DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-15-30,653

In re: 2727 M Street, N.W.

Ward Two (2)

PATRICK C. NOVAK
Tenant/Appellant

v.

NATALIA G. SEDOVA
Housing Provider/Appellee

DECISION AND ORDER

September 28, 2018

GREGORY, 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 - 3509.07 (2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-501 - 510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2010), 1 DCMR §§ 2920-2941 (2010), 14 DCMR §§ 3800-4399 (2004) govern these proceedings.

[1] OAH assumed jurisdiction over tenant petitions from the Department of Consumer and Regulatory Affairs ("DCRA"), Rental Accommodations and Conversion Division ("RACD") pursuant to the Office of Administrative Hearings Establishment Act, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-l)(l) (2007 Repl.). The functions and duties of RACD in DCRA were transferred to DHCD by § 2003 the Rental Housing Operations Transfer Amendment Act of 2007, D.C. Law 17-20, D.C. OFFICIAL CODE § 42-3502.04b (2010 Repl.)).

I. PROCEDURAL HISTORY

On April 1, 2015, tenant/appellant Patrick Novak ("Tenant"), former resident of the housing accommodation located at 2727 M Street, N.W. ("Housing Accommodation"), filed Tenant Petition RH-TP-15-30,653 ("Tenant Petition") with RAD against housing provider/appellee Natalia Sedova ("Housing Provider"). *See* Tenant Petition at 1-2; R. at 37-38. The Tenant Petition raised the following claims against the Housing Provider:

> 1. The Housing Provider, property manager, or other agent of the Housing Provider has improperly withheld my security deposit after the date when I/we moved out.
>
> 2. The Housing Provider, property manager, or other agent of the Housing Provider has failed to return the interest on my security deposit after the date when I/we moved out.

Tenant Petition at 3; R. at 36.

An evidentiary hearing was scheduled for July 7, 2015 before Administrative Law Judge Erika L. Pierson ("ALJ"). On June 29, 2015, the Housing Provider filed a request for a different hearing date ("Motion for Continuance") because of travel plans involving her sister who was currently living outside the United States. Motion for Continuance at 1; R. at 61. In her request, the Housing Provider asked for the hearing date to be set after June 20, 2015. *Id.* The Tenant did not consent to the continuance and filed a "motion to dismiss" the Housing Provider's request on June 29, 2015 ("Opposition to Continuance"). R at 56. The ALJ granted the Motion for Continuance on June 30, 2015 ("Order Granting Continuance"). R. at 65. The hearing was rescheduled for July 21, 2015. *Id.*

On July 16, 2015, the Tenant filed a document entitled "Amended Complaint/Evidence to be Presented during Hearing" ("Amended Complaint"). R. at 70-98. In the Amended Complaint, the Tenant alleged that the Housing Provider retaliated against him in violation of D.C. OFFICIAL CODE § 42-3505.02. Amended Complaint at 16-25; R. at 74-83. The Housing

Provider filed a motion to continue the hearing on the same day, stating that she needed time to respond to the Tenant's Amended Complaint and to obtain counsel. R. at 101. On July 17, 2015, the ALJ denied the Tenant's request to amend the Tenant Petition and determined that the Housing Provider's request for a continuance was therefore unnecessary. Order Denying Amended Complaint at 1-2; R. at 113-14. The evidentiary hearing was held as scheduled on July 21, 2015, at which the Housing Provider appeared, represented by counsel, and the Tenant appeared, *pro se*, by telephone. Rental Housing Attendance Sheet; R. at 120.

The ALJ issued a final order on August 13, 2015: Novak v. Sedova, 2015-DHCD-TP 30,653 (OAH Aug. 13, 2015) ("Final Order"). R. at 122-134. The ALJ made the following findings of fact in the Final Order:[2]

1. Tenant resided at 2727 M Street, NW (Housing Accommodation), a single family condominium town house from October 1, 2013, to December 22, 2014. Tenant sublet the Housing Accommodation from Housing Provider/Sublessor Natalia Sedova.

2. Ms. Sedova rented the Housing Accommodation in February 2013 from the owner's agent. Ms. Sedova signed a lease agreeing to pay monthly rent of $3,100 per month [sic]. When she moved in, Ms. Sedova purchased all new furniture and rugs for the house.

3. A few months later, Ms. Sedova's mother was displaced from her home due to a serious flood and needed to move in with Ms. Sedova. The Housing Accommodation was not large enough for two people and therefore, Ms. Sedova asked the owner if she could rent the house next door. Because of her one year lease, the owner told Ms. Sedova that she could rent the house next door if she found a sub-tenant to move into the Housing Accommodation.

4. Ms. Sedova advertised the Housing Accommodation for rent on Craig's list [sic] and Tenant and his fiancé[e] responded to the ad and visited the house. Tenant told Ms. Sedova that he was a disabled veteran and that he was having difficulty finding housing because he had extremely bad credit.

[2] The findings of fact are recited herein using the language of the ALJ in the First Final Order.

5. Tenant completed the application to rent the house which Ms. Sedova submitted to the owner. Due to Tenant's bad credit, the owner would not enter into a lease with Tenant.

6. Tenant told Ms. Sedova that he had enough money to pay one year of rent in advance if he rented the house. When Ms. Sedova presented this option to the owner, she was told that she could sublet the Housing Accommodation to Tenant and be responsible, but that the owner would not enter a lease with tenant.

7. Therefore, Ms. Sedova subleased the Housing Accommodation to Tenant and moved into the house next door. Tenant told Ms. Sedova that he wanted to rent the Housing Accommodation fully furnished. Ms. Sedova did not want to rent the house furnished because she had just purchased all the furnishings, but she agreed to do so because she needed to move and Tenant really wanted the furnishings.

8. Ms. Sedova used the same lease that she signed with the owner and changed the names on the lease to herself as "Tenant" and Mr. Novak as "Sub Tenant." RX 207. Ms. Sedova rented the Housing Accommodation plus furnishings to Tenant for $3,750 per month. $3,100 per month was for rent and $650 per month was for furniture rental, although the lease does not specifically separate costs. Attached to the lease is a list of all of the furnishings provided and the cost of those furnishings. *Id.* Ms. Sedova did not have any pets, but agreed in the lease that Tenant could have two cats in the Housing Accommodation.

9. Tenant paid a security deposit of $3,750.

10. When Tenant signed the lease he paid Ms. Sedova six months of advance rent. Subsequently, he paid three months of rent at a time.

11. Throughout the tenancy, Tenant, his fiancé[e], and Ms. Sedova were very good friends and had an excellent relationship.

12. In May 2014, the property owner's agent had asked to show the Housing Accommodation to prospective tenants to rent a similar unit because it was so beautifully furnished. Tenant and Ms. Sedova agreed.

13. After visiting the unit, the agent (Martha Smith) emailed Ms. Sedova stating that when she arrived at the unit, the smell of cat urine was so overwhelming that the prospective tenants declined to enter the unit. RX 218 at 4. Ms. Smith expressed her concern that Ms. Sedova had rented the unit furnished. In subsequent communications by text message with Tenant, he told Ms. Sedova that his cats "piss and shit everywhere when they are alone." *Id.* at 18.

14. Near the end of Tenant's one year lease, Ms. Sedova asked what his intentions were. Tenant told Ms. Sedova that he and his fiancé[e] would be moving to Japan at some point, but he did not have a date yet.

15. In November 2014, Tenant told Ms. Sedova that he would be moving to Japan in December. Before Tenant moved out, Ms. Sedova walked through the apartment, which had a strong odor of cat urine. Tenant said that he intended to have the rugs cleaned before he moved out. Ms. Sedova also observed that her white, sectional, leather sofa was damaged from cat scratches. RX 218 at 28-30. The white sofa cushions were also stained orange from urine soaking through the leather covers to the cushions inside. *Id.* at 27.

16. Although Tenant had the rugs professionally cleaned, the unit continued to have a strong odor of urine. Each day, Ms. Sedova had someone take the rugs out of the apartment to sit outside in the air all day, hoping that the smell would subside. Photographs taken of the underside of the rugs show numerous large, dark urine stains. RX 218 at 15, 16, 18, 19, 32, 33. In addition, the wood floors under the rugs were damaged from urine soaking through the wood. *Id.* at 1, 2, and 23.

17. Ms. Sedova threw the rugs away to alleviate the odor. The rugs were Victorian wool rugs. Ms. Sedova purchased the rugs on the internet and provided printouts of the cost of the three rugs totaling $1,517.99. RX 218 at 14, 17, 20, 21, and 22.

18. In the living room, Ms. Sedova had a black, furry ottoman. The top of the ottoman was torn open by the cats. RX 218 at 35, 36. The replacement cost for the ottoman was $217. RX 34.

19. The bed in the Housing Accommodation was a white, leather, platform bed. The base of the bed, which was enclosed in white leather, had numerous holes from cat scratches. RX 218 at 9-13. Tenant attempted to repair the scratches with white paint and in text messages told Ms. Sedova that he had done so. *Id.* at 1-2. The photographs show visible holes covered with white paint which did not repair the holes. The mattress and pillow top on the bed were soaked with cat urine and had to be thrown away. The replacement cost was $264.47 for the mattress and $239 for the pillow top. *Id.* at 25, 26. In addition, some of the base boards which hold the mattress were broken.

20. During the tenancy, Ms. Sedova bought a lamp for Tenant's bedroom after his fiancé[e] mentioned the room was dark. The lamp was broken and the replacement cost was $150.

21. On January 17, 2015, Ms. Sedova emailed Tenant about the problems in the apartment stating that his security deposit would not cover all the expenses. The email further stated that Ms. Sedova had been unable to rent the unit

because of the damage and smell, she tried to sell the furniture, but was unable because of the damage, and would have to discard the furniture. PX 104. Because she was leaving town, Ms. Sedova indicated she would send a detailed list at a later date.

22. On May 21, 2015, Ms. Sedova emailed Tenant an itemized list of damages totaling $7,150 as follows:

Bedroom black/white rug	$1,650
Black/White Runner	$400
White leather platform bed	$2,100
Lamp	$150
Mattress pad, wool lining	$200
Mattress, queen	$600
While leather sectional sofa	$1,700
Orange woolen rugs (3)	$150
Black fur puff	$100
Kitchen black/white rug	$100

23. After Ms. Sedova informed Tenant that she would not return his security deposit because of the damage, their friendship ended and numerous angry and accusing emails ensued.

24. During the pendency of this tenant petition, Tenant's fiancé[e] ended their relationship while they were in Japan. For reasons unclear, Tenant blamed Ms. Sedova for this break up, which was the basis of Tenant's motion to amend the tenant petition to add an allegation of retaliation.

25. In an email dated June 15, 2015, Tenant stated that the breakup with his fiancé has caused him significant legal problems in Japan. Tenant told Ms. Sedova that he would dismiss the tenant petition if she were willing to provide an affidavit regarding his relationship with his fiancé[e], he could use it in a D.C. court to obtain a marriage license based on a common law marriage during the time they resided in D.C. RX 221. He further asked Ms. Sedova to speak with his fiancé[e] to change her mind.

Final Order at 1-6; R. at 129-34. The ALJ made the following conclusions of law in the Final Order:[3]

1. The Rental Housing Act of 1985, as amended, grants OAH jurisdiction over the refund of security deposits and provides that security deposits are governed by the Security Deposit Act. D.C. Official Code § 42-3502.17 (2012). The Security Deposit Act is codified at 14 DCMR §§ 308 through

[3] The conclusions of law are recited using the language of the ALJ in the First Final Order, except that the Commission has numbered the ALJ's paragraphs for ease of reference.

311. As a preliminary matter, Counsel for Housing Provider argued that this administrative court has no jurisdiction over this petition because Ms. Sedova is not an "owner" and therefore the Security Deposit Act does not apply to her. The Security Deposit Act defines a "security deposit" as "monies paid to the **owner** by the tenant . . ." 14 DCMR § 308.1 (emphasis added). In setting forth the requirement for repayment of security deposits, the regulations state that "the owner" shall do certain things. While Ms. Sedova was herself a renter, the definition of "owner" encompasses more than holding legal title to a property. The Security Deposit Act is part of the Housing Code, Title 14, Chapter 3. Applicable definitions for chapter 1-19 of Title 14 are found at 14 DCMR § 199.1, which defines "owner" for the purposes of the Security Deposit Act as:

> Any person who, alone or jointly or severally with others, meets either of the following criteria:
>
> (a) Has legal title to any building arranged, designed, or used (in whole or in part) to house one or more habitations; or
>
> (b) **Has charge, care, or control of any building arranged,** designed or used (in whole or in part) to house one or more habitations, **as owner or agent of the owner,** or as a fiduciary of the estate of the owner or any officer appointed by the court. Any persons representing the actual owner shall be bound to comply with the terms of this subtitle, and any notice or rules and regulations issues pursuant to this subtitle, to the same extent as if he or she were the owner.

2. In this case, Ms. Sedova, as sublessor, has charge, care and control of the Housing Accommodation by virtue of her lease with the title owner. In addition, arguably, Ms. Sedova acted as the owner's agent in subleasing the property having done so with the knowledge and permission of the owner. To hold otherwise would be to hold that a sub-lessee has no protections under the Rental Housing Act for the return of a security deposit and that a sublessor has no responsibilities. This clearly was not the intention of the legislature. As a general rule, statutes should be interpreted so as to avoid an absurd result. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940); *Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938); *Zhou v. Jennifer Mall Restaurant*, 699 A.2d 348, 356 (D.C. 1997). Therefore, I find that for the purposes of the Security Deposit Act, Ms. Sedova is an owner.

3. The Security Deposit Act requires that within 45 days after the termination of a tenancy a housing provider must either tender payment to the tenant, without demand, or notify the tenant in writing of its intent to withhold any portion of the security deposit. 14 DCMR § 309.1. A housing provider can

withhold the security deposit, or a portion thereof, to defray the cost of expenses properly incurred under the lease. 14 DCMR § 309.1. A Housing provider then has 30 days after providing the tenant with notice of its intent to withhold, to refund the balance of the security deposit and provide an itemized statement of the repairs or other uses to which the monies were applied, and the cost of each repair or other use. 14 DCMR § 309.2. The regulations provide that failure to comply with these provisions (§ 309.1 and 309.2) of the Security Deposit Act "shall constitute *prima facie* evidence that the tenant is entitled to a full return including interest." 14 DCMR § 309.3.

4. In this case, Ms. Sedova notified Tenant by email on January 17, 2015, that she intended to withhold all or a portion of Tenant's security deposit. However, Ms. Sedova did not provide an itemized list of deductions until May 21, 2015, more than 30 days after she notified Tenant of her intent to withhold his security deposit. Therefore, Tenant has established a *prima facie* case that he is entitled to a refund of his security deposit. Prima facie evidence means only that Tenant need not present any additional evidence that he is entitled to a refund. However, the inquiry does not end there. A housing provider can rebut the evidence by establishing that it had lawful reasons to withhold the security deposit. *C.F. Shamoun v. Shough*, 377 S.W. 3d 63 (Tex. App. 2012) (holding that where failure to provide written notice of intent to withhold a security deposit created a presumption of bad faith, a landlord can rebut that presumption by proving its good faith).

5. The intent of the legislature was to require prompt refunds of security deposits, less lawful deductions. Therefore, the issue in this case is whether the deductions made by Housing Provider were lawful. The Security Deposit Act states that the term "security deposit" shall mean all monies paid by the tenant as a deposit or other payment made as "security for performance of the tenant's obligations in a lease or rental of the property." 14 DCMR § 308.1. As such, I conclude that lawful deductions are those damages caused by a tenant's failure to meet his or her obligations under the lease.

6. The Security Deposit Act is silent on who has the burden of proof. The Administrative Procedures Act (DCAPA) (D.C. Official Code § 1-[509(b))] and the OAH rules (OAH Rule 2822) place the burden of proof (i.e. proving a disputed fact) upon the proponent of a rule or order in a "contested case." The Tenant has the burden of proving that he or she paid a security deposit and that deposit was not returned to him. *Mills v. Weller*, 2008-Ohio-3008 (Ohio Ct. App., Montgomery County June 20, 2008); *Veliz v. Meehan*, 609 A.2d 45, 47 (App. Div. 1992). However, because the Act requires a Housing Provider to provide an itemized list of deductions when withholding a security deposit, Housing Provider has the burden of proving that those deductions are lawful, particularly where the Housing Provider is the party with the pertinent information regarding the deductions. Other jurisdictions

have similarly, placed the burden of proving damages on the Housing Provider. *See Expressway Assoc. II v. Friendly Icecream Corp. of Conn.*, 590 A.2d 431 (Conn. 1991) ("It is axiomatic that the burden of proving damages is on the party claiming them."); *Pulley v. Miberger*, 198 S.W.3d 418 (Texas App. Dallas 2006) (holding that a landlord has the burden to prove retention of any portion of the security deposit); *Veliz v. Meehan,* 609 A.2d at 47 (holding that a landlord has the burden of proving damages because he is in a superior position to advance such proof).

7. Generally, a tenant is liable for any willful or negligent damage to property. Housing Provider has the burden of proving that the deductions were necessary and that the damage was over and above normal wear and tear. The District of Columbia Court of Appeals has not provided guidance on what amounts to lawful deductions under the Security Deposit Act and therefore I have looked to other jurisdictions. Other jurisdictions have held that lawful deductions include (1) past due rent; (2) unpaid utilities; and (3) damages suffered by the landlord by reason of the tenant's noncompliance with the rental agreement. *See e.g. Albreqt v. Chen*, 477 N.E.2d 1150, 1153 (Ohio App. 1983).

8. In this case, there was substantial evidence that Tenant's cats destroyed Ms. Sedova's furnishings to the point that they had to be discarded. Tenant did not deny that his cats routinely urinated on the rugs and furniture, but suggested that amounted to ordinary wear and tear and that he was only required to clean the rugs. Ordinary wear and tear does not include damage. Rather, it assumes normal deterioration from day-to-day living. There is nothing normal about cats continuously urinating not only on the rugs, but on the sofa and bed. I reject Tenant's assertion that stains on the rugs were mold from Ms. Sedova maintaining an inadequate temperature in the house. One does not need to be a mold or animal expert to recognize urine stains on a rug. Tenant took no responsibility for his actions and was quite flippant when discussing the damage caused by his cats, stating "that's what cats do." It is unfortunate that Mr. Novak would be so disrespectful of Ms. Sedova's belongings when the evidence established that, to her own detriment, Ms. Sedova was more than generous and a good friend to Mr. Novak. The emails that Mr. Novak sent to Ms. Sedova after he vacated the premises are nothing short of preposterous. The emails are only relevant to this case in that counsel for [Housing Provider] argued at the hearing that the emails demonstrated that Mr. Novak had "unclean hands" and therefore, should not be permitted to recover any damages in this case.

9. The defense of unclean hands arises from the maxim, "He who comes into Equity must come with clean hands." *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal. App. 4th 970, 978-79 (Cal. App. 5th Dist. 1999). The doctrine demands that a plaintiff act fairly in the matter for which he seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be denied relief, regardless of the merits of his claim.

Precision Co. v. Automotive Co. (1945) 324 U.S. 806, 814-15. Counsel for Housing Provider argued that Tenant's emails stating that he would dismiss the tenant petition if Ms. Sedova helped to repair Tenant's relationship with his fiancé[e] established that he was disingenuous in filing a tenant petition. However, as Housing Provider has prevailed on the merits, I need not determine whether the doctrine of unclean hands applies.

10. Lastly, I need not address whether Tenant is entitled to interest on his security deposit because no interest earned on the security deposit in the 14 months Tenant resided in the unit, would cover the cost of damages and Ms. Sedova would be entitled to retain the interest as well.

Final Order at 6-10; R 125-29.

On September 1, 2015, the Tenant filed an appeal with the Commission ("Notice of Appeal"), raising the following issues:[4]

1. Whether the ALJ erred in rejecting Appellant's retaliation claim;

2. Whether the ALJ erred in rejecting Appellant's amended complaint;

3. Whether the ALJ erred in accepting Housing Provider's evidence, submitted after the deadline;

4. Whether the ALJ erred in granting a motion for continuance so that the Housing Provider could take a vacation;

5. Whether the ALJ erred in deciding for the Housing Provider; and

6. Whether the ALJ's findings of fact are "unreasonably adversarial" to the Tenant.

Notice of Appeal at 1.

On November 20, 2015, the Commission dismissed the Notice of Appeal as untimely filed, having determined that the Tenant was not entitled to an additional three days for mailing under 14 DCMR § 3802.2. Order Dismissing Appeal at 6-7. The Tenant appealed to the District of Columbia Court of Appeals ("DCCA"), and the Commission, determining that it had

[4] The Commission recites the issues raised using the same language and numbering as in the introduction to the Notice of Appeal for issues 1-5; for issue 6, the Commission has rephrased and numbered the additional contention by the Tenant. *See* Notice of Appeal at 1.

misapplied Super. Ct. Civ. R. 5 in analogizing the rules for service of a final order by email, consented to a voluntary remand.

On remand from the DCCA, the Tenant, now represented by counsel, resubmitted his Notice of Appeal in lieu of filing a brief. The Housing Provider did not file a brief. The Commission held a hearing on July 20, 2017, at which Jesse Winograd, Esq., appeared on behalf of the Tenant and no appearance was made on behalf of the Housing Provider. Hearing CD (RHC July 20, 2017) at 11:04.

II. ISSUES ON APPEAL[5]

1. Whether the ALJ erred in rejecting the Tenant's Amended Complaint.
2. Whether the ALJ erred in accepting Housing Provider's untimely submission of exhibits.
3. Whether the ALJ erred in granting the Housing Provider's Motion for Continuance.
4. Whether the ALJ erred in allowing the Housing Provider to rebut the Tenant's *prima facie* case that he was entitled to a full return of the security deposit.
5. Whether the ALJ erred in making findings of fact that are unsupported by substantial evidence on the record.
6. Whether the ALJ erred in failing to address the issue of interest on the security deposit.

III. DISCUSSION

1. Whether the ALJ erred in rejecting the Tenant's Amended Complaint.

As described *supra* at 2-3, the Tenant sought, five days before the scheduled evidentiary hearing at OAH, to amend the Tenant Petition to add a claim that the Housing Provider retaliated

[5] The Commission, in its discretion, has restated the issues raised by the Tenant in his Notice of Appeal to clearly identify the applicable legal principles and to combine overlapping matters. *See, e.g.*, Pearson v. Brown, RH-TP-14-30,482 & RH-TP-14-30,555 (RHC May 3, 2018) at n.15; Levy v. Carmel Partners, Inc. d/b/a/ Quary II, LLC, RH-TP-06-28,830 & RH-TP-06-28,835 (RHC Mar. 19, 2012) at n.9.

against him after the Tenant Petition was filed. *See* Amended Complaint at 1, 16-25; R. at 74-83, 98. The OAH Rules do not address the amendment of tenant petitions, but OAH Rule 2801.1 provides that "[w]here these Rules do not address a procedural issue, an Administrative Law Judge may be guided by the District of Columbia Superior Court Rules of Civil Procedure to decide the issue." 1 DCMR § 2801.1. The Commission has, therefore, consistently determined that Super. Ct. Civ. R. 15 provides the applicable legal standard for the amendment of tenant petitions. *See, e.g.,* Burkhardt v. B.F. Saul Co., RH-TP-06-28,708 (RHC Sept. 22, 2017) at 50-51; Tavana Corp. v. Tenants of 1850-1854 Kendall St., N.E., CI 20,694 (RHC Mar. 8, 1996).

Super. Ct. Civ. R. 15(a) provides, in relevant part:[6]

> A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise 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.

In this case, the Tenant filed the Amended Complaint over three months after the initial Tenant Petition was filed, and five days before the scheduled evidentiary hearing. Accordingly, the Tenant was not entitled to amend the Tenant Petition "as a matter of course," and was required to obtain either consent of the Housing Provider or leave of the ALJ. Super. Ct. Civ. R. 15(a).

An ALJ has "broad latitude" to grant or deny leave to amend a pleading and will only be reversed on appeal for an abuse of that discretion. Johnson v. Fairfax Vill. Condo. IV Unit Owners Ass'n, 641 A.2d 495, 501 (D.C. 1994) ("Absent a clear showing of an abuse of discretion, the trial court's exercise of its discretion either way will not be disturbed on appeal.");

[6] The Commission notes that Super. Ct. Civ. R. 15(a) was amended in 2017, after the relevant filings and orders in this case. The Commission accordingly applies the text of the rule as effective at the relevant time.

Saddler v. Safeway Stores, Inc., 227 A.2d 394, 395 (D.C. 1967); *see* Burkhardt, RH-TP-06-28,708 at 51. An ALJ's decision on leave to amend is to be based on five factors: "(1) the number of requests to amend made by the movant; (2) the length of time the case has been pending; (3) bad faith or dilatory tactics on the part of the movant; (4) the merit of the proffered pleading; and (5) prejudice to the nonmoving party." Taylor v. D.C. Water & Sewer Auth., 957 A.2d 45, 51 (D.C. 2008) (quoting Sherman v. Adoption Ctr. of Wash., Inc., 741 A.2d 1031, 1038 (D.C. 1979)). If a reviewing court determines that the denial of leave to amend is "predicated on some valid ground" within those factors, the denial will not be reversed. Sherman, 741 A.2d at 1034; *see, e.g.*, Sibley v. St. Albans Sch., 134 A.3d 789, 797 (D.C. 2016) (trial court "did not abuse its discretion in denying appellant's motion to amend because it considered 'the merit of the proffered pleading' and properly concluded that appellant's proposed claim . . . did not have merit").

In the Order Denying Amended Complaint, the ALJ rejected the Tenant's proffered amendments because:

> Tenant did not properly seek leave of this administrative court to amend the petition;
>
> Tenant's amendment, having been filed two business days before the scheduled hearing, is untimely and prejudicial to Housing Provider;
>
> Tenant cannot amend his petition to add allegations of retaliation based on acts that occurred after the filing date of the petition; and
>
> Tenant's allegations in his amended complaint exceed the scope of the Rental Housing Act.

R. at 114 (paragraph breaks added). The Commission is satisfied that the ALJ's rejection of the Amended Complaint was predicated on the valid grounds that the case had been pending for a long time when the Tenant filed it, particularly given the proximity to the scheduled hearing date. *See* Sibley, 134 A.3d at 797; Sherman, 741 A.3d at 1038; Burkhardt, RH-TP-06-28,708 at

51-52. Moreover, because the Tenant Petition had been filed several months earlier, the Tenant was required to seek leave to amend it and did not do so. Super. Ct. Civ. R. 15(a).

With respect to the merits of the proposed amendment, the ALJ determined that the Tenant's allegations exceeded the scope of the Act. Order Denying Amendment Complaint at 1; R. at 114. The Commission observes that the Amended Complaint specifically alleges retaliation in violation of the Act and its implementing regulations. Amended Complaint at 20-24; R. at 75-79. The factual basis of the allegation, as set forth by the Tenant, includes numerous references to a "D.C. common-law marriage," loss of housing, employment, and healthcare in Japan, and distress to a fragile relationship caused by the Housing Provider's communications with the Tenant and his fiancée. Amended Complaint at 15-25; R. at 74-83. On appeal, the Tenant asserts that Housing Provider's "communicative intent was indubitably malicious" because the Tenant's fiancée was not a party to the Tenant Petition or signatory on the lease, and therefore attempts to contact the fiancée to obtain "criminal evidence to use against [the Tenant] in OAH" were retaliatory actions. Notice of Appeal at 4-5.

Although the broad scope of the Tenant's alleged injuries may be confusingly stated, his basic retaliation claim, at least arguably, arises under the prohibition on retaliatory harassment, threats, or coercion. *See* D.C. OFFICIAL CODE § 42-3505.02(a). However, the Commission is satisfied that the proposed amendment lacks merit and would properly be denied for that reason. *See* Sibley, 134 A.3d at 797.[7] Although "harassment," "threats," or "coercion" are not defined in the Act, the Commission determines, by analogy to employment law, that a tenant must plausibly

[7] An appellate court "may affirm a decision for reasons other than those given by a trial court" when an appellant has had a "reasonable opportunity to be heard with respect to the reasoning." Randolph v. United States, 882 A.2d 201, 218 (D.C. 2005) (internal quotations omitted). The Commission is satisfied that it may affirm the denial of the Amended Complaint on the grounds it lacked merit under the Act because the Tenant has provided extensive detail of his factual and legal allegations in both the Amended Complaint and in the Notice of Appeal.

allege "severe and pervasive ridicule, intimidation, threats, or other abuse," rather than "petty slights or minor annoyances that often take place" between tenants and housing providers; "[t]he harassment must consist of more than a few isolated incidents, and genuinely trivial occurrences will not establish a prima facie case." Bereston v. UHS of Del., Inc., 180 A.3d 95, 112-13 (D.C. 2018) (internal quotations omitted). The actions alleged by the Tenant in the Amended Complaint could not reasonably support a conclusion that the Housing Provider engaged in "severe and pervasive" conduct, rather than ordinary slights and disagreements associated with adversarial litigation. *See* Amended Complaint at 24.[8] Therefore, the Commission is satisfied that the ALJ did not err in rejecting the Amended Complaint.[9] *See* Super. Ct. Civ. R. 15(a); Sibley, 134 A.3d at 797; Sherman, 741 A.3d at 1038; Burkhardt, RH-TP-06-28,708 at 51-52.

Accordingly, the Order Denying Amended Complaint is affirmed.

2. Whether the ALJ erred in accepting Housing Provider's untimely submission of exhibits.

The Tenant maintains that the ALJ erred by admitting exhibits into evidence that were untimely filed pre-hearing by the Housing Provider. Notice of Appeal at 7-8. The OAH Rules require each party to file its exhibits and proposed witness list no less than five calendar days before an evidentiary hearing. 1 DCMR § 2821.2. If a party fails to timely submit exhibits, the

[8] The Tenant alleged in the Amended Complaint that the Housing Provider: called his actions "shameful;" demanded he withdraw his Tenant Petition; refused to testify in another civil matter; called the Tenant's actions "criminal;" transmitted proposed exhibits late; requested a continuance of the evidentiary hearing; "threatened" to subpoena the Tenant's fiancée in this case; and was "abusive and discriminatory" in the emails to the Tenant making those statements. Amended Complaint at 24.

[9] With respect to the ALJ's other reasons for rejecting the Amended Complaint, the Commission notes that the fact that proposed claims arose after the filing of the Tenant Petition does not necessarily bar their litigation at a hearing. *See, e.g.*, Bettis v. Horning Assocs., RH-TP-15-30,658 (RHC July 20, 2018) at 33-36 (determining that ALJ erred in failing to rule on claim of retaliation that was tried by implied consent under Super. Ct. Civ. R. 15(b)). The Commission is satisfied, however that the ALJ's determinations with respect to timeliness and prejudice are sufficient to affirm the ALJ's exercise of discretion. *See* Sibley, 134 A.3d at 797; Sherman, 741 A.3d at 1038; Burkhardt, RH-TP-06-28,708 at 51-52.

ALJ "may exclude any witnesses or exhibits . . . if he or she finds that the opposing party has been prejudiced by the failure to disclose or if there has been a knowing failure to disclose." 1 DCMR § 2821.3.

The Tenant states that the Housing Provider filed her exhibits by email on Friday, July 17, 2015, four calendar days before the evidentiary hearing. *See* Notice of Appeal at 19 & 23 (Exhibit 1) (purported copy of email from Housing Provider to OAH and Tenant, dated July 17, 2015, 1:38 p.m., Japanese Standard Time, *i.e.,* 12:38 a.m. Eastern Daylight Time).[10] The Tenant asserts that this delay was prejudicial to his case because the Housing Provider took extra time to review the Tenant's evidence before compiling her own exhibits and because he could not review the Housing Provider's exhibits during a Japanese three-day weekend prior to the Tuesday, July 21, 2015 hearing. Notice of Appeal at 7-8.[11]

With respect to the three-day weekend in Japan, it is unclear from the Notice of Appeal why the Tenant would not be able to review the Housing Provider's exhibits, received on Friday, before the following Tuesday. Nor is it clear how the holiday would make receiving the exhibits at 1:38 p.m. local time substantially more burdensome for the Tenant than receiving them at 6:00 a.m. local time (the 5:00 p.m. D.C.-time deadline).

The Commission is satisfied that the Housing Provider's untimely submission of her exhibits did not prejudice the Tenant. *See* 1 DMCR § 2821.3. The Tenant, by his own account, was sent the exhibits electronically approximately seven and half hours after the deadline. *See* 1

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[10] The certified record provided by OAH to the Commission does not contain the cover email sent by the Housing Provider with her exhibits.

[11] The Tenant asserts the he suffered further prejudice based on the exhibits' failure to "reflect the repair [the Tenant] had funded." Notice of Appeal at 8. The accuracy of the information depicted in the Housing Provider's exhibits is not relevant to the timing of their filing, and the Commission therefore does not need to address this claim.

DCMR § 2809.3 (filings to be made by 5:00 p.m. D.C. time). The Commission is unable to discern any plausible advantage gained by the Housing Provider from this delay.

The Tenant also asserts that a single reference to RX 220 as "Petitioner's exhibit 5" demonstrates that the Housing Provider was responding to the Tenant's timely-filed exhibits. Notice of Appeal at 8. However, the Commission observes that the Tenant also attached a document labeled as "Exhibit 5" to his original Tenant Petition but labeled his pre-hearing submissions with three-digit numbers. *See* R. at 7. The Housing Provider's listing of the exhibit, therefore, appears to reference the Tenant's original submission. Moreover, RX 220 was ultimately not admitted into evidence. *See* Exhibit List at 2; R. at 136.

Because the Tenant was not prejudiced by the Housing Provider's failure to timely file exhibits, and because the Tenant does not assert that there was a "knowing failure to disclose" that would justify sanction by the ALJ, 1 DCMR § 2821.3, the Commission determines that the ALJ did not err by admitting the exhibits into evidence.

Accordingly, the Commission denies the Tenant's appeal on this issue.

3. Whether the ALJ erred in granting the Housing Provider's Motion for Continuance.

The Tenant asserts that OAH[12] erred in granting the Housing Provider's Motion for Continuance to reschedule the evidentiary hearing on this case from July 7, 2015 to July 21, 2015 due to the Housing Provider's vacation plans. Notice of Appeal at 8-9. Under the OAH rules, an ALJ may grant a continuance where "good cause" is shown. 1 DCMR § 2811.6. The DCCA has consistently held that the grant or denial of a motion for a continuance is committed to the "sound discretion of an agency . . . and will be set aside only for an abuse of discretion."

[12] Although all other orders in this record are signed by ALJ Erika Pierson, the Order Granting Continuance is signed by Administrative Law Judge Margaret Mangan.

See, e.g., Nursing Unlimited Servs., Inc. v. D.C. Dep't of Emp't Servs., 974 A.2d 218, 221 (D.C. 2009) (quoting King v. D.C. Water & Sewer Auth., 803 A.2d 966, 970 (D.C. 2002)); Wagley v. Evans, 971 A.2d 205, 208 (D.C. 2009) (quoting Fischer y. Estate of Flax, 816 A.2d 1,8 (D.C. 2003)); Lyons y. Jordan, 524 A.2d 1199, 1203 (D.C. 1987) (citing Harris v. Akindulureni, 342 A.2d 684, 686 (D.C. 1975)).

OAH granted the Motion for Continuance, finding that the Housing Providers' "travel plans involving her sister currently living outside of the United States" constituted good cause and that a two-week delay presented no unreasonable burden. Order Granting Continuance at 1; R. at 65. The Tenant maintains that this was error because the vacation was merely a cover for the Housing Provider's attorney to better prepare for the evidentiary hearing, because the Housing Provider did not contact him prior to filing the Motion for Continuance, and because the delay prejudiced his ability to "deal with increasing marital problems." Notice of Appeal at 9.

The Commission is satisfied that OAH did not abuse its discretion in granting the Housing Provider's Motion for Continuance. The Tenant offers no factual basis for his proposition that the delay was merely a cover for the Housing Provider to prepare for the evidentiary hearing. Nor does the Tenant explain why such additional time would be unfair, particularly considering that it also afforded him extra time to prepare. The Motion for Continuance certifies that the Housing Provider attempted to contact the Tenant by email before filing. *See* Motion for Continuance at 1; R. at 61. The OAH form used by the Housing Provider makes it clear that the party requesting a continuance is not required to await a response. See id. (box checked to indicate Housing Provider attempted to contact Tenant and "I have not heard from them"). Moreover, even if the Housing Provider did not actually attempt to contact the Tenant, the Commission is not persuaded that it would be an abuse of discretion for the ALJ to

nonetheless grant the continuance. Finally, the Tenant also fails to explain how the delay in an evidentiary hearing was damaging to his relationship with his fiancée, and injury to a personal relationship is not the kind of prejudice to his legal case that would make a continuance an abuse of discretion.

Accordingly, the Commission affirms the Order Granting Continuance.

4. Whether the ALJ erred in allowing the Housing Provider to rebut the Tenant's *prima facie* case that he was entitled to a full return of the security deposit.

The Tenant maintains that, because the Housing Provider did not provide him with an itemized list of deductions within the time required by the Security Deposit Act, D.C. Law 1-48, 14 DCMR §§ 308-311 (2012), the Housing Provider was required to return the full deposit. Notice of Appeal at 11. The Tenant argues that the ALJ misapplied the Security Deposit Act by citing inapplicable case law when she determined that the Housing Provider could put on evidence to show that the Housing Provider was entitled to withhold the security deposit. *Id.*

The Commission reviews an ALJ's conclusions of law *de novo* to determine if they are unreasonable or embody a material misconception of the law. *See* Wilson v. D.C. Rental Hous. Comm'n, 159 A.3d 1211, 1216 n.3 (D.C. 2017); United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014); Pourbabai v. Bell, RH-TP-13-30,448 (RHC Sept. 22, 2017) at 19. The Security Deposit Act, in relevant part, provides as follows:

> 309.1 Within forty-five (45) days after the termination of the tenancy, the owner shall do one of the following:
>
> (1) Tender payment to the tenant, without demand, any security deposit and any similar payment paid by the tenant as a condition of tenancy in addition to the stipulated rent, and any interest due the tenant on that deposit or payment as provided in paragraph (4)(a) and (a-1) (14 DCMR § 311); or
>
> (2) Notify the tenant in writing, to be delivered to the tenant personally or by certified mail at the tenant's last known address, of the owner's

intention to withhold and apply the monies toward defraying the cost of expenses properly incurred under the terms and conditions of the security deposit agreement.

309.2 The owner, within 30 days after notification to the tenant pursuant to the requirement of paragraph (2)(a)(2) (14 DCMR § 309.1(b)) [sic], shall tender a refund of the balance of the deposit or payment, including interest not used to defray such expenses, and at the same time give the tenant an itemized statement of the repairs and other uses to which the monies were applied and the cost of each repair or other use.

309.3 Failure by the owner to comply with § 309.1 and § 309.2 of this section shall constitute prima facie evidence that the tenant is entitled to full return, including interest as provided in § 311, of any deposit or other payment made by the tenant as security for performance of his or her obligations or as a condition of tenancy, in addition to the stipulated rent.

1 DCMR § 309. "*Prima facie* evidence" has been defined as "evidence that will establish a fact or sustain in a judgment unless contradictory evidence is produced." Storey v. D.C. Dep't of Emp't Servs., 162 A.3d 793, 802-03 (D.C. 2017) (quoting BLACK'S LAW DICTIONARY, at 877 (10th ed. 2014)). Once a *prima facie* case has been established by a complaining party, the burden of proof shifts to the opposing party to demonstrate that the complainant is not entitled to relief. *See, e.g.,* Storey, 162 A.3d at 803-04 (in workers' compensation cases, employee must make *prima facie* showing of workplace-related injury, then burden shifts to employer to show lack of causation); Curtis v. Cuff, 537 A.2d 1072, 1075 & n.4 (D.C. 1987) (in automobile negligence cases, burden-shifting applies where statute provides that vehicle ownership is "prima facie evidence" of consent for another to operate vehicle); *see also* Pourbabai, RH-TP-13-30,448 at 22 (record must contain evidence of actual damages to support withholding of some or all of security deposit).

The parties do not dispute that the Housing Provider failed to "give the tenant an itemized statement of the repairs and other uses to which the monies were applied," within the time frame

required by 14 DCMR § 309.2. Therefore, under 14 DCMR § 309.3, the Tenant presented "prima facie evidence that [he] is entitled to full return" of the security deposit.

The ALJ further determined that:

> A housing provider can rebut the [prima facie] evidence by establishing that it had lawful reasons to withhold the security deposit. *C.f. Shamoun v. Shough*, 377 S.W.3d 63 (Tex. App. 2012) (holding that where failure to provide written notice of intent to withhold a security deposit created a presumption of bad faith, a landlord can rebut that presumption by proving its good faith).

Final Order at 8; R. at 127. The Tenant attempts to distinguish Shamoun on the grounds that the issue in that case was a notice of withholding, as required by Texas law, not the itemization of the withheld amount of a security deposit, as additionally required by District of Columbia law. Notice of Appeal at 11.

The Commission is satisfied that the ALJ did not err in citing Shamoun. The context of the citation shows that it was merely used to illustrate that *prima facie* evidence can be rebutted and is not conclusive proof of a fact or legal claim.[13] This determination is consistent with the ordinary meaning of "*prima facie* evidence." *See* Storey, 162 A.3d at 802-03; Curtis, 537 A.2d at 1075; BLACK'S LAW DICTIONARY, at 877 (10th ed. 2014). The DCCA has explained that a court must look at the "plain meaning" of the words of a statute or regulation when the words are clear and unambiguous and construe the words according to their ordinary sense and with the meaning commonly attributed to them. *See* District of Columbia v. Edison Place, 892 A.2d 1108, 1111 (D.C. 2006); *see also* Dorchester House Assocs. L.P. v. D.C. Rental Hous. Comm'n, 938 A.2d 696,702 (D.C. 2007). The Commission therefore determines that the Security Deposit Act establishes a rebuttable presumption that a tenant is entitled to a full return of a security

[13] The signal "*Cf.*" is described in THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) at 55, to mean "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support. Literally, 'cf.' means 'compare.'"

deposit if a housing provider fails to timely provide an itemized statement of allowable deductions. 14 DCMR § 309.2, .3. Because the ALJ placed the burden of proof on the Housing Provider to show that the withholding of some or all of the security deposit was lawful, the ALJ did not misapply the Security Deposit Act. *See* Final Order at 8-9; R. at 126-27.

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

5. Whether the ALJ erred in making findings of fact that are unsupported by substantial evidence on the record.

The Tenant asserts that the ALJ erred in ruling in favor of the Housing Provider because several findings of fact are not supported by the record or were inappropriately "adversarial" towards the Tenant. *See* Notice of Appeal at 9-17. The Commission's standard of review of the ALJ's decision is contained at 14 DCMR § 3807.1 and provides that the Commission shall reverse final orders that are not based on substantial evidence in the record or are not otherwise in accordance with the Act. "Substantial evidence" has been consistently defined by the Commission as "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). The Commission has consistently determined that "[w]here substantial evidence exists to support the [ALJ's] findings, even 'the existence of substantial evidence to the contrary does not permit the reviewing agency to substitute its judgment for that of the [ALJ].'" Pourbabai, RH-TP-13-30,448 at 24-25; Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) at 29; *see also* Gary v. D.C. Dep't of Emp't. Servs., 723 A.2d 1205, 1209 (D.C. 1998) ("the relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence"). Moreover, "the Commission has

consistently stated that credibility determinations are 'committed to the sole and sound discretion of the ALJ.'" Notsch, RH-TP-06-28,690 at 32 (quoting Fort Chaplin Park Assocs., 649 A.2d at 1079) (emphasis added); *see* Pourbabai, RH-TP-13-30,448 at 25.

Of the several findings of fact challenged on appeal, the Tenant first asserts that the ALJ erred because an affidavit by the Housing Provider's roommate, Anotonietta Rohanna ("Affiant"), sworn in July 2015, is hearsay and does not reasonably support the finding that the Tenant's pets damaged the rugs and furniture in the Housing Accommodation. Notice of Appeal at 9-10; *see* RX 213, R. at 151. The Affiant states that, on December 7, 2014, before the Tenant moved out, the Housing Provider told the Affiant that the Housing Provider showed the Housing Accommodation to prospective tenants and that it smelled of cat urine. RX 213; R. at 151. The Affiant further states that on February 15, 2015, April 3, 2015, and April 17, 2015 she personally showed the Housing Accommodation to prospective tenants, each time attempting to air-out or mask the smell of cat urine unsuccessfully. *Id.*

Under the OAH Rules, hearsay evidence is admissible. 1 DCMR § 2821.12. The Tenant asserts that the affidavit nonetheless cannot support the Housing Provider because the Affiant's visits in early 2015 occurred after other tenants occupied the Housing Accommodation. Notice of Appeal at 9-10. The Tenant's asserts that his evidence, an email from the Housing Provider to him dated January 17, 2015 ("January 17 Email"), PX 104; R. at 222-23, undermines the value of the affidavit because the Housing Provider states that "people [were] giving [the Housing Provider] $4,500 per month through Airbandb." Notice of Appeal at 10 (alterations Tenant's).[14]

[14] The Commission's review of the record reveals that, in context, the Tenant's assertion that the Housing Provider admitted to having subsequent renters in the Housing Accommodation misstates the contents of the January 17 Email. After apparently discussing utility bills (PX 104 does not include any prior emails for context of that discussion), the Housing Provider states:

As noted, the weight of evidence and credibility determinations are soundly committed to the ALJ, and the Commission will not make such determinations on appeal. Fort Chaplin Park Assocs., 649 A.2d at 1079; Notsch, RH-TP-06-28,690 at 32; Pourbabai, RH-TP-13-30,448 at 25. Moreover, Commission's review of the record does not indicate that the ALJ relied on the affidavit in finding that the Housing Accommodation smelled of cat urine. *See* Final Order at 2-6; R. at 129-33. At most, the affidavit appears to corroborate the ALJ's finding that "[b]efore [the T]enant moved out, [the Housing Provider] walked through the apartment, which had a strong odor of cat urine," but RX 213 is not cited nor is the Affiant referenced by the ALJ. Final Order at 4 (¶ 15); R. at 131. Therefore, the Commission is not persuaded that the admission of RX 213 into evidence requires reversal of the Final Order. 14 DCMR § 3807.1; Fort Chaplin Park Assocs., 649 A.2d at 1079.

Second, the Tenant asserts that the owners of the Housing Accommodation had previously allowed pets, which caused the odor, and subsequently found no damage warranting the withholding of the security deposit. Notice of Appeal at 10, 12. The Tenant cites no support in the record for these claims, relying instead on speculation and inference from the fact that he was allowed to keep pets. *Id.* Therefore, the Commission has no basis to reverse the Final Order on these grounds. 14 DCMR § 3807.1.

> 2727 not rented. I had several people giving me $4,500 per month through Airbandb [sic] for three months each but management did not approve because it wants only a year contract, no less. Thus I am stuck with the furniture. I inspected it briefly and it is in really bad shape notwithstanding [y]our efforts.

January 17 Email (emphasis added); R. at 222. The Commission observes that the January 17 Email was sent approximately one month after the Tenant moved out of the Housing Accommodation; the statement that the Housing Provider had short-term renters "giving [her] $4,500 . . . for three months each" and the statement that the Housing Accommodation was "not rented" therefore do not support the Tenant's claim that the Housing Provider "rented to other persons in the interim" who may have been responsible for any pet odors. *See* Notice of Appeal at 10.

Third, the Tenant asserts that the ALJ's findings that the rugs smelled of cat urine contradicts the finding that the Housing Accommodation smelled of cat urine (due, he maintains, to the owners previously allowing pets). Notice of Appeal at 12-13; *see* Final Order at 4-5 (¶ 16); R. at 130-31. The Commission is satisfied that the ALJ could reasonably determine that the smell of cat urine coming from the rugs would cause the Housing Accommodation to also smell of urine while and for some time after the rugs were inside. Because there is no contradiction in the ALJ's findings of fact, the Commission has no basis to reverse the Final Order on these grounds.

Fourth, the Tenant asserts that, because the Housing Provider "had someone take the rugs out of the apartment to sit outside in the air all day, hoping that the smell would subside," Final Order at 4; R. at 131, the smell of urine could or would have been created or worsened by neighborhood dogs. *See* Notice of Appeal at 12-13. The Commission's role is not to reevaluate the credibility of witnesses or the weight of the evidence based on the Tenant's alternate theory of the origins of the stains and smells on the rugs. *See* Fort Chaplin Park Assocs., 649 A.2d at 1079; Notsch, RH-TP-06-28,690 at 29; Pourbabai, RH-TP-13-30,448 at 25. The Commission is satisfied that the ALJ's findings of fact relied on substantial evidence in the record, specifically the photographs of the stained rugs and of the floors underneath the rugs. Final Order at 5 (¶ 16); R. at 130; *see* RX 218 at 15, 16, 18, 19, 23, 32, & 33; R. at 169, 170, 172, 173, 177, 185, & 186. Because the evidence presented reasonably supports the ALJ's findings of fact, the Commission has no basis to reverse the Final Order on these grounds. 14 DCMR § 3807.1.

Fifth, the Tenant asserts that the ALJ mischaracterized evidence in the record in finding that the Housing Accommodation smelled of cat urine as early as May 2014. Notice of Appeal at 13-15; *see* Final Order at 4 (¶¶ 12-13); R. at 131. The Housing Provider's exhibit cited by the

ALJ, RX 218, contains a printout of an email exchange between the Housing Provider and an agent of the owner of the Housing Accommodation, with the subject "Re: access to your apartment needed." In relevant part, the exchange proceeds as follows:

> Agent: "I would have loved to [have] shown off your place. I met [Tenant] this morning. . . . He mentioned that he has a cat and he mentioned to me about cat smell. Since you have rented him a furnished unit you may want to check on that situation yourself."
>
> Housing Provider: "I do not understand: did [Tenant] complain about his own cats' smell to YOU? I have not been in their unit for many months, but I saw them carrying a comforter to dry-cleaner's after a cat 'accident.' What exactly did he say and did you or an engineer go to 2727?"
>
> Agent: "I asked him if he would mind if we came in and he said to me if you don['t] mind the cat smell. The people I [was] with opted not to go in. I have a cat and my house does not smell so why does his?"

See RX 218 at 3-4; R. at 157-58. In a later exchange of text messages, the Tenant stated to the Housing Provider that "the cats piss and shit everywhere when they are alone." *Id.* at 6; R. at 160. The Tenant maintains that it is unreasonable to read the email exchange as describing a urine odor, rather than a general "cat smell." He further claims that the text message refers only to a single incident in which "each pet had *one* accident." Notice of Appeal at 14.

The Commission is satisfied that the ALJ's findings of fact are supported by the cited evidence in the record. Fort Chaplin Park Assocs., 649 A.2d at 1079; Notsch, RH-TP-06-28,690 at 29; Pourbabai, RH-TP-13-30,448 at 25. In the context of the text messages and the totality of the evidence in the record, such as the photos of stains on the rugs, it was reasonable to infer that the referenced "cat smell" was a urine odor. The Tenant's attempt to explain his own statement that the cats defecated "everywhere" as referring to only one accident per cat goes to the weight and credibility of the evidence, a matter soundly within the ALJ's purview and not for the Commission to reevaluate on appeal. Fort Chaplin Park Assocs., 649 A.2d at 1079; Notsch, RH-TP-06-28,690 at 29; Pourbabai, RH-TP-13-30,448 at 25. Because the evidence presented

reasonably supports the ALJ's findings of fact, the Commission has no basis to reverse the Final Order on these grounds. 14 DCMR § 3807.1.

Sixth, the Tenant asserts that the ALJ erred in finding that the owners of the Housing Accommodation would not rent directly to the Tenant because he had "bad credit." Final Order at 3 (¶ 4); R. at 132. The Tenant maintains that he actually had "*no* credit." Notice of Appeal at 15. The Commission is satisfied that, as relevant to the background of the relationship between the Housing Provider and Tenant, there is no material difference between the terms "no credit" and "bad credit." The ALJ's finding of fact simply explains why the Tenant leased the Housing Accommodation as a subtenant of the Housing Provider, and it does not affect the outcome of the Final Order. *See* United Dominion Mgmt., 101 A.3d at 430 (reversal not required where error "ultimately immaterial"). Therefore, the Commission has no basis to reverse the Final Order on these grounds.

Seventh, the Tenant asserts that the ALJ erred in finding that the Housing Provider initially did not want to rent-out the Housing Accommodation with the furnishings because she had just purchased them. Notice of Appeal at 16; *see* Final Order at 3 (¶ 7); R. at 132. The Tenant also claims that the furnishings were "already used furniture by the time [he] arrived." Notice of Appeal at 16.[15] The Commission is satisfied that, even if this finding is erroneous, any error would be harmless. *See* United Dominion Mgmt., 101 A.3d at 430; Barac Co. v. Tenants of 809 Kennedy St., N.W., VA 02-107 (RHC Sept. 27, 2013) at n.15 (defining "harmless error" as "[a]n error which is trivial . . . and was not prejudicial to the substantial rights of the party

[15] The Commission notes that the ALJ also found that the Housing Provider had purchased the furnishings in the Housing Accommodation in 2013 when she first moved in, before subleasing the unit to the Tenant. *See* Final Order at 2; R. at 133. It is possible, though not entirely clear, that the ALJ was referring to the Housing Provider's purchase of the furnishings in 2013 as the reason for not wanting to rent the Housing Accommodation furnished.

assigning it. and in no way affected the final outcome of the case") (quoting BLACK'S LAW DICTIONARY, at 646 (5th ed. 1975)). Whether the Housing Provider initially wanted to rent-out the Housing Accommodation with furnishings is not relevant to whether the Tenant was entitled to the return of any portion of the security deposit. *See* 14 DCMR § 309.1(2) (security deposit may be withheld for purpose of "defraying the cost of expenses properly incurred under the terms and conditions of the security deposit agreement"); Pourbabai, RH-TP-13-30,448 at 22-23 (Commission's review is of whether substantial evidence in the record supports findings of fact as to actual damages justifying withholding). The record shows that the Housing Provider claimed withholdings that amortized the replacement value of the furnishings, summarized in RX 218 at 7; R. at 161. Because the record contains substantial evidence of the value of the damage to the furnishings, the ALJ's statement that the Housing Provider had "just purchased" them would not require reversal even if unsupported. *See* LCP, Inc. v. D.C. Alcoholic Beverage Control Bd., 299 A.2d 897, 903 (D.C. 1985) ("[R]eversal and remand is required only if substantial doubt exists whether the agency would have made the same ultimate finding with the error removed.").

Eighth, the Tenant asserts that the ALJ erred in finding that the white, leather sofa cushions were "stained orange from urine soaking through the leather covers to the cushions inside." Final Order at 4 (¶ 15); R. at 131. The Tenant claims this is impossible because "feline urine is yellow and would stain white objects the same color." Notice of Appeal at 16. The record contains a photograph moved into evidence by the Housing Provider, RX 218 at 28; R. at

181, that depicts a corner of a leather sofa with an orange stain. The Tenant asserts that the sofa was, instead, in "constant contact with an orange coffee table." Notice of Appeal at 16.[16]

As described, the Commission's role 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., 649 A.2d at 1079). The Commission has no basis to determine on appeal what shades of stains on various materials can or cannot be caused by cat urine, but the Commission is satisfied that orange and yellow are not such dissimilar colors that the ALJ could not reasonably credit the Housing Provider's evidence. The Tenant assertion that there is also substantial evidence to the contrary, specifically that the stain was caused by a coffee table, is not a sufficient basis for the Commission to reverse the Final Order. Fort Chaplin Park Assocs., 649 A.2d at 1079; Notsch, RH-TP-06-28,690 at 29; Pourbabai, RH-TP-13-30,448 at 25.

Finally, the Tenant asserts that the ALJ erred in findings of fact related to emails exchanged between the Housing Provider and the Tenant that affected their friendship and related to the Tenant's motives for filing the Tenant Petition. Notice of Appeal at 13, 17. The ALJ determined that these facts were only relevant to the defense of "unclean hands" asserted by the Housing Provider. Final Order at 10; R. at 125. The defense of unclean hands prohibits a party from recovering damages if the party engaged in misconduct as a part of the transaction that is the subject of the claim. Int'l Tours, Inc. v. Khalil, 491 A.2d 1149, 1155 (D.C. 1985).

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[16] The Tenant asserts that the "rectangular outline of the coffee table is visible in PX 133." Notice of Appeal at 16. The exhibit noted by the Tenant, PX 133; R. at 231, is a photograph of the leather sofa that is nearly identical, if not completely identical, to RX 218 at 28; R. at 181. The Commission is unable to identify an outline of a coffee table in the photograph.

Because the ALJ determined that the Tenant was not entitled to the return of any of the security deposit, based on the damages proven by the Housing Provider, the ALJ did not make any conclusions of law on whether the Tenant's later emails to the Housing Provider revealed that he had unclean hands. Final Order at 10; R. at 125. The Commission is satisfied that the ALJ correctly determined that these facts are not relevant to the issue of the Housing Provider's damages that may be validly withheld from the security deposit. *See* Pourbabai, RH-TP-13-30,448 at 22-23. Because the Housing Provider prevailed on its entitlement to withhold the entire deposit and the Tenant was not entitled to the return of any money, it is unnecessary to review whether findings of fact relevant to the Housing Provider's defense of unclean hands are supported by substantial evidence.

Accordingly, the Commission denies the Tenant's appeal on the issues of whether the ALJ's findings of fact were supported by substantial evidence in the record.

6. Whether the ALJ erred in failing to address the issue of interest on the security deposit.

The Tenant asserts that the ALJ erred by failing to rule on "whether the security deposit should have been placed in an interest-bearing account." Notice of Appeal at 13. In the Final Order, the ALJ determined that it was unnecessary to "address whether the Tenant is entitled to interest on his security deposit because no interest earned on the security deposit in the 14 months Tenant resided in the unit, would cover the cost of damages and [the Housing Provider] would be entitled to retain the interest as well." Final Order at 10; R. at 125.

The Security Deposit Act, in relevant part, provides as follows:

> 308.3 All monies paid to an owner by tenants for security deposits or other payment made as security for performance of the tenant's obligations shall be deposited by the owner in an interest bearing escrow account established and held in trust in a financial institution in the District of Columbia insured by a federal or state agency for the sole purposes of holding such deposits or payments.

. . .

309.2 The owner, within 30 days after notification to the tenant pursuant to the requirement of paragraph (2)(a)(2) (14 DCMR § 309.1(b)) [sic], shall tender a refund of the balance of the deposit or payment, including interest not used to defray such expenses, and at the same time give the tenant an itemized statement of the repairs and other uses to which the monies were applied and the cost of each repair or other use.

. . .

311.2 Interest on an escrow account shall be due and payable by the owner to the tenant upon termination of any tenancy of a duration of twelve (12) months or more, unless an amount is deducted under procedures set forth in paragraph (2) (14 DCMR §§ 309.1 and 309.2). Any housing provider violating the provisions of this section by failing to pay interest on a security deposit escrow account that is rightfully owed to a tenant in accordance with the requirements of this section, shall be liable to the tenant, as applicable, for the amount of the interest owed, or in the event of bad faith, for treble that amount. . . . Any housing provider who willfully violates the provisions of this section by failing to pay interest on a security deposit escrow account that is rightfully owed to a tenant in accordance with the requirements of this section shall be subject to a civil fine of not more than $ 5000 for each violation.

14 DCMR §§ 308, 309, & 311. In sum, a housing provider is required place a security deposit in an interest-bearing account and to return the security deposit plus the interest earned to a tenant but may withhold any lawful deductions from that total amount.

The Tenant paid the Housing Provider a security deposit of $3,750. Final Order at 3; R. at 132. The Housing Provider initially claimed that she was entitled to withhold $7,150 due to damages caused by the Tenant. *See* Final Order at 6; R. at 129; PX 111; R. at 225. In the course of litigating this Tenant Petition, the Housing Provider later reduced this claim to a total of $5,039.90. *See* RX 218 at 7; R. at 161. To cover the Housing Provider's allowable withholdings, the security deposit would therefore have needed to earn 34% interest over 14 months, a rate well-beyond even the District of Columbia Superior Court judgment interest rate of 2% per year in effect at the time. *See* D.C. Courts, "Judgment Interest Rates,"

https://www.dccourts.gov/sites/default/files/matters-docs/InterestRateSchedule.pdf (June 20, 2018), accessed Sept. 20, 2018.

An issue is moot when there is no relief available to the party raising the issue. *See, e.g.,* McChesney v. Moore, 78 A.2d 389, 390 (D.C. 1951) ("it is not within the province of appellate courts to decide abstract, hypothetical or moot questions, disconnected with the granting of actual relief or from the determination of which no practical relief can follow"); Burkhardt, RH-TP-06-28,708 at 33-34 (specific defects in registration form moot where Commission affirmed denial of motion to amend petition to include claim of invalid registration); Holbrook Street, LLC v. Seegers, RH-TP-14-30,571 (RHC July 15, 2016) (compliance with housing code moot where rent increase invalid because rental unit was not properly registered); BLACK'S LAW DICTIONARY, at 1029-30 (8th ed. 2004) (defining "moot" as "[h]aving no practical significance, hypothetical or academic"). The Commission is satisfied that there is no relief available to the Tenant related to interest on the security deposit. The ALJ correctly determined that the Housing Provider would be entitled to retain any interest earned on the $3,750 security deposit to cover the damages to the furnishings. Final Order at 10; R. at 125.

As the Tenant correctly observes, the ALJ did not determine whether the Housing Provider placed the security deposit in an interest-bearing account at the outset of the tenancy, as required by 14 DCMR § 308.3. *See* Final Order at 10; R. at 125. However, the Security Deposit Act does not create a remedy for a tenant based solely on a failure to place a security deposit in an interest-bearing account; interest is only payable to a tenant if it is not otherwise withheld to cover allowable costs, and civil fines may only be imposed for failure to pay interest that is "rightfully owed to a tenant." 14 DCMR § 311.2. Because the Housing Provider was entitled to

withhold an amount far in excess of any possible interest, the question of whether the Housing Provider initially placed the security deposit in an interest-bearing account is moot.

Accordingly, the Commission affirms the ALJ's determination that the issue of interest on the security deposit is moot.

IV. CONCLUSION

For the foregoing reasons, the Commission affirms the decision of the OAH. The Commission affirms the ALJ's Order Denying Amended Complaint with respect to the Tenant's retaliation claims. See *supra* at 11-15. The Commission further denies the Tenant's appeal with respect to the Housing Provider's untimely filing of exhibits prior to the evidentiary hearing. See *supra* at 15-17. The Commission further affirms OAH's Order Granting Continuance to reschedule the evidentiary hearing at the Housing Provider's request. See *supra* at 17-19. The Commission further affirms the Final Order on the issue of whether the Housing Provider could rebut the Tenant's *prima facie* evidence that he was entitled the full return of the security deposit. See *supra* at 19-22. The Commission further denies the Tenant's appeal on the grounds that several findings of fact were unsupported by substantial evidence on the record. See *supra* at 22-30. The Commission finally affirms the Final Order on whether the issue of interest on the security deposit is moot. See *supra* at 30-33.

SO ORDERED.

MICHAEL SPENCER, CHAIRMAN

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

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

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH- TP-15-30,653 was mailed, postage prepaid, by first class U.S. mail on this **18th day** of **September, 2018,** to:

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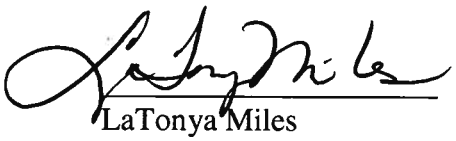

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