DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-13-30,431

In re: 3114 Wisconsin Ave., NW, Unit 203

Ward Three (3)

KAHLILL PALMER
Tenant/Appellant

v.

JOAN CLAY
Housing Provider /Appellee

DECISION AND ORDER

October 5, 2015

McKOIN, COMMISSIONER. This case is on appeal to the Rental Housing Commission (Commission) from 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 -3509.07, the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations (DCMR), 1 DCMR §§ 2800-2899 (2004), 1 DCMR §§ 2920-2941 (2004), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

I. PROCEDURAL HISTORY

Kahlill Palmer (Tenant), residing in Unit 203 of 3114 Wisconsin Ave., N.W. (Housing Accommodation), filed Tenant Petition 2013-DHCD-TP 30,431 (Tenant Petition) on October 1,

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

2013, against Joan Clay (Housing Provider). The Tenant Petition raised the following claims against the Housing Provider:

1. The building where my/our Rental Unit(s) is/are located is not properly registered with the RAD.
2. The rent increase was larger than the increase allowed by any applicable provision of the Act.
3. The Housing Provider did not file the correct rent increase forms with the RAD.
4. The rent was increased while my/our Rental Unit(s) was/were not in substantial compliance with the D.C. Housing Regulations.
5. The rent ceiling exceeds the legally-calculated rent for my/our units.
6. The rent charged is in excess of the rent ceiling for my Rental Unit.
7. Services and/or facilities provided as part of my/our rent have been substantially reduced.

Tenant Petition at 2-3; Record (R.) at 37-38.

An evidentiary hearing was held on May 6, 2014. On November 7, 2014, Administrative Law Judge Erika Pierson (ALJ) issued a final order in this case: Palmer v. Clay, 2013-DHCD-TP 30,431 (OAH Nov. 7, 2014) (Final Order); R. at 80-100. In the Final Order, the ALJ awarded the Tenant $8,950.00 for rent overcharges between October 1, 2010, and October 1, 2013 (the date on which the Tenant Petition was filed), plus $481.47 in interest (computed through the date of the Final Order), and rolled back the Tenant's rent to $1,225.00 per month, the amount of the Tenant's rent prior to a December 1, 2010, rent increase. Final Order at 13-15; R. at 86-88.

In the Final Order, the ALJ made the following findings of fact:[2]

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

1. The Tenant resided in Unit 203 at 3114 Wisconsin Avenue, NW, (Housing Accommodation) since April 5, 2006. The Housing Accommodation is a cooperative unit owned by Joan Clay.

2. When Tenant moved into the apartment he signed a standard lease agreement created by the Greater Capital Area Association of Realtors. The lease agreement which is specifically for single family homes, condominiums, and cooperatives, states that the Housing Accommodation is exempt from the rent stabilization provisions of the Rental Housing Act of 1985 because Housing Provider owns four or fewer rental units. The lease states:

> You must attach to the Lease a copy of the Claim of Exemption Form and Certificate of Registration/Exemption, both of which must bear the date stamp of the Rental Accommodations and Conversion Division showing that they have been filed with that office. IF YOU DO NOT HAVE THESE DOCUMENTS OR THE LANDLORD IS NOT ABLE TO PROVIDE YOU WITH THESE DOCUMENTS, DO NOT USE THIS LEASE FORM. (emphasis in original)

3. When Tenant signed the lease, he asked Housing Provider for proof of the exemption and Housing Provider said she would send it to him later.

4. Housing Provider is currently retired. She worked for some time as a nurse and then as a Sales Associate for Long and Foster Real Estate and has been a licensed Real Estate professional for 40 years. As a Sales Associate, Housing Provider sold residential properties in the District of Columbia, but did not handle any rental properties, other than her own.

5. Housing Provider owns two rental properties in the District of Columbia, both are apartments. When Housing Provider decided to rent out the Housing Accommodation, she asked the cooperative manager about rent control and she was told that because the building was a cooperative, it was not subject to rent control. Based on this information, Housing Provider checked the box on the lease that the Housing Accommodation was exempt.

6. When Tenant moved into the apartment he identified several items that needed repair: holes in walls, painting, and carpet cleaning. PXs 104, 107, 108. Tenant also sent Housing Provider photos of the needed repairs. Housing Provider told Tenant to go ahead and move in and that she would make the repairs. No repairs were ever made.

7. When Tenant moved in the Housing Accommodation, he was charged a monthly rent of $1,225. On October 21, 2010, Housing Provider emailed Tenant that his rent was increasing to $1,375, effective December 1, 2010.

PX 111. At some point, Housing Provider had sent an email that referred to Tenant's rent as $1,385, and therefore, since December 2010, Tenant paid $1,385 per month.

8. When Tenant received the email about the rent increase, Tenant asked Housing Provider to withdraw the increase due to the conditions of the apartment and repairs never having been made in the four years he lived there. PX 112. Housing Provider emailed a response stating that the carpet was cleaned and the apartment was painted before Tenant moved in, but that she would do them both again. PX 113. However, Housing Provider neither painted nor cleaned the carpet at that time.

9. In July 2011, Tenant emailed Housing Provider that in reviewing previous emails, his correct rent should have been $1,375, but that he had been paying $1,385 because of one email that noted his rent at that amount. PX 172. Housing Provider responded saying she would correct the error. PX 117. Subsequently, Housing Provider requested that Tenant continue paying $1,385 so that she could use the money to make repairs to the apartment.

10. On August 8, 2011, Housing Provider replaced the carpet in Tenant's apartment. Housing Provider said she would paint the apartment at a later time because she was caring for her son. No repairs were made in the following two years.

11. On July 1, 2013, Housing Provider informed Tenant by telephone that she was considering again increasing the rent. In an email sent on July 5, 2013, Housing Provider proposed to increase Tenant's rent by $100 per month, reasoning that his rent was substantially lower than other units in the cooperative which were renting for $1,600. PX 118.

12. Tenant was upset about the rent increase because no repairs had been done in his apartment and the apartments renting for $1,600 were renovated units. *Testimony of Tenant.* Tenant then began researching the law and learned that Housing Provider had been a licensed real estate professional for 40 years. PXs 162-164.

13. On July 30, 2013, the Interim Rent Administrator certified that there was no current registration on file for the Housing Accommodation. PX 121. On August 2, 2013, The Department of Consumer and Regulatory Affairs (DCRA) Business License Division certified that no basic business license for residential rental had been issued for Housing Provider or her husband Don Clay. PXs 1234 [sic], 124.

14. On September 27, 2013, DCRA inspected the Housing Accommodation and issued a notice of violation (NOV). PX 126. The NOV was served on the cooperative manager, who sent it to Housing

Provider by email. PX 127, 128, 129. The NOV cited the following seven violations:

a. Bedroom and living room window not capable of opening with ease;

b. Bedroom wall missing parts; bedroom wall has cracks[;]

c. Bedroom wall missing parts;

d. Living room wall has dampness;

e. Living room, hallway, and bathroom ceilings have loose or peeling paint;

f. Living room, hallway, and bathroom walls have loose or peeling paint;

g. Failure to provide a window screen and/or one with a minimum of 16 meshes to the inch or the equivalent.

15. Photographs that Tenant took on September 24, 2013, show the following:

a. Four small nail holes by entrance. PX 125A.

b. Small hole in wall by entrance. PX 125B.

c. Substantial cracks in the wall paint. PX 124C.

d. Bubbling paint along the lower walls. PX 124D.

e. Substantial bubbling, peeling, and cracking paint in all rooms. PX 124 E-P, R, S, T, U.

f. Various small holes in walls from nails. PX 124Q.

16. The apartment was painted and other repairs made in October and November 2013. PX 135.

In the Final Order, the ALJ made the following conclusions of law, in relevant part:[3]

A. Small Landlord Exemption

1. . . . [T]he Rental Housing Act requires housing providers either to register a housing accommodation containing rental units or file a claim of

[3] The Commission recites the ALJ's conclusions of law for each of the issues presented using the language of the ALJ in the Final Order, except that the Commission has numbered the findings of fact for ease of reference.

exemption. D.C. Official Code § 42-3502.05(a)(3)([F]); 14 DCMR [§] 4102.2. It is undisputed that Housing Provider in this case had not filed a registration or a claim of exemption for the housing accommodation. It appears that Housing Provider could qualify for an exemption based either on being a small landlord or a proprietary owner of a cooperative unit.

2. Notwithstanding the requirements of the Act, a housing provider can claim the benefits of the small landlord exemption and will not be penalized for failing to file a claim of exemption if he or she can prove that special circumstances exist. *Hanson v. D.C. Rental Hous. Comm'n,* 584 A.2d 592, 597 (D.C. 1991); *Smith v. Joshua,* RH-TP-07-28,961 (RHC Feb. 3, 2012). Those special circumstances are: (1) the housing provider was reasonably unaware of the requirement of filing a claim of exemption; (2) the rent charged was reasonable; and (3) the housing provider is not a landlord regularly. *Hanson* at 597; *Beamon v. Smith,* TP 27,863 (RHC July 1, 2005) at 7 (citing *Gibbons v. Hanes,* TP 11,076 (RHC July 11, 1984) at 3); *Boer v. D.C. Rental Hous. Comm'n,* 564 A.2d 54, 57 (D.C. 1989).

3. I do not reach the second two requirements because Housing Provider failed to prove the first requirement - that she was reasonably unaware of the requirement for filing a claim of exemption. The lease that Housing Provider used clearly informed Housing Provider of the requirement to register the Housing Accommodation as exempt. Housing Provider checked the box on the lease that she owned four or fewer rental properties. The lease, which is a standard form available to members of the Greater Capital Area Association of Realtors, explicitly states that the form cannot be used if the property is not registered and it identifies file-stamped documents from the RAD that must be attached to the lease. Moreover, after reading the lease, Tenant asked Housing Provider for a copy of the exemption, to which Housing Provider replied she would forward later. I found Tenant's testimony to be very credible. Tenant acknowledged that he did not follow-up with Housing Provider after signing the lease.

4. Housing Provider testified she was not aware of a requirement to register the Housing Accommodation despite the plain language on the lease she used. Housing Provider testified that she checked the box the property was exempt because that was a true statement. Housing Provider otherwise ignored the other portions of the lease regarding the exemption. I cannot find that Housing Provider was "reasonably" unaware of the filing requirements. I find that Housing Provider was made aware of the requirement to register the Housing Accommodation as exempt when she signed the lease and presented it to Tenant. Therefore, Housing Provider has failed to meet the *Hanson* requirement that she was reasonably unaware of the requirement and Tenant has met his burden of proving that the Housing Accommodation was not properly registered. In the absence of a proper claim of exemption or special circumstances, the Housing Accommodation is subject to rent control until

such time as a proper claim of exemption is filed and notice is simultaneously given to the tenant. *Carmel Partners, Inc. d/b/a Quarry II, LLC v. Levy,* RH-TP-06-28,830 and 28,835 (RHC May 16, 2014).

B. Tenant's Allegation of Improper Rent Increases

5. . . . Tenant has met his burden of proving that his rent was increased in an amount higher that allowed by the Act. Because the Housing Accommodation is not properly exempt from rent control, Housing Provider was required to file the rent increase with the RAD, which she did not do. D.C. Official Code § 42-3502.08(f); 14 DCMR [§] 4205.4. Therefore, Tenant has also met his burden of proving that Housing Provider did not file the correct rent increase forms. Because the rent increase was not properly taken, Tenant is owed a refund of the full $150 increase from December 1, 2010 through October 2013 (35 months). Tenant is owed a refund of $5,250 plus interest. In addition, Tenant's rent is rolled back to $1,225 per month until such time as the Housing Accommodation is properly registered and a proper rent increase taken.

6. I have not included a refund of the additional $10 per month that Tenant inadvertently paid Housing Provider because I find that it did not amount to a knowing violation of the Act. The Rental Housing Act provides that any person who "knowingly" demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable shall be held liable by [sic] for the amount by which the rent exceeds the applicable rent charged or treble that amount in the event of bad faith. D.C. Official Code § 42-3509.01. There was no evidence that Housing Provider made a demand for rent in the amount of $1,385. Tenant acknowledged that he paid that amount in error. When he brought the error to the attention of Housing Provider she indicated she would correct the error. Subsequently, however, Tenant agreed to pay the $10 to cover repairs.

7. Tenant also alleged that his rent was increased while the Housing Accommodation was not in substantial compliance with the housing regulations. However, because I invalidated the rent increase on other grounds, I need not consider whether substantial housing code violations existed when the rent was increased in 2010.

C. Tenant's Allegations of Reductions in Services and Facilities

. . .

8. Tenant has established that with the exception of replacing the carpet in August 2011, no repairs had been made in his apartment from the time he moved in until after he filed his tenant petition, a seven year period. The statute of limitations however, bars any recovery for violations that occurred more than three years prior to filing the tenant petition. D.C. Official Code §

42-3502.06. Therefore, Tenant may only challenge reductions in services and facilities that occurred between October 1, 2010, and October 1, 2013. Although Tenant argued at the hearing that his apartment was inhabitable [sic], such a conclusion was not supported by the evidence. The only problems that Tenant complained of were holes in the wall, cracked and peeling paint and carpet stains, none of which were so severe it made the apartment inhabitable [sic] or reduced the value of the apartment to zero. They did however, amount to a reduction in services. The maintenance of paint and carpeting falls into the categories of maintenance and repair, and are related services.

9. The Act defines "related services" as:

> Services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rent unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, and its related facilities.

D.C. Official Code § 42-3501.03(27). The maintenance of paint and carpeting falls into the categories of maintenance and repair, and are related services. The Rental Housing Commission has upheld that services and facilities are substantially reduced when there is a substantial reduction in maintenance and repair. *Washington Realty Co. v. 3030 30th Street Tenant Assc'n,*[sic] TP 20,749 (RHC Jan 30, 1991) at 28.

10. There was no evidence presented on the condition of the carpet prior to being replaced in August 2011, other than general statements that it was badly stained. There were no photographs of the carpet, no testimony on the extent, location, or description of the stains or dirt. Therefore, I am unable to make any findings regarding whether a stained or dirty carpet amounted to a reduction in services or facilities. The Rental Housing Commission has consistently held that the administrative law judge may rely on his or her knowledge, expertise and discretion in awarding damages as long as there is "substantial evidence in the record regarding the nature of the violation, duration, and substantiality." *Kemp v. Marshall Heights Cmty. Dev.,* TP 24,786 (RHC Aug. 1, 2000) at 8. Here, there was no evidence of how substantial the problem was. As such, there is insufficient evidence to award any rent refund for the carpet. There was however, substantial evidence regarding cracked and peeling paint and holes in the walls.

11. Tenant complained to Housing Provider about the paint and holes in the walls from the time he occupied the apartment in 2006. Tenant's sister testified credibly that she visited the apartment and stayed there often

when she came to town and she described the holes in the walls as resembling bullet holes. Both Tenant and his sister testified that the photographs taken in 2013 reflect the same condition the walls were in when Tenant occupied the apartment in 2006. Tenant admittedly, did not continuously complain to Housing Provider because he was busy with work, but there is no question that Housing Provider was on notice of the need to paint the apartment. When his rent was increased in 2010, Tenant again complained to Housing Provider about the paint, holes, and carpet; and Housing Provider again agreed to make repairs in exchange for the increased rent. The only repair made was to replace the carpet. When Housing Provider proposed to increase the rent again in July 2013, Tenant again complained about the paint problems and had the apartment inspected by DCRA. The September 2013 notice of violation issued by DCRA cited numerous violations for cracked and peeling paint and holes in the walls. The photographs presented by Tenant showed substantial peeling and cracking paint in the walls and ceilings throughout the apartment, which I would characterize as serious. The housing regulations provide that each interior wall shall be free from holes and wide cracks (14 DCMR [§] 706.2) and that loose or peeling wall covering or paint shall be removed and repainted by the owner (14 DCMR [§] 707.1).

12. Housing Provider testified very generally that it has been difficult to arrange times for repairs to Tenant's apartment because he refuses to provide a key, insists that he is present for repairs, and will not permit her husband into the apartment. However, the only time Housing Provider attempted to make the requested repairs was after Tenant filed his tenant petition. There was no evidence that between October 1, 2010, and October 1, 2013, that Housing Provider attempted to make any repairs that were impeded by Tenant. When facilities are reduced or eliminated, a housing provider is required to reduce the rent for the housing accommodation by an amount which reflects the monthly value of the decrease in related services or facilities. D.C. Official Code § 42-3502.11; 14 DCMR 4211.6. The Rental Housing Commission has consistently held that it is not necessary to assess the value of a reduction in services and facilities with "scientific precision," but I may instead rely on my "knowledge, expertise and discretion as long as there is substantial evidence in the record regarding the nature of the violation, duration, and substantiality." *Kemp v. Marshall Heights Cmty. Dev.,* TP 24,786 (RHC Aug. 1, 2000) at 8 *(citing Calomiris v. Misuriello,* TP 4809 (RHC Aug. 30, 1982) and *Nicholls v. Tenants of 5005, 07, 09 D St, S.E.,* TP 11,302 (RHC Sept. 6, 1985).

13. I find that the holes, although small, were numerous, and the presence of cracked and peeling paint was pervasive, serious, and negatively impacted Tenant's enjoyment and use of the apartment, and the problems existed for

a long period of time without repair. Accordingly, I value the reduction is [sic] services at $100 per month. Therefore, Tenant is awarded a rent refund of $100 per month from October 1, 2010, through October 1, 2013 (37 months) for a total refund of $3,700 plus interest.

14. Although the September 2013 notice of violation cited other violations including a difficult to open window, problem with the window screen, missing bedroom parts, and living room dampness, there was insufficient evidence to make any findings on these violations. There was no evidence of when any of these problems began. There was no evidence of what amounted to "missing bedroom parts." There was no evidence that Tenant ever informed Housing Provider of these problems prior to the September 13, 2013, notice of violation, and Tenant filed his petition two weeks later on October 1, 2013. In order to prevail on a claim for reductions in services or facilities, Tenant must establish that he notified Housing Provider of the need for repairs in a timely manner. *Davis v. Madden, TP* 24,983 (RI-IC Mar. 28, 2002) at 7. A Housing Provider cannot be held responsible for repairs it is not aware of. Tenant only presented evidence that he notified Housing Provider about the need to repair the paint, holes, and carpet.

D. Interest

15. The rules implementing the Rental Housing Act provide for the award of interest on rent refunds calculated from the date of the violation to the date of the issuance of the Final Order. 14 DCMR 3826.2. The interest rate imposed is the judgment interest rate used by the Superior Court of the District of Columbia on the date of issuance of the decision. *See* 14 DCMR 3826.3; *Joseph v. Heidaty,* TP-27,136 (RHC July 29, 2003); *Marshall v. D.C. Rental Hous, Comm'n,* 533 A.2d 1271, 1278 (D.C. 1987). The D.C. Superior Court interest rate is currently 2% per annum. Housing Provider is ordered to pay Tenant interest in the amount of $388.56 as calculated in Appendix B attached to this Order. (Appendix not included in this Decision and Order.)

Final Order at 1-21; R. at 80-100.

The Tenant filed a Motion for Reconsideration of the Final Order on November 21, 2014. Motion for Reconsideration at 1-20; R. at 101-21. The ALJ denied the motion on November 25, 2014. Order Denying Reconsideration at 1-3; R. at 122-25. On December 8, 2014, the Tenant filed a timely notice of appeal (Notice of Appeal). Notice of Appeal at 1-21. The Tenant raises the following issues in the Notice of Appeal:

1. Hearing Examiner abused her discretion and erred in her conclusion of law by permitting the Housing Provider to retain any rent above the legal limit.

2. Hearing Examiner erred in concluding that the Tenant did not prove substantial reduction in services and facilities with regard to carpet and further erred in concluding that the uncertainty of the degree of damage to the carpet precluded rent refund calculations for substantial reduction in services and facilities.

3. Hearing Examiner erred by not making findings of facts that the Property that the Property [sic] was built prior to 1978, had deteriorated paint which created a presumptive lead based paint hazard despite substantial evidence on the record; and Hearing Examiner erred in her calculation of a refund for the substantial reduction in services due to the existence of deteriorating paint creating a lead-based paint hazard.

4. Hearing Examiner erred by ignoring the issue of whether Housing Provider acted in bad faith.

Notice of Appeal at 3-11.

On December 19, 2014, the Tenant filed a motion with the Commission, styled "Motion to Compel Housing Provider to Comply with the Provisions of the Decision of the Hearing Examiner or to Refer to Rent Administrator for Non-Compliance" (Motion to Compel). In the Motion to Compel, the Tenant asked that the Commission compel the Housing Provider to comply with the Final Order by paying to the Tenant $2,080.00 for rent overcharges between October 2013 and November 2014 (the time between the filing of the Tenant Petition and the issuance of the Final Order) or to refer the matter to the Rent Administrator for non-compliance. *See* Motion to Compel at 4. The Commission denied the motion on January 29, 2015. Palmer v. Clay, 2013-DHCD-TP 30,431 (RHC Jan. 29, 2015) (Order on Motion to Compel).

On March 13, 2015 (reissued March 26, 2015),[4] the Commission offered the parties an opportunity to resolve their issues by mediation. The Tenant declined mediation on April 8, 2015. On June 26, 2015, the Tenant filed his brief on appeal (Tenant's Brief). On July 15, 2015, the Housing Provider, through counsel, filed her brief on appeal (Housing Provider's Brief). The Commission held its hearing on July 30, 2015. Hearing CD (RHC July 30, 2015).

II. ISSUES ON APPEAL[5]

A. Whether the ALJ abused her discretion and erred in her conclusion of law by permitting the Housing Provider to retain any rent above the legal limit.

B. Whether the ALJ erred in concluding that the Tenant did not prove a substantial reduction in services and facilities with regard to the carpet and further erred in concluding that the uncertainty of the degree of damage to the carpet precluded rent refund calculations for a substantial reduction in services and facilities.

C. Whether the ALJ erred by not making findings of facts that the Property was built prior to 1978 and had deteriorated paint which created a presumptive lead-based paint hazard despite substantial evidence on the record, and erred in her calculation of a refund for the substantial reduction in services due to the existence of deteriorating paint creating a lead-based paint hazard.

D. Whether the ALJ erred by ignoring the issue of whether Housing Provider acted in bad faith.

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[4] The Notice of Request for Settlement Negotiations was reissued on March 26, 2015, to reflect the correct address of Emilie Fairbanks, Esq., attorney for Joan Clay. The original mailing was returned for lack of a zip code for Ms. Fairbanks.

[5] The Commission, in its reasonable discretion has restated the issues, consistent with the Tenant's language in the Tenant's Brief, to state the issues in a manner which identifies the legal requirements of the Act. In addition, the Commission notes that the Tenant refers to the ALJ as Hearing Examiner, presumably because the regulations in 14 DCMR §§ 3800-4400 have not been updated to reflect the changes in the Act that transferred jurisdiction over contested cases from the RACD to the Office of Administrative Hearings. *See supra* at n.1.

III. DISCUSSION

A. Whether the ALJ abused her discretion and erred in her conclusion of law by permitting the Housing Provider to retain any rent above the legal limit.

In the Final Order, the ALJ awarded the Tenant a rent refund for the difference between the previous rent charged, $1,225 per month, and the unlawful, increased amount of $1,375. Final Order at 8-9; R. at 92-93. The Tenant argues in his appeal that the ALJ erred by not awarding a refund based on the increased amount of rent he actually paid, $1,385. Notice of Appeal at 3-4; *see* Final Order at 3 ("At some point, Housing Provider had sent an email that referred to Tenant's rent as $1,385, and therefore, since December 2010, Tenant paid $1,385 per month."); R. at 98. The ALJ determined that the Tenant was not entitled to "a refund of the additional $10 per month that Tenant inadvertently paid Housing Provider because I find that it did not amount to a knowing violation of the Act. . . . There was no evidence that Housing Provider made a demand for rent in the amount of $1385." Final Order at 9; R. at 92.

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

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

"Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10, (D.C. 1994); Allen v. D.C. Rental Hous. Comm'n, 538 A.2d 752, 753 (D.C. 1988); Hardy v. Sigalas, RH-TP-09-29,503 (RHC July 21, 2014); Bohn Corp. v. Robinson, RH-TP-08-29,328 (RHC July 2, 2014). The role of the Commission on appeal "is not to 'weigh

the testimony and substitute ourselves for the trier of fact who heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony.'" Washington Cmtys. v. Joyner, TP 28,151 (RHC Jul. 22, 2008) at 15 (quoting Fort Chaplin Park Assocs., 49 A.2d at 1079). Nonetheless, the Commission 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).

The penalties section of the Act, D.C. OFFICIAL CODE § 42-3509.01(a), provides that:

> Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, or (2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent charged or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.

(emphasis added). A person acts "knowingly" within the meaning of the Act so long as they have "only a knowledge of essential facts bringing [his or her] conduct within the reach of [the Act.]" Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n, 505 A.2d 73, 75 (D.C. 1986); *see* Gelman Mgmt. Co. v. Campbell, RH-TP-09-29,715 (RHC March 11, 2015); Marguerite Corsetti Trust v. Segreti, RH-TP-06-28,207 (RHC Sept. 18, 2012) (actual knowledge of unlawfulness of conduct not required).

The Commission and the District of Columbia Court of Appeals (DCCA) have both held that a rent demand alone, without proof of payment or receipt, is sufficient to hold a person liable for a refund under D.C. OFFICIAL CODE § 42-3509.01(a). *See* Kapusta v. D.C. Rental Hous. Comm'n, 704 A.2d 286, 287 (D.C. 1997); Delwin Realty Co. v. D.C. Rental Hous. Comm'n, 458 A.2d 59, 60 (D.C. 1983); Marguerite Corsetti Trust, RH-TP-06-28,207; 1773 Lanier Place, N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009). In Kapusta, the DCCA noted that, under the Act, "rent . . . is a term of art [meaning] 'the entire amount of money . . . demanded, received, or charged by a housing provider.'" Kapusta, 704 A.2d at 287 (quoting D.C. CODE § 45-2503(28) (1996 Repl.), now codified at D.C. OFFICIAL CODE § 42-3501.03(28)) (emphasis added). The Commission is satisfied that, under the plain language of the Act, a tenant also does not need to prove that unlawful rent was knowingly demanded so long as the rent was knowingly received by a housing provider. D.C. OFFICIAL CODE §§ 42-3501.03(28), 42-3509.01(a); *cf.* Kapusta, 704 A.2d at 287.[6]

In the Final Order, the ALJ made the finding of fact that the "Housing Provider had sent an email that referred to Tenant's rent as $1,385, and therefore, since December 2010, Tenant paid $1,385 per month." Final Order at 3; R. at 98. Further, the ALJ's findings of fact reflect that the Tenant notified the Housing Provider in July 2011 that he had been paying $1,385, and that the "Housing Provider requested that Tenant continue paying $1,385[.]" Final Order at 4; R. at 97.

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[6] *See also, e.g.*, Garcia v. United States, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive in this manner be given separate meanings."); Shipkey v. D.C. Dep't of Empl. Servs., 955 A.2d 718, 725 (D.C. 2008) (describing prongs of a legal test as "set out in a disjunctive ('or'), not conjunctive ('and'), manner"); 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 21.14 at 181-82 (6th ed. 2002) ("courts presume that 'or' is used in a statute disjunctively unless there is a clear legislative intent to the contrary"); AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 873 (4th ed. 2000) (defining "or" as "[u]sed to indicate . . . [a]n alternative").

The ALJ stated, however, in concluding that the Tenant is not entitled to a refund of the full amount he paid:

> There was no evidence that Housing Provider made a demand for rent in the amount of $1,385. Tenant acknowledged that he paid that amount in error. When he brought the error to the attention of Housing Provider she indicated she would correct the error. Subsequently, however, Tenant agreed to pay the $10 to cover repairs.

Final Order at 9; R. at 92. The Commission determines that the ALJ's conclusion that the Tenant is not entitled to a refund of the additional $10 embodies a material misconception of the Act, because: (1) it addresses only whether the Housing Provider knowingly *demanded* $1,385 and fails to address whether she knowingly *received* it; and (2) does not follow rationally from the finding of fact that the Housing Provider requested the Tenant to continue paying $1,385 in July 2011. 14 DCMR § 3807.1; D.C. OFFICIAL CODE § 42-3509.01(a); Quality Mgmt., 505 A.2d at 75; Kapusta, 704 A.2d at 287; Campbell, RH-TP-09-29,715; Marguerite Corsetti Trust, RH-TP-06-28,207.

The Commission additionally notes that the ALJ found that the Tenant "agreed to pay the $10 to cover repairs," Final Order at 9; R. at 92, and that the Tenant argues on appeal that the ALJ erred "because Housing Provider breached that agreement," Notice of Appeal at 6. *See also* Final Order at 4 ("Housing Provider requested that Tenant continue paying $1,385 so that she could use the money to make repairs to the apartment."); R. at 97. Under the rent stabilization provisions of the Act, a housing provider is only permitted to increase rent charged on specific, enumerated bases, several of which may compensate for repairs to a housing accommodation. *See* D.C. OFFICIAL CODE §§ 42-3502.11 (increases in services and facilities), 42-3502.12 (hardship), 42-3502.15 (voluntary agreement). However, each of these bases requires prior administrative approval. *See* D.C. OFFICIAL CODE §§ 42-3502.15(b), 42-3502.16(a). Moreover,

the definition of "rent" under the Act is "the entire amount of money . . . received . . . as a condition of . . . use of a rental unit [and] its related services[.]" D.C. OFFICIAL CODE § 42-3501.03(28). Therefore, the Commission is satisfied that the existence or breach of an agreement to perform repairs is not relevant to a determination of whether a housing provider knowingly demanded or received an unauthorized increase in the rent charged for a rental unit. D.C. OFFICIAL CODE § 42-3509.01(a).

Accordingly, the Commission reverses the ALJ's determination that the Housing Provider's receipt of the additional $10 per month "did not amount to a knowing violation of the Act." Final Order at 9; R. at 92. The issue is remanded to the ALJ for such proceedings, which may include a limited evidentiary hearing, as are necessary to make findings of fact regarding the Housing Provider's knowledge of her receipt of the additional $10 between December 2010 and the July 2011 email exchange. The ALJ is further instructed to make conclusions of law regarding the Housing Provider's receipt of the additional $10 after the July 2011 email exchange that are consistent with D.C. OFFICIAL CODE § 42-3509.01(a), this Decision and Order, and DCCA and Commission precedent and to recalculate the rent refund to which the Tenant is entitled.

B. Whether the ALJ erred in concluding that the Tenant did not prove a substantial reduction in services and facilities with regard to the carpet and further erred in concluding that the uncertainty of the degree of damage to the carpet precluded rent refund calculations for a substantial reduction in services and facilities.

In the Tenant Petition, the Tenant alleged that the Housing Provider substantially reduced related services in the rental unit by failing to repair the flooring and carpeting until August 2011. Tenant Petition Complaint Details at 2; R. at 34. In the Final Order, the ALJ denied the Tenant's request for a rent refund because there was insufficient evidence on the record "to make

any findings regarding whether a stained or dirty carpet amounted to a reduction in services or facilities." Final Order at 11; R. at 90. On appeal, the Tenant argues that the ALJ erred because that determination "is not supported by the evidence." Notice of Appeal at 7; *see also* Tenant's Brief at 9 (Tenant "asserts that there was sufficient evidence about the overall condition of the carpet, which was provided through exhibits and testimony by [Tenant], his sister and housing provider.").

Under the Act, a tenant may be awarded a rent refund where an "unauthorized reduction in services or facilities related to the rental unit" has occurred. 14 DCMR § 4214.4(d).[7] A housing provider is not permitted to reduce or eliminate services "required by law or the terms of a rental agreement" without decreasing the rent to "reflect proportionally the value of the change in services." D.C. OFFICIAL CODE §§ 42-3501.03(27), 42-3502.11.[8] The Commission has

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[7] 14 DCMR § 4214.4 provides, in relevant part, the following:

> 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:
>
> . . .
>
> (d) Any unauthorized reduction in services or facilities related to the rental unit not permitted by the Act or authorized by order of the Rent Administrator[.]

[8] D.C. OFFICIAL CODE § 42-3501.03(27) provides the following:

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

D.C. OFFICIAL CODE § 42-3502.11 provides the following:

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

consistently applied a three-prong test to tenants' claims of reductions or eliminations of related services or facilities:

> First, the tenant must provide evidence of a reduction and/or elimination of services, and the fact-finder must find that the housing provider eliminated or substantially reduced a service or services at the tenant's rental unit. Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1989). Second, the tenant must establish the duration of the reduction in services, and present evidence to support his allegations. Daro Realty. Inc. v. 1600 16th St. Tenants' Ass'n, TP 4,637 (RHC Oct. 20, 1988) (cited in Cobb v. Charles E. Smith Mgmt., Co., TP 23,889 (RHC July 21, 1998). Third, the tenant must show that the housing provider had knowledge of the alleged reduction of services. Gelman Co. v. Jolly, TP 21,451 (RHC Oct. 25, 1990).

Drell, TP 27,344; *see also* Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013); Ruffin v. Sherman Arms, LLC, TP 27,982 (RHC July 29, 2005) (citing Ford v. Dudley, TP 23,973 (RHC June 3, 1999)).

As stated, the Commission will affirm an ALJ's findings of fact and conclusions of law that are supported by substantial evidence on the record. 14 DCMR § 3807.1; Dreyfuss Mgmt., LLC v. Beckford, RH-TP-07-28,895 (RHC Sept. 27, 2013) (provided "a hearing examiner's decision . . . flows rationally from the facts and is supported by substantial evidence" the Commission will affirm). The Commission will not "substitute ourselves for the trier of fact who heard the conflicting testimony, observed the adversary witnesses, and determined the weight to be accorded their testimony." Fort Chaplin Park Assocs., 49 A.2d at 1079; Ahmed, Inc., v. Torres, RH-TP-07-29,064 (RHC October 28, 2014); Joyner, TP 28,151. The Commission has consistently stated that "[w]here substantial evidence exists to support the hearing examiner's findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [hearing] examiner.'" Torres, RH-TP-07-29,064; Boyd v. Warren, RH-TP-10-29,816 (RHC June 5, 2013) (quoting

Hago v. Gewirz, RH-TP-08-11,552 & RH-TP-08-12,085 (RHC Aug. 4, 2011)); Loney v. Tenants of 710 Jefferson St., N.W., SR 20,089 (RHC Jan. 29, 2013) at n.13.

The ALJ determined that the Tenant did not present "evidence of how substantial the problem [with the carpet] was," and therefore the Tenant's claim failed the first prong of the Commission's test. Final Order at 11; R. at 90. On appeal, the Tenant recites several exhibits and testimony on the record that he claims are substantial evidence of the condition of the carpet in the rental unit, each of which are statements by himself, his sister, or the Housing Provider regarding the condition of the carpet during the time period before the Housing Provider replaced it. Notice of Appeal at 7. The Tenant further asserts that "[s]urely there are reasonable inferences that can be drawn from the Housing Provider's testimony" as to the condition of the carpet. Tenant's Brief at 9 (notably, the Tenant also points out that the Housing Provider "agreed to replace it sight unseen").

The Commission determines that the Tenant's arguments on appeal amount to no more than a request for the Commission to substitute itself for the trier of fact and to reweigh the evidence, testimony, and credibility considered and weighed by the ALJ. Fort Chaplin Park Assocs., 49 A.2d at 1079; Torres, RH-TP-07-29,064; Boyd, RH-TP-10-29,816; Hago, RH-TP-08-11,552 & RH-TP-08-12,085. Based on its review of the record, the Commission is satisfied that substantial evidence supports the ALJ's determination and that the Tenant's arguments that substantial evidence to the contrary supports a different conclusion is not a basis for the Commission to overturn the ALJ's evaluation of the significance and credibility of the exhibits and testimony on the record. 14 DCMR § 3807.1; Drell, TP 27,344; Lizama, RH-TP-07-29,063; Pinson, TP 20,117.

Accordingly, the Commission affirms the Final Order on this issue.

C. Whether the ALJ erred by not making findings of facts that the Property was built prior to 1978 and had deteriorated paint which created a presumptive lead-based paint hazard despite substantial evidence on the record, and erred in her calculation of a refund for the substantial reduction in services due to the existence of deteriorating paint creating a lead-based paint hazard.

In the Final Order, the ALJ awarded the Tenant a rent refund based on the reduction of related services at the rental unit, specifically, $100 per month for failure to provide maintenance and repair of the paint and walls. *See* Final Order at 9-13; R. at 87-92. On appeal the Tenant argues that the ALJ erred in failing to award him a larger rent refund based on the legal presumption that the deteriorated paint in his rental unit was lead-based. Notice of Appeal at 6-9.

As stated, the Commission's standard of review requires it to reverse findings of fact and conclusions of law that are unsupported by substantial evidence on the record, are arbitrary, capricious, or an abuse of discretion, or not in accordance with the Act. 14 DCMR § 3807.1; Fort Chaplin Park Assocs., 49 A.2d at 1079; United Dominion Mgmt. Co., 101 A.3d at 430-31. Although findings of fact will be affirmed where there is substantial evidence on the record to support them, the Commission's review of legal conclusions is *de novo*. United Dominion Mgmt. Co., 101 A.3d at 430-31

As noted *supra* at 17, the Act provides that tenants may be awarded rent refunds for the substantial reduction or elimination of services or facilities required by law or by the terms of a rental agreement, including "repairs, decorating, and maintenance." D.C. OFFICIAL CODE §§ 42-3501.03(27), 3502.11; 14 DCMR § 4214.4(d); *see* Wash. Realty Co. v. 3030 30th St. Tenant Ass'n, TP 20,749 (RHC Jan. 30, 1991). The Commission has also consistently held that "failure to provide services required by the housing code constitutes a reduction in services under the Act." Lizama, RH-TP-07-29,063; (quoting Kuratu v. Ahmed, Inc., TP 28,985 (RHC Dec. 27,

2012)); Cascade Park Apts v. Walker, TP 26,197 (RHC Jan. 14, 2005); Hemby v. Residential Rescue, Inc., TP 27,887 (RHC Apr. 16, 2004); Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993). The presence of a substantial violation of the housing code therefore constitutes a substantial reduction in related services. Lizama, RH-TP-07-29,063; Walker, TP 26,197 ("unabated rodent infestation constituted a reduction in services, because the housing provider did not provide services required by the housing code").

In this case, the ALJ found that holes in the Tenant's walls, "although small, were numerous, and the presence of cracked and peeling paint was serious, and negatively impacted Tenant's enjoyment and use of the apartment, and the problems existed for a long period of time without repair." Final Order at 13; R. at 88. The ALJ noted that holes and cracks in walls and loose or peeling paint are required to be repaired by the Housing Regulations of the District of Columbia, 14 DCMR §§ 706.2 and 707.1. Final Order at 12; R. at 89.

After a tenant proves that a reduction in services is substantial, proves its duration, and proves that the housing provider was aware of the reduction, an ALJ may then award a rent refund or rollback in an amount to "reflect proportionally the value of the change in services." D.C. OFFICIAL CODE § 42-3502.11. The Commission has consistently determined that an ALJ may fix the dollar value of a reduction in services without expert testimony or other direct testimony on the dollar value of the reduction. *See, e.g.,* Karpinski v. Evolve Prop. Mgmt., LLC, RH-TP-09-29,590 (RHC Aug. 19, 2014); Smith Prop. Holdings Five (D.C.) L.P. v. Morris, RH-TP-06-28,794 (RHC Dec. 23, 2013); Drell, TP 27,344; Jonathan Woodner Co. v. Enobakhare, TP 27,730 (RHC Feb. 3, 2005). Rather than require "scientific precision," an ALJ is permitted to value a reduction in services based on his or her "knowledge, expertise, and discretion, as long

as there is substantial evidence in the record of the nature of the violation, duration, and substantiality." Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000).

In the Final Order, the ALJ concluded that the Tenant had met his burden of proving substantiality, duration, and notice, and valued the reduction in service at $100 per month. Final Order at 13; R. at 88. Based on its review of the record, however, the Commission is not satisfied that the ALJ's valuation reflects a complete consideration of the substantial evidence in the record of "the nature . . . and substantiality" of the violation. *Cf.* Kemp, TP 24,786; *see, e.g.,* Ryan v. Carmel Partners, TP 28,367 (RHC Sept. 27, 2007) (citing Spevak v. D.C. Alcoholic Beverage Control Bd., 407 A.2d 549, 553 (D.C. 1979) (agency findings "must be supported by substantial evidence apparent from the record as a whole")).

Specifically, although the ALJ determined that the Housing Provider's violation of 14 DCMR § 706.2 and 707.1 was a substantial reduction in services, the Final Order contains no consideration of the Housing Provider's failure to maintain and repair the paint as a violation of 20 DCMR § 3301, which provides:

> The interior and exterior of dwelling units and child-occupied facilities are presumed to contain lead-based paint if constructed prior to 1978, and any paint that is deteriorated, chipping, peeling, or otherwise not in intact condition is considered to be a lead-based paint hazard and is prohibited.[9]

Because the definition of "related services" under the Act includes repairs and maintenance that are "required by law," D.C. OFFICIAL CODE § 42-3501.03(27), and a "substantial violation"

[9] The Commission notes that the regulations found at 20 DCMR § 3301 were promulgated by the District Department of the Environment after the Tenant Petition was filed. *See* 60 D.C. Reg. 10909 (July 26, 2013). The purpose of that rulemaking, *see id.*, was to implement, among other laws, the Lead-Hazard Prevention and Elimination Act of 2008, effective March 31, 2009, D.C. Law 17-381, D.C. OFFICIAL CODE § 8-231.01 *et seq.* (2012 Supp.). The presumption of lead-based paint in pre-1978 structures is also established within that act. *See* D.C. OFFICIAL CODE § 8-231.01(32) ("'Presumed lead-based paint' means paint or other surface coating affixed to a component in or on a dwelling unit or child-occupied facility, constructed prior to 1978."). The Commission is therefore satisfied that the legal presumption of lead-based paint was in effect at all times relevant to this case.

means "the presence of any housing condition, the existence of which violates the housing regulations, or any other statute or regulation relative to the condition of residential premises," *id.* § 42-3501.03(35) (emphasis added), the Commission is satisfied that the presumption and prohibition of lead-based paint may be applied in cases arising under the Act. *See also* 14 DCMR § 4216.2(j) (substantial violation of the housing code to allow "[l]ead paint on the interior of the dwelling, or on the exterior of the dwelling where the paint is in a location or in a condition which creates a hazard of lead poisoning to children or the occupants").

The Commission's review of the record reveals that the Tenant introduced evidence on the record that the Housing Accommodation was constructed prior to 1978. *See, e.g.,* PX 102-K ("The Etheridge Cooperative House Rules," stating, "The [Housing Accommodation] was built in 1964."); R. at 216. The Commission's review of the record does not reveal any substantial evidence that the Housing Provider rebutted the presumption with "a lead-based paint inspection report, prepared by a lead-based paint inspector or a risk assessor, which documents that the paint in question is not lead-based paint." 20 DCMR § 3301.2. Therefore, the Commission determines that the deteriorated paint in the Tenant's rental unit constituted, as a matter of law, a lead-based paint hazard. 20 DCMR § 3301.1.

The Commission's review of the record reveals that the ALJ did not make any findings of fact or conclusions of law regarding the presumption of lead-based paint and its possible effect on the valuation of the reduction in related service. Final Order at 13; R. at 88. Because the ALJ did not give full consideration to "the nature . . . and substantiality" of the violation in determining the value of the rent refund to the Tenant, the Commission, reviewing the ALJ's legal conclusions *de novo*, is not satisfied that the ALJ's "knowledge, expertise, and discretion"

was applied in a manner that is consistent with the Act. 14 DCMR § 3807.1; Kemp, TP 24,786.[10]

Accordingly, the ALJ's award of $100 per month for the reduction in maintenance and repair to the walls and paint in the Tenant's rental unit is vacated, and the issue is remanded for the ALJ to make findings of fact and conclusions of law on the value of the reduced service in full consideration of the nature and substantiality of the violation of the housing code and other laws governing the condition of rental properties, specifically those relating to lead-based paint hazards.

D. Whether the ALJ erred by ignoring the issue of whether Housing Provider acted in bad faith.

The Tenant argues on appeal that the ALJ erred in failing to make any findings of facts or conclusions of law regarding whether the Housing Provider acted in bad faith and the rent refund awarded to the Tenant should therefore be trebled. Notice of Appeal at 11-20. The Tenant asserts that he raised the issue in the Tenant Petition and presented extensive evidence of bad faith by the Housing Provider with regard to both the unlawful rent increase in December 2010, *see* Issue A, *supra* at 13-17, and the substantial reduction in related services, *see* Issues B and C, *supra* at 17-25. Notice of Appeal at 12, 18.

As described *supra* at 13, the Act provides that a person who knowingly charges an unlawful amount of rent or substantially reduces related services shall be liable to a tenant "for the amount by which the rent exceeds the applicable rent charged or for treble that amount (in the event of bad faith)[.]" D.C. OFFICIAL CODE § 42-3509.01(a). The Commission has

[10] The Commission notes that, in his Motion for Reconsideration, the Tenant requested the refund be adjusted to $250 per month. Motion for Reconsideration at 10; R. at 112. The Commission, however, takes no position on the precise dollar amount that may be awarded upon full consideration by the ALJ of the nature and substantiality of the reduction in services.

consistently held that an award of treble damages under the Act requires the application of a two-prong test: "first, there must be a determination that the housing provider acted knowingly; and second, the housing provider's conduct must be 'sufficiently egregious' to warrant a finding of bad faith." Gelman Mgmt. Co. v. Grant, TP 27,995, 27,997, 27,998, 28,002, & 28,004 (RHC Aug. 19, 2014); Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) (quoting Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013)); *see also* 1773 Lanier Place, N.W. Tenants' Ass'n v. Drell, TP 27,344 (RHC Aug. 31, 2009); Smith v. Christian, TP 27,661 (RHC Sept. 23, 2005). A finding of bad faith must be based on specific findings of fact that "demonstrate a higher level of culpability," such as "a deliberate refusal to perform without a reasonable excuse and/or manifest[ed] dishonest intent, sinister motive, or heedless disregard of duty." Notsch, RH-TP-06-28,690 (quoting Drell, TP 27,344).

The DCAPA governs administrative decisions in contested cases under the Act and provides, in relevant part, as follows:

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

D.C. OFFICIAL CODE § 2-509(e) (emphasis added). To satisfy the requirements of the DCAPA, a final order must meet three criteria: "(1) the decision must state the findings of fact on each material, contested issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." Grant, TPs 27,995; 27,997; 27,998; 28,002; & 28,004 (citing Perkins v. D.C. Dep't of Emp. Servs., 482 A.2d 401, 402 (D.C. 1984)). If an ALJ's decision does not contain findings of fact and conclusions of law on each contested issue, the Commission is required to remand the issue for further consideration.

Butler-Truesdale v. Aimco Props., LLC, 945 A.2d 1170, 1170-71 (D.C. 2008) ("[The ALJ] failed to consider all of the evidence and testimony presented at the hearing. Because the ALJ did not make findings on all contested issues of material fact, we remand for further proceedings." (internal quotations omitted)); Branson v. D.C. Dep't of Emp't Servs., 801 A.2d 975, 979 (D.C. 2002) ("Since the issue [raised by the petitioner was] presented to the agency, and the agency failed to address it, we must remand the case . . . for a determination of [the claim]"); Wilson v. Smith Prop. Holdings Van Ness, RH-TP-07-28,907 (RHC Mar. 10, 2015) (failure to address claim of retaliation); Grant, TPs 27,995; 27,997; 27,998; 28,002; & 28,004 (error to dismiss exceptions and objections "simply by stating that they were 'without merit'").

The Commission's review of the record reveals that the Tenant raised the issue of bad faith in the Tenant Petition, specifically requesting in the attached complaint details "that the Court award him treble damages pursuant to D.C. Code § 42-3509.01." Tenant Petition Complaint Details at 4; R. at 32.[11] In addition, the Commission's review of the record shows that the Tenant, in his opening statement before the ALJ, specifically requested that he be awarded treble damages for both the rent increase and for violations of the housing code. *See* Hearing CD (OAH May 6, 2014) at 10:08. Except as discussed in Issue A, *supra* at 13-17, the Commission is satisfied that the ALJ determined the Housing Provider "knowingly" violated the Act, entitling the Tenant to rent refunds. *See* D.C. OFFICIAL CODE § 42-3509.01(a); Grant, TP 27,995, 27,997, 27,998, 28,002, & 28,004; Notsch, RH-TP-06-28,690; Lizama, RH-TP-07-29,063. However, in the Final Order, the ALJ did not make any findings of fact or conclusions of law regarding whether the Housing Provider Acted in bad faith when she increased the

[11] The Commission notes that the tenant petition form provided by RAD does not contain a specific check box or space to raise the issue of bad faith. *See* Tenant Petition 2-3; R. at 37-38. Accordingly, nothing in this Decision and Order should be taken as a determination that it is necessary for a tenant to allege bad faith in the initial filing with RAD in order to be awarded a trebled rent refund.

Tenant's rent charged or when related services were reduced and if the Tenant is consequently entitled to a trebled rent refund. *See generally* Final Order 1-21; R. at 80-100. Because an ALJ is required to make findings of fact and conclusions of law on each contested issue, the Commission determines that the ALJ erred by failing to address whether the Housing Provider acted in bad faith and whether the Tenant should be awarded a trebled refund. D.C. OFFICIAL CODE § 2-509(e); Butler-Truesdale v. Aimco Props., LLC, 945 A.2d 1170, 1170-71; Branson, 801 A.2d 975, 979; Wilson, RH-TP-07-28,907; Grant, TPs 27,995; 27,997; 27,998; 28,002; & 28,004.

Accordingly, the Commission remands the issue of bad faith to the ALJ to make findings of fact and conclusions of law on whether the Housing Provider acted in bad faith in unlawfully increasing the Tenant's rent and in substantially reducing related services at the rental unit. The Commission observes that, in the Final Order, the ALJ only addressed whether the December 2010 rent increase was unlawful because the rental unit was not registered with RAD. Final Order at 9; R. at 92. The ALJ accordingly did not address the Tenant's overlapping claim that the Housing Provider increased the rent while the rental unit was not in substantial compliance with the housing regulations. *Compare* D.C. OFFICIAL CODE § 42-3502.08(a)(1)(A) *with* (B).[12] If, on remand, the ALJ determines that the Housing Provider did act in bad faith in increasing the rent charged while the rental unit was not registered, the Commission is satisfied that the Tenant's allegations regarding the housing regulations will be unnecessary to address for

[12] D.C. OFFICIAL CODE § 42-3502.08(a)(1) provides, in relevant part:

> Notwithstanding any provision of this chapter, the rent for any rental unit shall not be increased above the base rent unless:
>
> (A) The rental unit and the common elements are in substantial compliance with the housing regulations, if noncompliance is not the result of tenant neglect or misconduct. . . . ;
>
> (B) The housing accommodation is registered in accordance with § 42-3502.05[.]

purposes of the December 2010 rent increase. However, in order to fully address the Tenant's allegations of bad faith, if the ALJ does not find that the Housing Provider acted in bad faith for purposes of the violation of D.C. OFFICIAL CODE § 42-3502.08(a)(1)(B), the Commission observes that it will be necessary for the ALJ to address the Tenant's alternative argument under subparagraph (A) to determine if the Housing Provider knowingly and in bad faith increased the rent while the rental unit was not in substantial compliance with the housing regulations. D.C. OFFICIAL CODE §§ 2-509(e), 42-3509.01(a); Grant, TP 27,995, 27,997, 27,998, 28,002, & 28,004.

IV. PLAIN ERROR

The Commission's review is typically limited to the issues raised in a notice of appeal, but it may always correct for "plain error." 14 DCMR § 3807.4; Lenkin Co. Mgmt. v. D.C. Rental Hous. Comm'n, 642 A.2d 1282, 1286 (D.C. 1994); Proctor v. D.C. Rental Hous. Comm'n, 484 A.2d 542, 550 (D.C. 1984); Doyle v. Pinnacle Realty Mgmt., TP 27,067 (RHC Mar. 10, 2015) (plain error in determination of identity of parties represented by tenant association); Washington v. A&A Marbury, LLC/UIP Prop. Mgmt., RH-TP-30,151 (RHC Dec. 27, 2012) (plain error to make findings of fact based on settlement agreement not admitted into evidence, to deny tenant opportunity to present supporting evidence, and to fail to make findings of fact and conclusions of law on each contested issue). Based on its review of the record, the Commission observes that the ALJ erred in determining the time period for which the Tenant may be awarded a rent refund for the following reasons.

The Commission has consistently held that a tenant may be awarded a rent refund for violations of the Act that continue past the date of filing a tenant petition, so long as there is evidence in the record. Dias v. Perry, TP 24,379 (RHC July 30, 2004); Redmond v. Majerle

Mgmt., Inc., TP 23,146 (RHC Mar. 26, 2002); Jenkins v. Johnson, TP 23,410 (RHC Jan. 4, 1995). Although a tenant has the burden of proving his or her entitlement to any damages, a refund may be awarded "up to the date the record closed, which is usually the hearing date." Dias, TP 24,379 (quoting Jenkins, TP 23,410).[13]

The Commission's review of the record shows that, at the evidentiary hearing, the ALJ admitted some evidence regarding the condition of the paint in the rental unit that was dated after the filing of the Tenant Petition. *See, e.g.,* PX 160 ("Krause Decorating Service Work Order dated 1/14/14"); R. at 348; Hearing CD (OAH May 6, 2014) at 11:57. However, the ALJ then denied the Tenant's request to enter several other exhibits into evidence, without any objection from the Housing Provider, stating, "[t]he cutoff date is the filing of your Tenant Petition; you can't offer evidence of what occurred after you filed your tenant petition. . . . That's what triggers your statute of limitations period for your claims." Hearing CD (OAH May 6, 2014) at 11:59-12:01 (denying admission of PXs 148, 149, and 150).

In the Final Order, the ALJ nonetheless made a finding of fact that "[t]he apartment was painted and other repairs made in October and November 2013[,]" citing PX 135 ("Email: 'Painting Update' from Kahlill Palmer to Joan Clay dated 10/29/13, 7:59pm"); R. at 307-09. *See* Final Order at 5; R. at 96. However, the ALJ awarded the Tenant a rent refund for reduced services only through October 1, 2013, the date the Tenant Petition was filed. Final Order at 13; R. at 88. The ALJ stated that "[w]hat may have occurred after the tenant petition is filed is not before me and any award of rent refunds goes only through the date Tenant filed his petition." *Id.* Similarly, the ALJ awarded the Tenant a rent refund for the unlawful, December 2010 rent

[13] The Commission notes that, although evidence may come into the record for alleged violations that are continuing in nature, a new violation that arises after a petition is filed, *i.e.*, a separate cause of action, must be the subject of a separate petition. *See* Menor v. Weinbaum, TP 22,769 (RHC Aug. 4, 1993) ("[I]f the filing of a petition is the cut off point for the issues to be adjudicated, the landlord would never know what was to be defended.").

increase only through October 2013. *See* Final Order at 8; R. at 93. The Commission determines that this conclusion disregards the substantial evidence on the record, as well as exhibits that the Tenant did offer, or would have offered into evidence but for the ALJ's *sua sponte* ruling, that the Tenant continued to reside in the rental unit after the date the Tenant Petition was filed and, presumably, continued to pay the unlawful rent charged, contrary to extensive Commission precedent on the relief available to tenants in administrative proceedings under the Act. *See* Dias, TP 24,379; Majerle Mgmt., TP 23,146; Jenkins, TP 23,410.

The Commission determines, therefore, that the ALJ committed plain error in rejecting the Tenant's offers of evidence regarding continued rent overcharges and reductions in services past the October 1, 2013, filing of the Tenant Petition. *See* 14 DCMR § 3807.4; Jenkins, TP 23,410. Accordingly, the Tenant Petition is remanded to the ALJ with instructions to reopen the evidentiary record and conduct a limited hearing, or to allow the parties to stipulate any relevant facts, as necessary to supplement the record in order to determine the number of months the Tenant paid the unlawful rent charged and the Housing Provider substantially reduced related services.

V. CONCLUSION

For the foregoing reasons, the Commission affirms the Final Order in part, vacates it in part, reverses it in part, and remands this case for further proceedings. The Commission reverses the ALJ's determination that the Housing Provider's receipt of the additional $10 per month did not amount to a knowing violation of the Act. The issue is remanded to the ALJ for such proceedings, which may include a limited evidentiary hearing, as are necessary to make findings of fact as the to the Housing Provider's knowledge of her receipt of the additional $10 between December 2010 and the July 2011 email exchange. The ALJ is further instructed to make

conclusions of law regarding the Housing Provider's receipt of the additional $10 after the July 2011 email exchange that are consistent with D.C. OFFICIAL CODE § 42-3509.01(a), this Decision and Order, and DCCA and Commission precedent and to recalculate the rent refund to which the Tenant is entitled accordingly.

The Commission affirms the ALJ's determination that the Tenant did not provide sufficient evidence of a substantial reduction in related services based on the condition of the carpet in the rental unit.

The Commission vacates the ALJ's award of $100 per month for the reduction in the related services of maintenance and repair to the walls and paint in the Tenant's rental unit, and the issue is remanded for the ALJ to making findings of fact and conclusions of law on the value of the reduced service in full consideration of the nature and substantiality of the violation of the housing code and other laws governing the condition of rental properties, specifically those relating to lead-based paint hazards.

The Commission remands the issue of bad faith to the ALJ to make findings of fact and conclusions of law on whether the Housing Provider acted in bad faith in unlawfully increasing the Tenant's rent and in substantially reducing related services at the rental unit. The ALJ is instructed to determine whether the December 2010 rent increase was in bad faith based on either the failure to register the rental unit or the existence of substantial housing code violations.

The Commission remands the Tenant Petition for plain error in determining the dates for which the Tenant may be awarded a rent refund. The ALJ is instructed to reopen the evidentiary record and conduct a limited hearing, or to allow the parties to stipulate any relevant facts, as necessary to supplement the record in order to determine the number of months the Tenant paid the unlawful rent charged and the Housing Provider substantially reduced related services.

SO ORDERED

Ronald A. Young

RONALD A. YOUNG, COMMISSIONER

Claudia L. McKoin

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-13-30,431 was mailed, postage prepaid, by first class U.S. mail on this **5th day** of **October, 2015,** to:

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