DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

RH-TP-16-30,812

In re: 5922 13th Street, N.W., Unit 102

Ward 4

CT CORPORATION SYSTEMS and
HAMPSTEAD BRIGHTWOOD PARTNERS
Housing Providers/Appellants

v.

BRIDGET OHIRI
Tenant/Appellee

DECISION AND ORDER

June 13, 2019

RANGA PUTTAGUNTA, JUDGE: Appellants Hampstead Brightwood Partners and CT Corporation Systems (jointly, "Housing Provider") appeal the decision of the Office of Administrative Hearings ("OAH") awarding rent refunds to appellee Bridget Ohiri ("Tenant") for substantial reductions in services based on the Housing Provider's failure to abate a rodent infestation and remove mold in her unit from October 2015 through October 2017. The Housing Provider contends that OAH erred in concluding there was a reduction of services because the record lacks substantial evidence in support of the Tenant's claim. The Commission agrees that the record lacks substantial evidence as to when Housing Provider was aware of the rodent infestation or the mold problem. Accordingly, the decision of OAH is reversed.

I. PROCEDURAL HISTORY

These proceedings are governed by the applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. OFFICIAL CODE §§ 42-3501.01 – 42-3509.07 (2012 Repl.), the District of Columbia Administrative Procedures Act ("DCAPA"), D.C. OFFICIAL CODE §§ 2-

501 – 2-510 (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2016), 1 DCMR §§ 2921-2941 (2016), and 14 DCMR §§ 3800-4399 (2004). On May 4, 2016, the Tenant, resident of 5922 13th Street, NW, Unit 102 ("Housing Accommodation") filed tenant petition 30,812 ("Tenant Petition") with the Rental Accommodations Divisions ("RAD") of the Department of Housing and Community Development ("DHCD")[1] against the Housing Provider. *See* Tenant Petition; R. at Tab 51. In the Tenant Petition, the Tenant alleged that the Housing Provider violated the Act by substantially reducing related services and facilities provided as a part of her rent. *Id.* at 3. Administrative Law Judge Yewande D. Aderoju ("ALJ") presided over an evidentiary hearing on February 28, 2018 and issued a final order on July 24, 2018. Ohiri v. CT Corp. Sys., 2016-DHCD-TP 30,812 (OAH July 24, 2018) ("Final Order").

In the Final Order, the ALJ concluded that the Tenant endured a substantial reduction of services due to the Housing Provider's failure to abate mold and a rodent infestation from October 9, 2015 to October 9, 2017 and awarded rent refunds for those conditions during that two-year period. The ALJ made the following findings of fact in the Final Order:[2]

1. Tenant resides at 5922 13th Street, NW, Apartment 102 (the Property) in Washington, D.C. The building is named the Valencia. The Property is a one bedroom apartment that consists of a living room, a dining room, a kitchen, a bathroom and a bedroom.

2. Tenant has resided at the Property since July 1, 2002, when she entered a lease agreement with Fleetwood Management Group, LLC., the prior

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodations and Conversion Division ("RACD") of the Department of Consumer and Regulatory Affairs ("DCRA") pursuant to the Office of Administrative Hearings Establishment Act of 2001, D.C. Law 14-76, D.C. OFFICIAL CODE § 2-1831.03(b-1)(1) (2012 Repl.). The functions and duties of RACD in DCRA were transferred to the RAD in 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.).

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

owners of the Property. RX 203. The current owners are Housing Providers who purchased the building in or around 2014.

3. Tenant's daughter, Jovis Miriam Ibeh also resides at the Property with Tenant and has resided there for several years.

4. Tenant currently pays $710.00 per month to rent the Property.

5. When Tenant had problems or issues with the Property, she contacted the manager of the building, and reported the problems. Initially, Housing Provider was responsive and the problems were addressed. RX 204. – Other problems, however, persisted for many months without being addressed adequately.

6. Housing Providers' procedure for tenants to report a problem in their apartment and to request maintenance assistance requires the tenant to contact the office and report the problem. If it is an emergency, Housing Providers assign someone to handle it immediately. If the problem is not an emergency, Housing Providers have 48 hours to schedule it and respond to Tenant.

7. When Housing Providers failed to be responsive to Tenant's complaints, Tenant contacted Department of Consumer and Regulatory Affairs (DCRA).

8. On or about October 9, 2015, at the request of Tenant, the Property was inspected by DCRA. No report was issued at that time despite multiple complaints by Tenant of the various problems with the Property. The problems included: 1) rodent and bug infestation and mouse holes; 2) mold on the walls and ceilings of the bedroom and living room; 3) holes in the ceiling and wall of the bathroom; 4) broken and non-functioning smoke detectors; 5) water leakage from the wall under the window onto the living room floor; 6) broken floor tiles in the kitchen; 7) broken kitchen cabinets; 8) the bedroom window that would not stay open; 9) a malfunctioning toilet with a broken base; 10) cracked bathroom floor tiles and walls; 11) no heat during a winter storm; 12) kitchen counter was in poor condition; 13) poor water pressure and a hole in the wall of the bedroom closet; 14) cracks in the walls in the bedroom and bathroom.

9. In 2015, Housing Providers began the process of applying for historic and renovation tax credits through the District of Columbia Department of Housing and Community Development (DHCD). Historic tax credits are granted based on the age of the property and are geared towards maintaining the affordability of the property while improving the condition of the buildings. There are federal guidelines and requirements that must be followed for eligibility.

10. Participation in the historic tax credit program entitles Housing Providers to be exempt from the Rental Housing Act Provisions. D.C. Official Code Section 42-3502.05(a).

11. Tenant conceded to knowing that Housing Providers receives tax credits however, Tenant did not indicate that she received notice of the exemption from Housing Providers.

12. Housing Providers did not give Tenant notice of the tax credit exemption.

13. Housing Providers hired outside contractors to perform the renovations and to communicate with the residents about the renovations.

14. Housing Providers notified the tenants of the planned renovations and how each unit was included in the renovations plans. Renovations were done in stages and while each unit was being renovated, the tenant was re-located to another "hospitality" apartment until the renovations in their unit were complete. The average time for unit renovations to be completed was 30-60 days.

15. Each unit was going to receive electrical and HVAC upgrades, new countertops, floors would be refinished and a full renovation of the entire apartment was offered to tenants. This was a requirement in the agreement between Housing Providers and DHCD in order to get historic tax credits.

16. Housing Providers communicated these plans through correspondence to Tenant. Tenant never responded to Housing Providers who sent two or three letters to Tenant which laid out the process for the renovations.

17. Tenant did not grant Housing Providers access to the Property to do the full renovation, but eventually agreed to a modified renovation option which included electrical and HVAC upgrades primarily. Electrical and HVAC upgrades could not be done to Tenant's neighbors' units unless Tenant's unit was also upgraded.

18. The renovations were completed sometime in 2016. Of the 33 units in the building, only 31 received the full renovation. Tenant's unit was one of the two units that did not get the full renovation.

19. Tenant does not allow access to the Property unless she or her daughter is present. Housing Providers do not have a key to the Property and are not able to access the Property to make repairs unless Tenant is home.

20. Tenant requires Housing Providers to give her 48 hour notice before Housing Provider is able to access the Property to make a repair or conduct a quality assurance inspection.

21. Ms. Cherise Harris is the Community Manager of the Valencia. She is responsible for the day to day operations including taking reports and scheduling repairs.

22. Ms. Harris has been the Community Manager of the Valencia since July 2017. Since Ms. Harris started working at the Valencia in July 2017, Tenant has cancelled two scheduled appointments for repair work to be done in the Property.

23. Since 2015, Tenant has experienced a serious rodent problem in the Property and believes she notified Housing Providers of the problem. There are mouse holes in the Property and Tenant and her daughter have observed mice going in and out of the holes.

24. Tenant placed mouse traps around the Property and directly near the mouse holes and caught several mice. PXs 113, 116, 119 and 124.

25. Housing Providers provide extermination services that treat the apartment units for rodents and bugs. Treatment occurs on a rotating basis per floor.

26. There was a significant mold problem in the Property. Mold was on the walls of the bedroom, the living room as well as the kitchen. PXs 100, 105, 107, 112, and 113.

27. Mold began to appear in the living room on the wall where there is a window. The wall had moisture and water leaking through it. The floor immediately below the window was consistently wet.

28. The mold spread to three of the four walls in the living room and to all the walls of the bedroom. *Id.* Mold also was observed in the kitchen but to a lesser degree.

29. The mold was present in the Property prior to the renovations in 2015 and had gotten really bad.

30. Tenant reported the mold problem to Housing Providers. Housing Providers' staff and former manager at the Valencia "Elizabeth" went to Tenant's unit and observed the condition of the apartment with the mold on the walls in 2016.

31. In 2017, Housing Providers hired a contractor to remove the mold from the walls of Tenant's unit.

32. In the bathroom, there was a large hole around the showerhead and above the shower/tub. At times, debris from the hole in the ceiling fell into the shower and onto Tenant. Tenant also heard "small animals" running above her head in the bathroom.

33. The two smoke detectors in the Property were in disrepair. The one in the hallway did not work at all and the one in the bedroom was falling off the ceiling and was held in place by tape.

34. The water pressure in the Property was not very good and it was determined that the pipes needed to be replaced. The pipes were located in the bedroom closet where a large hole was opened and remained open for several months.

35. A DCRA inspection was done on the Property in 2017, and a report was issued. Following the inspection and the report, some repairs were made to the Property.

36. In October 2017, the mold and rodent infestation were addressed by Housing Providers. Other repairs were made in 2017 included drywall repair and painting of the holes in bathroom wall and ceiling, the bathtub was re-glazed, the toilet was replaced, replacement of the electrical power box, drywall repair of holes in hallway wall and bedroom closet, kitchen floor tiles and kitchen countertop were replaced and the two smoke detectors were replaced.

Final Order at 4-10. In the Final Order, the ALJ made the following conclusions of law:[3]

1. Tenant asserts that Housing Providers substantially reduced and/or permanently eliminated her services and facilities. Failure of a housing provider to furnish "related" services and facilities amounts to a reduction of services and facilities. *Shapiro v. Comer*, TP 21, 742 (RHC Aug. 19, 1993). The Act defines related services and facilities as those provided in connection with rent or required by the housing code. D.C. Official Code § 42-3501.03(26)-(27).

2. The assessment of a tenant's claims for permanently eliminated or reduced services and/or facilities requires a three-part analysis. *Karpinski v. Evolve Mgmt.*, RH-TP-09-29,590 (RHC Aug. 19, 2014); *Kuratu v. Ahmed, Inc.*, TP 28,985 (RHC Dec. 27, 2010). First, the tenant must establish that a related service or facility was "substantially" reduced. D.C. Official Code 42-3509.01(a). The Act defines "related [facility]" as:

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

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

D.C. Official Code § 42-3501.03(26) (emphasis added).

3. The Act defines "related services" as:

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

D.C. Official Code § 42-3501.03(27) (emphasis added).

4. Although the Act does not state what constitutes a substantial reduction in services, the [D.C.] Court of Appeals has applied the Act's definition of a "substantial violation" as one measure of a substantial reduction in services. This requires a housing condition in violation of a statute or regulation that "may endager or materially impair the health and safety of any tenant or person occupying the propery." *Parreco v. D.C. Rental Hous. Comm'n*, 885 A.2d at 337 (quoting D.C. Official Code § 42-3501.03(35)). This measure however is not necessarily conclusive. *See Cobbs v. Charles E. Smith Mgmt., Co.,* TP 23,889 (RHC July 1, 1998). The Rental Housing Commission has held that a determination of whether a reduction is "substantial" is "a function of the 'degree of loss'...substantiated by the length of time that the tenants were without service." *Karpinski v. Evolve Mgmt*, RH-TP-09-29,590 at 19 (*quoting Newton v. Hope*, TP 27,034 (RHC May 29, 2002)). The regulations also provide a list of fourteen housing code violations that are deemed substantial as a matter of law, which means the fact that they exist makes them substantial without additional evidence. 14 DCMR 4216.2. In addition, a large number of minor violations can cumulatively amount to a substantial reduction. *Id.*

5. Second, the tenant must present "competent evidence of the existence, duration, and severity of the reduced services." *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 11 (citations omitted). Lastly, a tenant must show that the housing provider had knowledge of the alleged reduction in services and that the tenant gave the housing provider reasonable access to the premises to make repairs. *Id.* If a tenant fails to prove any of the three elements, the entire claim will fail. *Kuratu.* at 24.

6. If a housing provider substantially reduces a related service or facility, and there is competent evidence of the existence, duration and severity of the reduction, an Administrative Law Judge (ALJ) may order a rent refund that reflects, proportionately, the value of the reduced service, plus interest through the date of the order. D.C. Official Code §§ 42-3502.11-12, 42-3502.16, 42-3509.01(a); 14 DCMR 3826.1; 3826.2; 4217.1(a); *Jonathan Woodner Co.*, at 11. It is within the ALJ's discretion to determine the value of reduced services based on the nature of the violations, their duration, and

substantiality. *Id.* At 10. The dollar value need only flow rationally from the duration and severity of the reduction in services established. *Id.*

7. Although Tenant alleges that Housing Providers permanently reduced the facilities and/or services in the Property, the record is devoid of any service or facility that was *permanently* reduced. None of the testimony or documentary evidence entered during the evidentiary hearing identified any permanent losses to facilities or services provided by Housing Providers to Tenant. Accordingly, Tenant's claim of permanent reduction of services and facilities is dismissed.

8. As detailed in the findings of fact, Tenant identified several services and facilities that she asserted were substantially reduced at the Property. Despite having evidence of many problems in the Property, Tenant has failed to support her claim of reduction in services/facilities as it relates to broken smoke detectors, the holes in the walls in the hallway, bathroom and bedroom closet, the poor water pressure, worn countertops and cabinetry and a poorly functioning toilet. While there was clearly evidence of the presence of several other substantial reductions [] in services/facilities, Tenant failed to provide sufficient evidence of the duration of the many other problems in the Property. Both Tenant and Ms. Ibeh struggled at times to remember when some of the problems began or were repaired. In many instances, Tenant was unable to remember exactly when the problems began or exactly when the repairs were made. Additionally, it was not clear if Housing Provider was given notice of the various problems and repairs needed. It is not enough to say that Housing Provider knew of the problems. The evidence has to support this assertion. As the Rental Housing Commission has indicated, when applying the "test" and determining if a substantial reduction in services/facilities has occurred, if Tenant fails to prove any of the prongs of the test, the claim fails. *Kuratu v. Ahmed, Inc.*, TP 28,985 (RHC Dec. 27, 2010). There is insufficient evidence to pass the three-prong test as set out above. Therefore, these claims of substantial reduction to services and facilities are dismissed.

9. However, I conclude that the services and facilities that were substantially reduced in the Property include the rodent infestation and the presence of mold in the Property. Each of these claims is addressed below.

[Rodent Infestation]

10. Was the service/facility substantially reduced? There was significant testimony by Tenant and her daughter about the overwhelming presence of mice in the Property. Tenant testified that she saw mice in the apartment every day and on one occasion, seven mice were caught in a single day. Moreover, rodent infestation is deemed a substantial reduction as a matter of law based on housing code regulations. 14 DCMR 4216.2.

11. Was there evidence of the duration and severity of the reduced service/facility? Based on the testimony of Tenant and Ms. Ibeh, the Property was infested with rodents for several years before Tenant contacted DCRA to request an inspection of the Property in October 2015. Therefore, the duration of the problem existed from October 2015 to October 2017 when it was addressed. It is clear from the testimony of Tenant and Ms. Ibeh that the rodent infestation was extreme. Tenant and Ms. Ibeh saw mice in the Property every day. Moreover, there is evidence that there were several "mouse holes" in the Property and mice were seen going in and coming out of these holes. PXs 116, 119, and 124. Additionally, the number of mice caught in the mouse traps also demonstrates the severity of the rodent problem. *Id.*

12. Did Housing Providers know of the alleged reduction and did Tenant give Housing Provider reasonable access to make repairs? Based on the testimony, it is clear that Housing Providers knew of the rodent problem and had reasonable access to the Property. Ms. Harris testified that Housing Provider provided extermination services at the Property for the residents. Although there was testimony that Housing Provider did not have a key to access the Property, Ms. Harris also testified that the extermination was done on a rotating basis, each floor provided extermination services on different days or months. Ms. Harris also testified that Housing Providers and Tenant had an arrangement in which Housing Providers would give Tenant 48 hour notice that access was needed to the Property to make a repair and that Tenant was usually home, therefore able to allow Housing Providers into the Property.

[Mold]

13. Was the service/facility substantially reduced? There was ample testimony by Tenant and Ms. Ibeh about the presence of mold in the Property. According to Ms. Ibeh, the mold started on the wall in the living room and began to flourish throughout the Property in the bedroom. According to Tenant, there was a presence of mold on the walls of the kitchen as well. Ms. Ibeh took several pictures of the condition of the walls in the living room and bedroom. PXs 100, 105, 107, 112 and 113.

14. Was there evidence of the duration and severity of the reduced service/facility? I credit Ms. Ibeh's testimony that the mold began in 2015 when there was "moisture" in the Property. Additionally, Tenant testified that the mold began on the wall in the living room beneath a window and where the wall and floor were constantly wet. It is well known the health risks associated with exposure to mold. The extent of the mold was significant as evidenced in the pictures taken by Ms. Ibeh. PXs 100, 105, 107, 112 and 113.

15. Did Housing Provider know of the alleged reduction and did Tenant give Housing Providers reasonable access to make the repairs? I credit Tenant's testimony that a former property manager "Elizabeth" came to the Property and saw wet wall and mold and indicated that the moisture was not from a leaking pipe. Therefore, Housing Providers were aware of the reduction. As noted previously, Tenant and Housing Providers had an agreement that Housing Providers would give Tenant 48 hours notice to access the Property for repairs. Although Housing Providers asserted that Tenant's failure to give them a key violated provisions of the lease, there was not testimony that indicated Tenant did not give Housing Providers reasonable access to the Property. It defies reason that Tenant would prevent Housing Providers from accessing the Property to address the significant mold problem that persisted there.

[Remedies]

16. When services or facilities provided by a housing provider area substantially reduced, the housing provider must reduce the rent by an amount which reflects the monthly value of the decrease in the service or facilities. D.C. Code § 42-3502.11; 14 DCMR 4211.6. Therefore, Tenant is entitled to a refund for each month from the date of the violation to the last day of the hearing, plus interest to the date of the decision. See Appendix B. The Rental Housing Commission['s] [r]ules implementing the Act provide for the award of interest on rent refunds at the interest rate used by the D.C. Superior Court from the date of violation to the date of issuance of the decision. 14 DCMR 3826.1-3826.1; *Marshall v. D.C. Rental Hous. Comm'n*, 533 A.2d 1271, 1278 (D.C. 1987). Therefore, Housing Provider shall pay Tenant $3,460.20 in rent refunds plus interest of $4,999.96. (See Appendix B.)[[4]]

Final Order at 10-17.

On August 6, 2018, Housing Provider filed a notice of appeal ("Notice of Appeal") with the Commission, raising the following issues on appeal:[5]

1. The OAH erred in denying the Housing Provider's Motion to Dismiss;

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[4] The Commission notes that the award of $5,000 in interest on rent overcharges of less than $3,500 would be a 142% return over less than three years and is plainly incorrectly calculated. *See, e.g.*, Williams v. Thomas, TP 28,530 (RHC Dec. 24, 2015); Johnson v. Gray, TP 21,400 (RHC Aug. 1, 1994).

[5] The Housing Provider's issues on appeal are recited herein using the Housing Provider's language and numbering from the Notice of Appeal.

2. The OAH erred in denying the Housing Provider's Motion for Reconsideration;

3. The OAH erred in accepting jurisdiction of a tax credit property;

4. The OAH erred in ruling that the property is subject to the Rental Housing Act;

5. The OAH erred in ruling that the services and facilities section of the Rental Housing Act applies to tax credit properties;

6. The OAH erred in ruling that the registration provisions of the Rental Housing Act apply to tax credit properties;

7. The OAH erred in taking jurisdiction of the tax credit issues when the Tenant/Appellee did not raise any issues relating to the tax credit;

8. The OAH erred in raising the issue of whether proper notice of the claimed exemption was given to Tenant, when Tenant did not raise the issue;

9. Given the evidence in the record, the OAH erred in finding that there was mold in the unit;

10. Given the evidence in the record, the OAH erred in finding that there was a reduction in facilities and services;

11. Given the evidence in the record, the OAH erred in finding that any alleged reduction in facilities and services were substantial;

12. Given the evidence in the record that the Housing Provider was willing to provide alternative housing to the Tenant, the OAH erred in finding a reduction in facilities and services;

13. The OAH erred in awarding a rent refund to Tenant;

14. The OAH erred in its calculations;

15. The OAH erred in finding that there was a reduction in services and facilities;

16. The OAH erred in finding that the Tenant met her burden of proof; and

17. The OAH erred in raising the issue of whether proper notice of the claimed exemption was given to Tenant, when Housing Provider was on notice that this was at issue in the instant case.

Notice of Appeal at 1-3. The Housing Provider filed a brief on February 4, 2019 ("Housing Provider's Brief"), asserting that OAH lacked jurisdiction as the Housing Accommodation is

exempt from the Act due to tax credits and that, even if there is jurisdiction, the Tenant failed to meet her burden of proof for a reduction in services under the Act. Housing Provider's Brief at 2-8. The Tenant filed a brief on February 15, 2019 ("Tenant' Brief"). The Commission held a hearing on this matter on March 20, 2019, at which both parties were represented by counsel. Hearing CD (RHC Mar. 30, 2019) at 11:01.

II. PRELIMINARY ISSUE

In a motion to dismiss before OAH and again on appeal, the Housing Provider asserts that the Housing Accommodation is completely exempt from the Act, and OAH therefore lacks jurisdiction over the Tenant's claims, because the Housing Provider received tax credits through the auspices of the Housing Finance Agency. Respondent's Motion to Dismiss; R. at Tab 18; Housing Provider's Brief at 2-4; *see* D.C. OFFICIAL CODE § 42-2703.08(a) ("Housing projects assisted by the [Housing Finance] Agency or through the auspices of the [Housing Finance] Agency under the provisions of this chapter shall be exempt from the provisions of Chapter 35 of this title."). The Housing Provider raises substantial questions about the interplay of the Rental Housing Act and the District of Columbia Housing Finance Agency Act, D.C. Law 2-135, which contains similar-but-distinct filing and notice requirements to the claim of exemption process under the Commission's rules. *Id.*; *compare* D.C. OFFICIAL CODE § 42-3502.05 *and* 14 DCMR § 4101 *with* D.C. OFFICIAL CODE § 42-2703.08(d), (f).

Jurisdiction is ordinarily a threshold matter that must be addressed before substantive questions. Kamerow v. D.C. Rental Hous. Comm'n, 891 A.2d 253, 256 (D.C. 2006). However, in this case, the Commission determines, for the reasons stated below, that the record does not support the award of a rent refund to the Tenant. Because the Final Order must be reversed whether the Act applies to the Housing Accommodation or not, the Commission does not need to address the jurisdictional question. *See* 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").

III. ISSUES ON APPEAL

1. Whether the ALJ erred in concluding that there was a substantial reduction of services based on an unabated rodent infestation in Tenant's apartment from October 9, 2015 to October 9, 2017.

2. Whether the ALJ erred in concluding that there was a substantial reduction of services based on the presence of mold in Tenant's apartment from October 9, 2015 to October 9, 2017.

IV. DISCUSSION

A. Standard of Review

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

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

The DCAPA requires that an ALJ's decision (1) must state findings of fact on each material, contested factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings. Perkins v. D.C. Dep't of Emp't. Servs., 482 A.2d 401, 402 (D.C. 1984). Questions of law are reviewed *de novo*. United Dominion Mgmt. Co. v. D.C. Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014).

The Commission gives deference to the ALJ's factual findings, and it will not disturb those findings if they are supported by substantial evidence on the record. *See* Selk v. D.C. Dep't. of Emp't. Servs., 497 A.2d 1056, 1058 (D.C. 1985); Washington Cmtys. v. Joyner, TP 28,151 (RHC July 22, 2008); 424 Q St. Ltd. P'ship. v. Evans, TP 24,597 (RHC July 31, 2000).

Substantial evidence is defined 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). It requires "more than a mere scintilla" of evidence. Vogel v. D.C. Office of Planning, 944 A.2d 456, 463-64 (D.C. 2008) (internal citation omitted). Although the prevailing party must be given every reasonable inference, "inferences may not be based on guess or speculation." *Id.* (internal citation omitted).

B. Reductions in Related Services

A housing provider is not permitted to reduce or eliminate related services or facilities "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.[6] The reduction in services provision of the Act "was drafted to ensure that housing providers provide services required by [the] D.C. Housing Code." Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993) at 20. The Commission has consistently held that the failure to provide services required by the housing code constitutes a reduction in services under the Act. Kuratu v. Ahmed, Inc., RH-TP-07-28,985 (RHC Dec. 27, 2012) at 20. If housing code violations exist or services are otherwise reduced, a housing provider must "promptly restore" the service level

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

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

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

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

or promptly reduce the tenant's rent. 14 DCMR §4211.6.[7] Where an "unauthorized reduction in services or facilities related to the rental unit" has occurred, a tenant may be awarded a rent refund by filing a tenant petition. 14 DCMR § 4214.4(d);[8] *see also* Parecco v. D. C. Rental Hous. Comm'n, 885 A.2d 327, 337 (D.C. 2005) (no rent refund is mandated whenever there is a substantial reduction of service, but rather, only when the service is not "promptly restored" to the previous level).

To prevail on a claim for a rent refund, a tenant has the burden of satisfying a three-prong test by a preponderance of the evidence. Pena v. Woynarowsky, RH-TP-06-28,817 (RHC Feb. 3, 2012) at 20; Kuratu, RH-TP-07-28,985 at 24; *see also* D.C. OFFICIAL CODE § 2-509(b) ("In contested cases . . . the proponent of a rule or order shall have the burden of proof."); 1 DCMR § 2932.1-.2.[9] First, the tenant must establish that a substantial elimination or reduction in a related service occurred. Pena, RH-TP-06-28,817 at 20; Kuratu, RH-TP-07-28,985 at 24.

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[7] 14 DCMR § 4214.6 provides, in full:

> If related services or facilities at a rental unit or housing accommodation decrease by accident, inadvertence or neglect by the housing provider and are not promptly restored to the previous level, the housing provider shall promptly reduce the rent for the rental unit or housing accommodation by an amount which reflects the monthly value of the decrease in related services or facilities.

[8] 14 DCMR § 4214.4(d) provides, in relevant part, as follows:

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

[9] OAH Rule 2932, 1 DCMR § 2932, provides, in relevant part:

> 2932.1 The proponent of an order shall have the burden of proof. The tenant has the burden to prove the claims alleged in the tenant petition except that the housing provider has the burden to prove entitlement to any exemption under the Rental Housing Act. . . . .
>
> 2932.2 Unless otherwise provided by law, a party must prove each fact essential to his or her claim by a preponderance of the evidence so that the Administrative Law Judge finds that it is more likely than not that each fact is proven.

Second, the tenant must establish the extent and duration of the reduction in services. *Id.* Third, a tenant must establish that the housing provider had knowledge of the alleged reduction in services. *Id.* Knowledge is most frequently established by presenting evidence that a tenant gave notice to their housing provider of the problem. *See* Hudley v. McNair, TP 24,040 (RHC June 30, 1999) at 11 ("If the tenant claims a reduction of services in the interior of his unit, he must give the housing provider notice of the allegations that constitute violations of the housing code.") (citing Hall v. DeFabio, TP 11,554 (RHC Mar. 6, 1989)); Pena, RH-TP 28,817 at 20-21 (notice established where "[t]he administrative record indicate[d] that on October 17, 2006, [tenant] provided the Housing Providers with a letter documenting the infestation of mice and roaches in the housing accommodation and claimed that she had informed the Housing Providers of the problem earlier when she found a mouse in the kitchen trash can"); Caesar Arms, LLC v. Lizama, RH-TP-07-29,063 (RHC Sept. 27, 2013) at 26-27 (notice prong satisfied where tenant verbally notified housing provider of rodent problem once a month spanning many years and sent a letter addressing the problem on August 22, 2007); Woodner Apartments v. Taylor, TP 29,040 (RHC Sept. 1, 2015) at 54-56 (notice established where tenant notified housing provider of rodent infestation at the outset of the problem in November 2005, again during various meetings and inspections, and submitted 15 work request forms seeking extermination services for her unit); *see also* Kuratu, RH-TP-07-28,985 at 27-28 (tenant failed to meet his burden on the duration and notice prongs of the reduction of services claim where tenant failed to provide written notice, could not provide specific dates when he provided the housing provider with oral notice regarding housing code violations, and failed to show housing provider denied extermination services). If a tenant fails to prove any one of the three prongs, the entire claim

will fail and a judge may not order a rent refund for any period of time. Kuratu, RH-TP-07-28,985 at 24.

Here, the ALJ found that the Housing Provider substantially reduced services by failing to abate a rodent infestation and remove the mold in the Tenant's unit from October 9, 2015 to October 9, 2017. Final Order at 14-17. The Housing Provider contends that the Tenant failed to meet her burden of proving the substantial reduction of service claims because the Tenant failed to present any clear, specific evidence about the existence, duration, and severity of the reduced services or that she notified Housing Provider of the problem. Housing Provider's Brief at 6-7.

The Commission addresses both reductions in turn.

1. Rodent Infestation

At the evidentiary hearing, the Tenant testified that the Housing Accommodation was infested with rodents for many years, that she had mouse holes in her apartment, and that mice entered her apartment a lot, leading her to call DCRA, which inspected her rental unit on October 9, 2015. Hearing CD (OAH Feb. 28, 2018) at 10:11-10:13. Thus, there is substantial evidence in support of the ALJ's finding that the Tenant suffered from a rodent infestation from at least October 9, 2015. However, the record contains no specific or even approximate date by which the Housing Provider had notice of the infestation and from which the ALJ may properly calculate and award a refund of the monthly rent charged. *See* Waller v. Novo Devel. Corp., RH-TP-16-30,764 (RHC Feb. 15, 2018) at 38-39 (testimony failed to establish specific or approximate dates to establish duration of loss of service). Even assuming, without deciding, that there is substantial evidence in the record to support the ALJ's finding that the Housing

Provider ultimately abated the problem on October 9, 2017,[10] the Final Order must still be reversed because the record lacks substantial evidence that the Housing Provider had notice of the rodent problem for any clear period of time before taking steps to abate it.

The Tenant's testimony about notice to the Housing Provider of the rodent problem was vague and often ambiguous. She testified that she called "her," "him," "them," "the man" or "the person," referring to DCRA, the building management company, or employees of either, about the issues in her apartment. Hearing CD (OAH Feb. 28, 2018) at 10:30-10:42. She stated that she remembered no more than two calls to the management, although no time frame was given as to when these calls were made or what was said in the calls. *Id.* She also stated that before or around the October 9, 2015 DCRA inspection, "two people were called." *Id.*

There is no indication the Housing Provider was present at, or aware of, the inspection, or that an inspection report or any notice of violation was issued to the Housing Provider. The Tenant testified that no repairs were made before or after the October 9, 2015 inspection, that the DCRA inspector did not return or provide her with an inspection report despite her repeated calls, and that she called DCRA because no repairs were made. *Id.* The Tenant testified that "the person" who came indicated he would give her a report but failed to do so, that she called and called, that she called DCRA when repairs were not made, that the time she called "them"

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[10] As to when and how the Housing Provider abated the rodent infestation, the Tenant testified to the following: First, that management would come and "spray" her apartment for mice like they did for roaches, which would decrease the problem, but she did not specify when management treated her unit by "spraying." Hearing CD (OAH Feb. 28, 2018) at 10:13-10:14. Subsequently, the Tenant testified that that the management addressed the rodent problem in 2017 by calling a company, but she did not specify what the company did to solve the problem or provide any specific date or even month within 2017. *Id.* at 11:09-11:10. At yet another point in her testimony, the Tenant stated that management made repairs to her apartment in October and November of 2017, but that she could not remember which repairs were made at that time. *Id.* at 10:40-10:43, 11:09-11:10. She also stated that some repairs were made in 2016, but then corrected herself to say repairs were not made in 2016 but rather 2017. *Id.* at 10:40-10:43. The Housing Provider presented evidence that certain repairs were completed in March, October, and November of 2017, but none of the repairs identified related to abating rodents. RXs 205-214.

repairs were not made and that's why she called DCRA, and that because no repairs were made, she kept calling "the man." *Id.*

None of this testimony provides clear information as to when Tenant called the building management or what problems she reported during the call(s). Recognizing the confusing nature of the Tenant's testimony, the ALJ interrupted and asked Tenant's counsel to help clarify what the Tenant was trying to communicate. *Id.* At no point did the Tenant clarify her testimony. Giving all due deference to the finder of fact, the ALJ appears to have inferred in the Final Order (without explicitly stating) that the Tenant told the Housing Provider about all of the problems in her unit, implicitly including rodents, at some point before the October 9, 2015 inspection, and thus calculated a rent refund from that date. However, the Commission is not satisfied that the Tenant's testimony supports such an inference; the ALJ could only speculate as to what the Tenant might have meant to, but did not actually, say at the evidentiary hearing. That is not to say that the Tenant did not testify credibly, a determination that is soundly committed to the ALJ. Rubin v. Lee, 577 A.2d 1158, 1160 (D.C. 1990) ("Credibility determinations are within the province of the trier of fact and may not be disturbed unless plainly wrong or without evidence to support them."); In re M.A.C., 761 A.2d 32, 42 (D.C. 2000) ("issues of credibility are committed to the sole and sound discretion of the fact-finder"). Simply put, there were gaps in the Tenant's testimony that were necessary for meeting the three-part legal test, and an ALJ is not permitted to fill those gaps. Vogel, 944 A.2d at 463-465 (administrative agency decision in favor of petitioner reversed where petitioner failed to present substantial evidence for all of the elements of her retaliation claim).

Moreover, the Commission's review of the record fails to show any substantial evidence that the Housing Provider had notice of the rodent infestation at any other specific point in time.

The Tenant testified that she believed that she called management specifically about mice because they would come and "spray," like they would for roaches, which would decrease the problem. Hearing CD (OAH Feb. 28, 2018) at 10:13-10:14. She did not specify when she called management about the rodents or when management treated her unit by "spraying." *Id.* The Tenant subsequently testified that management addressed the rodent problem in 2017 by calling a company, but she did not specify what the company did to solve the problem or provide any specific date or even month within 2017. *Id.* at 11:09-11:10. At yet a different point in her testimony, the Tenant stated that management made repairs to her apartment in October and November of 2017, but that she could not remember which repairs were made at that time. *Id.* at 10:40-10:43, 11:09-11:10.

In describing one call she made to management, the Tenant testified that she told management "how bad everywhere it was" and that management told her that no repairs would be made until building-wide renovations were done, although no timeframe was given for that conversation. *Id.* at 10:31-10:32. Immediately after the Tenant stated that she told management how bad it was, the Tenant testified that she lacked heat and hot water during the "blizzard of 2015." It is unclear, however, whether the call to management in which she told them "how bad everywhere it was" was made during the blizzard of 2015 (presumably not in or around October 2015), or rather, whether she was simply testifying to fact that she lacked heat and hot water during that blizzard. None of this indicates when she might have notified management about rodents. *See* Waller, RH-TP-16-30,764 at 43 (no substantial evidence of duration where loss of heat was not described "with any greater specificity than the winter of 2014-2015").

Finally, although DCRA conducted a second inspection in March 2017 and gave the Tenant a copy of a notice of violation, there is no evidence this report was issued to the Housing

Provider. The Commission has previously held that a report that contains "no written (or other) indicia that it had been served on the owner of the building at that time" fails to satisfy the notice prong of the substantial reduction of services test. Atchole v. Royal, TP 29,891 (RHC Mar. 27, 2014) at 11-12. The sections of the DCRA report relating to service to the Housing Provider, *i.e.*, "name of person notified," "signature of person receiving notice," and "date/time of service or posting," are all blank. PX 127. There is no testimony or other evidence in the record indicating the Housing Provider was present during the inspection, or notified of the inspection or the report, or was issued a notice of violation. Therefore, there is no evidence from which the ALJ could reasonably infer the Housing Provider had notice of the rodent infestation in or by March 2017.

During oral argument before the Commission, the Tenant conceded that there is no specific evidence in the record as to when the Tenant notified the Housing Providers about the rodent problem but urged the Commission to find this prong satisfied based on the Housing Provider's "numerous infestation treatments to that building." Hearing CD (RHC Mar. 20, 2019) at 11:30-11:32. The Commission rejects the Tenant's argument. Nothing on this record persuades the Commission that the Housing Provider had knowledge of a rodent problem in the Tenant's rental unit simply because the Housing Provider arranged for extermination services on a rotating basis throughout the Housing Accommodation. *See* Kuratu, RH-TP-07-28,985 at 27-28 (Commission affirmed an ALJ's determination that the general provision of extermination services does not place a housing provider on notice of a rodent problem in a particular unit, especially where tenant failed to show housing provider denied extermination services to tenant).

The Housing Provider's witness, Ms. Harris, testified that the Housing Provider provides extermination services in all of their buildings. Hearing CD (OAH Feb. 28, 2018) at 3:45-3:47.

In addition, Ms. Harris testified that tenants may request the service of an exterminator even if that unit was not on the floor that was to be sprayed. In such instances, the Housing Provider would service the tenant's unit in addition to spraying floors on the ordinary rotation. *Id.* Here, however, there is no evidence that the Tenant ever requested the services of the exterminator, much less that the Housing Provider denied or delayed in responding to any requests. Indeed, it is unclear whether the rotating extermination service that treated the Tenant's apartment was the company the Tenant referred to when she stated management fixed the problem in 2017 by calling a company or whether the rodent problem continued despite the extermination services.[11]

In sum, the Commission is not satisfied that substantial evidence supported the ALJ's determination that the Housing Provider had notice of the rodent problem in the Tenant's unit on or before October 9, 2015. Nor does the Commission's review of the record reveal evidence of *any* specific date or even month by which the Housing Provider was clearly informed of the rodent infestation. The Tenant did not testify with any specificity as to when her calls to the Housing Provider were made or that she specifically mentioned rodents in any such conversation. Such testimony cannot support the calculation of and an order to pay a rent refund for reductions in services. No finder of fact could reasonably determine or even infer that the Housing Provider had notice of the rodents at or before any particular date based on any substantial evidence in this record.

Accordingly, the Final Order is reversed on this issue.

[11] *Cf.* Cascade Park Apartments v. Walker, RH-TP 26,197 (RHC Jan. 14, 2005) at 14-24 (housing provider ordered to pay rent refunds even though they provided extermination services because exterminator failed to abate the rodent infestation).

2. Mold

The Commission's review of the record shows no substantial evidence to support the ALJ's finding that the Housing Provider knew of the presence of mold in the Tenant's unit on or prior to October 9, 2015 or that mold was not abated until or after October 9, 2017. For the reasons described above, the Tenant's testimony about calling the building management or DCRA about various problems in the unit is too vague to support an award of a rent refund. Although there is evidence in the record from which it can be reasonably and easily inferred that the Housing Provider – having sent a mold removal company to Tenant's unit – knew of the mold problem at some point, there is no substantial evidence as to when they were first on notice.

The Tenant and her daughter, Ms. Ibeh, testified about the presence of mold in the unit, but neither witness presented specific evidence as to when the Housing Provider had notice of the presence of mold or when it was removed. Ms. Ibeh stated that the mold problem started in "2015, 16" and that, by "mid-2016," it flourished on the walls and was in every room in the apartment. *Id.* at 11:54. The Tenant testified that there was mold in her apartment in 2014, 2015, and 2016. *Id.* at 11:07-11:09. She testified that in 2015, she had mold "all over" her apartment, including the bedroom and living room. *Id.* at 10:22-10:31. The Tenant testified that people from the building management told her the substance she saw in her apartment was mold, although she did not state when the building management told her it was mold. *Id.* at 11:34-11:35. The Tenant also stated that (now-) former property manager Elizabeth saw the mold in her apartment after Tenant reported the problem, *id.* at 11:37-38, and that her previous attorney asked Elizabeth about a broken pipe in her apartment (presumably in connection with the mold issue), *id.* at 10:46-10:47, but she failed to indicate when any of this happened. The Tenant separately stated that "she" came and saw the mold in her apartment in response to being asked

whether the Tenant had mold in her apartment in 2016, but the Tenant did not specify which month in 2016 this took place or to whom "she" referred. *Id.* at 11:07.

Both the Tenant and Ms. Ibeh stated that the management sent a mold removal company, which fixed the problem. *Id.* at 11:38-11:41 & 12:02-12:04. As to when the mold was removed, however, the Tenant presented conflicting testimony, stating both that she did not remember when it was fixed and also that it was fixed in 2016 or early 2017.[12] *Id.* at 11:07-11:08 & 11:41. Ms. Ibeh testified that management fixed the problem in the "summer of 2016." *Id.* at 12:02-12:04. Ms. Ibeh stated that she was in the apartment when they arrived and described what they did. *Id.* She testified that she spoke to one of the mold removal workers, that he gave her his business card showing he was from a mold removal company, and that he showed her his work from other properties that had a mold problem. *Id.* Ms. Ibeh stated that the company scraped off the mold and treated the unit. *Id.* Tenant's testimony corroborates Ms. Ibeh's, in that Tenant also testified her daughter was present when the mold company treated the unit and that by the time Tenant got home, the mold had been scraped off. *Id.* at 1:38-11:41.

Ms. Ibeh testified that although management did not "immediately" take care of the mold problem when she informed them about it, they did send someone to look at the mold, and that, as described above, the Housing Provider sent a company that specialized in removing mold to service the apartment in the summer of 2016. *Id.* at 12:02-12:04. No other information was provided as to what Ms. Ibeh meant by management failing to "immediately" take care of the problem.

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[12] Tenant also testified that management made some repairs in October or November of 2017 but could not remember which repairs were made at that time. Hearing CD (OAH Feb. 28, 2018) at 10:40-10:43. She also testified that some repairs were made in 2016, but then corrected herself to say repairs were not made in 2016 but rather 2017. *Id.* at 10:39-10:41. The Housing Provider presented evidence that certain repairs were completed in March, October, and November of 2017, but none of the repairs identified related removing mold from Tenant's unit. RXs 205-214.

Although this testimony supports a finding that mold was present in the Tenant's rental unit and that the Housing Provider, at some point, was made aware of the mold, it is insufficient to support an award of a rent refund. *See* Kuratu, RH-TP-07-28,985 at 27-28. Evidence of notice and duration must be sufficiently specific to show that services were reduced and not "promptly restored." *See* 14 DCMR § 4211.6; Parecco, 885 A.2d at 337; *cf.* Am. Rental Mgmt. Co. v. Chaney, RH-TP-06-28,366 & RH-TP-06-28,577 (RHC Dec. 12, 2014) at 53-55 (evidence of existence and notice of housing code violations must be specific enough to show rent increases were prohibited on the dates implemented). Neither the Tenant nor Ms. Ibeh identified the date of the mold removal work any more specifically than the "summer of 2016." This does not support a finding that the mold problem persisted until October 9, 2017, as the ALJ determined. Nor does any other evidence support a finding that the Housing Provider knew of the mold and failed to abate the problem on any specific date. *See* Waller, RH-TP-16-30,764, at 43 (testimony that service was reduced during a particular season is insufficient).

Accordingly, the Final Order is reversed on this issue.

V. CONCLUSION

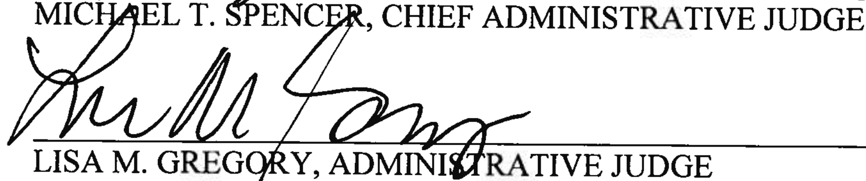
For the foregoing reasons, the Commission reverses the ALJ's award of a rent refund to the Tenant for substantial reductions in related services. The Commission's review of the record reveals no substantial evidence of the dates by which the Housing Provider was on notice of the rodent or mold problems in the Tenant's rental unit, and therefore a rent refund cannot be awarded under the Act. Pena, RH-TP-06-28,817.

Because the record does not support an award of a rent refund under the Act, the Commission does not address the Housing Provider's jurisdictional argument that the ALJ erred in finding that the Act applies to the Housing Accommodation, notwithstanding the claimed

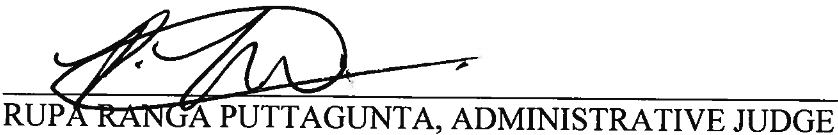
exemption under the District of Columbia Housing Finance Agency Act, D.C. OFFICIAL CODE § 42-2703.08.

SO ORDERED.

MICHAEL T. SPENCER, CHIEF ADMINISTRATIVE JUDGE



LISA M. GREGORY, ADMINISTRATIVE JUDGE



RUPA RANGA PUTTAGUNTA, ADMINISTRATIVE JUDGE

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-16-30,812 was mailed, postage prepaid, by first class U.S. mail on this **13th day** of **June, 2019** to:

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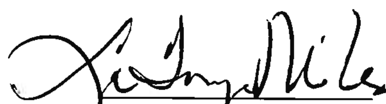

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