DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-10-29,875

In re: 3133 Connecticut Ave., N.W.
Units 506 and 901

Ward Three (3)

CHRISTINE BURKHARDT and
DON WASSEM
Tenants/Appellants

v.

KLINGLE CORPORATION,
B.F. SAUL COMPANY, and
B.F. SAUL PROPERTY COMPANY
Housing Providers/Appellees

DECISION AND ORDER

September 25, 2015

McKOIN, COMMISSIONER. 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 Division (RAD) of the Department of Housing and Community Development (DHCD).[1] The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 - 42-3509.07, the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501 - 2-510 (2001), and the District of Columbia Municipal Regulations (DCMR),

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division (RACD) of the Department of Consumer and Regulatory Affairs (DCRA) on October 1, 2006, pursuant to § 6(b-1)(1) of the OAH Establishment Act, D.C. Law 16-83, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of the RACD were transferred to the DHCD by § 2003 of the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2012 Repl.).

1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

On April 20, 2010, Tenant/Appellants Christine Burkhardt and Don Wassem (collectively, Tenants), residing at 3133 Connecticut Ave., N.W. (Housing Accommodation), Units 901 and 506, respectively, filed tenant petition RH-TP-10-29,875 (Tenant Petition) against Housing Providers/Appellees Klingle Corporation, B.F. Saul Company, and B.F. Saul Property Company (collectively, Housing Provider).[2] The Tenant Petition raised the following claims against the Housing Provider:

1. [O]ur rental unit(s) are not properly registered with the RAD.
2. Services and/or facilities provided as part of rent and/or tenancy have been permanently eliminated.
3. Services and/or facilities provide as part of rent and/or tenancy have been substantially reduced.
4. The landlord (housing provider), manager, or other agent has taken retaliatory action against me/us in violation of Section 502 of the Act.
5. A Notice to Vacate has been served on [us], which violates Section 501 of the Act.

Tenant Petition at 2; Record (R.) at 34.

On September 27, 2012, Administrative Law Judge Erika L. Pierson (ALJ) issued an Order Consolidating Petitions for Hearing, Scheduling Joint Status Conference, and Orders to Show Cause (Show Cause Order). R. at 200-43. The Show Cause Order addressed six (6) tenant petitions and one (1) contested voluntary agreement that were pending before OAH and ordered

[2] The Commission notes that the Tenant Petition was additionally signed by Kenneth Mazzer, Wendy Tiefenbacher, Peter Schwartz, Margot Siegel, Lloyd Siegel, Nicole Witenstein, Blake Nelson, and Wendy Nelson. Tenant Petition at 3-4; R. at 32-33. This appeal was filed solely by Tenants Burkhardt and Wassem.

the parties to the petitions to show cause as to why certain petitions, parties, and allegations should not be dismissed. Show Cause Order at 5; R. at 239.

On November 30, 2012, the Tenants filed a "Response to September 27, 2012 Order" (Group Response). R. at 266-72. The ALJ held a hearing on the Show Cause Order on March 13, 2013, at which Tenant Burkhardt was present and Tenant Wassem appeared by telephone. Hearing CD (OAH Mar. 13, 2013). Without holding an evidentiary hearing on the Tenants' claims, the ALJ issued a final order dismissing the Tenant Petition: Mazzer v. Klingle Corp., 2010-DHCD-00083 (OAH Oct. 24, 2014) (Final Order).

In the Final Order, the ALJ made the following findings of fact, as relevant to the Tenants:[3]

1. This petition challenges 120-day notices to vacate for renovations pursuant to § 501(f) of the Act, issued by Housing Provider B.F. Saul Company on March 1, 2010.

2. In July 2008, Housing Provider filed with the Rent Administrator, an application seeking approval to temporarily vacate and relocate tenants at 3133 Connecticut Avenue, NW, known as the Kennedy-Warren (Housing Accommodation) in order to complete major renovations. The application was docketed as Case No. NV-09-001 with the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD). Tenants opposed the 501(f) application before the Rent Administrator.

3. By Order dated December 16, 2009, the Rent Administrator ordered Housing Provider to suspend solicitation of any temporary relocation agreements and commencement of work that was the subject of the 501(f) application until the Rent Administrator made a decision on the application. On December 22, 2009, Housing Provider appealed that order to the Rental Housing Commission. Housing Provider subsequently withdrew its appeal in March 2010.

4. By Orders dated February 26, 2010, and March 3, 2010, the Rent Administrator found that the proposed renovations were necessary to bring the housing accommodation into compliance with the housing regulations and authorized the issuance of 120-day notices to vacate. *Klingle Corp. v. Tenants of 3133*

[3] The findings of fact are recited here using the same numbering, language, and terms as used by the ALJ in the Final Order.

Connecticut Ave., NW, RAD Case No. NV 09-001 (RAD Feb. 26, 2010) and (RAD Mar. 3, 2010).

5. Tenants appealed the March 3, 2010, Order to the Rental Housing Commission, which has not yet issued a decision on Tenants' appeal, other than to deny a motion that Tenants Nelson filed seeking to consolidate the appeal of NV 09-001 with TP 28,724 which is pending at OAH. *See Klingle Corp. v. Tenants of 3133/3131 Connecticut Ave., NW*, Order on Mot. for Consold. and Appeal Issues with Ten. Pet. 28,724 (RHC June 28, 2013).

6. On March 1, 2010, Housing Provider served Tenants with 120-day notices to temporarily vacate their apartments pursuant to § 501(f) of the Act. Some Tenants relocated temporarily and some never vacated. As of the date of this Final Order, all renovations have been completed. All Tenants returned to their units. Tenants Neslon and Wassem no longer reside in the Housing Accommodation. . . . .

7. On April 20, 2010, Tenants filed the instant tenant petition (TP 28,785) [sic] challenging the Rent Administrator's authority to approve the 501(f) application without a hearing, challenging the validity of the 501(f) notices to vacate, and challenging reductions in services and facilities that would occur in the future when the renovations were completed. The Rent Administrator transferred the tenant petition to this administrative court for a hearing.

. . .

9. On December 19, 2011, Tenants filed a joint status report stating that the appeal in NV-09-001 pending with the Rental Housing Commission, and their other pending tenant petitions, would affect the outcome of this tenant petition and therefore they requested this petition be stayed pending resolution of the appeal and other petitions.

10. Housing Provider filed a status report stating that the petition should be dismissed as moot because the renovations were completed and an appeal is pending with the Rental Housing Commission.

11. On December 30, 2011, Tenants Wassem and Burkhardt filed TP 30,172, which alleged improper registration, improper rent increases, reductions in services and facilities, and retaliation. TP 30,172 states that the reductions in services and facilities were related to the construction and renovation of the Housing Accommodation. An evidentiary hearing was concluded in that case on October 15, 2012, before Administrative Law Judge Goodie, and is currently pending final order. TP 30,172 also alleges improper registration for the same reasons that Tenant Wassem alleged, and was decided, in a Final Order issued in TP 28,220/TP 28,469 on August 5, 2013. *Wassem v. Marhefka et.* [sic] *al.*, OAH Case Nos. RH-TP-06-28,220 and RH-TP-06-28,649 (Final Order Aug. 5, 2013).

. . .

13. Also pending at OAH were several other petitions filed by the same tenants who filed this petition. On September 27, 2012, I issued an "Order Consolidating Petitions for Hearing; Scheduling Joint Status Conference, and Orders to Show Cause" (Show Cause Order). The Show Cause Order set forth the status of all pending Kennedy-Warren cases and ordered the parties to show cause why this petition and several other petitions or allegations should not be dismissed.

14. . . . [O]n November 30, 2012, Tenant Mazzer filed a "Group Response" to the show cause order on behalf of himself and Tenants Wassem, Burkhardt, and Siegel. On December 20, 2012, Housing Provider filed a reply to Tenants' responses.

15. A joint status conference was held on March 13, 2013. Tanya Marhefka, Vice President of B.F. Saul Company, appeared on behalf of Housing Provider and was represented by Richard Luchs, Esquire. The following tenants appeared: Christine Burkhardt, Kenneth Mazzer, Lee Cohen, and Don Wassem (by telephone). Tenants Blake and Wendy Nelson were represented by their counsel, Carol Blumenthal, Esquire.

Final Order at 2-6; R. at 315-19.

The ALJ made the following conclusions of law, as relevant to the Tenants, in the Final Order:[4]

1. Tenants Burkhardt and Wassem, similarly, have had multiple petitions at OAH that overlap in time and allegations and have claims in this petition that are moot. For the reasons discussed below, neither Tenant Burkhardt nor Tenant Wassem have any viable claims remaining in TP 29,875. Contrary to Tenants' assertions, the filing of tenant petition does not act simply as a placeholder for tenants "to preserve their rights" to raise every and any allegation that may have arose within three years of filing a petition, regardless of whether they have plead any specific allegations.

2. The September 27, 2012, Order to Show Cause stated the following about TP 29,875:

> The petition challenges the same March 3, 2010, 501(f) notice to vacate for unsafe alterations that Tenants Nelson challenged in TP 28,724. The petition also challenges the propriety of the Rent Administrator's granting of the 501(f) application, which is identical to the appeal pending with the RHC in NV-09-001. In response to an Order I issued in this case, the

[4] The conclusions of law are recited here using the same language and terms as used by the ALJ in the Final Order, except that the Commission has numbered the conclusions of law for ease of reference.

parties filed status reports in December 2011. Housing Provider's report stated that the issue was moot and the petition should be dismissed. Tenants stated that resolution of this case is contingent on the RHC's resolution of an appeal in NV-09-001 and the appeal of several individual tenant petitions. **For the reasons discussed below, Tenants' request to stay proceedings is DENIED. Tenants shall show cause why certain allegations in the petition should not be dismissed. . . . The remaining allegations shall be consolidated for hearing with TP 29,171, TP 28,724, and TP 30,056.**

Show Cause Order at 21.

1. OAH lacks jurisdiction over the 501(f) notices to vacate and the allegation is moot.

3. In regards to the notices to vacate, the only remedy available from this administrative court, under the Rental Housing Act of 1985, is to invalidate the notice to vacate. Tenants argue that a remedy would be a civil fine levied against Housing Provider pursuant to D.C. Official Code § 42-3509.01. However, a civil fine requires a finding that Housing Provider "willfully" violated the Act. D.C. Official Code § 42-3509.01(b); *Quality Mgmt, Inc. v. D.C. Rental Hous. Comm'n*, 870 A.2d 556, 558 (D.C. 2005). It is undisputed that the 501(f) notices to vacate were issued pursuant to an order of the Rent Administrator.

4. The issue of the Rent Administrator's authority to grant the 501(f) notices to vacate without a hearing is outside the jurisdiction of OAH for two reasons. First, Tenants appealed the Rent Administrator's March 3, 2010, Order to the Rental Housing Commission, which was the appropriate venue and divested OAH of jurisdiction. *See Dreyfuss Mgmt, LLC v. Neckford* [sic], RH-TP-07-28,895 (RHC Sept. 27, 2013) at 29-36 (holding that once an appeal is filed with the Commission, OAH is divested of jurisdiction to issue any orders). Second, the authority to grant 501(f) applications remains within the sole discretion of the Rent Administrator pursuant to the Rental Housing Act, D.C. Official Code § 42-3505.01(f)(1) . . . .

5. There is nothing in the Act that allows a tenant to appeal the Rent Administrator's decision to OAH. The Rent Administrator's March 3, 2010, Order included a notice of appeal rights that specifically instructed any aggrieved party to file an appeal with the Rental Housing Commission, which the Tenants did. **Therefore, Tenants' allegation that 120-day notices to vacate were issued in violation of the Act is dismissed for lack of jurisdiction.**

6. In addition, Tenants' allegations regarding the 501(f) notices to vacate are moot. Tenants Wassem and Burkhardt, in their November 30, 2012, Group Response to the Show Cause Order concede that they already vacated their apartments

pursuant to the 120-day notices to vacate, the renovations have been completed, and they have moved back into their apartments. Nonetheless, Tenants Burkhardt and Wassem assert that they suffered some unidentified harm for which they are entitled to relief. However, a notice to vacate for renovations where renovations have been completed is moot:

> A case is moot when the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome. Cropp v. Williams, 841 A.2d 328, 330 (D.C. 2004). Courts refrain from deciding cases if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'

Clarke v. United States, 915 F.2d 699, 701 (D.D.C. [sic] 1990) (*en banc*) (*quoting Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 575 (D.C. Cir 1990). The District of Columbia Court of Appeals has held that whether the court can fashion a remedy is a significant factor in determining whether a case is moot. *Thorn v. Walker*, 912 A.2d 1192, 1195 (D.C. 2006). At this point, there is no remedy for Tenants in regards to the 2010 notices to vacate. A civil fine would have no effect on the parties' rights and could not effect [sic] Mr. Wassem in the future because he no longer resides in the Housing Accommodation. Therefore, Tenant's allegation that 120-day notices to vacate were issued in violation of the Act is moot.

2. Tenants' allegation of improper registration is also moot because it is directly related to their challenge to the granting of the 501(f) application. In addition, Tenant Wassem challenged registration of the Housing Accommodation in previous tenant petitions (TP 28,220/TP 28,649).

7. In their petition, Tenants state that the notice to vacate was improper because a prerequisite to issuing a notice to vacate is that the Housing Accommodation must be properly registered. Because the challenge to the validity of the notice to vacate is moot, the related issue of registration is also moot. Moreover, there is nothing in the Rental Housing Act that prohibits a housing provider from issuing a notice to vacate if a housing accommodation is not properly registered. Notices to vacate are governed by D.C. Official Code § 42-3505.01 and 14 DCMR § 4302. The regulations provide that to be valid, a notice to vacate must include a statement that the property is registered with the Rental Accommodations Division and the registration number. 14 DCMR 4302.1(c). The only penalties in the Act and regulations for failing to register or not being properly registered, is a civil fine, if the failure to register was willful, and a prohibition against rent increases: "Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless: . . . (B) The housing accommodation is registered in accordance with § 42-3502.05." D.C. Official Code § 42-3502.08(a)(1)(B).

8. In addition, Tenant Wassem alleged that the Housing Accommodation was not properly registered in several other tenant petitions including the consolidated petitions TP 28,220 and TP 28,649. I issued a final order on those petitions on August 5, 2013, and found that the Housing Accommodation was properly registered between January 31, 2005 and January 31, 2008. *Wassem v. Marhefka et.* [sic] *al.*, RH-TP-06-28,220 and RH-TP-06-28,649 (Amended Final Order Aug. 5, 2013) at 36. Currently pending final order with Administrative Law Judge Goodie is TP 30,172, to which both Tenant Wassem and Burkhardt are parties. That petition, which covers the period December 30, 2008, through December 30, 2011, also alleges that the Housing Accommodation is not properly registered. Therefore, any allegation that the property was not properly registered in 2010 when the 501(f) notices were issued, is part of TP 30,172, and cannot also be raised here. **Accordingly, Tenants' allegation of improper registration is dismissed with prejudice.**

3. Tenants' allegations of reductions in services or facilities are duplicative of the allegations in other petitions.

9. The tenant petition alleges that the following services and facilities were reduced as part of the demolition and construction of the Housing Accommodation: roof deck eliminated; relocation and appropriation of parking spaces; loss of square footage due to installation of HVAC; interruption of utility service, elevator service, and laundry room access; and "other housing and fire code violations." These are the same allegations Tenants Wassem and Burkhardt made in TP 30,172 which is pending final order. TP 30,172 covers the period December 30, 2008, to December 30, 2011, and therefore necessarily includes 2010. As such, Tenants cannot challenge the same reductions in services or facilities that have already been adjudicated in TP 30,172.

10. In the November 30, 2012, Group Response to the Show Cause Order (page 2) Mr. Wassem argued that his claims of reductions in services and facilities should not be dismissed because there is a timeframe gap between his claims in TP 28,220/TP 28,649 and TP 30,172. TP 28,220/TP 28,649 had significant procedural irregularities. TP 28,220, which alleged only improper rent increases, had been filed in 2004, adjudicated by the Rent Administrator, appealed to the Rental Housing Commission, and remanded to OAH for a new hearing in 2006. Also in 2006, Mr. Wassem had filed TP 28,649, and the two petitions were consolidated for a hearing. However, in January 2008, another administrative law judge granted Mr. Wassem leave to amend the petitions to add allegations of reductions in services and facilities, improper registration, and retaliation, permitting Mr. Wassem to address these claims between 2001 and 2006, the statute of limitations period for both TP 28,220 and TP 28,649. Housing Provider, prior to and at the hearing, raised objections to the statute of limitations period for the amended allegations. In the Final Order, I held that permitting Mr. Wassem in 2008, to amend petitions that were filed in 2004 and 2006, with new and unrelated allegations, and having the benefit of the previous statute of limitations period was contrary to the law and prejudicial to Housing

Provider. Therefore, in the Final Order, the petition was deemed amended as of January 4, 2008, to cover only the three years preceding the amendment (January 4, 2005, through January 4, 2008), the same timeframe that would have applied if Tenant had filed a new petition. However, during the evidentiary hearing on TP 28,220/TP 28,649, Tenant was not permitted to introduce evidence after June 30, 2006, based on the previous ALJ's order and I noted as follows in the Final Order:

> On January 4, 2008, Tenant filed a motion to amend his petition to add an allegation that services and/or facilities were substantially reduced. As previously discussed, Tenant is permitted to challenge reductions in services or facilities that occurred between January 4, 2005, and January 4, 2008. However, as the ruling on the limitations period has been made only in this Final Order, during the hearing, Tenant was limited to presenting evidence through June 2006, consistent with Judge Cobbs' January 2008 order. As discussed previously, Tenant is not prejudiced by the limitation due to other tenant petitions he has pending which cover the same timeframe. All of the alleged reductions in services and facilities either occurred prior to January 2005 and are therefore barred by the statute of limitations, or, Tenant did not meet his burden of proof.

Wassem v. Marhefka et. [sic] *al.*, OAH Case. Nos. RH-TP-06-28,220 and RH-TP-06-28,649 (Amended Final Order Aug. 5, 2013) at 64-65. Therefore, as noted in the Final Order in TP 28,220/TP 28,649, Tenant failed to meet his burden of proving [any] reductions in services or facilities[.] [A]ll of the reductions in services or facilities alleged in that petition began before January 2005. The "gap" in time that Mr. Wassem references is that time between June 30, 2006 (the cut-off date for evidence in TP 28,220/TP28,649), and December 30, 2008 (the reach of TP 30,172), which could be covered by this petition or other pending petitions.

11. This petition also does not allege any specific reductions in services or facilities that began between the filing date on April 20, 2010, and the three year limitations period of April 20, 2007, that are not part of the allegations of reductions in services that Tenant alleged in TP 30,172, his most recent petition. Tenant has not identified here, in TP 28,220/28,649, or in his other petitions that have been dismissed, any reduction in services or facilities that began between June 30, 2006, and December 30, 2008, and therefore Housing Provider is not on notice of any allegations of reductions in services or facilities that it must defend against in this petition. Therefore, there is no viable allegation of reductions in services or facilities to survive dismissal of TP 29,875.

12. As I discussed in the Show Cause Order, in each petition, Tenants check almost all of the available allegations, but do not provide any supporting details for all the allegations. Often, Tenants make statements that they are "preserving their right" to address other issues. In some pleadings, various tenants have argued that they need only check a box in a tenant petition to put a housing provider on

notice of pending allegations. It is well established that a petition must give a defending party fair notice of the grounds upon which a claim is based. *See Parreco v. D.C Rental Hous. Comm'n*, 885 A.2d 327 (D.C. 2005). For example, it is not enough to check a box alleging that services and facilities were substantially reduced, but not place Housing Provider on notice of the specific alleged reductions. In Parreco, the Court of Appeals found the tenant failed to adequately place the housing provider on notice of the allegations where he checked a box without explanation: "[A]lthough the tenant checked the box that the rent ceilings was 'improper,' he did not give any explanation." *Id.* at 330 [n.] 4. As such, checking the services and facilities box is insufficient to place Housing Provider on notice of what allegations it must defend against.

13. To the extent that Tenant Wassem may argue reductions in services or facilities that were part of TP 28,220/TP 28,649 were on-going in nature after June 30, 2006, Tenant did not prevail on any of those alleged reductions in services or facilities and therefore cannot have an on-going claim.

14. In the November 30, 2012, Group Response to the Show Cause Order (page 4), Tenant Burkhardt conceded that her allegations of reductions in services and facilities in this petition are duplicative of TP 30,172, and therefore she agreed to withdraw that claim, but requested to remain a party to TP 29,875 to pursue claims of retaliation that occurred before December 30, 2008, which I discuss further below.

4. Tenants' alleged acts of retaliation are moot or duplicative of allegations in TP 30,172.

15. Although Tenants checked the box for retaliation on the tenant petition, the only alleged act of retaliation in the petition is the issuance of the 501(f) notice to vacate, which for the same reasons discussed above, is outside the jurisdiction of OAH and is moot. The Show Cause Order stated the following:

> Lastly, it is not clear from the petition, what the basis is for the allegation of retaliation. If the claim is based on the 501(f) notice to vacate, the claim is also moot. Therefore, Tenants' [sic] shall show cause why this allegation should not be dismissed and set forth with specificity, the alleged acts of retaliation.

Show Cause Order at 24. In the Group Response to the Show Cause Order, Tenants Wassem and Burkhardt, for the first time, identify the following acts of retaliation which they assert to challenge: (1) the intentional termination of heat to the units of tenants who challenged the notices to vacate; and (2) that a capital improvement (CI) payment of $233 was demanded only from tenants that opposed Housing Provider.

16. The capital improvement increase of $233 and any retaliation related thereto, is the subject of TP 29,125, which is pending before Administrative Law Judge

Sharkey, to which both Ms. Burkhardt and Mr. Wassem are parties. Indeed, by order dated July 9, 2014, Judge Sharkey granted Tenants' motion for partial summary judgment on the issue of the validity of the $233 increase and indicated a hearing would be scheduled on the remaining allegations, including retaliation. *See Burkhardt, et.* [sic] *al. v. B.F. Saul Co. et.* [sic] *al.*, OAH Case No. 2007-DHCD-TP 29,125 (Order on Pending Motions July 9, 2014). Therefore, Tenants may not pursue the same allegation of retaliation in this tenant petition. In addition, as alleged by Tenants in TP 29,125, the $233 CI surcharge was demanded in 2006. The statute of limitations for allegations in TP 29,875 is April 20, 2007, through April 20, 2010. Therefore, rent demanded in 2006 cannot be a part of a petition filed in 2010.

17. Because of Tenants pending claims in TP 30,172, any claims of retaliation in this petition are limited to the period April 20, 2007 (the statute of limitations period for TP 29,875) and December 30, 2008 (the statute of limitations period for TP 30,172). Tenants did not specify when heat was allegedly turned off other than to state "it took place long before the dates of relocation stated in the 501(f) application." Group Response at 4. TP 30,172 also includes allegations regarding disruption of utility service. As such, Tenants have still not established an act of retaliation that occurred within the relevant time period for this petition.

18. As with the claims of reductions in services and facilities, Mr. Wassem has not identified any act of retaliation that began between June 30, 2006, and December 30, 2008, and were not part of TP 29,215, TP 29,489, or TP 30,172. Indeed, Mr. Wassem failed to present any evidence of retaliation in TP 28,220/TP 28,649:

> As previously discussed, Tenant is permitted to challenge retaliation that occurred between January 4, 2005, and January 4, 2008. However, Tenant did not provide any specific testimony regarding actions by Housing Provider which he deemed to be acts of retaliation. . . Tenant did not provide any testimony that he participated in a protected act and therefore a presumption of retaliation does not apply here. Tenant did not provide any specific testimony regarding acts of retaliation on the part of Housing Provider. Therefore, this allegation is dismissed.

Wassem v. Marhefka et. [sic] *al.*, OAH Case. Nos. RH-TP-06-28,220 and RH-TP-06-28,649 at 109. **Accordingly, there are no remaining viable allegations in TP 29,875 for Tenants Wassem and Burkhardt, and the claims for all other Tenants have been dismissed or withdrawn. Therefore, TP 29,875 is dismissed with prejudice.**

Final Order at 11-21; R. at 300-10.

The Tenants filed a timely motion for reconsideration of the Final Order on November 1, 2014. R. at 321-31. The ALJ denied the motion for reconsideration on December 4, 2014. R. at 377-84. The Tenants filed a timely notice of appeal of the Final Order (Notice of Appeal) on December 23, 2014.

In the Notice of Appeal, the Tenants raise the following issues:

1. It was error to dismiss the claims that (i) the Notices to Vacate issued in March 2010 ("NtV's") were invalid (violated 501(f) of the Act, and the Rent Administrator's order in NV 09001) and that (ii) the NtV's were willful actions thus civil fines should be levied upon Klingle et al. for issuing them unless Klingle can show they issued the NtV's against their will (Order at 12-14).

2. It was error to rule that OAH lacks jurisdiction over the notices to vacate issued in March 2010 (Final Order at 12-13; Reconsideration-Denial at 3); the ALJ apparently overlooked 14 DCMR 4300.5, 4214.4(a) and (b), and 3900.1, and the OAH orders issued in TP 28724 invalidating one of the NtV's (because of two conditions in that NtV which the other NtV's also contained), which orders in TP 28724 the Final Order itself referenced (at 5-6, 9).

3. It was error to summarily rule, apparently, that the Notices to Vacate could not have been "willful violations" because they were "issued pursuant to an order of the Rent Administrator" (Order at 12).

4. While it might not be disputed that the NtV's followed chronologically the Rent Administrator's ("RA's") order(s) in NV 09001, it was error (Order at 12) to ***not*** conclude that the ***contents*** of the NtV did ***not*** "follow," as in "comply with," the RA's order and the 501(f) statutes, which OAH ALJ Sharkey did conclude in TP 28724 in June and July 2010 re the NtV for Apartment 802 (i.e., the NtV did not conform to the Rent Administrator's order and did not comply with the 501(f) statutes).

5. It was error to rule, implicitly (e.g., Order at 12), that the adverb 'wilfully' in Section 901(b) of the Act modifies the verb 'violates' rather than the four verbs 'collects', 'makes', 'commits [any other act]' and 'fails [to meet obligations]'.

6. It was error to not use the RHC's definition of willful in *Parreco v Akassy*, TP 27,408 (RHC Dec, 8, 2003), at 17, as noted by the D.C. Court of Appeals in both *Parreco v. D.C. Rental Housing Comm'n*, 885 A. 2d 327 (D.C. 2005), at 33 7-38 n. 15 and in *Bernstein Mgm't Corp. v. D.C. Rental Hous. Comm'n*, 952 A.2d 190, 199 (D.C. 2008).

7. Error to dismiss the claim that the (invalid) Notices to Vacate were "retaliatory actions" (as defined by 14 DCMR 4303; in particular, 4303.3(a): "Retaliatory action shall include, but is not limited to the following: (a) Any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit; * * *"), for which actions additional civil fines should be levied (Tenants had, among other exercisings of rights conferred by § 502 of the Act, contested NV 09001, complained about noise and dust, etc.).

8. Error to rule (Order, at 13-14), apparently, that because the 501(f) "renovations" have been completed, the NtV's cannot be ruled to have been invalid and to have been 'retaliatory actions' (as defined in 14 DCMR 4303), both of which violations are eligible for civil fines.

9. It was error to find (Order, at 13) that the Tenants "vacated their apartments pursuant to the 120-day notices to vacate" when Tenants did not in fact vacate their apartments in July 2010 (when Klingle et al. elected to sue for possession in Landlord Tenant Branch on about July 8, 2010, which suits were additional retaliatory actions).

10. It was error to rule, apparently (at 14), that civil fines cannot be a remedy for invalid notices to vacate because they "would have no effect on the parties' rights", when civil fines seem intended to punish and deter violations of the Act that were not done by housing providers against their will.

11. It was error to rule (Order, at 14) that proper registration is not a prerequisite for a notice to vacate to be valid: the OAH ALJ must have overlooked 14 DCMR 4214(a)(3) [sic], which deems that a § 501 notice "given for a rental unit that is subject to registration and is not properly registered" is a violation of the Act.

12. It was error to rule (Order at 15) that the ALJ has somehow already determined (in TPs 28220/28649) that the housing accommodation "was properly registered between Jan 31, 2005 and Jan 31, 2008 ['eight]" when elsewhere the Order (at 17) finds that "Tenant [in TPs 28220/28649] was limited to presenting evidence through June 2006 ['six]".

13. It is error to hold (Order at 16) that parking is "not a 'related" service or facility under the Rental Housing Act" when the Act itself explicitly includes 'parking facility' in its definition of 'related facility' (42 D. C. Code 3501.03(26)) and explicitly includes "charges" associated with related facilities to be part of the proper registration of a housing accommodation (42 D. C. Code 3502.05(f)(3)).

14. OAH misconstrues (and construes il-liberally, hampering tenant enforcement of the Act) notice-pleading, including *Parreco v. DC RHC* 885 A.2d 327 (DC 2005) and relate-back amendments of initial complaints (Rule 15(c)), and apparently overlooking authorities such as *Sawyer v. Mitchell*, TP 24,991 at 2-

4 (RHC Oct. 31, 2002), rules regarding pre-hearing submission of exhibits and witness lists before evidentiary hearings, and 16 DCMR 3101.5 and 3110 (notices of civil infractions can be amended at hearing and after hearing). (Order at 15-21, esp. 18)

15. OAH misconstrues (and construes il-liberally, hampering tenant enforcement of the Act) issue preclusion (Order at 15-21) and does not cite any authorities for its parsing of tenant petitions, let alone authorities appropriate for tenant enforcement of the Act or for consumer enforcement of a remedial act generally; meanwhile, Klingle et al. has been allowed to relitigate violations that have already been found against them in other proceedings (i.e., adverse rulings for Klingle et al. do not seem to be binding upon them elsewhere).

16. It is error to truncate and dismiss, rather than to consolidate or stay, portions or all of a tenant petition by comparing it to other related tenant petitions, especially other tenant petitions for which a final judgment has not been rendered (Order at 15-21)

17. Even by the Order's own criteria for issue preclusion, it was error to dismiss the claim of improper registration of the housing accommodation when the order itself (at 15) indicates that the time period between January 2008 and December 2008 was not "covered" by either TPs 28220/28649 or TP 30172.

18. Error to rule (at 21) that the Tenant in TPs 28220/28649 was somehow "permitted" to "challenge [sic] retaliation that occurred between January 4, 2005, and January 4, 2008" when "during the hearing, Tenant was limited to presenting evidence through June 2006" (Order at 17). (Moreover, Tenant in TPs 28220/28649 did testify that the $179 rent demand in 2006 seemed a retaliatory action following Tenant complaining to Ms. Marhefka and Mr. Newcome about an apparent housing code violation in front of other tenants in March 2006.)

Notice of Appeal at 1-5.

A hearing was scheduled for May 7, 2015, and the Tenants filed a joint brief on appeal (Tenants' Brief) on April 29, 2015. On May 1, 2015, the Commission granted a continuance requested by the Tenants and rescheduled the hearing for June 9, 2015. Order on Motion for Continuance (RHC May 1, 2015). On May 15, 2015, the Housing Provider filed a Memorandum in Lieu of Brief on Appeal (Housing Provider's Memo), foregoing the opportunity to present legal arguments and instead "incorporat[ing] by reference the well-reasoned decision of the [ALJ] below." Housing Provider's Memo at 1.

The Commission held its hearing on this appeal on June 9, 2015. Tenant Burkhardt appeared on behalf of herself and Tenant Wassem,[5] and the Housing Provider appeared through its counsel of record, Richard W. Luchs, *esq*. Hearing CD (RHC June 9, 2015).

II. ISSUES ON APPEAL[6]

A. Notices to Vacate

1. Whether the ALJ erred in determining that OAH lacks jurisdiction over the service of a notice to vacate after its approval by the Rent Administrator.

2. Whether the ALJ erred in determining that the Tenants' claims regarding the service of notices to vacate are moot.

---

[5] By a prior order, the Commission permitted Tenant Burkhardt to enter an appearance on behalf of the group of tenants who are parties to this appeal, *i.e.*, herself and Tenant Wassem. *See* Order on Appearance and Representation (RHC May 14, 2015); 14 DCMR § 3812.1(d) (2004).

[6] The Commission, in its reasonable discretion, has recast the issues on appeal, consistent with the Tenants' language in the Notice of Appeal and Tenants' Brief, to state the issues in a manner which clearly identifies the legal requirements under the Act for ease of discussion, and to group together claims that involve overlapping legal issues and the application of common legal principles. *See, e.g.*, Am. Rental Hous. Corp. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014); Bratcher v. Johnson, RH-TP-08-29,478 (RHC Mar. 25, 2014) (despite Tenant's narrative presentation in the notice of appeal, Commission identified cognizable issues); Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) at n.17 (recasting statement of issues on appeal); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013) at n.7 (Commission interpreted narrative statement of issues on appeal to raise one specific allegation of error); Ahmed, Inc. v. Avila, RH-TP-28,799 (RHC Oct. 9, 2012) at n.8 (issues on appeal recast to state in a manner that clearly and accurately identifies the legal grounds under the Act for appeal).

Specifically, the Commission's discussion of each issue on appeal corresponds to the Tenants' statements of the issues as follows:

Commission's Issue 1 corresponds to Tenants' Issues 1(i), 2, 4, and 10;

Commission's Issue 2 corresponds to Tenants' Issues 1(i), 4, 8, and 9;

Commission's Issue 3 corresponds to Tenants' Issues 1(i), 11, 12, 16, and 17;

Commission's Issue 4 corresponds to Tenants' Issue 7

Commission's Issue 5 corresponds to Tenants' Issues 1(ii), 3, 5, and 6;

Commission's Issue 6 corresponds to Tenants' Issues 13, 15 and 16;

Commission's Issue 7 corresponds to Tenants' Issue 14; and

Commission's Issue 8 corresponds to Tenants' Issue 18.

For the complete text of the Tenants' statement of the issues on appeal, *see supra* at 12-14.

3. Whether the ALJ erred in dismissing the Tenants' claim that the Housing Accommodation was not properly registered at the time notices to vacate were served.

4. Whether the ALJ erred in dismissing the Tenants' claim that the service of notices to vacate was retaliatory.

5. Whether the ALJ erred in dismissing the Tenants' claim that the service of notices to vacate was a willful violation of the Act.

B. Reductions in Related Services or Facilities

6. Whether the ALJ erred in dismissing the Tenants' claims of reductions in services or facilities as duplicative of other tenant petitions.

7. Whether the ALJ erred in determining that the Tenants did not plead any viable claim of an unlawful reduction in services or facilities with sufficient specificity.

C. Other Retaliation

8. Whether the ALJ erred in determining that the Tenants were permitted to challenge retaliatory acts that occurred between January 4, 2005, and January 4, 2008, in separate tenant petitions.

III. DISCUSSION

A. Notices to Vacate

1. Whether the ALJ erred in determining that OAH lacks jurisdiction over the service of a notice to vacate after its approval by the Rent Administrator.

The Tenants allege in the Tenant Petition that the Housing Provider violated the Act by serving notices to vacate their rental units within 120 days (120-day Notices to Vacate) on them that were not authorized by § 501 of the Act, D.C. OFFICIAL CODE § 42-3505.01 (2007 Supp.). In the Final Order, the ALJ made the following relevant findings of fact, which the parties do not contest on appeal:

2. In July 2008, Housing Provider filed with the Rent Administrator, an application seeking approval to temporarily vacate and relocate tenants at 3133 Connecticut Avenue, NW, known as the Kennedy-Warren (Housing Accommodation) in order to complete major renovations. The application

was docketed as Case No. NV-09-001 with the Rental Accommodations Division (RAD) of the Department of Housing and Community Development (DHCD). Tenants opposed the 501(f) application before the Rent Administrator.

4. By Orders dated February 26, 2010, and March 3, 2010, the Rent Administrator found that the proposed renovations were necessary to bring the housing accommodation into compliance with the housing regulations and authorized the issuance of 120-day notices to vacate.

5. Tenants appealed the March 3, 2010, Order to the Rental Housing Commission, which has not yet issued a decision on Tenants' appeal, other than to deny a motion that Tenants Nelson filed seeking to consolidate the appeal of NV 09-001 with TP 28,724 which is pending at OAH. *See Klingle Corp. v. Tenants of 3133/3131 Connecticut Ave., NW*, Order on Mot. for Consold. and Appeal Issues with Ten. Pet. 28,724 (RHC June 28, 2013).

6. On March 1, 2010, Housing Provider served Tenants with 120-day notices to temporarily vacate their apartments pursuant to § 501(f) of the Act.

Final Order at 2-3; R. at 317-18. The Tenant Petition alleges that, on March 1, 2010, when the Tenants received the 120-day Notices to Vacate, the Housing Accommodation was not properly registered with RAD. *See* Tenant Petition at 5; R. at 31.[7] Accordingly, the Tenants seek the imposition of a civil fine against the Housing Provider. *See* Final Order at 12; R. at 309.

In the Final Order, the ALJ dismissed this claim, stating that OAH lacks jurisdiction over the issue. Final Order at 12-13; R. at 308-09. The ALJ stated that, because the 120-day Notices to Vacate were issued pursuant to an order of the Rent Administrator, OAH lacks jurisdiction for two reasons: first, the Tenants' appeal of the Rent Administrators approval, *see* Tenants of 3133 Conn. Ave., N.W. v. Klingle Corp., NV 09-001 (RHC Sept. 1, 2015) (notices of appeal filed Mar. 19, 2010, Mar. 22, 2010, Apr. 19, 2010, Apr. 20, 2010), "divested OAH of jurisdiction;" and second, "the authority to grant 501(f) applications remains within the sole discretion of the

[7] The Commission separately addresses the ALJ's determination that improper registration is not a valid basis for a tenant petition under § 501 of the Act *infra* at 27.

Rent Administrator." Final Order at 12; R. at 309. On appeal, the Tenants argue that, "While it might not be disputed that the [120-day Notices to Vacate] followed chronologically the Rent Administrator's order(s) in NV 09[-]001, it was error . . . to not conclude that the contents of the [120-day Notices to Vacate] did not 'follow,' as in 'comply with,' the [Rent Administrator's] order and [§ 501(f) of the Act]." Notice of Appeal at 2.[8]

---

[8] The Commission notes that, at its hearing on this appeal, Tenant Burkhardt additionally asserted that the Housing Provider served her with a 120-day Notice to Vacate sooner than it was lawfully permitted to do so. *See* Hearing CD (RHC June 9, 2015) at 10:17-10:20, 10:23-10:24; 10:40-10:42. Although Tenant Burkhardt, appearing *pro se*, did not clearly express what provision of the Act she believed the Housing Provider had violated, the Commission observes that § 501(f) of the Act requires a housing provider to submit, as part of its application to issue a 120-day Notice to Vacate, "[a] timetable for all aspects of the plan for alterations and renovations, including . . . the relocation of the tenant from the rental unit[.]" D.C. OFFICIAL CODE § 42-3505.01(f)(1)(B)(iv); *see* Tenants of 3133 Conn. Ave., NV 09-001.

However, based on its review of the record, the Commission observes that the Tenants did not make any allegation regarding the relocation timetable in their Tenant Petition. *See* Tenant Petition at 2 (alleging that the Housing Accommodation was not properly registered); R. at 33. The Commission's review of the record is limited to claims raised before OAH and to evidence in the record, and it will not consider new claims or new evidence on appeal. *See* 14 DCMR § 3807; *see, e.g.*, Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Smith Prop. Holdings Consulate, LLC v. Lutsko, RH-TP-08-29,149 (RHC Mar. 10, 2015) at n.12; Burkhardt v. B.F. Saul Co., RH-T-06-28,708 (RHC Sept. 25, 2014) at 26-27; Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013).

Nonetheless, in light of the seriousness of this allegation, the remedial purposes of the Act, and the latitude afforded to *pro se* parties, the Commission observes that it may be permissible, on remand, for the Tenants to amend the Tenant Petition to include the issue of the Housing Provider's compliance with the terms of its approved application. *See* 1 DCMR § 2801.2 ("[w]here a procedural issue coming before [OAH] is not specifically addressed in these Rules, [OAH] may rely upon the District of Columbia Rules of Civil Procedure as persuasive authority."); Super. Ct. Civ. R. 15(a) ("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"), 15(c) ("amendment of a pleading relates back to the date of the original pleading when . . . the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading"); *see, e.g.*, Burkhardt, RH-TP-06-28,708 at 26-27 & 46-47 n.37; Tavana Corp. v. Tenants of 1850-1854 Kendall St., N.E., CI 20,694 (RHC Mar. 8, 1996). The Commission notes that the certified record in NV 09-001 contains a proposed timetable for relocation of each tenant in the Housing Accommodation, in which the Housing Provider proposed to relocate Tenants Burkhardt and Wassem 470 days after the administrative approval of its § 501(f) application. Record of NV 09-001 at 16-17. The uncontested factual allegations made by the Tenants in this petition indicate that the Housing Provider, apparently contrary to its plans as submitted to and approved by the Rent Administrator, served 120-day Notices to Vacate to the Tenants three (3) days after the Rent Administrator first issued an order approving the application. *See* Final Order at 2-3; R. at 317-18.

Because this issue cannot be addressed in the first instance by the Commission without a final order from OAH, the Commission emphasizes that it does not make any decision on the issue in this Decision and Order. *See* 14 DCMR § 3807; Johnson v. D.C. Rental Hous. Comm'n, 642 A.2d 135, 138-39 (D.C. 1994) (Commission must provide notice and opportunity before taking official notice of other administrative cases, may not sit as finder of fact, and cannot use evidence from other cases to establish facts which one party has the burden of proving).

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

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

Where a claim has been dismissed without a hearing, the Commission views all factual allegations in the record in the light most favorable to the party opposing dismissal. *See* Comer v. Wells Fargo Bank, N.A., 108 A.3d 364, 371 (D.C. 2015) (reviewing dismissal pursuant to Super Ct. Civ. R. 12(b)); Oparaugo v. Watts, 884 A.2d 63, 79 (D.C. 2005); Jordan, Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co., 870 A.2d 58, 62 (D.C. 2005); DHCD-RAD v. 1433 T St., N.W. Assocs., RH-SC-06-002 (RHC May 20, 2015); *see also* 14 DCMR § 3828.1 (2004).[9] The Commission, moreover, will review legal questions raised by an ALJ's interpretation of the Act *de novo* to determine if it is unreasonable or embodies a material misconception of the law. *See* United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Dorchester House Assocs. Ltd. P'ship v. D.C. Rental Hous. Comm'n, 938 A.2d 696, 702 (D.C. 2007) (citing Sawyer Prop. Mgmt. of Md. v. D.C. Rental Hous. Comm'n, 877 A.2d 96, 102-03 (D.C. 2005)); Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC Dec. 23, 2013); Carpenter v. Markswright, RH-TP-10-29,840 (RHC June 5, 2013).

---

[9] The Commission's rules at 14 DCMR § 3828.1 provide:

> When these rules are silent on a procedural issue before the Commission, that issue shall be decided by using as guidance the current rules of civil procedure published and followed by the Superior Court of the District of Columbia and the rules of the District of Columbia Court of Appeals.

OAH has jurisdiction to hear "adjudicated cases under the jurisdiction of the Rent Administrator" arising under the Act. D.C. OFFICIAL CODE § 2-1831.03(b-1)(1).[10] The Act provides that the Rent Administrator "shall have jurisdiction over those complaints and petitions arising under [titles] II, IV, V, VI, and IX . . . which may be disposed of through administrative proceedings." D.C. OFFICIAL CODE § 42-3502.04. Title V of the Act includes § 501. *See* D.C. OFFICIAL CODE § 42-3505.01.[11] Prior to the transfer of hearing jurisdiction to OAH, the Commission determined that the Rent Administrator had jurisdiction to adjudicate complaints of invalid notices to vacate under § 501. Horne v. Edgewood Mgmt. Corp., TP 24,119 (RHC Mar. 5, 1997) ("The hearing examiner had the duty to make the proper findings of fact within the jurisdiction of the Rent Administrator under [§ 501(f)] on whether the housing provider gave proper notice of relocation assistance[.]").

As stated by the ALJ and noted by the Tenants in the Notice of Appeal, the Rent Administrator issued an order on February 26, 2010, and again on March 3, 2010, authorizing the Housing Provider to issue 120-day Notices to Vacate. Final Order at 3; R. at 318; Notice of Appeal at 1; *see also* Tenants of 3133 Conn. Ave., NV 09-001. The Commission's regulations provide that, after an appeal is taken from a final order by the Rent Administrator:

> All parties to an appeal are required to comply with the decision or order appealed from, except . . . when a stay has been granted by the Commission[.]

---

[10] The OAH Establishment Act, D.C. OFFICIAL CODE § 2 1831.03(b-1)(1), provides:

> In addition to those agencies listed in subsections (a) and (b) of this section, as of October 1, 2006, this chapter shall apply to adjudicated cases under the jurisdiction of the Rent Administrator in the Department of Consumer Regulatory Affairs.

As noted *supra* at 1 n.1, D.C. OFFICIAL CODE § 42-3502.04b provides for the transfer of the functions of the RACD within DCRA to the RAD within DHCD, effective September 18, 2007.

[11] The Commission notes that, as codified in the D.C. OFFICIAL CODE (2001 ed.), "titles" of the Act are designated as "subchapters." *See* D.C. Law 6-10; 32 DCR 3089 (July 17, 1985).

14 DCMR § 3805.5 (2004); *see* Cafritz Co. v. D.C. Rental Hous. Comm'n, 615 A. 2d 222, 228 (D.C. 1992). The Commission's review of the record in this case and its own past orders does not show any stay of the Rent Administrator's order approving the Housing Provider's § 501(f) application in NV 09-001. *See* Tenants of 3133 Conn. Ave., NV 09-001. Accordingly, the Commission is satisfied that the Housing Provider was not prohibited from serving 120-Notices to Vacate, as provided in the Rent Administrator's order, by the pending appeal in NV 09-001. 14 DCMR § 3805.5; Cafritz, 615 A.2d at 228.

However, the Commission observes that the validity of administrative approval of a § 501(f) application, *i.e.*, the general subject of the appeal in NV 09-001, is a separate matter from the lawfulness of the actual service of a 120-day Notice to Vacate by the Housing Provider. *See* 1433 T St. Assocs., RH-SC-06-002 (service of document titled "Notice to Vacate" may violate the Act where Rent Administrator has approved 120-day Notices to Vacate with different contents); Horne, TP 24,119. The Commission notes that the distinction between tenant challenges to administrative approval and to actual implementation is consistent throughout the matters regulated by the Act. *Cf.* Tenants of 2300 and 2330 Good Hope Rd., S.E. v. Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015) ("any tenant of the Housing Accommodation could have contested an increase in the rent charged based on the capital improvement rent ceiling increase, through the filing of a tenant petition, alleging that the capital improvement increase was greater than the amount allowed"); Tenants of 2480 16th St., N.W. v. Dorchester House Assocs. Ltd. P'ship, CI 20,786 (RHC Nov. 18, 2014) ("the housing provider's certification of actual or presumptive compliance with the housing regulations does not prevent a tenant from filing a tenant petition if housing code violations exist at the time that the capital improvement surcharge is implemented through a rent increase").

To illustrate, the Commission observes that the regulations promulgated to implement the Act contain ten (10) discrete elements that must be written in a 120-day Notice to Vacate based on substantial rehabilitation, alteration, or renovations. 14 DCMR § 4302; 1433 T St. Assocs., RH-SC-06-002. The Commission has previously determined that if the Rent Administrator approves a § 501(f) application, and a housing provider nonetheless serves its tenants 120-day Notices to Vacate that do not contain these elements, that housing provider may be found to have engaged in conduct that violates the Commission's regulations. *See* 14 DCMR § 4302; 1433 T St. Assocs., RH-SC-06-002; Horne, TP 24,119.

The Commission's review of the record reveals that the Final Order conflates the Rent Administrator's jurisdiction to approve a § 501(f) application with jurisdiction over a tenant petition containing allegations regarding the actual service of a 120-day Notice to Vacate, stating, for example:

> The Rent Administrator's March 3, 2010, Order included a notice of appeal rights that specifically instructed any aggrieved party to file an appeal with the Rental Housing Commission, which the Tenants did. Therefore, Tenants' allegation that 120-day notices to vacate were issued in violation of the Act is dismissed for lack of jurisdiction.

Final Order at 13; R. at 308. However, as described, the Commission is satisfied that OAH has jurisdiction over tenant petitions that allege a housing provider, despite prior administrative approval, violated the Act and the regulations, 14 DCMR § 4302, by serving a non-compliant 120-day Notice to Vacate on a tenant. 1433 T St. Assocs., RH-SC-06-002; Horne, TP 24,119. Because the Tenants allege that the actual issuance of the 120-day Notices to Vacate violated the Act, viewing the allegations in the light most favorable to the Tenants, the Commission determines that OAH has jurisdiction over the Tenants' claim. 14 DCMR § 3807.1; Comer, 108 A.3d at 371; *see* D.C. OFFICIAL CODE § 2-1831.03(b-1); 1433 T St. Assocs., RH-SC-06-002; Horne, TP 24,119.

Accordingly, the ALJ's determination that OAH lacks jurisdiction over the service of notices to vacate, based on separate proceedings on a § 501(f) application, is reversed.

2. Whether the ALJ erred in determining that the Tenants' claims regarding the service of notices to vacate are moot.

In addition to dismissing the Tenants' claims regarding the service of the 120-day Notices to Vacate for lack of jurisdiction, the ALJ also determined that the claims should be dismissed as moot because no relief is available to the Tenants under the Act. Final Order at 13-14; R. at 307-08. In the Final Order, the ALJ found that, after the March 1, 2010, service of the 120-day Notices to Vacate:

> Some Tenants relocated temporarily and some never vacated. As of the date of this Final Order, all renovations have been completed. All Tenants returned to their units. Tenant[] Wassem no longer reside[s] in the Housing Accommodation.

Final Order at 4; R. at 317. The ALJ concluded that "a notice to vacate for renovations where renovations have been completed is moot[,]" and that "[a] civil fine would have no effect on the parties' rights[.]" Final Order at 13-14; R. at 307-08. The Tenants argue on appeal that their claims are not moot because of the availability of civil fines for violations of the Act. Notice of Appeal at 3.[12]

As stated, the Commission will reverse a final order that is "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

[12] The Tenants also assert that they "did not in fact vacate their apartments in July 2010 (when Klingle et al. elected to sue for possession in Landlord Tenant Branch on about July 8, 2010[).]" Notice of Appeal at 3. At the Commission's hearing, Tenant Burkhardt stated that she did vacate her rental unit in December 2010 for other reasons. Hearing CD (RHC June 9, 2015) at 10:42-10:43. The Commission's review of the record does not reveal any substantial evidence as to the status of any actions for possession in the Superior Court of the District of Columbia, except that Tenant Burkhardt asserted at the Commission's hearing that the action against her was dismissed voluntarily by the Housing Provider. *See id* at 10:19-10:20. Regardless of this apparent dispute of fact, which it is not the Commission's role to resolve, for the reasons the Commission explains herein, whether and when the Tenants did or did not actually vacate their rental units is not relevant to a legal determination of whether their allegations are moot.

evidence on the record of the proceedings." 14 DCMR § 3807.1. The Commission reviews *de novo* the ALJ's conclusion of law that no relief is available to the Tenants under the Act. United Dominion Mgmt., 101 A.3d at 430-31; *see also* Comer, 108 A.3d at 371; 1433 T St., N.W. Assocs., RH-SC-06-002.

A court will generally not decide an issue in a case when "the legal issues presented are no longer 'live' or when the parties lack a legally cognizable interest in the outcome." Cropp v. Williams, 841 A.2d 328, 330 (D.C. 2004) (resignation of an incumbent officeholder moots an appeal from an underlying action seeking to remove that individual); *see also* Douglas v. Dorchester House Assocs., LLC, RH-SF-09-20,098 (RHC Apr. 8, 2015) (Order on Motion to Extend Time to File Brief) (where extension was sought to file brief before hearing, motion moot after hearing occurred); Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Feb. 18, 2014) (where case remanded to determine remedy for violation of registration provision of the Act, issue of notice to tenant of reduction in services was moot on appeal). A legal issue is no longer "live" if "events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future." Transwestern Pipeline Co. v. Fed. Energy Regulatory Comm'n, 897 F.2d 570, 575 (D.C. Cir. 1990) (dispute over gas charges moot where termination of contracts eliminated possibility that any of pipeline company's customers would be charged); *see also* District of Columbia v. Group Ins. Admin., 633 A.2d 2, 12 (D.C. 1993) (where preliminary injunction was dissolved, challenges to its validity were generally moot, except on issue of contempt fines for its violation).

Pursuant to D.C. OFFICIAL CODE § 42-3509.01(b), civil fines may be imposed under the Act as follows:

> Any person who willfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court

> of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation.

As explained in Issue 1, the service of a notice to vacate on a tenant is a specific action, separate from the approval of the notice by the Rent Administrator, and the notice served may itself be unlawful if done in a manner that does not comply with or its contents do not conform to the Act or the regulations. *See supra* at 21-22. In 1433 T St. Associates, RH-SC-06-002, the Commission remanded a civil fines case to OAH to conduct a hearing on a housing provider's service of allegedly unlawful notices to vacate. Prior to dismissing the claim on other grounds, the ALJ in that case denied the housing providers' motion to dismiss as moot, which was based on the fact that tenants who had been served allegedly unlawful notices had eventually been allowed to stay or had later otherwise agreed to vacate. 1433 T St. Assocs., RH-SC-06-002. On appeal, the housing providers in that case reargued that the entire case was moot and should be dismissed by the Commission. *Id.* The Commission declined to do so and remanded for a hearing on the merits. *Id.*

In this case, the ALJ concluded that "[a] civil fine would have no effect on the parties' rights and could not effect [sic] Mr. Wassem in the future because he no longer resides in the Housing Accommodation." Final Order at 14; R. at 307. However, long-standing precedent of the District of Columbia Court of Appeals (DCCA) establishes that the Act (and identical language of its predecessors) permits the imposition of civil fines through tenant petitions. Bernstein Mgmt. Corp. v. D.C. Rental Hous. Comm'n, 952 A.2d 190, 193-95 (D.C. 2008); Revithes v. D.C. Rental Hous. Comm'n, 536 A.2d 1007, 1019-22 (D.C. 1987); *see also* 14

DCMR § 4214.4 (2004).[13] The Commission notes that civil fines under D.C. OFFICIAL CODE § 42-3509.01 are not enforceable as awards to complaining tenants, but must instead be paid to the District. Turner v. Tscharner, TP 27,014 (RHC June 13, 2002); Johnson v. Moore, TP 23,705 (RHC Mar. 23, 1999). The Commission is not aware of, nor does the ALJ cite to, anything in the Act, the regulations, DCCA precedent, or prior decisions of the Commission that suggests that the imposition of civil fines, payable to the government, for unlawful conduct is moot because of any change in the position of the tenant who brings the matter before an administrative agency. *See, e.g.*, Ahmed, Inc. v. Torres, RH-TP-07-29,064 (RHC Oct. 28, 2014) (affirming in part and remanding in part the imposition of fines, notwithstanding settlement between housing provider and tenants on issues of rent refunds and rollbacks). Therefore, the Commission is satisfied that the allegation that the Housing Provider willfully served unlawful 120-day Notices to Vacate may, following an evidentiary hearing on the record, result in the imposition of civil fines under D.C. OFFICIAL CODE § 42-3509.01(b) and is not moot. *See* Bernstein Mgmt., 952 A.2d at 193-95; Group Ins. Admin., 633 A.2d at 12; 1433 T St. Assocs., RH-SC-06-002; Torres, RH-TP-07-29,064.

Accordingly, the ALJ's determination that the Tenants' claims on the service of the 120-day Notices to Vacate are moot is reversed.

---

[13] 14 DCMR § 4214.4 provides:

> The tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, complain of and request appropriate relief for any other violation of the Act including, but not limited to, the following:
>
> (a) Any violation of the notice requirements of § 501 of the Act[.]

3. Whether the ALJ erred in dismissing the Tenants' claim that the Housing Accommodation was not properly registered at the time notices to vacate were served.

The Tenants' specific allegation regarding the issuance of the 120-day Notices to Vacate is that the Notices were served on them at a time when the Housing Accommodation was not properly registered with the RAD. *See* Tenant Petition at 5; R. at 31. In addition to the ALJ's determinations, discussed *supra* in Issue 1 and Issue 2, that OAH lacks jurisdiction and that this claim is moot, the ALJ determined that the Tenants' claim must be dismissed because: (a) "there is nothing in the Rental Housing Act that prohibits a housing provider from issuing a notice to vacate if a housing accommodation is not properly registered;" and (b) "Tenant Wassem alleged that the Housing Accommodation was not properly registered in several other tenant petitions[.]" Final Order at 14; R. at 307.

As stated, the Commission reviews the ALJ's dismissal of the Tenant Petition by viewing all factual allegations in favor of the Tenants and reviewing the conclusions of law *de novo*. 14 DCMR § 3807.1; Comer, 108 A.3d at 371; United Dominion Mgmt., 101 A.3d at 430-31; 1433 T St., N.W. Assocs., RH-SC-06-002.

The Act requires that each housing provider in the District of Columbia, unless excluded entirely from the Act's scope, register any housing accommodation, and the rental units therein, that it owns for the purposes of the Rent Stabilization Program. D.C. OFFICIAL CODE § 42-3502.05(f); 14 DCMR § 4101 (2004); *see, e.g.*, Temple v. D.C. Rental Hous. Comm'n, 536 A.2d 1024, 1029-30 (D.C. 1987); Webb v. Admasu, RH-TP-08-29,147 (RHC May 21, 2015); Dejean v. Gomez, RH-TP-07-29,050 (RHC Aug. 15, 2013) (explaining that the invalidation of a rent increase is a remedy for improper registration). As the ALJ noted in the Final Order, the regulations promulgated to implement the Act provide that:

In order to be valid, a notice to vacate shall include the following:

. . .

(c) A statement that the housing accommodation is registered with the Rent Administrator, and the registration number, or a statement that the accommodation is exempt from registration, and the basis for the exemption[.]

14 DCMR § 4302.1 (2004). The regulations further provide for the enforcement of this rule, in relevant part, as follows:

> The tenant of a rental unit or an association of tenants of a housing accommodation may, by petition filed with the Rent Administrator, complain of and request appropriate relief for any other violation of the Act including, but not limited to, the following:
>
> (a) Any violation of the notice requirements of § 501 of the Act including, but not limited to, allegations that:
>
> . . .
>
> (2) The notice is given for a rental unit that is subject to registration and is not properly registered[.]

14 DCMR § 4214.4. The Commission reviews the ALJ's determinations, which it has identified as (a) and (b), in turn for compliance with the Act and these regulations.

a. Proper registration is a requirement for the issuance of notices to vacate

The Commission determines that the ALJ erred in concluding that 14 DCMR § 4302 does not "prohibit[] a housing provider from issuing a notice to vacate if a housing accommodation is not properly registered." Final Order at 14; R. at 307. The ALJ apparently read that regulation to merely require a statement "that the housing accommodation is registered," regardless of the truth of that statement. *See id.* The Commission determines that such a reading contradicts the remedial purposes of the Act to protect tenants' interests in the supply of rental housing in the District of Columbia. *See* D.C. OFFICIAL CODE § 42-3501.02 (2001); Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1297-1300 (D.C. 1990); *see also* United Dominion Mgmt. Co.

v. Hinman, RH-TP-06-28,728 (RHC June 5, 2013) (interpretation of statute of limitations in manner that expands tenant ability to challenge defective rent adjustments), *aff'd* United Dominion Mgmt., 101 A.3d at 426. Moreover, that reading is directly contradicted by the section of the regulations governing tenant petitions, which expressly allows challenges to notices to vacate that are served while a rental unit's registration is improper. 14 DCMR § 4214.4(a)(2); *see, e.g.*, King v. Burwell, No. 14-114, slip op. at 21 (U.S. June 25, 2015) (courts rely on context and structure to, if at all possible, interpret law in a way that is consistent with its underlying purposes); Carillon House Tenants' Ass'n v. D.C. Rental Hous. Comm'n, 793 A.2d 461, 464 (D.C. 2002) ("meaning is . . . to be derived, not from the reading of a single sentence or section, but from consideration of an entire enactment against the backdrop of its policies and objectives.") (quoting Gondelman v. D.C. Dep't of Consumer & Regulatory Affairs, 789 A.2d 1238, 1245 (D.C. 2002)).

As the ALJ noted, a civil fine may be an appropriate remedy if a housing provider's failure to properly register was willful. *See* Final Order at 14; R. at 307; D.C. OFFICIAL CODE § 42-3509.01(b); Temple, 536 A.2d at 1029-30. The ALJ further noted that the Act prohibits any rent increases for rental units that are not properly registered. *Id.*; *see* D.C. OFFICIAL CODE § 42-3502.08(a)(1)(B); Dejean, RH-TP-07-29,050. The ALJ concluded, however, that those are the exclusive remedies under the Act for a housing provider's failure to register. Final Order at 14; R. at 307. Based on its review of the record, the Commission observes that the ALJ failed to recognize that the issuance of a notice to vacate *while the registration for the housing accommodation and rental unit is improper* constitutes a separate violation of the regulations. 14 DCMR §§ 4214.4(a)(2), 4302.1(c); *see also* Issue 1, *supra* at 21-22 (prior administrative

approval and actual issuance of notices are distinct legal issues); Issue 2, *supra* at 25-26 (civil fines may be imposed through tenant petition process).

The Tenant Petition alleges that the 120-day Notices to Vacate served on the Tenants on March 1, 2010, "are invalid because the rental units in the [H]ousing [A]ccommodation are not properly registered." Tenant Petition at 5; R. at 31. The Commission is therefore satisfied, based on its review of the record and applicable regulations, that the Tenant Petition alleges a violation of the Act for which civil fines may be imposed. D.C. OFFICIAL CODE § 42-3509.01(b); 14 DCMR § 4214.4(a)(2); Bernstein Mgmt., 952 A.2d at 193-95; Revithes, 536 A.2d at 1019-22; *see also* Comer, 108 A.3d at 371 (in reviewing dismissal of complaint, factual allegations and reasonable inferences therefrom are accepted as true); Oparaugo, 884 A.2d at 79; Jordan, Keys & Jessamy, LLP, 870 A.2d at 62.

Accordingly, the Commission reverses the ALJ's determination that the Tenants did not allege a violation of the Act or the regulations in claiming that 120-day Notices to Vacate were served on them while the registration of the Housing Accommodation was improper.

b. The ALJ improperly determined that other tenant petitions precluded the Tenants from raising this issue

The Commission also determines that the ALJ erred in dismissing the allegation that the 120-day Notices to Vacate were unlawful because the Housing Accommodation was not properly registered because "any allegation that the property was not properly registered in 2010 when the 501(f) notices were issued, is part of TP 30,172, and cannot also be raised here." Final Order at 15; R. at 306. The Commission observes, initially, that the ALJ's determination is couched in terms of mootness and failure to state a claim under the Act, but her analysis is instead in the nature of the doctrines of *res judicata* or collateral estoppel. *See id.*; *see, e.g.*, Will v. Hallock, 546 U.S. 345, 355 (2006) (purpose behind *res judicata* is a concern "of avoiding

duplicative litigation, 'multiple suits on identical entitlements or obligations between the same parties") (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402, p. 9 (2d ed. 2002)); District of Columbia v. Thompson, 593 A.2d 621, 634 (D.C. 1991) ("doctrines of claim preclusion and election of remedies, for example, are usually available to prevent [the] particular evil" of "duplicative handling of the same dispute").

The doctrine of *res judicata*, or "claim preclusion," operates as a bar against new litigation: (1) between the same parties to an earlier, final judgement; and (2) arising out of the same set of facts. *See* EDCare Mgmt. v. Delisi, 50 A.3d 448, 451 (D.C. 2012); Carmel Partners, Inc. d/b/a Quarry II, LLC v. Levy, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC May 16, 2014). Collateral estoppel, or "issue preclusion," on the other hand, gives controlling effect to judgements on specific issues litigated in prior cases and "can be invoked against a party where (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." Wilson v. Hart, 829 A.2d 511, 514 (D.C. 2003); Levy, RH-TP-06-28,830 & RH-TP-06-28,835. The DCCA and the Commission have consistently held that *res judicata* and collateral estoppel are affirmative defenses that must be pleaded and established by the party asserting them. Johnson v. D.C. Rental Hous. Comm'n, 642 A.2d 135, 139 (D.C. 1994); Jonathan Woodner Co. v. Adams, 534 A.2d 292, 296 (D.C. 1987); Campbell, RH-TP-09-29,715; Mann Family Trust v. Johnson, TP 26,191 (RHC Nov. 21, 2005). Therefore, "[t]o evaluate a claim of preclusion, the trier of fact must 'have before it the exhibits and records involved in the prior cases . . . .'" Johnson, 642 A.2d at 139 (quoting Block v. Wilson, 54 A.2d 646, 648 (D.C. 1947)).

Based on its review of the record, the Commission is not satisfied that the ALJ made findings of fact or conclusions of law on each of the elements of either legal doctrine. *See* D.C. OFFICIAL CODE § 2-509(e);[14] Perkins v. D.C. Dep't of Emp't Servs., 482 A.2d 401, 402 (D.C. 1984);[15] Carmel Partners, LLC v. Barron, TP 28,510, TP 28,521, & TP 28,526 (RHC Oct. 27, 2014); Washington v. A&A Marbury, LLC, RH-TP-11-30,151 (RHC Dec. 27, 2012). Most significantly, the Commission observes that the ALJ failed to identify, for purposes of either element (1) of *res judicata* or element (2) of collateral estoppel, a valid, final judgment covering any claims between the Tenants and the Housing Provider on the date on which the 120-day Notices to Vacate were issued. *See* Final Order at 15; R. at 306.[16]

---

[14] D.C. OFFICIAL CODE § 2-509(e) provides, in relevant part:

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

[15] In Perkins, the DCCA articulated a three-part (3-part) test under D.C. OFFICIAL CODE § 2-509(e) as follows: "(1) the decision must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." 482 A.2d at 402.

[16] The Commission notes that, at is hearing on this appeal, counsel for the Housing Provider asserted that the ALJ's dismissal of the Tenant Petition as "duplicative" may be supported by the common law doctrine of "abatement." Hearing CD (RHC June 9, 2015) at 10:34-10:38. However, the Housing Provider did not elect to provide the Commission any briefing on this alternative theory, or, for that matter, any issue raised in the Notice of Appeal. *See* Housing Provider's Memo at 1 ("In response to [the Tenants' Brief], Housing Provider adopts and incorporates by reference the well-reasoned decision of the [ALJ] below."). The Commission may not "act as counsel for either litigant," and is especially disinclined to accept unsupported assertions from a party with legal representation. Flax v. Schertler, 935 A.2d 1091, 1107 n.14 (D.C. 2007) (internal quotations omitted); Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Jan. 20, 2015) (Order on Reconsideration); Tenants of 4021 9th St., N.W. v. E & J Props., LLC, HP 20,812 (RHC June 11, 2014).

The Commission observes, nonetheless, that courts in the District of Columbia have held that "the pendency of a former action in the same jurisdiction between the same parties based on the same cause of action is ground for abatement of the second cause of action." Paraskevas v. McKee Auto Serv., Inc., 162 A.2d 488, 490 (D.C. 1960) (citing 1 Am. Jur., Abatement & Revival § 14; 1 C.J.S. Abatement & Revival § 17). The most significant difference apparent to the Commission between the doctrine of abatement and the doctrines of claim and issue preclusion is that the latter depend upon a final adjudication, rather than a pending action. *Compare* Paraskevas, 162 A.2d at 490, *with* Levy, RH-TP-06-28,830 & RH-TP-06-28,835. But for the second case to be abated, both the first and second must arise from the same cause of action, and the party bringing the case must be able to obtain "full and adequate relief" in the first case. 1 Am. Jur. 2d, Abatement, Survival, & Revival § 29 (citing Tebbs v. Union Realty Corp., 286 F. 1011, 1014 (D.C. 1922)).

Specifically, the ALJ stated:

> I issued a final order on those petitions on August 5, 2013, and found that the Housing Accommodation was properly registered between January 31, 2005 and January 31, 2008. *Wassem v. Marhefka et. al.*, RH-TP-06-28,220 and RH-TP-06-28,649 (Amended Final Order Aug. 5, 2013) at 36. Currently pending final order with Administrative Law Judge Goodie is TP 30,172, to which both Tenant Wassem and Burkhardt are parties. That petition, which covers the period December 30, 2008, through December 30, 2011, also alleges that the Housing Accommodation is not properly registered.

Id. As discussed *supra* in Issue 1 and Issue 2, the Commission's review of the record reveals that the Tenant Petition in this case relates to the conduct of the Housing Provider in serving 120-day Notices to Vacate on March 1, 2010, and to whether the Housing Accommodation was properly registered on that date. *See* Tenant Petition at 5; R. at 31. As described in the Final Order, the first case identified by the ALJ (TP 28,220 & TP 28,649, consolidated) relates to an earlier time period; the second (TP 30,172) relates to the relevant time period but no final order has been, or was at the time, issued in that case. Final Order at 15; R. at 306.

The Commission further observes that, by ordering the Tenants to show cause why their claims should not be dismissed, *see* Show Cause Order at 24; R. at 220, the ALJ improperly shifted the burden of proof to the parties against whom claim or issue preclusion were being asserted. Johnson, 642 A.2 at 139; Adams, 534 A.2d at 296; *see also* Oh v. Nat'l Capital Revitalization Corp., 7 A.3d 997, 1003 (D.C. 2010) ("Our case law makes clear, however, that for an affirmative defense to stand . . ., facts establishing the elements of the defense 'must be particularized in some detail.'") (quoting Patterson v. Walker-Thomas Furniture Co., 277 A.2d 111, 114 (D.C. 1971)); Block, 54 A.2d at 648 ("*res judicata* or any other matter constituting an

---

As explained *supra*, the Commission determines that the Tenant Petition alleges a distinct violation of the Act by serving 120-day Notices to Vacate while not validly registered on March 1, 2010. The Commission's review of the record reveals nothing to suggest that this particular claim was made in any other petition. *See, e.g.,* Show Cause Order at 19, 21, & 34 n.12; R. at 225, 223, & 210. Accordingly, the Commission is not persuaded that it should affirm the Final Order on the alternative grounds that abatement was an appropriate basis for dismissing this claim in the Tenant Petition. *See* Paraskevas, 162 A.2d at 490; Tebbs, 286 F. at 1014.

affirmative defense must be affirmatively pleaded and such defense may not be raised by motion addressed to the sufficiency of the complaint"). The Commission's review of the record reveals that the ALJ raised this issue on her own initiative, not by motion of the Housing Provider, and reveals no substantial evidence on the record of the "exhibits and records involved in the prior cases." Johnson, 642 A.2d at 139; *see* Show Cause Order at 5; R. at 239; *cf.* 14 DCMR § 3807.1 (Commission shall reverse decisions that contain "findings of fact unsupported by substantial evidence on the record of the proceedings"); Adams, 534 A.2d at 296; Block, 54 A.2d at 648.

For these reasons, the Commission is not satisfied that the ALJ made findings of fact, based on substantial evidence, which rationally support the conclusion of law that the Tenants are precluded from litigating the validity of the Housing Accommodation's registration in this case. D.C. OFFICIAL CODE § 2-509(e); Delisi, 50 A.3d at 451; Hart, 829 A.2d at 514; Perkins, 482 A.2d 401, 402; Levy, RH-TP-06-28,830 & RH-TP-06-28,835.

Accordingly, the Commission vacates the ALJ's determination that the Tenants are precluded from litigating the registration status of the Housing Accommodation on March 1, 2010, the date on which notices to vacate were served on the Tenants.

Having disposed of each basis on which the ALJ dismissed the Tenants' allegations regarding the service of the 120-day Notices to Vacate, the Commission remands the Tenant Petition to OAH for such further proceedings as are necessary to adjudicate the Tenants' claims, consistent with this Decision and Order, the Act, the DCAPA, and applicable precedent. If, on remand, the Housing Provider asserts a defense of *res judicata* or collateral estoppel, or otherwise moves to abate this action, *see supra* n.16, the ALJ is instructed to make findings of fact, based on substantial evidence of the issues in and disposition of any related proceedings,

and conclusions of law on each element of the applicable legal doctrine before granting such a motion.

4. **Whether the ALJ erred in dismissing the Tenants' claim that the service of notices to vacate was retaliatory.**

5. **Whether the ALJ erred in dismissing the Tenants' claim that the service of notices to vacate was a willful violation of the Act.**

As described *supra* under Issue 2, at 23-26, the Act makes civil fines available as a remedy in a tenant petition. *See* D.C. OFFICIAL CODE § 42-3509.01(b); Bernstein Mgmt., 952 A.2d at 193-95; Revithes, 536 A.2d at 1019-22. In the Final Order, the ALJ noted that the imposition of civil fines under D.C. OFFICIAL CODE § 42-3509.01(b) requires that a housing provider's violation of the Act be willful. Final Order at 12; R. at 309. The ALJ also noted that the Tenants claim that the service of the 120-day Notices to Vacate was retaliatory action that is prohibited by D.C. OFFICIAL CODE § 42-3505.02 (2001). Final Order at 19; R. at 302.

The Tenants make numerous arguments on appeal that the ALJ erred in determining that the Housing Provider's actions were not willful or retaliatory. *See* Notice of Appeal at 1-3. The Commission's review of the record, however, shows that the ALJ did not make any determinations on these issues because the ALJ dismissed the underlying claims for lack of jurisdiction, for mootness, and for failure to allege a violation of the Act. *See* Final Order at 12, 19; R. at 309, 302; *see also* Issues 1, 2, & 3, *supra*. Because the Commission reverses those determinations and remands the Tenant Petition for further proceedings on whether the Housing Provider violated the Act, there is no further relief the Commission can grant the Tenants at this time, and the issues of willfulness and retaliation are moot for the purposes of this appeal. *See, e.g.,* Hiatt Place P'ship v. Hiatt Place Tenants Ass'n, TP 21,149 (RHC May 10, 1991) ("[Because] there will be a remand on the reduction in services issue, we need not pursue the

treble damage question at this time. The question of treble damages can be considered if any damages are awarded after remand."); Knight-Bey v. Henderson, RH-TP-07-28,888 (RHC Jan. 8, 2013) (where tenant/petitioner fails to appear at hearing, failure to afford due process through proper notice of hearing to housing provider/respondent is moot); Kuratu, RH-TP-07-28,985 (where case remanded to determine remedy for violation of registration provision of the Act, issue of notice to tenant of reduction in services was moot on appeal); Oxford House-Bellevue v. Asher, TP 27,583 (RHC May 4, 2005) ("[T]here is no further relief the Commission may grant after reversing the hearing examiner's determination that the housing accommodation was exempt from Title II of the Act, and directing the hearing examiner to decide all issues raised in the tenant petition.").

Accordingly, the Tenants' appeal of these issues is dismissed without prejudice. On remand, if the ALJ determines that the Housing Provider violated the Act, the ALJ is instructed to make findings of fact and conclusions of law on whether the Housing Provider's violation was willful or retaliatory. Wilson v. Smith Prop. Holdings Van Ness, RH-TP-07-280,907 (RHC Mar. 10, 2015) ("both the DCAPA and the Act require [the Commission] to remand issues which are not fully considered in a final order for further consideration"); *see also* Miller v. D.C. Rental Hous. Comm'n, 870 A.2d 556, 559 (D.C. 2005) ("Unless the Commission was of the view – not apparent from its opinion – that such findings could lead to only one conclusion on the record, *viz.*, non-willfulness, the proper course for it was to remand the case to the ALJ for the necessary findings of fact."); Gomez v. Independence Mgmt: of Del., Inc., 967 A.2d 1276, 1290 (D.C. 2009) ("The fact that the Rent Administrator 'determine[d] that these improvements [to the building] cannot be safely or reasonably accomplished while the rental units are occupied[,]'

may be important evidence that the evictions were necessary, but it is not, without more, enough to preclude a finding that the action was retaliatory.").

B. Reductions in Related Services or Facilities

6. Whether the ALJ erred in dismissing the Tenants' claims of reductions in services or facilities as duplicative of other tenant petitions.

The Tenant Petition alleges that the Housing Provider reduced or eliminated several related services or facilities at the Housing Accommodation in violation of the Act: a roof deck, parking spaces, square footage in units due to additional piping, utility service, elevator service, laundry room access, and "other housing and fire code violations." *See* Tenant Petition at 5; R. at 31. In the Final Order, the ALJ dismissed all of those claims because the Tenants alleged the same reductions or eliminations, during at least partly overlapping time periods, in two other proceedings before OAH: TP 28,220 & TP 28,649 (consolidated) and TP 30,172. *See* Final Order at 15-19; R. at 302-06. On appeal, the Tenants[17] argue that the ALJ erred in applying the doctrine of issue preclusion to dismiss their claims as "duplicative." Notice of Appeal at 4; *cf.* Final Order at 15; R. at 306.

As with the ALJ's dismissal of the Tenants' allegations of invalid registration, *supra* at 30, the Commission again observes that the proper, applicable legal framework for dismissal of a

[17] The Commission notes that, in the Final Order, the ALJ dismissed the claims by Tenant Burkhardt because, in the Group Response, she "conceded that her allegations of reductions in services and facilities in this petition are duplicative of TP 30,172 and therefore she agreed to withdraw this claim[.]" Final Order at 19; R. at 302. The Commission's review of the record shows that, responding to the ALJ's order to "show cause why the allegation of retaliation should not be dismissed and set forth[,] with specificity, the alleged acts of retaliation," Tenant Burkhardt stated that her "individual tenant petition TP 30,172 challenged *some* services and facilities-related retaliation as to her own unit, so she will withdraw from TP 29,875 *to that extent*[.]" Group Response at 4 & n.10 (emphasis added); R. at 269.

The Tenants do not specifically address on appeal whether the ALJ correctly identified the "extent" to which Tenant Burkhardt agreed to withdraw her claims in the Tenant Petition, but they assert generally that the ALJ's comparison of other, pending tenant petitions was erroneous. *See* Notice of Appeal at 4. For the purpose of resolving the current appeal, the Commission will refer to the "Tenants" collectively for convenience and ease of discussion on the issue of reductions in services or facilities, without making any determination as to the extent Tenant Burkhardt may or may not have withdrawn her claims in this Tenant Petition.

case based on related litigation is that of either *res judicata* or collateral estoppel. Delisi, 50 A.3d at 451; Wilson, 829 A.2d at 514; Levy, RH-TP-06-28,830 & RH-TP-06-28,835.[18] Pursuant to the DCAPA, in order to dismiss the claims in the Tenant Petition, the ALJ was required to make findings of fact and conclusions of law, based on substantial evidence in the record, on each element of either legal doctrine. *See* D.C. OFFICIAL CODE § 2-509(e); Perkins, 482 A.2d at 402; Barron, TP 28,510, TP 28,521, & TP 28,526; A&A Marbury, RH-TP-11-30,151. As set forth *supra* at 32, the elements of *res judicata*, or claim preclusion, are that the current litigation be: (1) between the same parties to an earlier, final judgement; and (2) arising out of the same set of facts. Delisi, 50 A.3d at 451; Levy, RH-TP-06-28,830 & RH-TP-06-28,835. The elements of collateral estoppel, or issue preclusion, are that: (1) the issue was actually litigated; (2) was determined by a valid, final judgment on the merits; (3) after a full and fair opportunity for litigation by the party; (4) under circumstances where the determination was essential to the judgment." Wilson, 829 A.2d at 514; Levy, RH-TP-06-28,830 & RH-TP-06-28,835.

The Commission's review of the Final Order again reveals no systematic analysis by the ALJ of elements of any applicable legal standard. D.C. OFFICIAL CODE § 2-509(e); Perkins, 482 A.2d at 402; Allentruck v. D.C. Minimum Wage & Indus. Safety Bd., 261 A.2d 826, 833 (D.C. 1969); Barron, TP 28,510, TP 28,521, & TP 28,526; A&A Marbury, RH-TP-11-30,151. For example, the Final Order states, in a footnote, that "[i]t is also notable that in the final order issued in TP 28,22[0]/TP 28,649, I held that parking at the Kennedy-Warren was not a 'related'

---

[18] *See also supra* at n.16. As explained, the Housing Provider's asserted that the ALJ could have dismissed these claims under the doctrine of abatement. Hearing CD (RHC June 9, 2015) at 10:34-10:38. The Commission is not persuaded that the Tenants could have obtained "full and adequate relief" in their other petitions because this Tenant Petition alleges continuing damages from reductions in services or facilities during a time period not considered in the other petitions. 1 Am. Jur. 2d, Abatement, Survival, & Revival § 29; *see* Final Order at 18-19; R. at 302-03; Tenant Petition at 5; R. at 31. Moreover, the ALJ's determination that Tenant Wassem "did not prevail on any of those alleged reductions in services or facilities [in TP 28,220 & TP 28,649] and therefore cannot have an on-going claim" is most directly in the nature of issue preclusion. *Compare* Wilson, 829 A.2d at 514.

service or facility under the Rental Housing Act." Final Order at 16 n.9; R. at 305. At a minimum, a determination of issue preclusion requires more than "notable" similarity. *See, e.g.,* Hutchinson v. D.C. Office of Emp. Appeals, 710 A.2d 227, 236 (D.C. 1998) (issues are not identical for preclusion purposes without overlapping facts). The Commission's review of the record reveals no findings of fact on whether the underlying facts are unchanged with regard to the parking situation at the Housing Accommodation or any of the other related services or facilities allegedly reduced or eliminated. *Id.*; *see generally* Final Order; R. at 297-320.

Moreover, the Commission's review of the record does not reveal that any party submitted, or that the ALJ took official notice of, any final order in a related proceeding. *See* Johnson, 642 A.2 at 139 (preclusion is affirmative defense); Adams, 534 A.2d at 296. Where evidence is absent from the record, the Commission is unable to perform its review and determine if an ALJ's findings of fact and conclusions of law follow rationally from substantial evidence. 14 DCMR § 3807.1; *see, e.g.,* Branson v. D.C. Dep't of Emp't Servs., 801 A.2d 975, 979 (D.C. 2002) (explaining that the DCCA cannot "assume that an issue has been considered . . . when there is no discernible evidence that it has.") (quoting Washington Times v. D.C. Dep't of Emp't Servs., 724 A.2d 1212, 1221 (D.C. 1999)); A&A Marbury, RH-TP-11-30,151 (plain error for ALJ to consider settlement agreement not admitted into evidence); Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012). Because the Final Order does not contain findings of fact based on substantial evidence in the record and conclusions of law that systematically apply the elements of either issue or claim preclusion, the Commission determines that the ALJ erred in dismissing the reduction in services or facilities claims in the Tenant Petition as being duplicative of other petitions. D.C. OFFICIAL CODE § 2-509(e); 14 DCMR § 3807.1; Perkins, 482 A.2d at 402; Allentruck, 261 A.2d at 833.

Accordingly, the Commission vacates the ALJ's determination that the Tenants are precluded from litigating their claims of reductions in services or facilities based on other petitions they have filed. The Commission remands the Tenant Petition to OAH for such further proceedings as are necessary to adjudicate the Tenants' claims, consistent with this Decision and Order, the Act, the DCAPA, and applicable precedent. If, on remand, the Housing Provider asserts a defense of *res judicata* or collateral estoppel, or otherwise moves to abate this action, *see supra* n.18, the ALJ is instructed to make findings of fact based on record evidence and conclusions of law on each element of the applicable legal doctrine before granting such a motion.

7. Whether the ALJ erred in determining that the Tenants did not plead any viable claim of an unlawful reduction in services or facilities with sufficient specificity.

In the Tenant Petition, the Tenants checked two boxes on the RAD petition form alleging that related services or facilities have been reduced or eliminated at the Housing Accommodation. Tenant Petition at 2; R. at 34. The "Complaint Details" portion of the Tenant Petition enumerates several specific services and facilities that the Tenants allege to be reduced or eliminated "[a]s part of the ongoing demolition and construction activities and other actions by [H]ousing [P]rovider[,]" in addition to "other housing code and fire code violations." *Id.* at 5; R. at 31. In the Final Order, the ALJ stated that "checking the services and facilities box is insufficient to place Housing Provider on notice of what allegations it must defend against." Final Order at 18; R. at 303. The Tenants, on appeal, contest the ALJ's interpretation of the law governing pleadings in administrative hearings under the Act. *See* Notice of Appeal at 4 (directing the Commission's attention to "[Final] Order at 15-21, esp. 18," which is reproduced

in the procedural history of this Decision and Order, *supra* at 9-10, where the Commission has numbered the relevant paragraphs of the Final Order as 11, 12, and 13).[19]

The Commission observes that pleadings filed under the Act should be construed with broad latitude to tenants, particularly those who appear *pro se*. Goodman, 573 A.2d at 1297-1300. Moreover, the ALJ's interpretation of notice pleading appears to read too much into the DCCA's decision in Parreco v. D.C. Rental Hous. Comm'n, 885 A.2d 327 (D.C. 2005). Decisions of the DCCA "must be read in the context of the facts presented in those cases[,]" and attorneys and judges alike must resist "the tendency to interpret [the DCCA's] holdings as establishing hard and fast rules with broad application beyond the case decided." Cafritz Co. v. D.C. Rental Hous. Comm'n, 615 A.2d 222, 228 n.5 (D.C. 1992). The issue before the DCCA in Parreco was whether the Commission erred in finding a specific rent increase was invalid because of lack of notice to the tenant, even though the tenant only alleged it was unlawful on other grounds. 885 A.2d at 333-34. Specifically, the DCCA stated:

> Important for this appeal, the tenant *did not check the box* provided on the form for claiming that "the rent increase was larger than the amount of increase which was allowed by any applicable provision of the Rental Housing Emergency Act of 1985," *i.e.*, higher than the rent ceiling, *nor did he check the box* claiming that "[a] proper . . . notice of rent increase was not provided" to him by the landlord. *Nowhere in the petition did the tenant specifically claim* that the rent increase violated the rent control law or that he did not have adequate notice of the increase and the reasons for it.

[19] The Tenants also assert that the ALJ erred in applying the law governing amendments of pleadings. Notice of Appeal at 4. The Commission's review of the record does not reveal any instance in which the Tenants moved to amend this Tenant Petition; rather, they sought to amend other petitions and, failing in those efforts, filed this petition. *See* Tenant Petition at 5; R. at 31. Because the Commission's review on appeal is limited to the record before it and to claims that are actually raised before OAH, the Commission will not address this issue. 14 DCMR § 3807.5 ("The Commission shall not receive new evidence on appeal."); Watkis v. Farmer, RH-TP-07-29,045 (RHC Aug. 15, 2013) at n.12; Hawkins v. Jackson, RH-TP-08-29,201 (RHC Aug. 21, 2009) at n.9 (noting that the Commission cannot consider factual allegations that were not raised below, were not part of the record on appeal, and constituted inadmissible new evidence).

Id. at 330 (emphasis added). In a footnote to that factual summary, the DCCA observed that "although the tenant checked the box that the rent *ceiling* was 'improper,' he did not give any explanation." *Id.* at 330 n.4 (emphasis added).

Relying on the DCCA's observation in the footnote, the ALJ concluded in this case that "it is not enough to check a box alleging that services and facilities were substantially reduced, but not place Housing Provider on notice of the specific alleged reductions." Final Order at 18; R. at 303. However, the DCCA's footnote continues, stating that "[a]t no time in the proceedings before the agency has there been a determination that the rent ceiling is improper, and no such claim is made before this court." Parreco, 885 A.2d at 330 n.4. The DCCA ultimately held that:

> The tenant's complaint that the rent was "too high" was insufficient to alert the landlord to a challenge to the adequacy of the rent increase notice. The petition form specifically prompted the tenant to raise the issue of defective notice, but the tenant did not check the box to do so, nor did he mention anything about the notice in the narrative space of the petition. The tenant had the opportunity to raise this issue in his opening statement and in his case-in-chief, but did not.

Id. at 334. In light of the myriad opportunities that the tenant in Parreco did not avail himself of to make the specific claim that was on appeal in that case, the Commission is satisfied that this case is distinguishable because the Tenants' checked both services and facilities boxes, provided some further detail in the narrative portion of the Tenant Petition form, and were never permitted to present a case-in-chief, much less to impose liability on the Housing Provider, after a hearing, for a claim it had no notice of the need to defend. Tenant Petition 2, 5; R. at 31, 24; *see* Parreco, 885 A.2d at 330; Cafritz Co., 615 A.2d at 228 n.5.

However, although the Commission is not satisfied that the ALJ correctly interpreted the requirements for pleading under the Act, the Commission is satisfied that the ALJ's pronouncement on the insufficiency of checking a box on the tenant petition form is harmless

error in this case. *See, e.g.,* United Dominion Mgmt., 101 A.3d at 430-31 (error immaterial where Commission articulated a deferential standard of review but its analysis amounted to *de novo* review); Tenants of 2300 Good Hope Rd., S.E. v. Marbury Plaza, LLC, CI 20,753 & CI 20,754 (RHC Mar. 10, 2015) at n.23; Karpinski v. Evolve Prop. Mgmt., RH-TP-09-29,590 (RHC Aug. 19, 2014) (defining "harmless error" as an error which "was not prejudicial to the substantive rights of the party assigning it, and in no way affected the final outcome of the case."); Jackson v. Peters, RH-TP-12-28,898 (RHC Feb. 3, 2012) at n.21 (deciding that ALJ's statement that the tenant could not appeal an order was harmless error where the Commission exercised jurisdiction over the appeal by accepting the filing of the tenant's notice of appeal).

The Commission's review of the record shows that, in the Show Cause Order, the ALJ suggested that the Tenant Petition should be dismissed because Tenant Wassem "raised identical allegations of reductions in services and facilities in TP 28,200 and TP 28,649." Show Cause Order at 24; R. at 220. As described *supra* at 37-40, the ALJ dismissed the Tenants' claims of reductions in services, to the extent they are duplicative of TP 28,220 & TP 28,649 (consolidated), under a theory resembling claim or issue preclusion. Although the Commission reverses the ALJ's determination on preclusion in Issue 6, *supra* at 37-40, the Commission is satisfied that, by logical implication, the ALJ's discussion of specificity in pleading does not apply to those claims, because the ALJ was able to identify them as "identical" to claims in other petitions.

The Commission's review of the Final Order also indicates that the ALJ may have been discussing the fact that the Tenant Petition did not specifically allege any *new* reductions in services or facilities arising within the three (3) years preceding the filing of the Tenant Petition. *See* Final Order at 17-18 (referring to reductions "that began" between certain dates); R. at 302-

03; *see also* D.C. OFFICIAL CODE § 42-3502.06(e) (three-year statute of limitations under the Act). The Commission's review of the record of these proceedings does not reveal any instance in which the Tenants alleged any reductions in services or facilities that were not continuations of claims raised in other petitions. *See, e.g.,* Tenant Petition at 5 ("Tenants believe that these issues should be addressed in TP 29,125"); R. at 31; Group Response at 2 ("there is a time-frame gap between the evidentiary reach of TP 28220/28649 and of TP 30, 172"); R. at 271. The Commission's review of the Tenants' arguments in this appeal also does not reveal any claim that the Tenants were denied the opportunity to pursue allegations that any services or facilities were *first* reduced or eliminated within the three (3) years preceding the filing of this Tenant Petition, rather than continuations of damages alleged in earlier petitions. *See, e.g.,* Notice of Appeal at 3-4; Tenants' Brief at 6-7; Hearing CD (RHC June 9, 2015) at 10:12-10:15.

Based on the foregoing, the Commission is unable to determine that the ALJ's statement that "it is not enough to check a box alleging that services and facilities were reduced" actually foreclosed any claims the Tenants intended to make in the Tenant Petition. *Compare* Final Order at 18; R. at 303 *with* Tenant Petition at 5; R. at 31 *and* Notice of Appeal at 4 and Tenants' Brief at 6-7.[20] Therefore, the Commission is satisfied that any error made by the ALJ regarding pleading standards is harmless in this case. *See* United Dominion Mgmt., 101 A.3d at 430-31; Tenants of 2300 Good Hope Rd., CI 20,753 & CI 20,754; Karpinski, RH-TP-09-29,590.

Accordingly, the Tenants' appeal on this issue is dismissed.

[20] The Commission observes that, on remand, the Tenants' allegations of reduced services or facilities may be an appropriate subject of a motion *in limine* to further specify, refine, and constrain the scope of the claims being litigated.

C. Other Retaliation

8. Whether the ALJ erred in determining that the Tenants were permitted to challenge retaliatory acts that occurred between January 4, 2005, and January 4, 2008, in separate tenant petitions.

The Tenants argue on appeal that the ALJ erred in determining that the Tenants had an opportunity to claim in separate tenant petitions that certain acts by the Housing Provider were retaliatory. *See* Notice of Appeal at 5; Tenants' Brief at 7. Although the Tenants' assertion of error is less than a model of clarity, the Commission's review of the record indicates that the ALJ determined the allegations to be "duplicative" of claims in related tenant petitions, including TP 28,220 & TP 28,649 (consolidated) and TP 30,172. *See* Final Order at 19-21; R. at 300-02.[21]

For the same reasons the Commission explained in Issue 3.b, *supra* at 30-35, and Issue 6, *supra* at 39-40, the Commission determines that the ALJ failed to make findings of fact and conclusions of law that apply the doctrines of *res judicata* or collateral estoppel to these claims by the Tenants. *See* Delisi, 50 A.3d at 451; Wilson, 829 A.2d at 514; Levy, RH-TP-06-28,830 & RH-TP-06-28,835. The Final Order does not contain a systematic application of the elements of any legal doctrine that would permit the ALJ to dismiss the Tenants' allegations on the current evidentiary record. D.C. OFFICIAL CODE § 2-509(e); Perkins, 482 A.2d at 402; Allentruck, 261 A.2d at 833; Barron, TP 28,510, TP 28,521, & TP 28,526; A&A Marbury, RH-TP-11-30,151.

Accordingly, the ALJ's determination that the Tenants are precluded from litigating claims of retaliation is vacated to the extent it is based on duplication of other tenant petitions. The Commission remands the Tenant Petition to OAH for such further proceedings as are necessary to adjudicate the Tenants' claims, consistent with this Decision and Order, the Act, the

[21] The Commission observes that the ALJ also determined that certain claims of retaliation were barred by the statute of limitations, D.C. OFFICIAL CODE § 42-3502.06(e), and that the Tenants do not assert any error with this determination on appeal. *See* Final Order at 20; R. at 301.

DCAPA, and applicable precedent. If, on remand, the Housing Provider asserts a defense of *res judicata* or collateral estoppel, or otherwise moves to abate this action, *see supra* n.16 & n.18, the ALJ is instructed to make findings of fact based on record evidence and conclusions of law on each element of the applicable legal standard before granting such a motion.

IV. CONCLUSION

For the foregoing reasons, the Final Order is reversed in part and vacated in part. Specifically, the Commission reverses the ALJ's determination that OAH lacks jurisdiction over the service of notices to vacate based on separate proceedings on a § 501(f) application. The Commission reverses the ALJ's determination that the Tenants' claims regarding the service of the 120-day Notices to Vacate are moot. The Commission reverses the ALJ's determinations that the Tenants did not allege a violation of the Act or the regulations in claiming that 120-day Notices to Vacate were served on them while the registration of the Housing Accommodation was improper and vacates the ALJ's determination that the Tenants are precluded from litigating the registration status of the Housing Accommodation on March 1, 2010, the day the Notices were served on the Tenants. The Commission remands the Tenant Petition for such further proceedings as are necessary to adjudicate the Tenants' claims regarding the service of 120-day Notices to Vacate, consistent with this Decision and Order, the Act, the DCAPA, and applicable precedent. The Commission dismisses, without prejudice, the Tenants' issues on appeal that the service of the 120-day Notices to Vacate was a willful violation of the Act and was retaliatory as moot. If the ALJ determines on remand that the Housing Provider violated the Act, the ALJ is instructed to make findings of fact and conclusions of law on whether the violation was willful or retaliatory.[22]

---

[22] *See also supra* n.8, regarding the Tenants' allegation that the service of the 120-day Notices to Vacate violated the terms of the Rent Administrator's approval of the § 501(f) application.

The Commission also vacates the ALJ's determination that the Tenants are precluded from litigating their claims of reductions in services or facilities based on other petitions they have filed. The Commission dismisses as harmless error the Tenants' appeal of the ALJ's articulation of the standard for notice pleading under the Act. The Commission remands the Tenant Petition to OAH for such further proceedings as are necessary to adjudicate the Tenants' claims regarding reductions in services or facilities, consistent with this Decision and Order, the Act, the DCAPA, and applicable precedent. The Commission dismisses the Tenants' issue on appeal that the ALJ erred in determining that the Tenants did not plead any claim of reductions in services or facilities with sufficient specificity because any error by the ALJ is harmless.

Finally, the Commission vacates the ALJ's determination that the Tenants are precluded from litigating claims of retaliation to the extent it is based on duplication of other tenant petitions. The Commission remands the Tenants' claims for further proceedings as are necessary to adjudicate the Tenants' claims, consistent with this Decision and Order, the Act, the DCAPA, and applicable precedent.

On remand the ALJ is specifically instructed that, if the doctrines of claim or issue preclusion are raised, the Tenant Petition or any claims therein may not be dismissed, or otherwise abated, without making findings of fact and conclusions of law based on substantial record evidence that systematically apply the elements of an applicable legal standard.

The Commission notes one additional matter relevant to the remand of this case: in the Notice of Appeal, the Tenants tangentially assert that the ALJ should have consolidated or stayed the proceedings on this petition or their related petitions. Notice of Appeal at 4 ("It is error to truncate and dismiss, rather than to consolidate or stay, portions or all of a tenant petition by comparing it to other related tenant petitions, especially other tenant petitions for which a final

judgment has not been rendered."). The Commission observes that it has limited authority to direct OAH to take certain actions in the management of cases pending in that forum, such as the consolidation of cases for hearings or a stay (or continuance) of proceedings in a case. "The 'question of consolidation is a decision in which the [trial] court has great latitude and . . . its ruling thereon is not to be disturbed on appeal except for an abuse of discretion.'" Carter-Obayuwana v. Howard Univ., 764 A.2d 779, 794 (D.C. 2001) (quoting Alfred A. Altimont, Inc. v. Chatelain, Samperton & Nolan, 374 A.2d 284, 287-88 (D.C. 1977)). "The standard of review for the denial of continuance is whether the [ALJ] abused his [or her] discretion." Davenport v. Cowan, TP 20,709 & VA 20,199 (RHC Apr. 26, 1989). Accordingly, the Commission makes no determination as to how the ALJ should best manage the numerous, pending cases filed by the Tenants.

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
430 E. Street, N.W.
Washington, D.C. 20001
(202) 879-2700

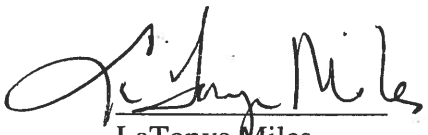
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-10-29,875 was mailed, postage prepaid, by first class U.S. mail on this **25th day** of **September, 2015,** to:

Christine Burkhardt
3133 Connecticut Ave., NW
Apt. 901
Washington, DC 20008

Don Wassem
c/o Ken Mazzer
3133 Connecticut Ave., NW
Apt. 115
Washington, DC 20008

Richard W. Luchs
Roger D. Luchs
Gwynne L. Booth
Greenstein, DeLorme, & Luchs, P.C.
1620 L Street, N.W.
Suite 900
Washington, D.C. 20036



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