prove their claims that the rents on November 1, 2004, November 1, 2005, and May 6 [sic], 2006 were improper. They did not introduce on [sic] any evidence concerning the amount of the rent increases, and they failed to introduce any notices of rent increase. Moreover, the [T]enants failed to demonstrate how much rent they were charged during the period subject to this [Tenant] [P]etition. They argued that the absence of the evidence makes it impossible for the court to calculate any relief that could be afforded to the [T]enants, whether there was a rent overcharge or reduction in services and facilities, because the court is without a starting point to make the calculation. Assuming for the sake of this motion that the [H]ousing [P]roviders violated [the] Act, they argued, the [T]enants provided the court with no means to provide a remedy. In response, the [T]enants attempted to demonstrate that they submitted sufficient evidence to overcome the motion to dismiss their claims.

2. The court recessed the matter briefly to consider the [H]ousing [P]roviders' motion to dismiss. The court granted the motion to dismiss the [T]enants' claims that the [H]ousing [P]roviders improperly increased the rent on November 1, 2004 and November 1, 2005 because there was not a quantum of evidence to support their burden of proof. The court denied the motion to dismiss the [T]enants' claims concerning the May 1, 2006, rent increase, the rent ceiling claims, and the claim that the [H]ousing [P]roviders substantially eliminated services and facilities because the [T]enants introduced sufficient evidence to overcome a motion to dismiss. However, after considering the evidence in its entirety, the court determined that the [T]enants failed to meet their burden of proof on any claims alleged in the [T]enant [P]etition. Consequently, the court will dismiss TP 28,668.

B. Tenants' Rent Increase and Rent Ceiling Issues

1311, 1327. The Commission recites the conclusions of law made in both sections of the Final Order herein using the language of the ALJ, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

3. The [T]enants raised the following claims related to rent increases and rent ceilings: the [H]ousing [P]roviders failed to file the proper rent increase forms with the RACD, the rent ceilings filed with RACD for their unit were improper, and "several adjustments to rent ceiling and rent charged have been improperly taken/implemented." TP 28,668 at 3. The [T]enants challenged three discrete rent increases that the [H]ousing [P]roviders implemented on November 1, 2004, November 1, 2005, and May 1, 2006.

1. Rent Increase Implemented on November 1, 2004

4. The [T]enants claimed that the rent increase implemented on November 1, 2004, was improper. The [T]enants testified that they received a rent increase notice in September 2004, for a rent increase that was effective on November 1, 2004. However, the [T]enants did not offer the rent increase notice into evidence or testify concerning the contents of the notice. They offered no evidence concerning the amount of rent the [H]ousing [P]roviders charged before they increased the [T]enants' rent, and they did not testify to the amount of the rent increase effective November 1, 2004. Instead, the [T]enants attempted to introduce Certificates of Election of Adjustment of General Applicability, affidavits from other tenants, and countless documents without demonstrating their relevance to their claims. As a result, the court granted the [H]ousing [P]roviders' oral motion to dismiss the [T]enants' challenge to the November 1, 2004 rent increase, because the [T]enants' failed to introduce any evidence to support their claim. *See* discussion *supra* Part III.A.

5. The [T]enants attempted to introduce nine Certificates of Election of Adjustment of General Applicability (Certificates of Election) that the [H]ousing [P]roviders filed with RACD from December 29, 1995, through May 5, 2006. Petitioners' Exhibits (PX) 150(a-i). After the [H]ousing [P]roviders objected to the admission of the exhibits as a group, the [T]enants withdrew them as a group and attempted to introduce the exhibits separately. However, the [T]enants never identified a Certificate of Election that the [H]ousing [P]roviders used to increase their rent on November 1, 2004. More importantly, they provided no oral or documentary evidence to prove that the rent increase implemented on November 1, 2004, was improper.

6. The [T]enants first introduced a Certificate of Election date-stamped December 29, 1995. The [T]enants did not show how this exhibit was relevant to the rent increase implemented on November 1, 2004. The [H]ousing [P]roviders objected to the admission of the document. They argued that the [T]enants did not show that it was related to the November 1, 2004, rent increase. And the statute of limitations barred its admission because it was not within the three year statutory period covered by the [Tenant] [P]etition. The court agreed and denied the admission of PX 150(a).

7. The [T]enants then introduced a Certificate of Election date-stamped February 3, 2003, for a 2.6% CPI-W adjustment of general applicability for calendar year 2002. PX 150(f). The [T]enants offered no evidence linking this Certificate of Election to the rent increase implemented on November 1, 2004. They did not testify to the amount of the rent increase or offer the rent increase notice to show, for example, that the [H]ousing [P]roviders used this rent ceiling adjustment to increase the rent on November 1, 2004. The [T]enants stated that they offered this Certificate of Election to demonstrate that the rent ceiling adjustment that was effective on March 1, 2003, was not proper. This was a direct challenge to a rent ceiling adjustment taken more than three years before the [T]enants filed the [Tenant] [P]etition. The [H]ousing [P]roviders objected to the admission of the exhibit because the statute of limitations barred the admission of this Certificate of Election that was filed more than three years before the [T]enants filed the [Tenant] [P]etition on June 19, 2006.

8. The court denied the admission of the Certificate of Election for the rent ceiling adjustment effective on March 1, 2003, because the [T]enants were introducing it to challenge the propriety of the rent ceiling adjustment that was taken more than three years before the [T]enants challenged it. The statute of limitations bars a challenge more than three years after the effective date of the rent ceiling adjustment. D.C. Official Code § 42-3502.06(e).

9. The [T]enants did not link this Certificate of Election, PX 150(f), to the November 1, 2004, rent increase that was within the statutory period. *See Grant v. Gelman Mgmt. Co.*, TPs 27,995, 27,997, 27,998, 28,002, 28,004 (RHC Feb. 24, 2006). In *Grant*, the tenant introduced a Certificate of Election to prove that a rent increase was improper, because the rent ceiling used to implement the rent increase was not perfected. The Rental Housing Commission (Commission) upheld the introduction of the Certificate of Election, because the tenant introduced the rent increase notice that showed the adjustment of general applicability that the housing providers used to increase the rent that was being challenged. The Commission permitted the introduction of the Certificate of Election that corresponded to the adjustment of general applicability on the rent increase notice even though the Certificate of Election was dated more than three years before the tenant filed the petition. Since the tenant was not challenging the actual rent ceiling taken more than three years before, but introduced the Certificate of Election to show that the rent increase was not proper, the Commission upheld the introduction of the Certificate of Election. The facts in the instant case do not comport with the facts in *Grant,* because the [T]enants in the instant case challenged the rent ceiling that was in place more than three years before they filed the [Tenant] [P]etition; and they did not introduce the notice of rent increase or testify that the Certificate of Election from 2003 was used for the rent increase that they were challenging. *See also Sawyer v. D.C. Rental Hous. Comm'n*, 877 A.2d 96 (D.C. 2005)[.]

10. Next, the [T]enants argued that the November 1, 2004, rent increase was invalid because the [H]ousing [P]roviders did not meet the requirements of 14 DCMR [§] 4101.6 by posting copies of the Certificates of Election or rent increase notice. The [T]enants introduced four affidavits from other tenants who claimed they never saw any documents filed with RACD posted in the building. PX 160-163. The [T]enants argued that the affidavits proved that the [H]ousing [P]roviders did not meet the notice requirements of § 4101.6. The [H]ousing [P]rovider[s] objected to the admission of the affidavits, but the court admitted the affidavits into evidence for the limited purpose for which they were offered.

11. The [T]enants' reliance upon 14 DCMR [§] 4101.6 is misplaced because the regulation requires [H]ousing [P]roviders to post a true copy of the Registration/Claim of Exemption form or mail it to the tenant. The [T]enants testified that they received the notice for the rent increase effective November 1, 2004; so even if [14 DCMR §] 4101.6 was applicable to the [T]enants' claim, posting is only required if the [H]ousing [P]rovider does not mail a true copy to the tenant.

12. For the foregoing reasons, the [T]enants did not meet their burden of proving that the rent increase implemented on November 1, 2004, was improper. They did not introduce into evidence the notice that they received in September 2004, for the rent increase effective on November 1, 2004, or offer testimony concerning the contents of the notice, such as the source and amount of the rent increase, the rent or rent ceiling before the [H]ousing [P]roviders increased the rent, and they did not indicate what if any Certificate of Election the [H]ousing [P]roviders used to increase their rent on November 1, 2004.

2. Rent Increase Implemented on November 1, 2005

13. The [T]enants' proof for their claim that the November 1, 2005, rent increase was improper suffered many of the deficiencies in their proof for the November 1, 2004, rent increase. The [T]enants did not offer evidence concerning the amount of the rent increase, and they did not identify the rent charged or rent ceiling that was in place before the [H]ousing [P]roviders implemented the rent increase on November 1, 2005. Consequently, they did not introduce the necessary evidence to meet their burden of proving that the November 1, 2005, rent increase was improper. Consequently, the court granted the [H]ousing [P]roviders' motion to dismiss this claim. *See* discussion *supra* Part III.B.1.

14. The [T]enants testified that they received the notice for the rent increase that was effective on November 1, 2005. However, they did not submit the notice during the hearing or testify concerning its contents. Instead, they stated, "We

think the whole house of cards of faulty registration dates should be entered." OAH Hearing, Sept. 9, 2009. They testified that the rent increase letter noticing the rent increase did not state what Certificate of Election is applicable to it. As a result, they wanted "to submit all Certificates of Election and one of them has to be applicable to it." *Id.*

15. They introduced a Certificate of Election date-stamped February 4, 2004, and stated that it was not filed in a timely manner, and it was not posted. PX 150(g). When the court asked the [T]enants to explain the relevance of PX 150(g) to the November 1, 2005, rent increase, they said the [H]ousing [P]roviders did not list it on the rent increase notice so they did not know. The [T]enants argued that the Certificate of Election might be related to November 1, 2005, rent increase, because the [H]ousing [P]roviders did not indicate what Certificate of Election they used to increase the rent in 2005. The [T]enants also introduced the Certificate of Election date-stamped January 27, 2005, and argued that it was not valid because it was not "done" in May, and it was not posted. PX 150(h). The court admitted PX 150(g) and (h). However, there was no testimony linking either exhibit to the November 1, 2005 rent increase.

16. When the court resumed the hearing on September 10, 2009, the [T]enants stated they offered PX 150(g), a Certificate of Election date-stamped February 4, 2004, and 150(h), a Certificate of Election date-stamped January 27, 2005, "but based on the dates, between those two, it is PX 150(h) [Certificate of Election date-stamped January 27, 2005], that was used for the rent increase notice that was effective on November 1, 2005." The [T]enant[s] offered no additional evidence on this claim. The Certificate of Election date-stamped January 27, 2005, PX 150(h), shows that the 2003 CPI-W was 2.9%, and the rent ceiling for the [T]enants' unit 115, was increased from $1503 to $1547 on March 1, 2005; there was no change in the rent. Since the [T]enants did not introduce the rent increase notice or testify to the amount of the rent increase, there is no way to determine if the [H]ousing [P]roviders increased the rent on November 1, 2005, by implementing the rent ceiling adjustment reflected in PX 150(h).

17. The [T]enants also re-introduced the affidavits, PXs 160-163, to show that the November 1, 2005, rent increase was invalid because the [H]ousing [P]roviders did not post the Certificates of Election, PX 150(g) and (h), as required by 14 DCMR [§] 4101.6. For the reasons stated above, the [T]enants' reliance on [14 DCMR §] 4101.6 is misplaced. *See* discussion *supra* Part III.A.

18. Finally, the [T]enants introduced a DCRA Housing Violation Notice dated October 8, 2003, and a DCRA Housing Notice of Violation dated January 9, 2007. PXs 144 and 145. The [T]enants introduced these exhibits to show that the rent and rent ceiling adjustments were invalid because housing code

violations existed on the dates of the adjustments. The [H]ousing [P]roviders objected to the admission of PXs 144 and 145 because the [T]enants did not raise this issue in the [T]enant [P]etition. The [T]enants argued that their August 2009 motion for summary disposition placed the [H]ousing [P]roviders on notice of this claim. The court denied the admission of PXs 144 and 145 because the [T]enants did not claim, in the [Tenant] [P]etition, that substantial housing code violations existed when the [H]ousing [P]roviders increased the rent. *See Parreco v. D.C. Rental Hous. Comm'n*, 885 A.2d 327, 334 (D.C. 2005) (holding that a tenant cannot proceed on claims that the tenant did not raise in the petition, because the housing provider was not placed on notice of the claim).

3. Rent Increase Implemented on May 1, 2006

19. The [H]ousing [P]roviders objected to the [T]enants proceeding on this claim, because the rent increase is related to a capital improvement petition that is on appeal to the Commission. The [T]enants requested to proceed on this claim because they were not challenging the contents or substance of the order on appeal. They indicated that they only raised issues related to perfection and the rent increase that was imposed on them. These issues, they argued, were not part of the capital improvement petition on appeal. The court permitted the [T]enants to proceed on this issue.

20. The [T]enants argued that the rent increase implemented on May 1, 2006, was improper because the rent ceiling that was the basis of the rent increase was not perfected within thirty days of the date of the Rent Administrator's Decision and Order granting the capital improvement petition, which authorized the rent ceiling surcharge.

21. The [T]enants introduced the Decision and Order in CI 20,794 issued by the Rent Administrator on March 24, 2004. PX 148. The parties agree that CI 20,794 is pending on appeal to the Commission. The [T]enants also introduced the Amended Registration form that the Klingle Corporation filed with DCRA on March 16, 2006. PX 149. The Amended Registration Form showed that the [H]ousing [P]roviders increased the rent ceiling for the [T]enants' unit from $1547 to $1726 on May 1, 2006. PX 149. The Amended Registration form only reflected a change in the rent ceiling; it did not show an increase in the [T]enants' rent. The court admitted PX 148 and 149 without objection. The [T]enants did not introduce the notice of rent increase or testify concerning the contents of the notice. The [T]enants did not provide evidence of the rent charged before or after the rent increase.

22. The [T]enants argued that the capital improvement increase authorized by CI 20,794 should have been "implemented and taken" within 30 days of the Rent Administrator's Decision and Order issued on March 24, 2004. The parties agree, however, that the Rent Administrator's decision was appealed to the

Commission. The [T]enants did not cite any case law, or provision of the Act or the housing regulations that supported their contention that the rent ceiling adjustment had to be perfected within 30 days of a Decision and Order that was appealed.

23. The [T]enants also argued that the May 1, 2006, rent increase was not valid because it violated notice requirements of 14 DCMR [§] 4101.6, and the [T]enants re-introduced the affidavits, PXs 160-163, to prove this point. For the reasons stated above, the [T]enants' reliance on [14 DCMR §] 4101.6 is misplaced. *See* discussion *supra* Part III.A. The [T]enants also attempted to introduce a Notice of Violation dated January 7, 2007, PX 145, which was offered to show housing code violations in 2007 had to exist when the rent was increased on May 1, 2006. The court denied the admission of PX 145, in accordance with *Parreco v. D.C. Rental Hous.* Comm'n [sic], 885 A.2d 327, 334 (D.C. 2005), because the [T]enants did not raise this claim in the [T]enant [P]etition.

24. The [T]enants have not presented sufficient evidence to prove that the rent increase implemented on May 1, 2006 was improper. Moreover, even if the court ruled that the rent increase was improper, the [T]enants have not provided the court with evidence, such as the amount of the rent charged or the time period that the [H]ousing [P]rovider demanded the rent increase to provide a remedy.

25. Therefore, the court dismisses the [T]enants' claim concerning the May 1, 2006 rent increase.

B. [sic] Substantial Reduction in Services and Facilities Claim

26. When the [T]enants filed the [Tenant] [P]etition, they alleged that the [H]ousing [P]roviders substantially reduced services and facilities provided in connection with the rental unit because there was noise and dust for several months as a result of major work that the [H]ousing [P]roviders were doing on the lower floors of the [H]ousing [A]ccommodation.

27. During the hearing, the [T]enants testified that the [H]ousing [P]roviders permanently eliminated a convenience store, garden plots, a piano in the lounge, storage spaces, dry cleaners, a florist, a restaurant, valet, a dressmaker, green spaces, and a picnic play area. The [H]ousing [P]roviders objected to this evidence, because the [T]enants did not claim that the [H]ousing [P]roviders permanently eliminated services and facilities when they filed the [Tenant] [P]etition. They stated that the [T]enants only claimed dust and noise as the basis of their substantial reduction in services and/or facilities claim and should not be permitted to proceed on any other services and facilities claim. The court overruled the objection and allowed the [T]enants to offer additional evidence to support their substantial reduction in services

and facilities claim. However, the [T]enants continued to testify concerning amenities that they maintained were permanently eliminated from the [H]ousing [A]ccommodation, in spite of the fact that they did not allege the permanent elimination of services and facilities when they filed the [T]enant [P]etition.

28. The [T]enants attempted to admit brochures, landscape plans, zoning reports, photographs, and other documents that were not probative of their claim that the [H]ousing [P]roviders substantially reduced services and facilities provided in connection with the rental unit. D.C. Official Code § 42-3502.11. Moreover, the [T]enants did not prove that the services and facilities were related services and facilities provided in connection with the rent, and they could not offer the specific dates that the services and facilities were substantially reduced or permanently eliminated. They surmised that it may have happened at some time in 1994 or sometime between the statutory period, June 19, 2003, and June 19, 2006.

29. Tanya Marhefka, the Vice President of Residential Properties for B.F. Saul Company introduced an Amended Registration Form and testified that the related services and facilities provided in connection with the rental units at 3133 Connecticut Avenue, NW were a cooking range, refrigerator, elevator, exterminator, and coin operated washer and dryer.

30. The [T]enants also attempted to introduce evidence concerning a leak that occurred on June 28, 2006. The [H]ousing [P]rovider made an oral motion to prohibit the [T]enants from introducing evidence concerning the leak. The court granted the motion because the leak occurred after the [T]enants filed the [Tenant] [P]etition on June 19, 2006, the [T]enants did not amend the [Tenant] [P]etition or provide notice of the leak, and the [H]ousing [P]roviders were not prepared to proceed on the leak.

31. The [H]ousing [P]roviders objected to the propriety of the [T]enants proceeding on a substantial reduction in services and facilities claim when the basis of the complaint was noise and dust, as opposed to a substantial reduction of a related service or facility. The [H]ousing [P]roviders cited *Washington Realty Co. v. Rowe*, TP 11,802 (RHC May 14, 1986) as authority for their position that the [T]enants should not be permitted to proceed on this claim. In *Washington Realty Co.,* the Commission evaluated what constitutes a compensable reduction in services. The Commission stated that the services and facilities provision of the Act does not apply to every change in service; it is "triggered only by a substantial change or, to use the words of the Act, when related services [or facilities] 'are substantially increased or decreased.'" *Id.* at 3.

32. In order for a substantial reduction in services or facilities claim to meet the requirements of D.C. Official Code § 42-3502.11, there must be a substantial

reduction of a related service or facility. The Act defines related services as "services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse." D.C. Official Code § 42-3501.03(27). In *Washington Realty Co.*, TP 11,802 at 4, the Commission held that an action to eliminate noise . . . was not a "service" required by law or the terms of the rental agreement. On the facts of that case, the Commission found there was no reduction of a related service previously provided as contemplated by the Act.

33. The [T]enants cited *H.G. Smithy Co. v. Arieno,* TP 23,329 (RHC Aug. 7, 1998) to support their position that they had a viable services and facilities claim. In *H.G. Smithy Co.,* the Commission held that a tenant cannot prevail on the reduction in services or facilities claim unless the tenants prove that the service or facility was related; there was a substantial reduction of the related service or facility; and the tenants prove the duration of the reduction.

34. The tenants in *H.G. Smithy Co.* complained that the housing providers substantially reduced their related services when they were deprived of their roof, windows, and balcony while the housing providers made repairs. The tenants proved that the roof, windows, and balcony connected to their unit were related services as defined by D.C. Official Code § 42-3501.03(27). They also offered evidence to prove the reduction was substantial, and they provided the dates to support their claim. They testified to feeling as if they lived in a cave when their windows were boarded, described the impact of drilling on the roof directly above their unit, provided the exact date the housing providers removed the roof of their unit during a heat wave, and showed that the conditions in the apartment required them to seek lodging elsewhere.

35. In the instant case, the [T]enants complained of noise and dust when the [H]ousing [P]roviders did extensive work in connection with a capital improvement in the old wing of the [H]ousing [A]ccommodation, and said it lasted about a year. The [T]enants stated that there was extensive noise and dust that started sometime in March 2006, but they were not sure of the day, and ended sometime in June 2007. The [T]enants testified that their habitability, enjoyment, services and ability to live in the apartment were reduced for this entire time period. Instead of demonstrating that there was a related service or facility that was reduced or testifying about the impact of the noise and debris on them or their rental unit, the [T]enants attempted to introduce notes and emails from other tenants detailing their complaints about noise. The [H]ousing [P]roviders objected to many of these exhibits. The court denied their admission, because the [T]enants failed to lay a proper foundation for the exhibits, the exhibits were not signed, the dates of the

complaints were not clear, and the [T]enants did not demonstrate the relevance of the exhibits to their claim. Moreover, the [T]enants did not explain why the parties were not called as witnesses and presented for cross-examination.

36. The [T]enants did not meet the requirements of *H.G. Smithy Co. v. Arieno,* TP 23,329 (RHC Aug. 7, 1998), because they did not prove that the [H]ousing [P]roviders substantially reduced a related service or facility. The holding in *Washington Realty Co. v. Rowe*, TP 11,802 (RHC May 14, 1986) applies to the instant case and the [T]enants cannot prevail on the services and facilities claim raised in the [Tenant] [P]etition.

. . .[6]

V. Conclusions of Law

A. Jurisdiction

37. This matter is governed by the Rental Housing Act of 1985, D.C. Official Code §§ 42-3501.01 – 3509.07, the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. Official Code §§ 2-501 – 510, the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR [§§] 2800 – 2899, 1 DCMR [§§] 2920 – 2941, and 14 DCMR [§§] 4100 – 4399. On October 1, 2006, the Office of Administrative Hearings ("OAH") assumed the Rent Administrator's jurisdiction to hear rental housing cases pursuant to the Office of Administrative Hearings Establishment Act, D.C. Official Code § 2-1831.03(b-1)(1).

B. Burden of Proof

38. When the [T]enants filed the [Tenant] [P]etition, they alleged that the [H]ousing [P]roviders failed to file the proper rent increase forms, filed improper rent ceilings, substantially reduced services and/or facilities provided in connection with the rental unit and several adjustments to rent ceiling and rent charged were improperly taken or implemented. The [T]enants bear the burden of affirmatively proving the facts to support their claims. *Allen v. D.C. Rental Hous. Comm'n*, 538 A.2d 752, 754 (D.C. 1988). In this rental housing case, the [T]enants had 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 [sic], 538 A.2d at 754.

---

[6] The Commission notes that section IV of the Final Order contains the ALJ's Findings of Fact, which are recited *supra* at 3-5. Final Order at 19-21; R. at 1311-13.

39. The [T]enants failed to meet their burden of proof on any claims raised in the [T]enant [P]etition.

Final Order at 5-19, 21-22; R. at 1310-11, 1313-27 (footnotes omitted).

On October 12, 2010, the Tenants filed a timely notice of appeal with the Commission (Notice of Appeal), in which they raised the following issues:

1. It was reversible error for the Judge (and apparently OAH as a body) to rule that discovery is not allowed in a case like this [T]enant [P]etition.

2. It was reversible error for the judge to rule that Tenants' case had to be limited to the boxes that were checked on the [T]enant [P]etition form and that our attempts to notify the OAH and the Housing Providers of the details of those claims were invalid.

3. It was reversible error not to allow the issue of improper registration of the [H]ousing [A]ccommodation (including improper registrations of rent and rent ceiling increases, housing providers and so on) to be an issue in this case.

4. It was reversible error for the judge to rule that Tenants "introduced no evidence of the actual rent increase," and to therefore dismiss our claims as to the rent increases of November 1, 2004, November 1, 2005 and May 1, 2006.

5. It was reversible error for the judge to rule that the statute of limitations covering violations of the Act (said by the judge to be three years, pursuant to D. C. [sic] Code Sec. 42-3502.06(e)) barred not only recoveries of rent adjustments made more than three years before the filing of the [T]enant [P]etition but also barred any claims as to invalid rent ceiling adjustments made more than three years before the filing, barred evidence of other violations of the Act that occurred or began prior to such three years, and barred the introduction of documents and other evidence older than three years (with some apparently arbitrary exceptions).

6. It was reversible error for the judge to rule that letters sent to the Tenants by the Housing Providers notifying of planned rent ceilings and rent raises satisfied the requirements of "posting or mailing" under 14 DCMR [§] 4101.06.

7. It was reversible error for the judge to require the Tenants to cite any case law or provisions of the Act or housing regulations that supported their contention that a rent ceiling adjustment had to be taken and perfected

within thirty days of a Decision and Order authorizing a capital improvement petition rent ceiling increase, when that Decision and Order was being appealed.

8. It was reversible error for the judge not to allow presentation and proof of the issue of the invalidation of rent and rent ceiling increases (pursuant to Section 208 of the Act) due to existing Housing Code violations.

9. It was reversible error for the judge to deny Tenants' claim for remedies due to the substantial reduction or elimination of services and facilities.

10. It was reversible error for the judge to make a distinction between a substantial reduction in related services and facilities and an elimination of them, and to state that she did not have a claim of permanent elimination before her.

11. In connection with our claim about excessive noise and related disruption caused by the Housing Providers, it was reversible error for the judge not to admit into evidence statements of similar complaints made by other tenants.

12. It was error for the judge to not allow testimony and submission of evidence of a series of power and water shut-offs, water leaks and other disruptions caused by the actions of the Housing Providers that started before the Tenant Petition was filed and continued for months thereafter.

13. It was reversible error for the judge not to allow admission of emails as evidence.

14. It was error for the judge not to allow evidence in that B.F. Saul Property Company was a manager of the Housing Accommodation and thus an (unregistered) housing provider.

15. It was error for the judge to prevent our questioning of witness Tanya Marhefka, the general manager of the Housing Accommodation, about which entity was actually managing the Housing Accommodation.

16. It was reversible error for the judge not to include all housing providers in existence during the period covered by the [T]enant [P]etition (namely, First Union National Bank of Virginia, U.S. Bank National Association, and TIAA-CREF) as respondents in this case.

17. Tenants were denied their due process rights in the way that the hearing and pre-hearings proceedings were conducted.

18. It was reversible error for the judge to reject our acting as "private attorneys general" in trying to enforce the Act to protect ourselves, other tenants in the [H]ousing [A]ccommodation and indeed tenants throughout the District.

19. It was reversible error for the judge to put the entire burden of proof of violations of the Act on the Tenants.

20. It was error for the judge to admit Respondent's exhibit RX 211 (consisting of five pages of various building work permits).

21. It was reversible error for the judge to deny the admission into evidence of some of our exhibits on the ground that they were not properly identified yet to allow into evidence Housing Providers' exhibits that had no proper identification at all.

22. It was error for the judge to require pro se Tenants, during the hearing, to cite statutes, regulations and cases in support of there [sic] assertions, especially when these authorities has [sic] already been fully cited in the Tenants' pleadings.

23. The judge's ruling that the Tenants failed to meet their burden of proof on any claims alleged in the Tenant Petition should be reversed.

Notice of Appeal at 2-6.

The Tenants filed a brief on January 11, 2013 (Tenants' Brief), and the Housing Providers filed a responsive brief on January 29, 2013 (Housing Providers' Brief). The Commission held its appellate hearing on February 21, 2013.

II. PRELIMINARY ISSUE[7]

[7] In assessing the Tenants' Notice of Appeal, the Commission is mindful of the important role that lay litigants play in the Act's enforcement. Goodman, 573 A.2d at 1298-1299; Cohen v. D.C. Rental Hous. Comm'n, 496 A.2d 603, 605 (D.C. 1985). Courts have long recognized that pro se litigants can face considerable challenges in prosecuting their claims without legal assistance. Kissi v. Hardesty, 3 A.3d 1125, 1131 (D.C. 2010) (citing Hudson v. Hardy, 412 F.2d 1091, 1094 (D.C. Cir. 1968)). The DCCA has noted that "[i]n matters involving pleadings, service of process, and timeliness of filings, pro se litigants are not always held to the same standards as are applied to lawyers." Padou v. District of Columbia, 998 A.2d 286, 292 (D.C. 2010) (quoting Macleod v. Georgetown Univ. Med. Ctr., 736 A.2d 977, 980 (D.C. 1999), cert. denied, 528 U.S. 1188 (2000)). Nonetheless, "while it is true that a court must construe pro se pleadings liberally . . . the court may not act as counsel for either litigant." Flax, 935 A.2d at 1107 n.14 (quoting Bergman v. Webb, 212 B.R. 320, 321 (Bankr. Fed. App. 1997)).

The Commission's regulation concerning the initiation of appeals, 14 DCMR § 3802.5(b) (2004), provides that a notice of appeal shall contain the following: " . . . a clear and concise statement of the alleged error(s) in the decision of the Rent Administrator." 14 DCMR § 3802.5(b) (emphasis added). *See, e.g.,* Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) (dismissing issue stated merely as "the Hearing Examiner used the wrong burden of proof," because the housing provider did not identify either the allegedly erroneous standard of proof that was used, or the burden of proof that the housing provider contended should have been applied); Paz v. Park Lee Assocs., RH-TP-07-28,977 (RHC Jan. 31, 2013) (dismissing appeal where the appellant broadly alleged that the findings of the ALJ were "arbitrary, capricious, represent an abuse of discretion . . ."); Sellers v. Lawson, TP 29,437 (RHC Dec. 6, 2012) (explaining that the Commission cannot review issues on appeal that do not contain a clear and concise statement of alleged error in an ALJ's decision).

Furthermore, the regulations permit the Commission to dismiss an issue on appeal for a failure to comply with the requirements of 14 DCMR § 3802.5. 14 DCMR § 3802.13.[8] *See, e.g.,* United Dominion Mgmt. Co. v. Coleman, RH-TP-06-28,833 (RHC Sept. 27, 2013) (dismissing issue on appeal for failure to make a "clear and concise" statement of error); Sellers, TP 29,437. While the Commission reads *pro se* litigants' documents liberally with an eye on the remedial nature of the Act and the role *pro se* litigants play in its enforcement, Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1295 (D.C. 1990), a *pro se* litigant "cannot generally be permitted to shift the burden of litigating his case to the courts." Tenants of 4021 9th St., N.W. v. E & J Props., LLC, HP 20,812 (RHC June 11, 2014). *See also* Am. Rental Mgmt. Co. v.

[8] 14 DCMR § 3802.13 provides the following: "The Commission may dismiss the appeal for failure to comply with the requirements of § 3802.5."

Chaney, RH-TP-08-29,302 (RHC May 22, 2014); Carmel Partners, Inc. v. Levy, RH-TP-06-28,830; RH-TP-06-28,835 (RHC May 16, 2014).

Having reviewed the Notice of Appeal, the Commission determines that, even with a liberal reading, several issues do not conform to the requirement for "clear and concise" statements of issues under 14 DCMR § 3802.5(b), specifically, issue 18, issue 22, and issue 23. Notice of Appeal at 5-6. The Commission observes that issue 18 contends that the ALJ erred in rejecting "our acting as 'private attorneys general' in trying to enforce the Act" but does not identify any specific finding of fact or conclusion of law in the Final Order itself, that was a result of the ALJ's failure to allow the Tenants to act as "private attorneys general." *See id.* at 5. Similarly, issue 22 asserts that the ALJ erred by requiring the Tenants "to cite statutes, regulations and cases in support of there [sic] assertions" at the OAH hearing, but does not identify any specific finding of fact or conclusion of law in the Final Order that were error as a result.[9] *See id.* at 6. Finally, issue 23 states as a pure legal conclusion that the Final Order "should be reversed" because the ALJ erred in determining that the Tenants failed to meet their burden of proof on any of their claims; however, the Tenants do not identify any factual or legal basis that would support such a general reversal of the Final Order, nor do they identify any allegedly erroneous finding of fact or conclusion of law in which the ALJ erred.[10] *See id.* at 6.

The Commission determines that the Tenants' failed to comply with 14 DCMR § 3802.5(b) in their statement of issues 18, 22, and 23 in the Notice of Appeal, and thus

[9] In response to other issues raised on appeal by the Tenants, the Commission addresses whether the OAH proceedings on the Tenant Petition were conducted in a manner that violated the Tenants' due process rights. *See infra* at 62-64.

[10] In response to other issues raised on appeal by the Tenants, the Commission addresses whether the ALJ erred in determining that the Tenants failed to prove that the Housing Providers illegally increased their rent, *see infra* at 49-58, and whether the ALJ erred in determining that the Tenants failed to prove a reduction in services and/or facilities. *See infra* at 58-62.

dismisses these issues. *See* 14 DCMR § 3802.13; Coleman, RH-TP-06-28,833; Barac Co., VA 02-107; Paz, RH-TP-07-28,977; Sellers, TP 29,437. *See also* Notice of Appeal at 5-6.

III. ISSUES ON APPEAL[11]

A. Whether the ALJ erred by denying the Tenants' request for discovery.

B. Whether the ALJ erred in applying the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) to the Tenants' claims of improper rent charged and rent ceiling adjustments.

C. Whether the ALJ erred by failing to admit into evidence statements offered by the Tenants regarding complaints from other tenants at the Housing Accommodation of excessive noise and related disruption.

D. Whether the ALJ erred by failing to admit PX 167, a string of emails, offered by the Tenants into evidence.

E. Whether the ALJ erred by admitting the Housing Providers' exhibit RX 211, five pages of various building work permits.

F. Whether the ALJ erred by failing to admit into evidence PXs 100(a)-(c), 112, and 182, for not being properly identified, and by admitting into evidence the Housing Providers' exhibit RXs 212-215 that were not properly identified.

G. Whether the ALJ erred in ruling that the Tenants' case had to be limited to the boxes that were checked on the Tenant Petition, and that the Tenants' attempts to notify OAH and the Housing Providers of the details of their claims were invalid.

H. Whether the ALJ erred by failing to allow the Tenants to include improper registration as a claim in their Tenant Petition.

I. Whether the ALJ erred by failing to allow presentation and proof of improper rent charged and rent ceiling increases due to existing housing code violations.

J. Whether the ALJ erred by failing to allow testimony and the submission of evidence regarding a series of power and water shut-offs, water leaks, and other disruptions caused by the actions of the Housing Providers.

---

[11] The Commission, in its discretion, has rephrased and reordered the issues on appeal in this section of its Decision and Order in order to clearly identify the allegations of the ALJ's error(s) in the Final Order, and to group together issues that involve the application of common legal principles. *See, e.g.*, Carmel Partners, Inc., RH-TP-06-28,830; RH-TP-06-28,835; Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013) at n.12; Jackson v. Peters, RH-TP-12-28,898 (RHC Sept. 27, 2013). For the complete language of the Tenants' Notice of Appeal, see Tenants' Notice of Appeal at 2-6; *supra* at 15-18.

K. Whether the ALJ erred by failing to allow the Tenants to present evidence that B.F. Saul Property Company was a manager of the Housing Accommodation, and thus an unregistered housing provider.

L. Whether the ALJ erred by failing to allow the Tenants to question the Housing Providers' witness Tanya Marhefka, the general manager of the Housing Accommodation, regarding the entity that was actually managing the Housing Accommodation.

M. Whether the ALJ erred by failing to include all housing providers in existence during the time period relevant to the Tenant Petition, including First Union National Bank of Virginia, U.S. Bank National Association, and TIAA-CREF, as respondents in this case.

N. Whether the ALJ erred by dismissing the Tenants claims of improper rent increases on November 1, 2004, November 1, 2005, and May 1, 2006, because the Tenants introduced no evidence of the actual rent increases.

O. Whether the ALJ erred by determining that letters sent to the Tenants from the Housing Providers notifying the Tenants of planned rent ceiling and rent charged increases satisfied the "posting or mailing" requirements under 14 DCMR § 4101.6.

P. Whether the ALJ erred by requiring the Tenants to cite case law, provisions of the Act, or the housing regulations to support their contention that a rent ceiling adjustment must be taken and perfected within thirty (30) days of a decision and order authorizing a capital improvement petition rent ceiling increase, despite that decision and order being appealed.

Q. Whether the ALJ erred by denying the Tenants' claim of substantial reductions or eliminations of services and facilities.

R. Whether the ALJ erred by distinguishing between a substantial reduction in related services and facilities and an elimination of related services and facilities, and in determining that the Tenants had not properly raised a claim of an elimination of services and facilities.

S. Whether the pre-hearing and hearing proceedings conducted by OAH violated the Tenants' due process rights.

T. Whether the ALJ erred by determining that the entire burden of proof of violations of the Act was on the Tenants.

IV. DISCUSSION OF ISSUES ON APPEAL

A. Whether the ALJ erred by denying the Tenants' request for discovery.

The Tenants filed two separate discovery motions in this case. The first was filed on August 12, 2008 (August 12, 2008 Motion for Discovery), and the second was filed on July 1, 2009 (July 1, 2009 Motion for Discovery).[12] R. at 380-86, 932-47. The Tenants asserted that discovery was necessary in order to obtain documents to prove their assertions of improper registration, to show a pattern of violations arising out of rent charged and rent ceiling adjustments, and to obtain documents related to their claim of reductions in services and/or facilities related to excessive noise. July 1, 2009 Motion for Discovery at 3-6; R. at 942-45. The Tenants asserted that Super. Ct. Civ. R. 26(b), providing that generally parties may obtain discovery, should be applicable to their case.[13] *Id.* at 6; R. at 942.

The ALJ denied the Tenants' motion for discovery for the following reasons: (1) the ALJ determined that the motion was overly broad, as it sought, for example, documents that existed prior to the time that the Tenants became Tenants; and (2) the ALJ determined that the Tenant

---

[12] The Commission's review of the record reveals the July 1, 2009 Motion for Discovery included nineteen (19) requests for production of documents, R. at 939-47; however, the August 12, 2008 Motion for Discovery did not include any specific discovery requests, but instead requested permission from the ALJ to conduct discovery. R. at 380-86.

[13] Super. Ct. Civ. R. 26(b) provides, in relevant part, the following:

> Discovery scope and limits. -- Unless otherwise limited by order of the Court in accordance with these rules, the scope of discovery is as follows:
>
> > (1) In general. -- Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the Court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence . . . .

The Commission notes that the Tenants' reliance on Super. Ct. Civ. R. 26(b) is mistaken. The OAH regulations provide that when a procedural issue is not specifically addressed, the ALJ may rely upon the D.C. Superior Court Rules of Civil Procedure as "persuasive authority." 1 DCMR § 2801.2. However, the OAH rules address discovery procedures, and thus Super. Ct. Civ. R. 26(b) is not applicable to these proceedings. *Id. See* 1 DCMR § 2823.

Petition was not a "complex case" under OAH rules, and thus discovery was not warranted. Hearing CD (OAH Sept. 9, 2009) at 11:18-11:19.

The Commission's standard of review is contained at 14 DCMR § 3807.1 and provides the following:

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

See also, e.g., Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014); Bohn v. Robinson, RH-TP-08-29,328 (RHC July 2, 2014); Tenants of 4021 9th St., N.W. v. E&J Props., LLC, HP 20,812 (RHC June 11, 2014).

Under the relevant OAH regulations, discovery shall not be permitted unless authorized by an ALJ, and shall be limited to "Complex Track" cases. 1 DCMR § 2823.2.[14] Cases are assigned to a Standard or Complex case track by the OAH Clerk, as follows:

> (a) Standard Cases include all matters arising from the Civil Infractions Act of 1985, as amended (D.C. Official Code Title 2, Chapter 18) and lawfully committed to the jurisdiction of this administrative court. Standard Cases shall also include, but not be limited to, the following cases:
>
> (1) D.C. Department of Employment Services matters;
>
> (2) D.C. Department of Human Services matters;
>
> (3) D.C. Taxicab Commission matters;
>
> (4) Board of Appeal and Review Cases, excluding Certificate of Need and Notice of Program Reimbursement determinations; and
>
> (5) Matters arising under D.C. Official Code Title 8, Chapter 8.

[14] 1 DCMR § 2823.2 provides as follows: "No discovery shall be permitted unless authorized by order of the presiding Administrative Law Judge. Discovery shall be limited to Complex Track cases, and all requests for discovery shall be made upon motion."

(b) Complex Cases include those matters not designated as Standard Cases under this Section.

1 DCMR § 2806.1. *See, e.g.* 1433 T St. Assocs., LLC v. Tenants of 1433 T St., N.W., RH-SR-08-20,115 (OAH Jan. 8, 2009) (indicating that cases under the Rental Housing Act are "Standard Cases" and must be designated as "Complex Cases" through a party's motion or upon the ALJ's own motion). Moreover, a party may file a motion to change a Standard Case to a Complex Case, within thirty (30) days of the commencement of the case and before the hearing. 1 DCMR § 2806.2.[15]

The Commission observes that the ALJ in this case indicated that the Tenant Petition was on a "Standard Case" track, and the Commission's review of the record reveals that the Tenants did not make a motion to the ALJ to change the case designation to a "Complex Case" as required by 1 DCMR § 2806.2, nor did the Tenants appeal the ALJ's determination that the Tenant Petition was a "Standard Case." Notice of Appeal at 1-6; Hearing CD (OAH Sept. 9, 2009) at 11:18-11:19.

Where the Commission's review of the record reveals that the ALJ's determination that the Tenant Petition was "Standard Case" complied with the requirements of 1 DCMR § 2806.1, the Commission is satisfied that the ALJ's denial of discovery was not arbitrary, capricious or an abuse of discretion, and was in accordance with the applicable regulations. 14 DCMR § 3807.1.

---

[15] 1 DCMR § 2806.2 provides the following:

> A party in a Standard Case track may, within thirty (30) days of the commencement of a case and prior to trial, file a motion in accordance with Rule 2812 to change to a Complex Case track. The presiding Administrative Law Judge also may change a Standard Case to a Complex Case upon his or her own motion. In deciding whether the designate a case as a Complex Case under this Section, the presiding Administrative Law Judge shall consider the number of parties, the relief requested, the number and difficulty of the legal and factual issues, the anticipated number of witnesses and exhibits, the anticipated length of the trial, and any other factor that, in his or her discretion, indicates that the fair, just and prompt disposition of the case will or will not be enhanced by use of the procedures available in Complex Cases.

See 1 DCMR §§ 2806.1, 2823.2. *See also* 1433 T St. Assocs., LLC, RH-SR-08-20,115 (designation of case as a Complex Case under 1 DCMR § 2806.1 is in an ALJ's discretion). Accordingly, the ALJ is affirmed on this issue.

B. Whether the ALJ erred in applying the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e) to the Tenants' claims of improper rent charged and rent ceiling adjustments.

The Tenants assert in the Notice of Appeal that the ALJ erred by excluding evidence at the OAH hearing on the basis that it was outside of the relevant three-year statute of limitations period, such as exhibits related to rent ceiling adjustments for the Tenants' unit as well as exhibits related to the Tenants' claim of reductions in services and/or facilities. Notice of Appeal at 27-36.

1. Whether the ALJ erred in excluding evidence of rent ceiling adjustments based on the Act's statute of limitations at D.C. OFFICIAL CODE § 42-3502.06(e).

The Tenants asserts generally that the ALJ erred by denying the admission of multiple Certificates of Election and Amended Registration forms on the basis of the statute of limitations. *See* Notice of Appeal at 27-36. The Tenants do not identify any specific Certificate of Election or Amended Registration form that was denied by the ALJ, but instead reference the following times during the OAH hearing that the ALJ denied the admission of exhibits based on the statute of limitations: September 9, 2009 at 1:34-2:04, 2:16-2:17, 2:21-2:36, 2:45; 2:50; and September 10, 2009 at 9:50-9:55. *Id.* at 33-34; Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009). Based on its review of the record, and in its reasonable discretion, the Commission identifies the following Certificates of Election and/or Amended Registration forms that were denied admission by the ALJ based on the Act's statute of limitations during the times referenced by the Tenants in the Notice of Appeal: PX 150(a), a Certificate of Election dated

December 29, 1995, and PX 150(f), a Certificate of Election dated February 3, 2003. Hearing CD (OAH Sept. 9, 2009) at 1:44, 1:59.

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

> A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

The Commission has previously interpreted this provision to apply to adjustment in rent ceilings as follows:

> When . . . the "effective date" of a contested adjustment in rent ceiling is beyond the limitations period in § 42-3502.06(e) – because the date of its implementation through a corresponding, contested adjustment in rent charged is also beyond the limitations period – the Commission is satisfied that any claims under the Act regarding either adjustment are barred by § 42-3502.06(e) . . . .
>
> [W]hen the "effective date" of a contested adjustment in rent ceiling is within the limitations period in § 42-3502.06(e) – and its corresponding, contested adjustment in rent charged also occurs within the limitations period – the Commission observes that any claims under the Act regarding either adjustment are not barred by the limitations period of § 42-3502.06(e).
>
> Finally . . . when a contested adjustment in rent ceiling is beyond the limitations period in § 42-3502.06(e) – but the date of its implementation through a corresponding, contested adjustment in rent charged is within the limitations period – the "effective date" of the contested adjustment in rent ceiling under § 42-3502.06(e) remains as the date of its implementation through the corresponding adjustment in rent charged, and any claims under the Act regarding either adjustment are permitted under § 42-3502.06(e).

United Dominion Mgmt. v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013) at 23-24 (citing Kennedy v. D.C. Rental Hous. Comm'n, 709 A.2d 94, 97-99 (D.C. 1998)(emphasis in original).

See also Gelman Mgmt. Co. v. Grant, TPs 27,995, 27,997, 27,998, 28,002, & 28,004 (RHC Aug.

19, 2014); Morris, RH-TP-06-28,794; Coleman, RH-TP-06-28,833; United Dominion Mgmt. Co. v. Kelly, RH-TP-06-28,707 (RHC Aug. 15, 2013); United Dominion Mgmt. Co. v. Rice, RH-TP-06-28,749 (RHC Aug. 15, 2013).

The ALJ stated in the Final Order that she denied the admission of PX 150(a) and PX 150(f), because the rent ceiling adjustments taken in the respective Certificates of Election had occurred more than three (3) years prior to the filing of the Tenant Petition on June 19, 2006, and thus outside the statute of limitations period. Final Order at 8-9; R. at 1323-24. The ALJ explained that the exception set forth in Grant v. Gelman Mgmt. Co., TPs 27,995, 27,997, 27,998, 28,002, 28,004 (RHC Feb. 24, 2006), allowing for challenges to rent charged adjustments within the statutory period based on improper rent ceiling adjustments that may have occurred outside of the statutory period, did not apply in this case because the Tenants had failed to link either PX 150(a) or PX 150(f) to any rent charged increases within the three-year statute of limitations period. Final Order at 9; R. at 1323. *See, e.g.,* Hinman, RH-TP-06-28,728; Morris, RH-TP-06-28,794; Coleman, RH-TP-06-28,833; Kelly, RH-TP-06-28,707; Rice, RH-TP-06-28,749.

The Commission's review of the record reveals substantial evidence to support the ALJ's determination that the Tenants failed to link either PX 150(a) or PX 150(f) to any rent charged adjustment within the three year period prior to the filing of the Tenant Petition, or between June 19, 2003 and June 19, 2006, as required under relevant Commission precedent. *See* Hearing CD (OAH Sept. 9, 2009) at 1:41-1:44, 1:50-2:00. *See also, e.g.,* Hinman, RH-TP-06-28,728; Gelman Mgmt. Co., TPs 27,995, 27,997, 27,998, 28,002, & 28,004; Morris, RH-TP-06-28,794; Coleman, RH-TP-06-28,833; Kelly, RH-TP-06-28,707; Rice, RH-TP-06-28,749. The Commission notes that, at the OAH hearing, the Tenants did not testify regarding the specific

rent charged increase that arose out of the rent ceiling increases indicated in PX 150(a) and PX 150(f). *Id.* Moreover, the Commission's review of the record supports the ALJ's finding that the Tenants did not enter into evidence any rent charged increase forms, which may have provided the necessary link to the rent ceiling increases taken in PX 150(a) and PX 150(f). *See* Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009).

The Commission determines that the exclusion of evidence regarding rent ceiling adjustments taken more than three years prior to the filing of the Tenant Petition was not error where the substantial record evidence supports the ALJ's finding that the Tenants failed to connect any of the rent ceiling adjustments to rent charged adjustments that occurred within the three years prior to the filing of the Tenant Petition. D.C. OFFICIAL CODE § 42-3502.06(e); 14 DCMR § 3807.1. *See* Hinman, RH-TP-06-28,728; Gelman Mgmt. Co., TPs 27,995, 27,997, 27,998, 28,002, & 28,004; Morris, RH-TP-06-28,794; Coleman, RH-TP-06-28,833; Kelly, RH-TP-06-28,707; Rice, RH-TP-06-28,749. Accordingly, the ALJ is affirmed on this issue.

2. Whether the ALJ erred by excluding evidence related to the Tenants' claims of reductions in services and/or facilities based on the Act's statute of limitations

As it relates to claims of reductions in services and/or facilities, the Commission has determined that the Act's statute of limitations bars claims arising out of reductions that first occurred more than three years prior to the filing of the tenant petition. *See* Peerless Props. Inc. v. Hashim, TP 21,159 (RHC Aug. 26, 1992). *See* D.C. OFFICIAL CODE § 42-3502.06(e); Willoughby Real Estate Co., Inc. v. Shuler, TP 28,266 (RHC Nov. 7, 2008) (claim of reduction in services due to lack of heat violated the Act's statute of limitations where the reduction first began more than 3 years prior to the filing of the tenant petition); Alpar v. Pounger, Shannon & Luchs, TP 27,146 (RHC Aug. 8, 2003) (consideration of a 1996 noise complaint in a tenant

petition filed in 2001 was barred by the Act's statute of limitations); Chamberlain Apartments Tenants' Ass'n v. 1429-51 Ltd. P'ship, TP 23,984 (RHC July 7, 1999) (where elimination of resident manager occurred in March, 1992, claim of elimination of services in tenant petition filed on July 20, 1995 was barred by the Act's statute of limitations).

The Commission notes that the Tenants have identified specifically only Petitioners' Exhibits (PX) 100(a), 100(b), and 100(c),[16] that were allegedly denied admission erroneously on the basis of the statute of limitations. Notice of Appeal at 35. In addition, the Tenants make two general references to times during the OAH hearing that the admission of an exhibit was denied by the ALJ, without stating the specific exhibit that was denied. *See id.* at 29. For example, the Tenants stated that "at 9/10/09 at approx. 10:49 a.m. [the ALJ] did not allow admission of a drawing submitted to the Zoning Commission hearing from about 1997 and concerning the same issue, on statute of limitations grounds;" the Commission's review of the record reveals that at approximately 10:49 a.m. on September 10, 2009, the ALJ denied the admission of PX 112(a) and (b). *Id.* at 29; Hearing CD (OAH Sept. 10, 2009) at 10:49. Similarly, the Tenants state that the ALJ erroneously denied the admission of an exhibit that would have shown eliminations of services and facilities at "9/10/09 at 9/10 at approx.. 11:01 a.m. on statute of limitations grounds;" the Commission's review of the record reveals that at approximately 11:01 a.m. on September 10, 2009 the ALJ denied the admission of PX 115. Notice of Appeal at 29; Hearing CD (OAH Sept. 10, 2009) at 11:01.

[16] The Commission notes that the Notice of Appeal identifies exhibits 100(a) through 100(e) as having been erroneously denied admission by the ALJ. Notice of Appeal at 35. However, the Commission's review of the record does not reveal substantial evidence that the Tenants presented any documents identified as either PX 100(d) or PX 100(e) to the ALJ at the OAH hearing. 14 DCMR 3807.1. *See* Hearing CD (OAH Sept. 9, 2009); Hearing CD (OAH Sept. 10, 2009).

First, the Commission notes that the record indicates that the ALJ admitted PX 100(a), PX 100(b), and PX 100(c) into evidence, *see* OAH Exhibit List at 1; R. at 1306, and although PX 115 was introduced at the OAH hearing, it was subsequently withdrawn by the Tenants. Hearing CD (OAH Sept. 10, 2009) at 11:03-11:04. Thus, the Commission's review of the record reveals that the Tenants' allegation that the ALJ erred by denying the admission of these exhibits into evidence is unfounded.

Regarding PXs 112(a) and (b), the Commission's review of the record reveals that the Act's statute of limitations was only one of three reasons given by the ALJ for the denial of these exhibits. *Id.* at 10:50. The ALJ stated the following on the record at the OAH hearing:

> Let me say this . . . there are a number of reasons that I rejected [PX 112(a) and (b)]. In order for you to admit an exhibit you have to be able to show that this exhibit is authentic, and in order to do that you have to demonstrate who prepared it, when they prepared it, why it was prepared, and then you have to demonstrate that it's relevant to these proceedings. And a landscape plan that may have been prepared by someone on November 8, 1996, is not relevant as far as this court is concerned, to these proceedings. You also have a host of statute of limitations issues with respect to a document prepared in 1996 and your failure to challenge it within 3 years of that date.

Id.

The Commission observes that the Tenants have not appealed the ALJ's ruling that they failed to prove the authenticity and the relevance of PX 112(a) and (b). *See* Notice of Appeal. Additionally, the Commission is satisfied that, where the record reflects that the Tenants did not testify regarding the link between PX 112(a) and (b), dated November 8, 1996, and any reduction in services and/or facilities during the three years prior to the filing of the Tenant Petition, the ALJ's conclusion that the Tenants were barred by the Act's statute of limitations from introducing PXs 112(a) and (b) to assert a claim of reduction in services and/or facilities beginning in 1996 was not an abuse of discretion. D.C. OFFICIAL CODE § 42-3502.06(e); 14

DCMR § 3807.1. *See* Willoughby Real Estate Co., Inc., TP 28,266; Alpar, TP 27,146; Chamberlain Apartments Tenants' Ass'n, TP 23,984; Peerless Props. Inc., TP 21,159. *See also, e.g.*, Hinman, RH-TP-06-28,728; Gelman Mgmt. Co., TPs 27,995, 27,997, 27,998, 28,002, & 28,004; Morris, RH-TP-06-28,794; Coleman, RH-TP-06-28,833; Kelly, RH-TP-06-28,707; Rice, RH-TP-06-28,749.

Therefore the ALJ is affirmed on this issue.

C. Whether the ALJ erred by failing to admit into evidence statements offered by the Tenants regarding complaints from other tenants at the Housing Accommodation of excessive noise and related disruption.

The Tenants contend on appeal that the ALJ erred by failing to admit into evidence letters written by other tenants at the Housing Accommodation related to the Tenants' claim of a reduction in services and/or facilities due to "noise, dust, debris and disruption" throughout their unit and the common areas of the Housing Accommodation. Notice of Appeal at 62-63. Again, the Tenants have not identified the specific exhibit that was excluded from evidence, but instead only provided a time at the OAH hearing that the ALJ made a ruling on the admissibility of an exhibit. *Id.* The Commission determines based on the Tenants' reference to the September 10, 2009 OAH hearing at 11:33 a.m., that the Tenants are challenging the ALJ's exclusion of PX 166(a) and PX 166(b). Hearing CD (OAH Sept. 10, 2009) at 11:28-11:34. The Tenants identified PX 166(a) as a letter dated April 7, 2007 from a tenant, Ms. Diane Monroe, of the Housing Accommodation complaining about "noise and other disruptions to services." *Id.* at 11:28. The Tenants identified PX 166(b) as a letter dated April 7, 2007 also from Ms. Monroe, to the Housing Provider B.F. Saul Company, stating that she "cannot take the noise anymore, it's unbearable and so she's vacating her apartment." *Id.* at 11:32.

As the Commission stated previously, *see supra* at 24, it will uphold the ALJ's decision so long as it is not arbitrary, capricious or an abuse of discretion, and it is in accordance with the provisions of the Act and supported by substantial evidence. 14 DCMR § 3807.1. The DCCA has stated the following regarding the discretion afforded to an ALJ on the admissibility of evidence:

> [A]ny administrative agency . . . may "exclude irrelevant, immaterial and unduly repetitious evidence." D.C. Code § 2-509(b). Agencies may exercise their discretion in determining the admissibility of evidence. With respect to trial judges, we have said that "an evidentiary ruling by the trial judge on the relevancy of a particular item is a highly discretionary decision that will be upset on appeal only upon a showing of grave abuse." Roundtree v. United States, 581 A.2d 315, 328 (D.C. 1990). Given the flexibility of their proceedings and their expertise, administrative agencies are "invested with a correspondingly greater discretion than trial judges in determining the admissibility of evidence." Haight v. D.C. Alcoholic Beverage Control Bd., 439 A.2d 487, 491 (D.C. 1981).

District of Columbia v. Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,* Compton v. D.C. Bd. of Psychology, 858 A.2d 470, 476 n.9 (D.C. 2004); Metro. Baptist Church v. D.C. Dep't of Consumer & Regulatory Affairs, 718 A.2d 119, 129 (D.C. 1998); Haight, 439 A.2d at 491. Under the DCAPA, the ALJ is required to exclude "irrelevant, immaterial, and unduly repetitious evidence" from the record. D.C. OFFICIAL CODE § 2-509(b).[17]

The ALJ upheld the Housing Providers' objections to PX 166(a) and PX 166(b), and denied the admission of these exhibits on the grounds that the Tenants failed to establish the authenticity of the exhibits, and that the Tenants failed to demonstrate the relevance of Ms. Monroe's complaints to the conditions specifically in the Tenants' unit. Hearing CD (OAH Sept. 10, 2009) at 11:33-11:34. For example, the Commission's review of the record reveals that the Tenants testified that Ms. Monroe lived in unit 402, three floors above the Tenants' unit, 115, but

[17] D.C. OFFICIAL CODE § 2-509(b) provider, in relevant part, the following: "In contested cases . . . [a]ny oral and any documentary evidence may be received, by the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence . . . ."

provided no testimony regarding how the level of construction noise in Ms. Monroe's unit was relevant to the claim of reductions in services and/or facilities arising out of construction noise specifically in their own unit. Hearing CD (OAH Sept. 10, 2009) at 11:32. Based on its review of the record, the Commission is not persuaded that the ALJ's exclusion of PX 166(a) and PX 166(b) was an abuse of discretion. 14 DCMR § 3807.1; Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,* Compton, 858 A.2d at 476 n.9; Metro. Baptist Church, 718 A.2d at 129; Haight, 439 A.2d at 491.

For the foregoing reasons, since the Commission's review of the record reveals substantial evidence to support the ALJ's determination that the Tenants failed to demonstrate the relevance of PX 166(a) and PX 166(b) to their Tenant Petition, the Commission is satisfied that the ALJ's exclusion of PX 166(a) and PX 166(b) did not constitute an abuse of discretion. 14 DCMR § 3807.1; Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,* Compton, 858 A.2d at 476 n.9; Metro. Baptist Church, 718 A.2d at 129; Haight, 439 A.2d at 491. Thus, the ALJ is affirmed on this issue.

D. Whether the ALJ erred by failing to admit PX 167, a string of emails, offered by the Tenants into evidence.

The Tenants assert on appeal that the ALJ erred by denying the admission of PX 167, a string of emails, on the grounds that they were not signed. Notice of Appeal at 65. The Commission's review of the record reveals that the Tenants described PX 167 as a "digest" of twenty-one (21) emails among the tenants in the Housing Accommodation discussing construction noise. Hearing CD (OAH Sept. 10, 2009) at 11:35.

The Commission's standard of review, and the relevant legal standard governing the ALJ's admission of exhibits into evidence are set forth *supra* at 33. 14 DCMR § 3807.1; Pub.

Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,* Compton, 858 A.2d at 476 n.9; Metro. Baptist Church, 718 A.2d at 129; Haight, 439 A.2d at 491.

As stated *supra* at 33, the ALJ is required to exclude "irrelevant, immaterial, and unduly repetitious evidence" from the record. D.C. OFFICIAL CODE § 2-509(b). Hearsay evidence[18] is generally admissible in administrative proceedings; however, an ALJ is tasked with determining the reliability of hearsay evidence, which may include the evaluation of the following factors: "whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn." Young v. United States, 863 A.2d 804, 809 n.6 (D.C. 2004) (quoting Wisconsin Ave. Nursing Home v. D.C. Human Rights Comm'n, 527 A.2d 282, 288 (D.C. 1987)); Compton, 858 A.2d at 477; Gropp v. D.C. Bd. of Dentistry, 606 A.2d 1010, 1014 & n.10 (D.C. 1992)

The Commission determines that the ALJ did not abuse her discretion where substantial record evidence supports her grounds for denying the admission of PX 167. 14 DCMR § 3807.1. For example, the substantial record evidence supports the ALJ's determinations that the Tenants failed to demonstrate that the relevance of PX 167 to their Tenant Petition, where they did not testify regarding how the complaints of other tenants at the Housing Accommodation were relevant to their claim of reductions in services and/or facilities specifically in their unit.[19] Hearing CD (OAH Sept. 10, 2009) at 1:35-1:40. Additionally, the Commission's review of the record corroborates the ALJ's determinations that the emails were not signed by any of their

[18] "Hearsay" is defined as "an out-of-court statement offered to prove the truth of the matter asserted." Smith v. United States, 26 A.3d 248, 260 (D.C. 2011) (quoting Dutch v. United States, 997 A.2d 685, 688 (D.C. 2010)); Walker v. United States, 982 A.2d 723, 736 (D.C. 2009).

[19] The Commission notes that the Tenants do not specifically appeal the ALJ's determination that they failed to prove the relevance of PX 167.

authors, and that the authors of the emails were not present at the hearing for cross-examination by the Housing Provider. Hearing CD (OAH Sept. 10, 2009) at 11:46-11:48. *See, e.g.,* Compton, 858 A.2d at 479 ("Where . . . the declarant is unavailable to testify and be cross-examined, the practice of relying exclusively on hearsay is strongly discouraged"); Glenbrook Rd. Ass'n v. D.C. Bd. of Zoning Adjustment, 605 A.2d 22, 48 (D.C. 1992) ("'This Court has been zealous to protect [the rights of cross-examination and confrontation] from erosion . . . in all types of cases where administrative and regulatory actions were under scrutiny.'" (quoting Goldberg v. Kelly, 397 U.S. 254, 269 (1970))).

Accordingly, where the record evidence supports a determination that the ALJ gave due consideration to the reliability and relevancy of PX 167, including whether the emails were signed by their authors, whether the authors of the emails were present for cross-examination by the Housing Providers, and whether the complaints in the emails related specifically to the Tenants' unit, the Commission is satisfied that the exclusion of PX 167 from evidence was not an abuse of discretion. 14 DCMR § 3807.1; Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See* Young, 863 A.2d at, 809 n.6; Compton, 858 A.2d at 477; Gropp, 606 A.2d at 1014 & n.10. Thus, the ALJ is affirmed on this issue.

E. Whether the ALJ erred by admitting the Housing Providers' exhibit RX 211, five pages of various building work permits.

The Tenants assert on appeal that the ALJ erred by admitting into evidence RX 211, five (5) pages of building work permits, because the Housing Providers' witness Tanya Marhefka did not have sufficient knowledge of the contents of the documents, and she had not been involved in the process of obtaining the permits.[20] Notice of Appeal at 76-77.

[20] The Commission's review of the record reveals that the Tenants objected at the OAH hearing to the admission of RX 211, building work permits, on the basis that Ms. Marhefka, as a lay person, was not qualified to testify as to

The DCCA has adopted the jurisdictional requirement of "standing" before an appellate court will decide the merits of a claim, in order to promote judicial economy. *See* Grayson v. AT&T Corp., 13 A.3d 219, 229 (D.C. 2011) (stating that "standing" is a threshold jurisdictional question) (citing Bochese v. Town of Ponce Inlet, 405 F.3d 964, 974 (11th Cir. 2005)); Highland Park Apartments, RH-TP-09-29,593; Miller v. Daro Realty, RH-TP-08-29,407 (RHC Sept. 18, 2012). In order for a party to have "standing," there must be an allegation of "an actual or imminently threatened injury;" a mere contingent or speculative interest in a problem is not sufficient. *See* York Apartments Tenants Ass'n v. D.C. Zoning Comm'n, 856 A.2d 1079, 1084 (D.C. 2004) (determining that appellant lacked standing because it failed to allege any actual injuries to its members, rather than merely generalized grievances); Friends of Tilden Park, Inc. v. District of Columbia, 806 A.2d 1201, 1206-1207 (2002) (holding that alleged threat to natural resources that appellant sought to protect was not a concrete injury in fact for standing purposes, without a showing that a member of appellant's organization would suffer actual injury); Miller, RH-TP-08-29,407 (determining that where tenant association was not a party to the OAH proceedings on a tenant petition, they had not suffered any actual injury from the decision and thus lacked standing to appeal the decision to the Commission).

The Commission's review of the Final Order reveals no substantial evidence that the ALJ cited to, or otherwise relied upon RX 211 in reaching her decision on the Tenant Petition. *See* Final Order at 6-22; R. at 1310-26. Furthermore, the Tenants have not provided any citation to a particular finding of fact or conclusion of law in which the ALJ relied upon RX 211 in making her determinations. Notice of Appeal at 76-77. *See* Tenants' Brief at 76-77. Finally, the

---

whether the work listed in the building permits had actually been performed. Hearing CD (OAH Sept. 10, 2009) at 3:27-3:28. However, the Commission observes that the Tenants did not present any witnesses or testimony to contradict the contents of RX 211, or Ms. Marhefka's testimony related to RX 211. Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009).

Commission observes that the Tenants have not made any allegations regarding how they have been injured by the ALJ's admission of RX 211 into evidence. Notice of Appeal at 76-77. *See* Tenants' Brief at 76-77.

Following its review of the record, the Commission is satisfied that the Tenants have not alleged "an actual or imminently threatened injury" resulting from the ALJ's admission of RX 211 into evidence. *See* Grayson, 13 A.3d at 229; York Apartments Tenants Ass'n, 856 A.2d at 1084; Friends of Tilden Park, Inc., 806 A.2d at 1206-1207; Highland Park Apartments, RH-TP-09-29,593; Miller, RH-TP-08-29,407. The Commission thus determines, for the reasons stated *supra* at 36-37, that the Tenants lack standing to appeal the admission of RX 211, and thus dismisses this issue. *See* Grayson, 13 A.3d at 229; York Apartments Tenants Ass'n, 856 A.2d at 1084; Friends of Tilden Park, Inc., 806 A.2d at 1206-1207; Highland Park Apartments, RH-TP-09-29,593; Miller, RH-TP-08-29,407.

F. Whether the ALJ erred by failing to admit into evidence PXs 100(a)-(c), 112, and 182, for not being properly identified, and by admitting into evidence the Housing Providers' exhibit RXs 212-215 that were not properly identified.[21]

The Tenants assert on appeal that the ALJ erred by admitting into evidence RXs 212-215. Notice of Appeal at 77-78. The Tenants contend that the Housing Providers did not provide any

[21] As the Commission previously stated, the record evidence demonstrates that PXs 100(a)-(c) were admitted into evidence. *See supra* at 31. Additionally, the Commission has previously considered whether the ALJ erred by excluding PX 112(a)-(b). *See supra* at 30-32. Thus, the Commission will not consider in its discussion of this issue whether the ALJ erred by failing to admit PXs 100(a)-(c), and 112 into evidence.

The Commission notes that the Tenants have not specified the nature of the ALJ's error in not admitting PX 182 into evidence. Notice of Appeal at 77. Nevertheless, as stated *supra* at 33, the ALJ is required to exclude "irrelevant, immaterial, and unduly repetitious evidence" from the record, and an ALJ is tasked with determining the reliability of hearsay evidence. D.C. OFFICIAL CODE § 2-509(b); Young, 863 A.2d at 809 n.6; Compton, 858 A.2d at 477; Gropp, 606 A.2d at 1014 & n.10. The Commission determines that the ALJ did not abuse her discretion in not admitting PX 182, a letter from the "KWRA Board," where the substantial record evidence supports the ALJ's determinations that PX 182 was undated, unsigned, and that the author(s) of PX 182 was not present at the OAH hearing for cross-examination by the Housing Provider. 14 DCMR § 3807.1; Young, 863 A.2d at 809 n.6; Compton, 858 A.2d at 477; Gropp, 606 A.2d at 1014 & n.10; Hearing CD (OAH Sept. 10, 2009) at 1:20.

testimony on PX 212, a photograph of the posting of a rent adjustment notice, regarding the date the photograph was taken, or the location in the Housing Accommodation that the photograph was taken. *Id.* Additionally, the Tenants state that RXs 213-215, Certificates of Election and Amended Registration forms, were not properly identified because the Housing Providers did not offer testimony regarding authorship of the forms, or the date of their preparation. *Id.* at 78.

The Commission's standard of review, and the relevant legal standard governing the ALJ's admission of exhibits into evidence are set forth *supra* at 33. 14 DCMR § 3807.1; Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,* Compton, 858 A.2d at 476 n.9; Metro. Baptist Church, 718 A.2d at 129; Haight, 439 A.2d at 491. The ALJ is given broad discretion concerning the admission of evidence, and is required to exclude "irrelevant, immaterial, and unduly repetitious evidence" from the record. D.C. OFFICIAL CODE § 2-509(b); 14 DCMR § 3807.1; Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,* Compton, 858 A.2d at 476 n.9; Metro. Baptist Church, 718 A.2d at 129; Haight, 439 A.2d at 491.

The Commission has consistently stated that credibility determinations are committed to the "sole and sound discretion" of the ALJ, and that the Commission's role is not to "weigh the testimony and substitute ourselves for the trier of fact who heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony." *See* Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014); Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012) (quoting Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 (D.C. 1994)); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012).

1. Whether the ALJ erred by admitting RX 212 into evidence

The DCCA has stated that the admission of photographic evidence is entrusted to the discretion of the trial judge. *See* Jones v. United States, 27 A.3d 1130, 1142 (D.C. 2011); Washington Post v. D.C. Dep't of Emp't Servs., 675 A.2d 37, 43 (D.C. 1996); Henderson v. United States, 527 A.2d 1262, 1264 n.1 (D.C. 1987). The test of whether a photograph is admissible is whether the "photograph accurately represents the facts allegedly portrayed by it." Jones, 27 A.3d at 1142 (quoting Henderson, 527 A.2d at 1264). *See* Washington Post, 675 A.2d at 43; Henderson, 527 A.2d at 1264 n.1.

The Commission observes that the Housing Providers' witness, Ms. Marhefka, testified that she took the photographs in RX 212, and that they accurately reflect what is depicted in them. Hearing CD (OAH Sept. 10, 2009) at 3:14. Ms. Marhefka also testified that the amended registration form that appeared in the photograph of RX 212 was the same amended registration form that had been submitted into evidence as the Tenants' PX 149. *Id.* at 3:17. Finally, the Commission notes that Ms. Marhefka testified that she took the photographs in RX 212 with a copy of a March, 22, 2006 issue of the Washington Post newspaper in the background, in order to show the date that the photograph had been taken. *Id.* at 3:16. The ALJ admitted RX 212 over the Tenants' objection, noting that Ms. Marhefka's testimony regarding the details of RX 212 was subject to cross-examination.[22] *Id.* at 3:28.

The Commission is satisfied that the ALJ's admission of RX 212 was not an abuse of discretion. 14 DCMR § 3807.1; Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,* Compton, 858 A.2d at 476 n.9; Metro. Baptist Church, 718 A.2d at 129; Haight, 439 A.2d at

[22] The Commission's review of the record reveals that, in contradiction to Ms. Marhefka's testimony, the Tenants testified at the OAH hearing that they never saw any amended registration forms posted in the Housing Accommodation. Hearing CD (OAH Sept .9, 2009) at 2:18, 3:00. Nevertheless, as the Commission stated *supra* at 39, credibility determinations are committed to the "sole and sound discretion" of the ALJ, and that the Commission will not substitute itself for the ALJ who "heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony." *See* Notsch, RH-TP-06-28,690; Kuratu, RH-TP-07-28,985; Marguerite Corsetti Trust, RH-TP-06-28,207.

491. The Commission observes that Ms. Marhefka testified that the photograph was an accurate representation of the amended registration form that it depicted. Hearing CD (OAH Sept. 10, 2009) at 3:14-3:18. *See* Jones, 27 A.3d at 1142; Washington Post, 675 A.2d at 43; Henderson, 527 A.2d at 1264 n.1. The Commission notes that the Tenants' objections to RX 212 relate more to whether Ms. Marhefka's testimony was credible, than whether RX 212 was irrelevant, immaterial, or unduly repetitious. D.C. OFFICIAL CODE § 2-509(b); Notice of Appeal at 77-78; Hearing CD (OAH Sept. 10, 2009) at 3:27-3:28. As noted, credibility determinations are committed to the sole and sound discretion of the ALJ. *See* Jones, 27 A.3d at 1142; Washington Post, 675 A.2d at 43; Henderson, 527 A.2d at 1264 n.1. The Commission is satisfied that the ALJ's credibility determination of Ms. Marhefka's testimony was not an abuse of discretion. *See* 14 DCMR § 3807.1; Jones, 27 A.3d at 1142; Washington Post, 675 A.2d at 43; Henderson, 527 A.2d at 1264 n.1.

Accordingly, the Commission affirms the ALJ on this issue. 14 DCMR § 3807.1.

2. Whether the ALJ erred by admitting RXs 213-215 into evidence

The Commission observes that the Housing Providers' witness, Ms. Marhefka testified that RXs 213-215 were updates that were posted in the Housing Accommodation to provide information to tenants, including a notice that Certificates of Election and Amended Registration forms were located in the management office, dated October 1, 2004, October 8, 2004, and October 15, 2004, respectively. Hearing CD (OAH Sept. 10, 2009) at 4:34-4:39. The ALJ admitted RXs 213-215 over the Tenants' objection, explaining that their objection went to the weight that she should afford the exhibits when making her decision. *Id.* at 4:49-4:51.

The Commission is satisfied that the ALJ's admission of RXs 213-15 was not an abuse of discretion. 14 DCMR § 3807.1; Pub. Serv. Comm'n of D.C., 802 A.2d at 379. *See also, e.g.,*

Compton, 858 A.2d at 476 n.9; Metro. Baptist Church, 718 A.2d at 129; Haight, 439 A.2d at 491. The Commission's review of the record leads it to concur in the ALJ's conclusion that the Tenants' objections to RXs 213-215 relate more to whether Ms. Marhefka's testimony was credible regarding when and where the exhibits had been posted in the Housing Accommodation, rather than whether RXs 213-15 were irrelevant, immaterial, or unduly repetitious. D.C. OFFICIAL CODE § 2-509(b); Notice of Appeal at 77-78; Hearing CD (OAH Sept. 10, 2009) at 4:49-4:51. The Commission has consistently stated that credibility determinations are committed to the discretion of the ALJ, and that the Commission will not substitute itself for the trier of fact for credibility determinations. *See* Notsch, RH-TP-06-28,690; Kuratu, RH-TP-07-28,985; Marguerite Corsetti Trust, RH-TP-06-28,207. For the reasons stated herein, the Commission concludes that the ALJ did not err by admitting RXs 213-215 into evidence. *See* Notsch, RH-TP-06-28,690; Kuratu, RH-TP-07-28,985; Marguerite Corsetti Trust, RH-TP-06-28,207.

Accordingly, the ALJ is affirmed on this issue. 14 DCMR § 3807.1.

G. Whether the ALJ erred in ruling that the Tenants' case had to be limited to the boxes that were checked on the Tenant Petition, and that the Tenants' attempts to notify OAH and the Housing Providers of the details of their claims were invalid.

H. Whether the ALJ erred by failing to allow the Tenants to include improper registration as a claim in their Tenant Petition.

I. Whether the ALJ erred by failing to allow presentation and proof of improper rent charged and rent ceiling increases due to existing housing code violations.

J. Whether the ALJ erred by failing to allow testimony and the submission of evidence regarding a series of power and water shut-offs, water leaks, and other disruptions caused by the actions of the Housing Providers.

K. Whether the ALJ erred by failing to allow the Tenants to present evidence that B.F. Saul Property Company was a manager of the Housing Accommodation, and thus an unregistered housing provider.

L. Whether the ALJ erred by failing to allow the Tenants to question the Housing Providers' witness Tanya Marhefka, the general manager of the Housing Accommodation, regarding the entity that was actually managing the Housing Accommodation.

M. Whether the ALJ erred by failing to include all housing providers in existence during the time period relevant to the Tenant Petition, including First Union National Bank of Virginia, U.S. Bank National Association, and TIAA-CREF, as respondents in this case.

At the OAH hearing, the Tenants repeatedly attempted to present evidence related to the propriety of the Housing Accommodation's registration, as well as housing code violations.[23] *See, e.g.,* Hearing CD (OAH Sept. 9, 2009) at 11:57, 2:19, 2:22, 2:23. The ALJ determined at the OAH hearing that the Tenants had not properly raised these two issues in the Tenant Petition, and also denied the Tenants' request to amend the Tenant Petition to add the claims of improper registration and housing code violations. *Id.* at 11:22-11:28, 2:19-2:20.

The Commission observes that each of the above-recited issues, G through M, raised on appeal by the Tenants, relate to the ALJ's determination that the Tenants were not permitted to litigate claims of improper registration and housing code violations at the OAH hearing. Notice of Appeal at 2-5. The Commission will address these issues as follows: (1) whether the ALJ erred in her identification and determination of the claims that had been raised in the Tenant Petition; and (2) whether the ALJ erred by denying the Tenants' requests to amend the Tenant Petition.

As the Commission has previously stated, its standard of review is contained at 14 DCMR § 3807.1. *See supra* at 24. This Commission will defer to the ALJ's decision so long as it is not arbitrary, capricious, or an abuse of discretion, and flows rationally from the facts and is

[23] Based on its review of the record, the Commission notes that issues H, K, L, and M relate to the Tenants' claim that the Housing Accommodation was not properly registered; issues I, and J relate to the Tenants' claim of housing code violations. *See, e.g.,* Hearing CD (OAH Sept. 9, 2009) at

supported by substantial evidence. 14 DCMR 3807.1. *See also, e.g.,* Hardy, RH-TP-09-29,503; Bohn, RH-TP-08-29,328; Tenants of 4021 9th St., N.W., HP 20,812; *supra* at 24.

1. Whether the ALJ erred in her identification and determination of the claims that had been raised in the Tenant Petition.

The Tenants maintain that the ALJ erred in determining that the claims at issue in their case were limited to the boxes that had been checked in their Tenant Petition, and by not letting them present evidence on claims of improper registration and housing code violations. Notice of Appeal at 16-22, 47-49. In support, they cite Parreco v. D.C. Rental Hous. Comm'n., 885 A.2d 327 (D.C. 2005), for the proposition that "a claim can be raised at any time, even at the hearing, as long as the other side has a chance to respond." *See, e.g., id.* at 19, 21, and 49. They also assert that the issues identified in their Tenant Petition "implicitly cover" registration as an issue and "that if any box is checked on the tenant petition form, that always and automatically raises notice of registration issues." *Id.* at 20-21, 65-69.

The ALJ found that the Tenant Petition did not put the Housing Providers on notice of claims of registration and housing code violations, because, even though the Tenant Petition form contained these claims, the Tenants did not select them. Final Order at 3-4; R. at 1328-29 (citing Parreco, 885 A.2d at 334). *See* Hearing CD (OAH Sept. 9, 2009) at 11:21-11:22.

In Parreco, 885 A.2d at 334, the DCCA held as follows: "A [tenant] petition must give a defending party notice of the grounds upon which a claim is based, so that the defending party has the opportunity to adequately prepare its defense and thus ensure that the claim is fully and fairly litigated." Parreco, 885 A.2d at 334 (citing Autocomp, Inc. v. Publishing Computer Servs., Inc., 331 A.2d 338, 340 (D.C. 1975) (holding that pleadings in a complaint did not give defendant fair notice of a separate theory of recovery that plaintiff sought to prove at trial)). *See* Coleman, RH-TP-06-28,833 (determining that the ALJ erred by considering claims related to

rent increases in 2004 and 2005, where the only rent increase challenged in the tenant petition occurred in 2006). The Commission notes that the facts of Parreco, 885 A.2d 327, are substantially similar to the facts of this case.

In Parreco, 885 A.2d 327, the tenant did not check the box on the tenant petition form to allege that he did not receive proper notice of a rent increase; nevertheless, the hearing examiner found that the notice of the rent increase was improper, and ordered a rent rollback and imposed a fine on the housing provider. Parreco, 885 A.2d at 330-31. The housing provider appealed, first to the Commission, and subsequently to the DCCA, asserting that it was error for the hearing examiner to make findings on a claim that had not been raised in the tenant petition, and the DCCA agreed. *Id.* at 332-33. The DCCA held the following:

> Given the multitude of reasons why a tenant could complain that rent is unjustifiably high, and the specific reasons listed on the petition form (*e.g.*, retaliation, discrimination, poor condition of apartment), it is unreasonable to expect the landlord to have inferred a challenge to the adequacy of the notice of rent increase, and to have been prepared to defend on that ground.

Id. at 334. Additionally, the Court explained that the tenant petition form had prompted the tenant to raise the issue of defective notice, but the tenant did not check the box or allege anything regarding defective notice in the narrative space of the petition. *Id.* at 333-34.

Similar to the facts of Parreco, 885 A.2d 327, the Tenant Petition form prompted the Tenants in this case to raise the issues of improper registration and housing code violations, but the Commission's review of the record reveals that the Tenants neither checked the appropriate boxes to raise the claims, nor included any details regarding these claims in the narrative space of the Tenant Petition. *See* Tenant Petition at 3-6; R. at 5-8. *See* Parreco, 885 A.2d at 333-34. In light of the DCCA's legal analysis and conclusion in Parreco, 885 A.2d at 334, *supra*, regarding the number and variety of claims listed on a tenant petition form, the Commission

determines that it would be unreasonable to expect the Housing Providers to infer that the Tenants were challenging registration and housing code violations when there was no specific identification of these claims on the Tenant Petition form. Parreco, 885 A.2d at 334; Coleman, RH-TP-06-28,833. Accordingly, based upon DCCA and Commission precedent, the Commission is satisfied that the ALJ's determination that the Tenant Petition did not raise the claim of improper registration was not arbitrary, capricious, or an abuse of discretion, and was supported by substantial record evidence. 14 DCMR 3807.1; Parreco, 885 A.2d at 334; Hardy, RH-TP-09-29,503; Bohn, RH-TP-08-29,328; Tenants of 4021 9th St., N.W., HP 20,812. Thus the ALJ is affirmed on this issue.

2. Whether the ALJ erred by denying the Tenants' requests to amend the Tenant Petition.

The Tenants assert the ALJ's determination that they could not amend their Tenant Petition at the OAH hearing was error because they gave the Housing Providers "adequate notice" of the claims of improper registration and housing code violations, and because they had attempted "to amend and supplement" their Tenant Petition prior to the OAH hearing in the following instances: (1) in a January 26, 2007 Motion to Expand the Scope of the Proceeding (hereinafter "Motion to Expand the Scope"); (2) through "an outline of our claims and issues at a status conference held on May 27, 2009" (hereinafter "May 27, 2009 Outline"); (3) in a July 1, 2009 discovery motion (hereinafter, "Discovery Motion"); (4) in their August 21, 2009 and August 26, 2009 motions for partial summary disposition (hereinafter collectively "Motions for Partial Summary Disposition"); and (5) in their "Reply to Opposition to Consolidation" of the

tenant petitions (hereinafter "Reply to Opposition to Consolidation"). *See* Notice of Appeal at 16-18, 22, 48, and 64.[24]

Under OAH regulation 1 DCMR § 2801.2, "[w]here a procedural issue coming before this administrative court is not specifically addressed in these Rules, this administrative court may rely upon the District of Columbia Superior Court Rules of Civil Procedure as persuasive authority." The D.C. Superior Court Rules of Civil Procedure provide the following regarding amendments to pleadings, in relevant part:

> . . . a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . . . No motion to amend will be considered unless it recites that the movant sought to obtain the consent of parties affected, that such consent was denied and the identity of the party or parties who declined to consent.

Super. Ct. Civ. R. 15(a).

The DCCA has held that "leave to amend is within the discretion of the trial court." Johnson v. Fairfax Village Condominium IV Unit Owners Ass'n, 641 A.2d 495, 501 (D.C. 1994) (citing Super. Ct. Civ. R. 15 (a); Gordon v. Raven Systems & Research, Inc., 462 A.2d 10, 13 (D.C. 1983)). "Absent a clear showing of an abuse of discretion, the trial court's exercise of its discretion . . . will not be disturbed on appeal." *Id.* (citing Brown v. Dyer, 489 A.2d 1081, 1084 (D.C. 1985); Gordon, 462 A.2d at 13). *See also* Han v. Southeast Acad. Of Scholastic Excellence Pub. Charter Sch., 32 A.3d 413, 417 (D.C. 2011) (finding no abuse of discretion when judge refused amendment after summary judgment proceedings that would have alleged a new time period and required additional discovery); Flax v. Schertler, 935 A.2d 1091, 1105

[24] The Commission observes that a number of the documents cited by the Tenants in the Notice of Appeal do not appear in the official record for this case, including the January 26, 2007 Motion to Expand the Scope, the May 27, 2009 Outline, and the Reply to Opposition to Consolidation. As such, these documents referenced by the Tenants in the Notice of Appeal are new evidence that the Commission is prohibited from considering for the first time on appeal. 14 DCMR § 3807.5 ("The Commission shall not receive new evidence on appeal"). *See* Williams v. Thomas, TP 28,530 (RHC Sept. 27, 2013).

(D.C. 2007) ("'undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by previous amendments, and undue prejudice to the opposing party, are all valid grounds for refusing to allow amendment.'" (quoting Howard Univ. v. Good Food Servs., Inc., 608 A.2d 116, 120 (D.C. 1992))).

First, the Commission's review of the record reveals that the ALJ did not abuse her discretion by refusing to accept the Discovery Motion or the Motions for Partial Summary Disposition as motions to amend the Tenant Petition. 14 DCMR § 3807.1. The Tenants do not contend, and the Commission's review of the record does not support, that either of these documents requested leave of the court to amend the Tenant Petition. Super. Ct. Civ. R. 15 (a); Notice of Appeal at 16-18, 22, 48, and 64. *See, e.g.,* August 26, 2009 Motion for Partial Summary Judgment at 1-23; August 21, 2009 Motion for Partial Summary Disposition at 1-38; Discovery Motion at 1-4; R. at 941-47, 1025-62, 1067-89. Furthermore, the Tenants do not contend, and the Commission's review of the record does not support, that either of these documents indicated that the Tenants sought or received consent from the Housing Providers to amend the Tenant Petition. Super. Ct. Civ. R. 15 (a); Notice of Appeal at 16-18, 22, 48, and 64. *See, e.g.,* August 26, 2009 Motion for Partial Summary Judgment at 1-23; August 21, 2009 Motion for Partial Summary Disposition at 1-38; Discovery Motion at 1-4; R. at 941-47, 1025-62, 1067-89.

Accordingly, where the Commission's review of the record reveals that the Tenants failed to comply with the regulations regarding amendments in the Discovery Motion and the Motions for Partial Summary Disposition, the Commission is not persuaded that the ALJ abused her discretion by refusing to accept such filings as requests to amend the Tenant Petition. 14

DCMR § 3807.1; Super. Ct. Civ. R. 15(a). *See* Han, 32 A.3d at 417; Flax, 935 A.2d at 1105; Johnson, 641 A.2d at 501.

Second, the Commission is not persuaded that the ALJ abused her discretion by denying the Tenants' request to amend the Tenant Petition at the start of the OAH hearing. 14 DCMR § 3807.1. The Commission's review of the record reveals that the ALJ denied the Tenants' request to litigate claims of improper registration and housing code violations at the September 9, 2009 and September 10, 2009 OAH hearings because she determined that the Housing Providers had not been given proper notice that the claims were at issue. Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009). The Commission is not persuaded that the ALJ committed an abuse of discretion in finding that the Housing Providers had not been put on proper notice regarding these claims at any time prior to the OAH hearing, where the Commission has already determined that improper registration and housing code violations were not included in the Tenant Petition, and that the Tenants did not move to amend the Tenant Petition. 14 DCMR § 3807.1; Super. Ct. Civ. R. 15(a); Han, 32 A.3d at 417; Flax, 935 A.2d at 1105; Parreco, 885 A.2d at 334; Johnson, 641 A.2d at 501; Hardy, RH-TP-09-29,503; Bohn, RH-TP-08-29,328; Tenants of 4021 9th St., N.W., HP 20,812. *See supra* at 43-48.

Accordingly, the ALJ is affirmed on this issue.

N. Whether the ALJ erred by dismissing the Tenants claims of improper rent increases on November 1, 2004, November 1, 2005, and May 1, 2006, because the Tenants introduced no evidence of the actual rent increases.

O. Whether the ALJ erred by determining that letters sent to the Tenants from the Housing Providers notifying the Tenants of planned rent ceiling and rent charged increases satisfied the "posting or mailing" requirements under 14 DCMR § 4101.6.

P. Whether the ALJ erred by requiring the Tenants to cite case law, provisions of the Act, or the housing regulations to support their contention that a rent ceiling adjustment must be taken and perfected

within thirty (30) days of a decision and order authorizing a capital improvement petition rent ceiling increase, despite that decision and order being appealed.

In issues N, O, and P on appeal, the Tenants raise allegations of error related to the ALJ's conclusion that the Tenants had failed to prove that rent charged increases effective November 1, 2004, November 1, 2005, and May 1, 2006 were improper. The Commission will address the ALJ's determinations for each of the rent increases, respectively.

1. November 1, 2004 rent increase

The Tenants contend that the ALJ erred in determining that they failedto prove that the November 1, 2004 rent increase was invalid for the following reasons: (1) the ALJ was mistaken in finding that the Tenants failed to provide evidence identifying the amount of the rent increase; (2) the Housing Providers' exhibits show the relevant rent and rent ceiling increase history for the Tenants' unit; and (3) the rent ceiling increase implemented in the November 1, 2004 rent increase was invalid because the Housing Providers did not comply with the notice requirements of 14 DCMR § 4101.6.[25] Notice of Appeal at 23-27, 36-43.

In relation to the November 1, 2004 rent increase, the ALJ found that the Tenants did not offer into evidence any exhibits or testimony concerning the amount of the increase. Final Order at 7; R. at 1325. Instead, the ALJ explained, the Tenants attempted to introduce several Certificates of Election as well as affidavits from other tenants concerning whether the Certificates of Election were properly "posted" in accordance with 14 DCMR § 4101.6. *Id.* The ALJ determined that the Tenants had failed to identify a particular Certificate of Election that

---

[25] 14 DCMR § 4101.6 provides the following:

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

was used by the Housing Providers for the November 1, 2004 rent increase. *Id.* at 7-8; R. at 1324-25. Regarding the Tenants contention that the Housing Providers failed to comply with the notice requirements of 14 DCMR § 4101.6, the ALJ stated that the Tenants' reliance on this regulation was misplaced for the following reasons:

> [T]he regulation requires the housing providers to post a true copy of the Registration/Claim of Exemption form or mail it to the tenant. The [T]enants testified that they received the notice for the rent increase effective November 1, 2004; so even if [14 DCMR §] 4101.6 was applicable to the [T]enants claim, posting is only required if the housing provider does not mail a true copy to the tenant.

Id. at 10; R. at 1322.

Under the Act's regulations, at 14 DCMR § 4205.7, each adjustment in rent charged "may not exceed the amount of one (1) rent ceiling increase perfected but not implemented by the housing provider." *See* Sawyer v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 103 (D.C. 2005) (a housing provider "must perfect its entitlement to a rent ceiling adjustment in accordance with regulatory requirements in order to 'implement' the adjustment in a rent increase."). An adjustment in rent charged will be invalid where it is based on an unperfected adjustment in rent ceiling. Hinman, RH-TP-06-28; Grant, TP 27,995.

Based on its review of the record, the Commission is satisfied that the ALJ's determination that the Tenants failed to prove that the November 1, 2004 rent increase was improper was in accordance with the provisions of the Act and was supported by substantial evidence. 14 DCMR § 3807.1. The Commission's review of the record confirms the ALJ's findings that the Tenants never testified or presented evidence regarding the amount their rent was increased on November 1, 2004, nor did the Tenants testify or present evidence regarding the rent ceiling adjustment that was used to increase their rent on November 1, 2004. *See* Hearing CDs (OAH Sept. 9-10, 2009).

Additionally, the Commission is satisfied that the ALJ was correct in finding that the Tenants' reliance on 14 DCMR § 4101.6 was misplaced. First, the Commission notes that 14 DCMR § 4101.6 contains notice requirements for rent ceiling adjustments, not rent charged adjustments. Therefore, if the Tenants contention is that their notice of the November 1, 2004 rent increase did not comply with 14 DCMR § 4101.6, the ALJ was correct in finding that their reliance on this regulation was misplaced. Second, to the extent that the Tenants are asserting that the rent ceiling adjustment that formed the basis of the November 1, 2004 rent increase violated 14 DCMR § 4101.6, the Commission has already affirmed the ALJ's finding that the Tenants failed to prove which rent ceiling adjustment was used for the November 1, 2004 rent increase, and thus failed to prove that their rent increase was improper.

Finally, assuming arguendo that the rent ceiling adjustment which formed the basis of the November 1, 2004 rent increase was invalid for any of the reasons claimed by the Tenants (i.e., improper notice, and failure to properly "take and perfect"), the Commission determines that where the Tenants failed to introduce any evidence of the amount of the November 1, 2004 rent increase, the ALJ would have had no substantial evidence on which to determine whether the Tenants' rent charged exceeded the legal rent ceiling, and thus award damages. D.C. OFFICIAL CODE § 42-350 9.01(a).[26] Therefore, assuming arguendo that the rent ceiling adjustment that formed the basis of the November 1, 2004 rent charged increase was invalid for any of the reasons claimed by the Tenants, the Commission determines that any such error constitutes

---

[26] D.C. OFFICIAL CODE § 42-3509.01(a) provides, in relevant part, the following:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter . . . shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling . . . .

(emphasis added).

"harmless error."[27] *See, e.g.,* Bohn Corp., RH-TP-08-29,328 at n.14; Jackson, RH-TP-12-28,898 at n.21; Young, TP 28,635.

For all of the foregoing reasons, the ALJ is affirmed on this issue.

2. November 1, 2005 rent increase

The Tenants contend that the ALJ erred in determining that they failed to prove that the November 1, 2005 rent increase was invalid for the following reasons: (1) the ALJ was mistaken in finding that the Tenants failed to provide evidence identifying the amount of the rent increase; (2) the Housing Providers' exhibits show the relevant rent and rent ceiling increase history for the Tenants' unit; and (3) the rent ceiling increase implemented in the November 1, 2005 rent increase was invalid because the Housing Providers did not comply with the notice requirements of 14 DCMR § 4101.6. Notice of Appeal at 23-27, 36-43.

In relation to the November 1, 2005 rent increase, the ALJ found that the Tenants did not offer into evidence any exhibits or testimony concerning the amount of the increase. Final Order at 11; R. at 1321. The ALJ determined that the Tenants had failed to identify a particular Certificate of Election that was used by the Housing Providers for the November 1, 2005 rent increase. *Id.* at 11-12; R. at 1320-21. Regarding the Tenants' contention that the Housing Providers failed to comply with the notice requirements of 14 DCMR § 4101.6, the ALJ stated

[27] The Commission defines "harmless error" as "an error which is trivial or merely academic and was not prejudicial to the substantive rights of the party assigning it, and in no way affected the final outcome of the case . . ." *See, e.g.,* Bohn Corp., RH-TP-08-29,328 at n.14 (determining that ALJ's application of a higher threshold than required by the Act for determining eligibility as a disabled tenant was harmless error); Jackson, RH-TP-12-28,898 at n.21 (deciding that ALJ's statement that the tenant could not appeal an order was harmless error where the Commission exercised jurisdiction over the appeal by accepting the filing of the tenant's notice of appeal); Young v Vista Mgmt., TP 28,635 (RHC Sept. 18, 2012) at n.5 (determining that hearing examiner's failure to include ex parte communication in the record was harmless error where the Commission was satisfied the hearing examiner did not consider the communication in the final order).

that the Tenants' reliance on this regulation was misplaced, for the same reasons given in relation to the November 1, 2004 increase. *Id.* at 12; R. at 1320. *See supra* at 51-52.

As the Commission explained previously, *supra* at 51, under the Act's regulations, each adjustment in rent charged "may not exceed the amount of one (1) rent ceiling increase perfected but not implemented by the housing provider." 14 DCMR § 4205.7. *See* Sawyer, 877 A.2d at 103. An adjustment in rent charged will be invalid where it is based on an unperfected adjustment in rent ceiling. Hinman, RH-TP-06-28; Grant, TP 27,995.

Based on its review of the record, the Commission is satisfied that the ALJ's determination that the Tenants failed to prove that the November 1, 2005 rent increase was improper was in accordance with the provisions of the Act and was supported by substantial evidence. 14 DCMR § 3807.1. The Commission's review of the record confirms the ALJ's findings that the Tenants never testified or presented evidence regarding the amount by which their rent was increased on November 1, 2005, nor did the Tenants testify or present evidence regarding the rent ceiling adjustment that was used to increase their rent on November 1, 2005. *See* Hearing CDs (OAH Sept. 9-10, 2009).

Additionally, for the reasons stated *supra* at 51-52, the Commission is satisfied that the ALJ was correct in finding that the Tenants' reliance on 14 DCMR § 4101.6 was misplaced. Finally, assuming arguendo that the rent ceiling adjustment which formed the basis of the November 1, 2005 rent increase was invalid for any of the reasons claimed by the Tenants (i.e., improper notice, and failure to properly "take and perfect"), the Commission determines that where the Tenants failed to introduce any evidence of the amount of the November 1, 2005 rent increase, the ALJ would have had no basis on which to award damages. D.C. OFFICIAL CODE § 42-3509.01(a). *See supra* at 52 n.26. Therefore, assuming arguendo that the rent ceiling

adjustment that formed the basis of the November 1, 2005 rent charged increase was invalid for any of the reasons claimed by the Tenants, the Commission determines that any such error constitutes "harmless error," as defined *supra* at n.27. *See, e.g.,* Bohn Corp., RH-TP-08-29,328 at n.14; Jackson, RH-TP-12-28,898 at n.21; Young, TP 28,635.

Accordingly, the ALJ is affirmed on this issue.

3. May 1, 2006 rent increase

The Tenants asserted at the OAH hearing, and again on appeal, that the May 1, 2006 rent charged increase was invalid because it was based on a capital improvement rent ceiling increase that the Housing Providers had failed to perfect within the proper time period. Notice of Appeal at 44-47; Hearing CD (OAH Sept. 9, 2009) at 2:47. *See* Final Order at 13-15; R. at 1317-19. The Tenants also contend that the ALJ erred by finding that they had presented no evidence of the amount of the May 1, 2006 rent increase. Notice of Appeal at 28 (citing Hearing CD (OAH Sept. 9, 2009) at 2:10). Finally, the Tenants contend that the ALJ erred by stating that the Act's requirements for posting were not relevant to the May 1, 2006 rent increase. *Id.* at 36-43.

The ALJ determined that the May 1, 2006 rent increase was based on a capital improvement petition, which was approved by the Rent Administrator on March 24, 2004. Final Order at 13; R. at 1219. However, the ALJ found that the Tenants had not presented sufficient evidence to prove that the May 1, 2006 rent increase was improper. *Id.* at 15; R. at 1317. Moreover, even if the rent increase had been improper, the ALJ determined that the Tenants had not presented her with sufficient evidence to award damages. *Id.* The reasons she provided for her findings were that the Tenants had not introduced any evidence of the notice of rent increase or testimony concerning the contents of the notice, nor did the Tenants provide any evidence of the rent charged before or after the May 1, 2006 rent increase. Final Order at 14; R. at 1318.

As stated previously, *supra* at 24, the Commission will uphold an ALJ's decision where it is in accordance with the provisions of the Act and supported by substantial evidence. 14 DCMR § 3807.1.

In order for a housing provider to implement an adjustment in rent charged, the adjustment in rent charged must be based on a properly taken and perfected adjustment in rent ceiling. *See* Sawyer, 877 A.2d at 103; Hinman, RH-TP-06-28; Grant, TP 27,995. The regulations concerning the taking and perfecting of a capital improvement rent ceiling adjustment provide the following:

> 4210.14 A housing provider shall take and perfect a rent ceiling adjustment to recover the cost of capital improvements in the manner set forth in § 4204.10, and the date of perfection shall be the date on which the housing provider satisfies the notice requirements of § 4101.6.
>
> 4210.23 A housing provider shall take and perfect a rent ceiling surcharge to recover the costs of capital improvements . . . by filing an amended registration form in accordance with § 4204.9 stating the amount of the surcharge for each rental unit. The date of perfection shall be the date on which the housing provider has filed the amended registration form with the Rent Administrator and posted or mailed it in accordance with § 4101.6.
>
> 4204.9 Except as provided in § 4204.10, any rent ceiling adjustment authorized by the Act and this chapter shall be . . . considered taken and perfected only if the housing provider has filed with the Rent Administrator a properly executed and amended Registration/Claim of Exemption Form as required by § 4103.1, and met the notice requirements of § 4101.6.
>
> 4204.10 Notwithstanding § 4204.9, a housing provider shall take and perfect a rent ceiling increase authorized by § 206(b) of the Act (an adjustment of general applicability) by filing with the Rent Administrator and serving on the affected tenant or tenants in the manner prescribed in § 4101.6 a Certificate of Election of Adjustment of General Applicability, which shall do the following: . . .
>
> > (c) Be filed and served within thirty (30) days following the date when the housing provider is first eligible to take the adjustment.
>
> 4103.1 Each housing provider of a rental unit or units covered by the Act shall file an amendment to the Registration/Claim of Exemption form provided by the Rent Administrator in the following circumstances: . .

> (d) Within thirty (30) days after the implementation of any rent increase or decrease allowed pursuant to [§] 210 . . . of the Act . . . .

14 DCMR §§ 4201.9-.10, 4210.10, 4210.23.[28]

The Commission's review of the Final Order reveals that the ALJ erred by not making any findings of fact or conclusions of law regarding whether the capital improvement rent ceiling increase that formed the basis of the May 1, 2006 rent charged increase had been properly taken and perfected in accordance with the regulations. Final Order at 13-15; R. at 1317-19. Nevertheless, the Commission is satisfied that this error was harmless.[29] *See, e.g.,* Bohn Corp., RH-TP-08-29,328 at n.14; Jackson, RH-TP-12-28,898 at n.21; Young, TP 28,635.

Even if the Tenants had proven that the May 1, 2006 rent increase was improper because the Housing Providers had failed to properly take and perfect the corresponding capital improvement rent ceiling adjustment, the Commission's review of the record reveals substantial evidence to support the ALJ's conclusion that the Tenants would not be entitled to damages because they had failed to prove that their rent charged exceeded their rent ceiling.[30] D.C.

---

[28] The Commission observes that the above-recited provisions contain two alternative procedures for taking a perfecting a capital improvement rent ceiling adjustment: (1) under 14 DCMR § 4210.14, a capital improvement rent ceiling adjustment is properly taken and perfected if a housing provider files a Certificate of Adjustment of General Applicability within thirty days following the date when the housing provider is first eligible to take the capital improvement rent ceiling adjustment, 14 DCMR §§ 4204.10(c), 4210.14; and (2) under 14 DCMR § 4210.23, a capital improvement rent ceiling adjustment is properly taken and perfected if a housing provider files an Amended Registration form within thirty days after the implementation of any rent increase pursuant to § 210 of the Act, which governs capital improvement petitions. 14 DCMR §§ 4103.1, 4204.9, 4210.23. The Commission need not resolve this inconsistency in this case, as it affirms the ALJ's decision on other grounds. Moreover, the Commission notes that subsequent to the capital improvement rent ceiling increase at issue in this case, the Act was amended to eliminate rent ceilings. D.C. Law 16-145 § 2(a) & (c), 53 D.C. Reg. at 4899-90 (2006).

[29] "Harmless error" is defined *supra* at n.27.

[30] The Tenants assert in their Notice of Appeal that the ALJ erred by finding that they had introduced no evidence of the amount of the May 1, 2006 rent increase. Notice of Appeal at 24. The Commission agrees with the Tenants that substantial evidence in the record indicates that the Tenants testified at the OAH hearing that their rent was increased on May 1, 2006 by $179. Hearing CD (OAH Sept. 9, 2009) at 2:10, 3:03-3:04. Nevertheless, the Commission is satisfied that the ALJ's finding on this issue was harmless error, *see supra* at n.27, because the Commission's review of the record reveals substantial evidence to support the ALJ's determination that the Tenants

OFFICIAL CODE § 42-3509.01(a). *See* Final Order at 15; R. at 1317. *See, also, e.g.* Notsch, RH-TP-06-28,690 (affirming ALJ's conclusion that the tenant was not entitled to a rent refund or damages where her rent charged did not exceed her rent ceiling); Covington v. Foley Props., Inc., TP 27,985 (RHC June 21, 2006) (instructing hearing examiner on remand to award a rent refund if the rent charged exceeds the rent ceiling); Redman v. Graham, TP 24,681 & TP 24,681A (RHC July 1, 2004) ("'The housing provider is liable for a rent refund only if the rent charged is higher than the reduced rent ceiling'" (quoting Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000))).

Accordingly, the ALJ is affirmed on this issue.

Q. Whether the ALJ erred by denying the Tenants' claim of substantial reductions or eliminations of services and facilities.

R. Whether the ALJ erred by distinguishing between a substantial reduction in related services and facilities and an elimination of related services and facilities, and in determining that the Tenants had not properly raised a claim of an elimination of services and facilities.[31]

The Tenants in their Notice of Appeal, separate their services and/or facilities claims into two categories: (1) "substantial reduction or elimination of services and/or facilities such as trash removal, a lounge and, most importantly, a convenience store for residents only;" and (2) "a substantial reduction of services and/or facilities caused by noise, just [sic] and other disturbance [sic] due to the Housing Providers' own activities in the building."

---

did not present any evidence regarding the amount of their rent charged either before or after the May 1, 2006 increase. Final Order at 15; R. at 1317. *See* Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009).

[31] The Commission's review of the Final Order reveals that the ALJ did not exclude the consideration of any of the claimed reductions in services and/or facilities based on whether they had been eliminated or simply reduced. *See* Final Order at 15-19; R. at 1313-17. Moreover, the Commission notes that the elements of a claim of elimination of services and facilities are the same as those for a reduction in services and facilities. *See* Dejean v. Gomez, RH-TP-07-29,050 (RHC Aug. 15, 2013); Kuratu, RH-TP-07-28,985; Pena v. Woynarowsky, RH-TP-06-28,817 (RHC Feb. 3, 2012); Ford v. Dudley, TP 23,973 (RHC June 3, 1999). Accordingly, any claim of elimination of services and/or facilities would suffer from the same lack of proof that the ALJ determined to apply to the Tenants claim of a reduction in services and/or facilities. Final Order at 15-19; R. at 1313-17. *See* Dejean, RH-TP-07-29,050; Kuratu, RH-TP-07-28,985; Pena, RH-TP-06-28,817; Ford, TP 23,973.

The Commission's standard of review is contained at 14 DCMR § 3807.1, and is recited *supra* at 24. The Commission will uphold an ALJ's determinations where they are supported by substantial evidence and in accordance with the provisions of the Act. 14 DCMR § 3807.1. Where substantial evidence exists to support the ALJ'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 examiner." *See* WMATA v. D.C. Dep't of Emp't Servs., 926 A.2d 140, 147 (D.C. 2007); Young, 865 A.2d at 540; Atchole v. Royal, RH-TP-10-29,891 (RHC Mar. 27, 2014); Marguerite Corsetti Trust, RH-TP-06-28,207; Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011). The Commission will not substitute its judgment of the evidence for that of the ALJ who had direct opportunity to assess witness testimony and credibility, as well as other evidence introduced by the parties. *See* WMATA, 926 A.2d at 147; Atchole, RH-TP-10-29,891; Marguerite Corsetti Trust, RH-TP-06-28,207; Hago, RH-TP-08-11,552 & RH-TP-08-12,085.

The services and facilities provision of the Act provides:

> If the Rent Administrator determines that the related services or related facilities supplied by a housing provider for a housing accommodation or for any rental unit in the housing accommodation are substantially increased or decreased, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities.

D.C. OFFICIAL CODE § 42-3502.11.

"Related services" and "related facilities" are defined terms under the Act, which provides as follows:

> (26) "Related facility" means any facility, furnishing, or equipment made available to a tenant by a housing provider, the use of which is authorized by the payment of the rent charged for a rental unit, including any use of a kitchen, bath, laundry facility, parking facility, or the common use of any common room, yard, or other common area.

> (27) "Related services" means services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse.

D.C. OFFICIAL CODE § 42-3501.03(26)-(27).

In addition, the Commission has stated:

> [F]or a tenant to successfully pursue a claim of reduction or elimination of services, a three-prong test must be satisfied. First, the tenant must provide evidence of a reduction or elimination of services, and the fact-finder must find that the housing provider eliminated or substantially reduced a service or services at the tenant's rental unit. Second, the tenant must establish the duration of the reduction in services, and present evidence to support his allegations. Third, the tenant must show that the housing provider had knowledge of the alleged reduction of services.

Ford, TP 23,973 (citations omitted). *See also* Dejean, RH-TP-07-29,050; Pena, RH-TP-06-28,817; 1773 Lanier Place, N.W., Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug 31, 2009).

The ALJ determined that the Tenants did not prove that any of the allegedly reduced services and/or facilities were related services and/or facilities as provided by the Act. Final Order at 16-19; R. at 1313-16. Additionally, the ALJ found that the Tenants did not testify or otherwise offer evidence regarding the specific dates that the services and/or facilities had allegedly been reduced or eliminated. *Id.*

Based on its review of the record, the Commission is satisfied that the ALJ's determination that the Tenants failed to carry their burden of proof with respect to their services and/or facilities claims was in accordance with the Act and supported by substantial evidence. 14 DCMR § 3807.1. *See* Final Order at 15-19; R. at 1313-17.

First, the Commission's review of the record reveals substantial evidence to support the ALJ's determination that the Tenants failed to prove that any of the services and/or facilities

were "related services" or "related facilities" as defined by the Act. D.C. OFFICIAL CODE § 42-3501.03(26)-(27); 14 DCMR § 3807.1. For example, the record reflects that the Housing Providers' witness, Ms. Tanya Marhefka, testified that according to the Housing Accommodation's Amended Registration, the related services and related facilities included in the payment of the Tenants' rent were a cooking range, a refrigerator, an elevator, an exterminator, a laundry room, a coin operated washer, and a coin operated dryer. Hearing CD (OAH Sept. 10, 2009) at 3:11. *See* D.C. OFFICIAL CODE§ 42-3501.03(26)-(27).

Second, in relation to the claimed reductions related to the removal of a convenience store and a lounge, the Commission's review of the record reveals that the Tenants did not prove one of the elements of their claim: the duration of the elimination or reduction. Dejean, RH-TP-07-29,050; Pena, RH-TP-06-28,817; Drell, TP 27,344; Ford, TP 23,973. *See generally,* Hearing CD (OAH Sept. 9, 2009); Hearing CD (OAH Sept. 10, 2009). For example, regarding the claimed reduction in services and/or facilities related to the removal of a lounge, the Tenants testified that the reduction occurred between 2004 and 2006. Hearing CD (OAH Sept. 10, 2009) at 11:09. Similarly, regarding the Tenants claim of a reduction in services and/or facilities related to the removal of a convenience store, the Tenants testified that the reduction occurred sometime in the three years prior to the filing of the Tenant Petition, or between 2003 and 2006. *Id.* at 10:59-11:01.

Finally, even if the Tenants had proven a reduction in services and/or facilities, the Commission is satisfied, based on its review of the record, that the ALJ would not have had any basis on which to award damages. *See* D.C. OFFICIAL CODE § 42-3509.01(a); Notsch, RH-TP-06-28,690; Covington, TP 27,985; Redman, TP 24,681 & TP 24,681A. Under the Act, if an ALJ determines that services and/or facilities have been substantially reduced, the ALJ may reduce

the tenant's rent ceiling to reflect the value of the reduced services and/or facilities, and may award damages only if the tenant's rent charged exceeds the reduced rent ceiling. D.C. OFFICIAL CODE § 42-3502.11; Notsch, RH-TP-06-28,690; Morris, RH-TP-06-28,794; Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013). In this case, even if the ALJ had reduced the Tenants' rent ceiling to reflect a reduction in services and/or facilities, the Commission's review of the record reveals that the ALJ would not have had substantial evidence on which to determine whether a reduced rent ceiling exceeded the Tenants' rent charged, since the Tenants had failed to supply any evidence of their rent charged. Final Order at 15; R. at 1317. *See* Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009).

For the foregoing reasons, the Commission determines that the ALJ's determinations regarding the Tenants' claims of reductions in services and/or facilities were in accordance with the provisions of the Act and supported by substantial evidence, and thus affirms the ALJ on these issues. D.C. OFFICIAL CODE §§ 42-3501.03(26)-(26), -3502.11; 14 DCMR § 3807.1. *See, e.g.,* Notsch, RH-TP-06-28,690; Dejean, RH-TP-07-29,050; Pena, RH-TP-06-28,817; Drell, TP 27,344; Ford, TP 23,973.

S. Whether the pre-hearing and hearing proceedings conducted by OAH violated the Tenants' due process rights.

The Tenants contend that they were denied their due process rights under the Constitution. *See* Notice of Appeal at 70-74. They maintain that they expected "a hearing examiner in the office of the Rent Administrator" to rule on the petition but were "given no say" when the matter was "transferred" to OAH. Notice of Appeal at 70. The Tenants additionally argue that there was no "step in the process where we could simply and briefly tell our story without interruption" as they had been told, that "Tenants never got the chance to make the equivalent of an opening statement" at the hearing, and that they "had no opportunity to state

[their] claims logically and fully before submitting evidence on the individual points." Notice of Appeal at 70-72.

The DCAPA, D.C. OFFICIAL CODE § 2-509, mandates the following procedures in contested case proceedings, in relevant part:

> (a) In any contested case proceedings, all parties thereto shall be given reasonable notice of the afforded hearing by the Mayor or the agency, as the case may be. The notice shall state the time, place, and issues involved . . . .
>
> (b) In contested cases, except as may otherwise be provided by law, other than this subchapter, the proponent of a rule or order shall have the burden of proof. Any oral and any documentary evidence may be received, but the Mayor and every agency shall exclude irrelevant, immaterial, and unduly repetitious evidence. Every party shall have the right to present in person or by counsel his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts . . . .
>
> (e) Every decision and order adverse to a party to the case, rendered by the Mayor or an agency in a contested case, shall be in writing and shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in accordance with the reliable, probative, and substantial evidence. A copy of the decision and order and accompanying findings and conclusions shall be given by the Mayor or the agency, as the case may be, to each party or to his attorney of record.

D.C. OFFICIAL CODE § 2-509(a), (b), (e). *See* Richard Milburn Pub. Charter Alt. High School v. Cafritz, 798 A.2d 531, 536 n.6 (D.C. 2002); Jackson, RH-TP-12-28,898; Borger Mgmt., Inc. v. Lee, RH-TP-06-28,854 (RHC Mar. 6, 2009).

As the Commission noted *supra* at 1 n.1, the hearing function formerly performed by the Rent Administrator was transferred to OAH pursuant to the OAH Establishment Act, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (Supp. 2005). The Commission is satisfied that the legislative determination to transfer the hearing function from the Rent Administrator to OAH did not diminish the due process protections afforded to tenants, insofar as OAH hearings are

governed by the same "contested case" requirements under the DCAPA as were hearings under the Rent Administrator. D.C. OFFICIAL CODE § 2-509. The Commission's review of the record reveals, as described below, that the Tenants in this case were afforded a full and fair contested case hearing by OAH, just as they would have been afforded by the Rent Administrator. Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009). *See infra* at 64.

Based on its review of the record the Commission is satisfied that the ALJ complied with the requirements for a contested case proceeding under the DCAPA, as described *supra*. *See, e.g.,* Final Order; Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009). For example, the Commission's review of the record reveals that the ALJ provided written notice of the hearing to all the parties, which stated the time, place and issues involved. D.C. OFFICIAL CODE § 2-509(a); Notice of New Hearing Date; Case Management Order; R. at 24-29, 826. Additionally, the OAH hearing afforded an opportunity to both parties to present oral and documentary evidence and argument regarding the claims in the Tenant Petition, submit rebuttal evidence, and to conduct cross-examination. D.C. OFFICIAL CODE § 2-509(b); Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009). All oral and documentary evidence was received into the record, except that which the ALJ determined to be irrelevant, immaterial, or unduly repetitious. D.C. OFFICIAL CODE § 2-509(b); Hearing CD (OAH Sept. 10, 2009); Hearing CD (OAH Sept. 9, 2009). *See supra* at 26-49. The ALJ's decision was issued in writing, and contained findings of fact and conclusions of law in accordance with the substantial record evidence. D.C. OFFICIAL CODE § 2-509(e); Final Order at 1-23; R. at 1309-31. A copy of the decision was mailed to all parties by first-class mail, postage prepaid. D.C. OFFICIAL CODE § 2-509(e); Final Order at 25; R. at 1307.

Accordingly, the Commission is satisfied that the ALJ conducted the OAH proceedings in accordance with the DCAPA requirements, and thus affirms the ALJ on this issue. D.C. OFFICIAL CODE § 2-509(a), (b), (e). *See* Richard Milburn Pub. Charter Alt. High School, 798 A.2d at 536 n.6.

T. Whether the ALJ erred by determining that the entire burden of proof of violations of the Act was on the Tenants.

The Tenants assert that the ALJ incorrectly put the burden of proof for violations of the Act on the Tenants. *See* Notice of Appeal at 75. The Commission observes that the Tenants did not identify any specific claim for which the ALJ improperly held that the burden of proof was on the Tenants, nor did the Tenants cite any statutory, regulatory, case law, or other legal authority to support their assertion that tenants do not have the burden of proof for claims brought in a tenant petition. *See id.*

The Commission's standard of review is contained in 14 DCMR § 3807.1. *See supra* at 24. In the Final Order, the ALJ determined that the Tenants "bear the burden of affirmatively proving the facts" to support the claims in the Tenant Petition by a "preponderance of the evidence." Final Order at 22; R. at 1310 (citing D.C. OFFICIAL CODE § 2-509(b)); Allen v. D.C. Rental Hous. Comm'n, 538 A.2d 752, 754 (D.C. 1988).

The DCAPA provides that "[i]n contested cases . . . the proponent of a rule or order shall have the burden of proof." D.C. OFFICIAL CODE § 2-509(b). The Commission has consistently confirmed that tenants have the burden of proof for claims brought in a tenant petition under the Act. *See* Dias v. Perry, TP 24,379 (RHC July 30, 2004) ("the tenant must provide evidence to satisfy the burden of proving her claim"); Bedell v. Clarke, TP 24,979 (RHC Apr. 29, 2003) ("Since the tenant bears the burden of proof, the hearing examiner will permit the tenant to

present his evidence first, after any preliminary matters are addressed."); Rosenboro v. Askin, TPs 3,991 & 4,673 (RHC Feb. 26, 1993).

The Commission is satisfied that the ALJ's determination that the Tenants had the burden to prove each of the claims brought in the Tenant Petition was in accordance with the provisions of the Act, and was not arbitrary, capricious, or an abuse of discretion. 14 DCMR § 3807.1. Accordingly, the Commission affirms the ALJ on this issue.

IV. CONCLUSION

For the reasons stated herein, the Commission affirms the Final Order.

SO ORDERED

PETER B. SZEGEDY-MASZAK, CHAIRMAN

RONALD A. YOUNG, COMMISSIONER

CLAUDIA L. McKOIN, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR §3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-06-28,668 was mailed, postage prepaid, by first class U.S. mail on this **26th day** of **September, 2014** to:

Wendy Tiefenbacher
Kenneth Mazzer
3133 Connecticut Avenue, NW
Unit 115
Washington, D.C. 20008

Richard W. Luchs, Esquire
Debra F. Leege, Esquire
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036-5605

LaTonya Miles
Clerk of Court
(442-8949)