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PASTORA BENITEZ, Tenant/Petitioner, v. OGDEN GARDENS, INC., CAFRITZ COMPANY, AND THE MORRIS & GWENDOLYN CAFRITZ FOUNDATION/AMBASSADOR, INC., Housing Providers/Respondents.	Case No.: RH-TP-08-29189 *In re* 1445 Ogden Street NW Unit No. 214

FINAL ORDER

Petitioner Pastora Benitez (Tenant) filed a tenant petition complaining of housing code violations, illegal rent increases, and retaliatory acts by Ogden Gardens, Inc., Cafritz Company, and the Morris & Gwendolyn-Cafritz Foundation/Ambassador, Inc. (Housing Provider). Housing Provider's witnesses acknowledged serious conditions in Tenant's apartment, but asserted that Tenant failed to make timely complaints and that Housing Provider cured the defects expeditiously once they became known. For reasons discussed below, I find that Tenant proved that her apartment contained substantial housing code violations sufficient to invalidate rent increases in 2005, 2006, and 2007, and to merit a roll back of Tenant's rent. However, I conclude that Tenant failed to prove that Housing Provider acted in bad faith or engaged in willful violations of the Rental Housing Act. I award Tenant $11,333.62 in rent refunds, including interest.

I. Procedural Background

On February 21, 2008, Tenant/Petitioner Pastora Benitez filed Tenant Petition (TP) 29,189, complaining of violations of the Rental Housing Act of 1985 (the "Rental Housing Act" or the "Act") at her rental unit, No. 214, in the Housing Accommodation, 1445 Ogden Street NW. The petition named the building owner, Ogden Gardens, Inc., as the sole housing provider. It alleged that: (1) a rent increase was taken while the unit was not in substantial compliance with the District of Columbia Housing Regulations; (2) services and/or facilities provided in connection with the rental of the unit had been substantially reduced; and (3) retaliatory action had been directed against Tenant by Housing Provider for exercising Tenant's rights in violation of Section 502 of the Rental Housing Act. After counsel appeared on behalf of Tenant, I granted Tenant's motion to add additional claims that: (4) the rental unit suffered from substantial or prolonged violations of the District of Columbia Housing Regulations; (5) services in the rental unit had been substantially reduced on account of Housing Provider's alleged harassment of Tenant; (6) the rent ceiling filed with the Rental Accommodations and Conversion Division (RACD) was improper;[1] (7) the rent charged exceeded the maximum allowable rent for Tenant's unit; and (8) the 2006 rent increase was improper on account of Housing Provider's failure to file the proper forms.

Tenant's amended petition also named two additional Housing Providers, the Morris & Gwendolyn Cafritz Foundation/Ambassador, Inc., (the Foundation) and Cafritz Company (Cafritz). The Foundation owns Ogden Gardens, Inc., the corporation that is owner of record.

[1] On October 1, 2007, the rental housing functions of the Department of Consumer and Regulatory Affairs were transferred to the Department of Housing and Community Development (DCHD). The RACD functions were assumed by the Rental Accommodations Division of DCHD. The transfer does not affect any of the issues in this case.

Cafritz Company manages the property. I refer to all three respondents as the "Housing Provider" in this Final Order.

On July 3, 2008, the parties in this case and in two other cases involving the housing complex attempted to mediate the dispute. Following the mediation the parties agreed to go forward with this case and to stay the other cases. The hearing of this case commenced on July 17, 2008, and continued on July 18, September 3, September 4, September 5, September 25, November 6, and December 2, 2008. Tenant presented testimony from Tenant, Pastora Benitez, her daughter, Julisa Benitez, Jose Salgado, president of the building's tenant association, and Maria Mier, a student attorney who assisted Ms. Benitez in a proceeding in the Superior Court of the District of Columbia Landlord and Tenant Branch. Fifty-two of Tenant's exhibits were received in evidence.[2]

Housing Provider presented testimony from Patricia Waddy, Cafritz's executive vice president, Deidra McIntyre, Cafritz's property manager, and Angela Charles, the building's resident manager. Thirty-six of Housing Provider's exhibits were received in evidence.[3]

Following the close of the hearing the parties submitted post-hearing memorandums of law. Based on the testimony of the witnesses, the exhibits in evidence, and the entire record as a whole, I now make the following Findings of Fact and Conclusions of Law.

[2] See Appendix A below for a list of Tenant's exhibits received in evidence.

[3] See Appendix B below for a list of Housing Provider's exhibits received in evidence.

II. Findings of Fact

A. Building History

The Housing Accommodation, 1445 Ogden Street NW, is a large apartment building containing 115 units. The building, and its neighbor, 1445 Otis Street NW, comprise a complex known as Tivoli Gardens. The corporations that own the respective buildings are, in turn, owned by the Morris and Gwendolyn Cafritz Foundation. One of the missions of the Foundation is to support community-based charitable projects including low income housing. The Foundation owns 20% of the Cafritz Company, which manages the buildings that the Foundation owns.

Ms. Benitez has resided in unit 214 since 1995, when it was rented by her ex-husband, Efrain Benitez. Petitioner's Exhibits (PXs) 103, 106. In 1998 Ms. Benitez and her husband separated. The court gave her possession of the apartment, which she continued to occupy together with her daughter. The previous resident manager, Jim Doyle, and other Cafritz employees confirmed her right to occupy the apartment and accepted rent from her. PXs 103, 106, 107. Nevertheless, Housing Provider's records continued to record Efrain Benitez as the sole tenant. *E.g.* PX 102. Prior to 2008, Housing Provider never asked Ms. Benitez to execute a new lease in her own name.

From the time she moved into the apartment, Tenant experienced a serious problem with infestation by pests. Initially the vermin consisted primarily of cockroaches and mice. Then, in 2005, her apartment became infested with bedbugs. In response to Tenant's complaints, Mr. Doyle occasionally arranged for an exterminator to spray her apartment, but the treatments were sporadic and ineffectual and Tenant's requests were frequently ignored altogether.

Mr. Doyle was even less responsive to Tenant's other complaints. As set forth in Table 1 below, between 2005 and 2007, Tenant complained of holes in the walls of her kitchen and bathroom, rusted kitchen cabinets, defective wiring, peeling paint and crumbling plaster, inadequate air conditioning, and a broken closet door, among other defects. Housing Provider did nothing to fix these until the Department of Consumer and Regulatory Affairs (DCRA) inspectors issued citations for housing code violations beginning in September 2007. PXs 110 – 113.

Ms. Waddy and Ms. McIntyre acknowledged that Mr. Doyle abused his position, neglecting building maintenance and allowing criminal activities on the premises, including gambling, drugs, and prostitution. The security of the Housing Accommodation was entrusted to contractors who may have been privy to Mr. Doyle's schemes.

Mr. Doyle held his position for eight years, starting around 1999. The decline of the building's maintenance and habitability during this time escaped detection by Mr. Doyle's superiors at Cafritz. As resident manager, Mr. Doyle was on the lower rung of the company's managerial ladder. In 2005 and 2006 he was supervised by a property manager, Don Godfrey, who was responsible for three other properties in addition to Tivoli Gardens. Mr. Godfrey, in turn, was supervised by an executive vice president, in charge of all Cafritz's residential properties. It was not until after Mr. Godfrey left Cafritz in 2007 that Cafritz management began to appreciate the extent to which the building had deteriorated.

An additional reason that Mr. Doyle's neglect of the property went undetected arose out of the demographics of the Housing Accommodation. About 90 percent of the residents were Hispanic. Many, including Tenant, spoke little or no English, and some, including Tenant, had

limited writing skills in Spanish as well as in English. Mr. Doyle and four other Cafritz employees who worked at the property, Veronica Chavez, German Gonzales, Horatio Howell, and Deli Ruiz, spoke Spanish. Ms. Benitez and the other tenants customarily complained of any problems by talking to Mr. Doyle or one of the other Spanish-speaking employees rather than by submitting written repair requests. The absence of written requests from the tenants and the lack of any complaints to Mr. Doyle's superiors from residents who were unfamiliar with Cafritz's management structure encouraged complacent supervision by Cafritz's higher management.

B. Management and Tenant Association Initiatives To Improve the Property

In June 2006, Patricia Waddy became Cafritz's executive vice president in charge of all residential properties, including the Housing Accommodation here. Don Godfrey left Cafritz in early 2007 and was replaced in July 2007 by Deidra McIntyre.

After she took charge of the Housing Accommodation, Ms. McIntyre inspected the property and was disturbed by its condition. It was clear that the property was badly maintained. Moreover, Mr. Doyle was unable to account for the use of some of the apartments or to produce keys to units where illegal activities were conducted. Mr. Doyle was fired on September 4, 2007, and was replaced by Angela Charles, who spoke no Spanish. Two other Spanish-speaking employees were also fired — Ms. Chavez for embezzling rent receipts and application fees; Mr. Howell for stealing from one of the residents and renting an apartment on his own illegally.

Ms. McIntyre and Ms. Charles then began an inspection of the individual units in the Housing Accommodation. Ms. McIntyre conceded that a lot of the units were in bad condition and infested with bedbugs and mice. In addition, they found that many of the units were overcrowded and the current residents were not the tenants listed on the lease.

In the meantime, the residents of the Housing Accommodation began an organized campaign to improve conditions. Under the leadership of Jose Salgado, a neighbor of Ms. Benitez, the tenants formed a tenant association. On August 27, 2007, some 40 tenants of the building sent a letter to Cafritz complaining of lack of security, infestation, and housing code violations. PX 109. Ms. McIntyre responded in a letter of September 6, 2007, that was copied to Councilmember Jim Graham. Ms. McIntyre claimed that "to my knowledge there are now code violations," but urged the tenants "to report any concerns immediately to the rental office." RX 208.

At the same time, the tenants complained to the DCRA and asked to have the building inspected. The DCRA responded by sending eight inspectors to the building on September 25, 2007. The inspectors found that the entire building was infested with roaches, bedbugs, rodents, and other vermin. PX 110. They also cited Housing Provider for multiple housing code violations in Tenant's apartment, including a defective stove and toilet, leaks in the bathroom and kitchen, a cracked tub, peeling paint, holes, and cracks in the walls and floor throughout the apartment, defective kitchen cabinets, and a defective window frame in the bathroom. PXs 111, 112, 113. The need to abate the DCRA housing code violations increased Ms. McIntyre's and Ms. Charles's determination to gain control over the management of the property.

One of Ms. McIntyre's and Ms. Charles's objectives was to rid the Housing Accommodation of people who did not belong there. As a consequence of Mr. Doyle's illegal activities and lax supervision, many of the units were overcrowded or occupied by people who had no leases. The unauthorized residents presented a security problem both because Housing Provider did not know who was living in the building and because persons without key cards to access the building would leave the entrance doors open or devise other ways to get into the

building without a key card. Overcrowding in many of the apartments put an undue strain on the building's utilities and facilities.

Because Ms. Charles did not speak Spanish, she confronted serious communication difficulties in her effort to determine which of the building's residents were legitimate and which were unauthorized. Moreover, Ms. Charles, an African-American, was often tactless in her dealings with the Hispanic residents. When Mr. Salgado attempted to tape up notices of a tenant association meeting, Ms. Cbarles tore them up and derided him. When Mr. Salgado attempted to talk to Ms. Charles about the problems in the building, he found ber to be insulting and dismissive, calling him a "stupid Hispanic." Another resident, Carlos Sanchez, wrote a letter to Cafritz complaining that Ms. Charles yelled at him and insulted him when he attempted to get a key card activated. PX 177. The letter was copied to Councilmember Jim Graham who, in turn, wrote to Ms. Waddy asking her to investigate the allegations. On February 14, 2008, a letter to Ms. Waddy signed by 71 tenants of the Ogden Street and Otis Place buildings demanded that Ms. Charles be removed because she was treating the tenants "like animals" and making them "victims of retaliation, discrimination and intimidation." PX 121. Ms. Waddy responded that Cafritz was not going to remove Ms. Charles. RX 212. But Ms. Waddy did counsel Ms. Charles about the importance of being respectful to the residents and questioned her about specific allegations of misconduct.

Ms. Charles's lack of sensitivity to linguistic and cultural differences was reciprocated by some of the residents. At one point Mr. Salgado told Ms. Charles that he would never respect her because she was black and a woman. Mr. Salgado also complained to Ms. Waddy when he saw two African-American men whom he considered "suspicious" talking to Ms. Charles. The men were legitimate vendors. RX 244. Ms. Charles believed that many of the tenants were

trying to thwart her attempts to improve the building because it would bring an end to longstanding abuses that the tenants had come to regard as the status quo.

C. Tenant's Conflicts with Housing Provider

On January 4, 2008, Ms. Charles's first encounter with Ms. Benitez convinced Tenant that Ms. Charles was discriminating against her. Ms. Charles was accompanying a DCRA inspector to determine whether the earlier housing code violations had been abated. When she entered, she was angered to find that Ms. Benitez had installed a curtain inside the apartment and that a man was sleeping on the bed in the living room. Ms. Charles demanded that Tenant remove the curtain, berated her for not being the lessee of record, and implied that Ms. Benitez was allowing unauthorized persons to stay in the apartment. Ms. Benitez responded with an indignant letter to Cafritz accusing Ms. Charles of being "racist" and retaliating against Tenant "for exercising my tenant rights."[4] PX 114. The man sleeping on the bed was Tenant's nephew.

Following the inspections of the units by Cafritz and DCRA, Housing Provider decided that many of the apartments were in such poor condition that it would be appropriate to move the residents to other vacant apartments in the building during renovations. In October of 2007, Mr. Salgado moved to a vacant apartment while his unit was renovated. On January 18, 2008, Ms. Benitez requested similar treatment, seeking to be "relocated temporally [sic]" while Housing Provider made "needed repairs to my apartment number 214." PX 115.

Tenant's request to relocate was partially motivated by her concern that Housing Provider's contractors were entering her apartment without prior permission. On January 16,

[4] Ms. Benitez's letters to Housing Provider were drafted with the assistance of volunteers from CARACEN, a local resource center for Latinos.

2008, Ms. Charles sent a letter to Efrain Benitez informing Tenant that workmen would be making repairs to her unit from January 22 to January 25 during the day. RX 225. Tenant responded with a note in Spanish prohibiting access to her apartment, advising that she would let management know when workmen had permission to make repairs. RX 226. Tenant then posted a sign in Spanish on her apartment door prohibiting entry until further notice. RX 237.

Tenant's communications led to another confrontation with Ms. Charles. Since her inspection of the apartment on January 4, 2008, Ms. Charles had been trying to determine why there was no record of Ms. Benitez's residence in the apartment and who, besides Tenant, was staying there. The request to relocate induced Ms. Charles to confirm that Ms. Benitez was not listed in any of Cafritz's records. Ms. Charles's suspicions were further aroused when German Gonzalez, the receptionist, informed her that a prostitute who had been barred from the building had signed in as a visitor to Apartment 214. On January 22, 2008, Ms. Charles wrote a letter to the "Resident" of Unit 214, informing her that it was a violation of her lease to allow "questionable persons" into her apartment for any "unlawful" purpose. RX 228, 229.

Tenant responded the following day in an angry letter addressed "To Whom It May Concern," asserting that the visitor was an innocent friend, and again accusing Housing Provider of "retaliation just because I am exercising my tenant rights." RX 228. The letter decried that "You also are racist not just with me but with the majority of the tenant [sic] that are Hispanic," and concluded with a plea, in all capital letters, to "STOP LYING AND BE HONEST." *Id.*

On January 28, 2008, Ms. Charles sent a letter to Efrain Benitez in Apartment 214 stating that Ms. Pastora Benitez had been residing in the apartment although "it has been determined that she is not the leaseholder." RX 231. The letter advised that Mr. Benitez had seven days to

correct the violation or he would be served with a notice to quit. *Id.* Tenant did not respond to this threat of eviction. The following day she sent a letter to Housing Provider that demanded a response to her letter of January 18, 2008, about relocation and renewed her prohibition on workmen entering her unit without authorization. RX 232.

In February 2008, Ms. Charles refused to accept the rent payment from Ms. Benitez, purporting to follow a Cafritz policy that managers should only accept rent payments from persons who were leaseholders or authorized occupants. Ms. Benitez was not the only occupant of the building to have the rent payment refused. Ms. Charles also enforced the policy against other residents who were not documented in Cafritz's records.

Having refused to accept the February rent from Ms. Benitez, on February 13, 2008, Cafritz filed a Complaint for Possession against Efrain Benitez in the Superior Court of the District of Columbia Landlord and Tenant Branch for non-payment of rent. PX 119. The following week, on February 21, 2008, Tenant filed this tenant petition.

The case in Landlord and Tenant Branch was heard on March 26, 2008. The parties agreed that Tenant could stay in the apartment and pay her rent. Housing Provider agreed to make repairs to the apartment, although no specific timetable was discussed. In turn, it was agreed that Ms. Benitez would submit an application for a lease in her own name.

Following the court hearing, Tenant returned to the building and proffered her rent payment to Deli Ruiz. Mr. Ruiz at first refused to accept the payment. Then, after he was informed of the settlement agreement, he asked Tenant to return to the office and accepted the payment. Tenant was given the papers to apply for a lease in her own name. She submitted the application in June 2008.

After settling the action in the Landlord and Tenant Branch, Housing Provider offered to relocate Tenant so that her apartment could be renovated. Housing Provider required Tenant to sign a transfer agreement before she could be relocated. The transfer agreement contained a paragraph stating that Tenant released all claims against Housing Provider. Tenant spoke to Mr. Salgado, who advised her not to sign the agreement. Tenant's refusal to sign the agreement and her slow completion of the application for a new lease delayed the arrangements for relocation until August 2008.

While Housing Provider's eviction action was pending, Tenant and Ms. Charles were involved in a dispute concerning Tenant's daughter, Julisa Benitez's, key card. The building tenants were issued key cards for access. In an effort to improve building security, Ms. Charles reviewed the records to ensure that the activated key cards were issued to authorized residents. In the winter of 2007 – 08, Ms. Benitez's key card was deactivated, either inadvertently, as Ms. Charles believed, or because Ms. Benitez was not the tenant of record on the Cafritz lease. Tenant then used her daughter's key card to access the building. She did not complain until March 2008 that her key card was deactivated. PX 122. Ms. Charles then activated Tenant's key card. Shortly afterwards Ms. Charles discovered that Tenant's daughter's key card was recorded as having been issued to a tenant in another building. Ms. Charles then deactivated the daughter's card. Tenant again complained. Ms. Charles refused to reactivate the daughter's card insisting, instead, that Tenant purchase a new key card for $30. Tenant refused to purchase a new card.

In mid-August 2008 Tenant relocated to another apartment while Apartment No. 214 was renovated. Housing Provider spent approximately $16,000 to repair the unit and install new

equipment in the kitchen and bath. Tenant returned to the apartment on August 29, 2008. She agreed at the hearing that all of her complaints had been resolved.

Housing Provider also renovated or made substantial repairs in the other apartments in the building and in the common areas. By September 2008 Housing Provider had spent more than one million dollars on repairs and renovations in the Housing Accommodation.

D. Tenant's Services and Facilities Complaints

Infestation of the building by mice, rats, and cockroaches began well before 2005 and continued until at least June 2008. PXs 110; 126. In 2005 infestation by bedbugs also became a serious problem, and continued until June 2008 and beyond. PX 110. The bedbugs were particularly irksome because they inflicted painful bites on Tenant and her daughter. Both Ms. Benitez and Mr. Salgado described these conditions in detail and Ms. McIntyre acknowledged that, at the time she became property manager, the building's apartments were infested with bedbugs, mice, and other vermin. There had been occasional attempts to fumigate the apartments when Mr. Doyle was resident manager. However, these sporadic efforts were ineffective.

Once Ms. McIntyre and Ms. Charles assumed management of the Housing Accommodation in mid 2007, Housing Provider undertook a more systematic program to rid the building of pests. Residents could request weekly treatments with more comprehensive, building-wide services every quarter. When these efforts proved to be ineffectual, Housing Provider contracted with a new exterminator. Beginning in June 2008 each of the units was subjected to an intensive six-week treatment program. Tenant's apartment continued to be infested with mice and cockroaches until August 2008 when it was renovated.

In addition to the infestation problems, Tenant's apartment suffered numerous maintenance and repair deficiencies up to the time of the renovation in August 2008. The table below lists the specific defective conditions in Tenant's apartment and the dates during which Housing Provider was on notice of those defects.

Table 1
Services and Facilities Defects

Defect	Dates	Severity	Source[5]
Building			
Building infested with rodents and roaches	1996 – 8/08	Serious	PX 110 7/17 10:50; 11:00; PX 126
Building infested with /bedbugs	2/05 – 8/08	Serious	PX 110 7/17 10:47; 10:55; 2:50
Kitchen			
Rear stove eye defective	9/25/07 – 8/08	Moderate	PX 111; 7/18 10:40
Sink has leaky faucets	9/25/07 – 10/1/07	Mild	PX 112;
Kitchen cabinet has defective/rotten parts	7/06 – 8/08	Moderate	PX 113 PX 163, PX 165; 7/17 4:00;
Kitchen cabinet has broken drawers	9/25/07 – 8/08	Moderate	PX 113
Kitchen cabinet drawers ill fitting	9/25/07 – 8/08	Moderate	PX 113
Kitchen shelves rusted	7/07-8-08	Moderate	PX 165; 7/17 4:18
Kitchen wall has holes	2/05 – 8/08	Moderate	PX 167; 7/17 4:25
Kitchen floor damaged near cabinet	7/06 – 8/08	Moderate	PX 172; 7/17 4:30

[5] "Source" refers to the exhibit that documents the condition and/or to the testimony that describes the condition. Testimony is referenced by the hearing date (in 2008) and approximate time. A repair date of 8/08 is recorded without any source where the record contains no evidence of repair of a defect prior to Housing Provider's renovation of the apartment in August 2008.

Defect	Dates	Severity	Source[5]
Bathroom			
Broken toilet	9/25/07-10/1/07	Moderate	PX 111; RXs 219, 220
Radiator peeling paint	10/07 – 8/08	Mild	PX 111; PX 138; 7/17 12:20
Tub drain leaks	9/25/07-10/1/07	Moderate	PX 111; RXs 219, 220
Defective flushing mechanism	9/25/07-10/1/07	Moderate	PX 111; RXs 219, 220
Tub caulking missing	9/25/07-8/08	Moderate	PX 113 PX 145; 7/17 2:35
Bathroom window frame rotted	9/25/07- 8/08	Moderate	PX 113 PX 140; 7/17 12:33
Tub cracked	9/25/07 – 1/11/08	Mild	PX 113; 7:18 11:00; PX 115
Water leak in bathroom ceiling; plaster falling	8/07 – 3/08	Moderate	7/17 10:50; 11:50;
Hole in bathroom ceiling	3/08 – 8/08	Moderate	PX 144; 7/17 11:50
Shower curtain rod rusted	7/06 – 8/08	Moderate	7/17 10:50 PX 142, 143; 7/17 12:40
Towel holder broken	8/07 – 8/08	Mild	PX 139; 7/17 12:20
Light switch coming out of wall	11/07 – 8/08	Moderate	PX 137; 7/17 12:00
Tiles cracked in bathroom	3/08 – 8/08	Mild	PX 141; 7/17 12:40
Hole in wall of ceiling by bathroom, wire exposed	2/06 – 8/08	Moderate	PX 134; 9/5 12:10
Defective lock on door to bathroom; door will not close	1997 – 8/08	Moderate	PX 149; 9/3/ 11:30
Hole in wall by entrance to bathroom	2/06 – 8/08	Moderate	PX 133; 9/5 12:00
Living Room			
Closet wall separating from floor	9/25/07 – 8/08	Mild	PX 113
Closet wall has holes	9/25/07 – 8/08	Mild	PX 113
Closet floor cracked, separating from wall	9/25/07 – 8/08	Mild	PX 113

Defect	Dates	Severity	Source[5]
Living room floor has cracks; separating from wall	7/05 – 8/08	Moderate	PX 113; PX 151; 152; 7/17 3:10
Living room wall paint peeling	12/05 – 8/08	Mild	PX 113 PX 156; 7/17 3:30
Living room wall has holes	10/07 – 8/08	Moderate	PX 113; PX 161; 9/5 11:50
Socket pulled out of wall at entry	8/07 – 8/08	Moderate	PX 146; 7/17 2:40
Defective light switch	10/08 – 8/08	Moderate	PX 137; 7/17 12:05
Plaster and paint peeling near air conditioner	2/05 – 8/08	Mild	PX 153, 154; 7/17 3:20
Living room floor finish worn off	2/05 – 8/08	Mild	PX 157, 158; 7/17 3:35
Window in living room will not close	8/07 – 8/08	Moderate	PX 160; 7/17 3:40; 3:50
Hole in living room wall near bathroom	2/07 – 9/07	Moderate	7/18 10:50; PX 161
Air conditioning inadequate	6/05 – 8/08	Moderate	7/17 4:50
Bedroom			
Bedroom wall has holes	9/25/07-10/07	Mild	PX 113; RX 221; RX 222
Light fixture has no cover	8/07 – 7/08	Mild	PX 148; 7/17 2:52 9/3 11:20
Closet door has no latch	12/05 – 7/08	Mild	PX 171; 7/17 4:44 9/2 11:30

Notwithstanding these problems, the condition of the apartment never deteriorated to the point where it became uninhabitable. The Housing Provider continued to provide the essential utilities, heat, water, and electricity, and critical appliances and facilities, such as the stove, refrigerator, sink, shower, and toilet, remained usable even though they often suffered defects.

E. Rent Increases

In the three years before the tenant petition was filed Housing Provider imposed three rent increases, as follows:

(1) On September 26, 2005, Housing Provider wrote a letter to Efrain Benitez stating that Tenant's rent would increase from $705 per month to $715 per month effective November 1, 2005. The rent increase was attributed to a rent ceiling increase of 2.7% in accord with the CPI-W for calendar year 2004. RX 238.[6] Housing Provider's previous rent ceiling adjustment based on the CPI-W for calendar year 2003, was taken as of November 1, 2004. *Id.*

(2) On June 28, 2006, Housing Provider sent Efrain Benitez a Notice of Increase in Rent Charged stating that Tenant's rent would increase from $715 to $758, effective as of August 1, 2006. The increase was attributed to the partial implementation of a 1996 vacancy rent ceiling increase of $167 under Section 213(a)(2) of the Rental Housing Act, D.C. Official Code § 42-3502.13(a)(2) (2002). RX 238.

(3) On June 25, 2007, Housing Provider sent Efrain Benitez a Notice of Increase in Rent Charged stating that Tenant's rent would increase from $758 to $795, effective as of August 1,

[6] The application of the CPI increase, or the adjustment of general applicability, was described by the District of Columbia Court of Appeals as follows: "The adjustment of general applicability allows housing providers the option to increase rent ceilings annually in order to keep up with inflation. The adjustment 'shall be equal to the change during the previous calendar year, ending each December 31, in the Washington, D.C., Standard Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the preceding calendar year,' subject to a cap of ten percent. D.C. Code § 42-3502.06(b). It is the RHC's [Rental Housing Commission's] duty to determine the amount of the general applicability adjustment annually and publish it by March 1 of each year. *See id.* and D.C. Code § 42-3502.02(a)(3). The adjustment is published annually in the D.C. Register with an effective date of May 1." *Sawyer Prop. Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 104 (D.C. 2005) (footnotes omitted).

2007. RX 238. The increase was attributed to the CPI-W of 3.5% for calendar year 2006, which the Rental Housing Commission authorized for implementation by housing providers as of May 1, 2007. *Id.* On July 30, 2007, Housing Provider documented this rent increase by filing a Certificate of Notice of Increase in Rent Charged with the Rent Administrator. RX 242.

III. Conclusions of Law

A. Jurisdiction

This matter is governed by the District of Columbia Administrative Procedure Act (D.C. Official Code §§ 2-501 *et seq.*) (DCAPA); the Rental Housing Act of 1985 (D.C. Official Code §§ 42-3501.01 *et seq.*); substantive rules implementing the Rental Housing Act at 14 District of Columbia Municipal Regulations (DCMR) 4100 - 4399; the Office of Administrative Hearings Establishment Act at D.C. Official Code § 2-1831.03(b-1)(1), which authorizes OAH to adjudicate rental housing cases; and OAH procedural rules at 1 DCMR 2800 *et seq.* and 1 DCMR 2920 *et seq.*

B. Tenant's Claims Concerning Services and Facilities

Four of the amended tenant petition's allegations involve claims relating to the services and facilities in the rental unit: (1) a rent increase was taken while the unit was not in substantial compliance with the District of Columbia Housing Regulations; (2) services and/or facilities provided in connection with the rental of the unit had been substantially reduced; (3) the rental unit suffered from substantial or prolonged violations of the District of Columbia Housing Regulations; and (4) services in the rental unit had been reduced on account of Housing Provider's alleged harassment of Tenant.

1. Tenant's Claim that a Rent Increase Was Taken While the Unit Was Not in Substantial Compliance with the District of Columbia Housing Regulations

The Rental Housing Act provides that the rent for any rental unit "shall not be increased above the base rent unless: (A) The rental unit and the common elements are in substantial compliance with the housing regulations . . . ." D.C. Official Code § 42-3502.08(a)(1). The Rental Housing Regulations prescribe that certain types of housing code violations are substantial as a matter of law. These include defective electrical wiring, outlets, or fixtures, 14 DCMR 4216.2(e); exposed electrical wiring or outlets not properly covered, 14 DCMR 4216.2(f); leaks in the roof or walls, 14 DCMR 4216.2(g); infestation of insects or rodents, 14 DCMR 4216.2(i); plaster falling or in immediate danger of falling, 14 DCMR 4216.2(n); floor, wall, or ceilings with substantial holes, 14 DCMR 4216.2(p); and a large number of housing code violations, each of which may be either substantial or non-substantial, the aggregate of which is substantial, because of the number of violations, 14 DCMR 4216.2(u).

Tenant's claims in this tenant petition are limited to events that occurred within the three year period before the tenant petition was filed on February 21, 2008. D.C. Official Code § 42-3502.06(e); *Kennedy v. D.C. Rental Hous. Comm'n*, 709 A.2d 94, 97 (D.C. 1998). During that period Housing Provider imposed three rent increases on November 1, 2005, August 1, 2006, and August 1, 2007, respectively. I have found that, in November 2005, Tenant's apartment was infested with roaches, rodents, and bedbugs and that the kitchen wall had holes, in addition to other housing code violations. These same conditions existed in August 2006, together with holes in the bathroom ceiling and in the wall by the entrance to the bathroom, and exposed wires in the bathroom. By August 2007 none of these violations had been abated. By

then, in addition, an electric socket had pulled out of the wall at the entry and plaster was falling from the ceiling in the bathroom due to the leak from the apartment upstairs.

In sum, Tenant's apartment suffered from housing code violations that were substantial under the Rental Housing Regulations on each of the three occasions when Housing Provider implemented rent increases in 2005, 2006, and 2007. It follows that these rent increases were illegal and must be refunded. The refund of illegal rent increases is included in the computation of Tenant's total refund in Table 3 below.

2. Tenant's Claim that Services and/or Facilities Provided in Connection with the Rental of the Unit Had Been Substantially Reduced

In view of the myriad defects in Tenant's apartment I described above, it is easy to conclude that Tenant has proven her claim that services and facilities in her unit were substantially reduced. The Rental Housing Act contains separate definitions for "related services" and "related facilities." "Related services" are defined as:

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

D.C. Official Code § 42-3501.03(27).

"Related facility" is defined 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 a rental unit, including any use of a kitchen, bath, laundry facility, parking facility, or the common use of any common room, yard, or other common area.

D.C. Official Code § 42-3501.03(26).

The key difference between the two definitions is that services are related only when they are required by law or agreement while related facilities may include any equipment that is made available to a tenant under the lease. The majority of Tenant's complaints relate to repair and maintenance services required by law. Her complaint about insufficient air conditioning involves equipment that was made available to her by payment of the rent charged. Tenant has proven that Housing Provider substantially reduced services and facilities in the apartment, as set forth in Table 1 above.

The Rental Housing Act's remedies for tenants who prove that services or facilities were reduced are set forth in D.C. Official Code § 42-3509.01(a). One remedy is a rent refund. Prior to August 2006, the refund was computed as the difference between the rent charged and the rent ceiling. D.C. Official Code § 42-3509.01(a) (2002). *See, e.g., Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 14 ("[t]he housing provider is liable for a rent refund only if the rent charged is higher than the reduced rent ceiling"); *Hiatt Place P'ship v. Hiatt Place Tenants' Assoc.*, TP 21,149 (RHC May 1, 1991) at 26 (same holding). As of August 5, 2006 the Rent Control Reform Amendment Act of 2006 amended the Rental Housing Act to provide that the rent refund would be based on "the amount by which the rent exceeds the applicable rent charged." D.C. Official Code § 42-3509.01(a) (2007). *See* 53 D.C. Reg. 4889, (June 23, 2006); 53 D.C. Reg. 6688 (Aug. 18, 2006).

The second remedy set forth in the Rental Housing Act is a rollback of the rent. The rollback is provided as an alternate penalty in addition to or in lieu of a rent refund under

D.C. Official Code § 42-3509.01(a). Prior to the 2006 amendment, any rollback under this provision was computed, like the rent refund, on the difference between the rent ceiling and the rent charged.[7]

Tenant's rent ceiling in February 2005 was $1,904. PX 101. Any rent refund for rent that she paid in the 18 months between the statute of limitations cutoff date and the effective date of the amendments to the Rental Housing Act in August 2006 would have to be computed by reducing the rent ceiling for the rental unit. Because Tenant's rent in February 2005 was only $705, the rent ceiling would have to be reduced by more than 60% in order for Tenant to obtain any refund. PX 101. The condition of Tenant's apartment does not justify such a severe reduction of Tenant's rent ceiling.

Beginning in August 2006, Tenant is entitled to a refund and rollback based on the rent charged. But, since I find that Tenant is entitled to a rollback of her rent prior to August 2006 because her apartment suffered excessive and prolonged violations of the Housing Regulations,

[7] Decisions of the Rental Housing Commission are in conflict about computation of a rollback under D.C. Official Code § 42-3509.01(a). Tenant contends that the RHC permitted a rollback of rent as an additional remedy independent of any reduction of the rent ceiling in *Cobb v. Charles E. Smith Mgmt. Co.*, TP 23,889 (RHC July 21, 1998) at 10-11. While the Commission's decision in *Cobb* seems to support Tenant's position, in its later decision in *Jonathan Woodner Co. v. Enobakhare*, TP 27,730 (RHC Feb. 3, 2005) at 12, the Commission explicitly held that "[w]here the hearing examiner finds that the tenant's services have been reduced, the remedy is to reduce the rent ceiling, not the rent." Because this holding was addressed directly to the housing provider's contention that "[t]he tenant is not entitled to a rent rollback and rent refund," *Id.* at 11, it implicitly prohibited a rollback in circumstances where the rent charged did not exceed the reduced rent ceiling. This interpretation is consistent with the structure of the statute, which incorporates the rollback provisions into the provision for award of rent refunds. The structure suggests that the rollback is not intended as an alternative means to award a rent refund by reducing the rent rather than the rent ceiling, but rather as a remedy that is available only in circumstances where the rent charged exceeds the rent ceiling. *See also Cascade Park Apts. v. Walker*, TP 26,197 (RHC Jan. 14, 2005) at 31 (contrasting the remedy of a reduction in the rent ceiling with the remedy of a rollback for "excessive and prolonged violations of the housing regulations affecting the health, safety, and security of the tenants or the habitability of the housing accommodation").

an award under D.C. Official Code § 42-3509.01(a) would be redundant of the rollback remedy discussed below.

3. Tenant's Claim that the Rental Unit Suffered from Substantial and Prolonged Violations of the Housing Code.

As discussed above, any refund or rollback under D.C. Official Code § 42-3509.01 for reductions of services and facilities prior to August 2006 must be based on the unit's rent ceiling. However, a rollback remedy is also available under D.C. Official Code § 42-3502.08(a)(2) for services and facilities reductions that involve excessive and prolonged housing code violations:

> Where the Rent Administrator [now the Administrative Law Judge] finds there have been excessive and prolonged violations of the housing regulations affecting the health, safety, and security of the tenants or the habitability of the housing accommodation in which the tenants reside and that the housing provider has failed to correct the violations, the [Administrative Law Judge] may roll back the rents for the affected rental units to an amount which shall not be less than the September 1, 1983, base rent for the rental units until the violations have been abated.

The Rental Housing Regulations also prescribe this remedy.

> The rent which a housing provider may charge for a unit may be decreased by order of the [Administrative Law Judge] without at the same time reducing the rent ceiling upon adjudication of a petition filed by one (1) or more tenants under § 216 of the Act [D.C. Official Code § 42-3502.16] for any of the following reasons:
>
> * * *
>
> (b) To seek relief or compensation for the existence of prolonged housing code violations.

14 DCMR 4205.6.

Unlike the rollback remedy of D.C. Official Code § 42-3509.01(a), the remedy of § 42-3502.08(a)(2) is only applicable if the judge finds that there have been "excessive and prolonged" housing code violations that affect the "health, safety, and security" of the tenants or the "habitability" of the housing accommodation. *See Cascade Park Apts. v. Walker,* TP 26,197 (RHC Jan. 14, 2005) at 31; *Nwankwo v. D.C. Rental Hous. Comm'n,* 542 A.2d 827, 831 (D.C. 1988). A rollback under § 42-3502.08(a)(2) may be retroactive to the date of the violations or, as is the case here, the date established by the Rental Housing Act's three year statute of limitations under D.C. Official Code § 42-3502.06(e). *See In re Stancil,* 2005 Bankr. LEXIS 2185, *91, 2005 WL 30366647, *32 (Bankr. D.D.C.)

Here, the evidence fully justifies a rollback under D.C. Official Code § 42-3502.08(a)(2). The testimony of Tenant and Mr. Salgado established, without contradiction by Housing Provider, that the Housing Accommodation and Tenant's apartment were infested with cockroaches and rodents since 1995, in addition to bedbugs beginning in 2005. Infestation by vermin is presumed to be a "substantial" housing code violation under the Housing Regulations, 14 DCMR 4216.2(i). The infestation patently affected the health and safety of Tenant and her daughter and the habitability of the rental unit. In addition, I have found that Tenant's apartment had holes in the kitchen walls in 2005, another substantial violation under the regulations, 14 DCMR 4216.2(p), among other violations, including defective locks on the bathroom and closet doors, peeling plaster and paint, and cracks in the floor. I will therefore roll back Tenant's rent under D.C. Official Code § 42-3502.08(a)(2) through August 5, 2006, when the amendments to the Rental Housing Act permit a rollback of the rent under D.C. Official Code § 42-3509.01(a) based on a reduction of the services and facilities in the rental unit.

4. Tenant's Claim That Services and Facilities Were Reduced on Account of Housing Provider's Harassment of Tenant

Tenant also claims that Tenant's services and facilities were reduced on account of Housing Provider's harassment of Tenant. For reasons discussed below in the analysis of Tenant's retaliation claim, I conclude that the acts that Tenant characterizes as "harassment" were not motivated by any intent to annoy or punish Ms. Benitez, but rather by Ms. Charles's sincere, though mistaken, belief that Tenant did not belong in the apartment. Moreover, even if Ms. Charles had intended to harass Tenant, Tenant has not proven how that harassment caused any additional reductions in Tenant's services and facilities other than those I have already found. Therefore I conclude that Tenant has not proven that Tenant's services and facilities were reduced on account of Housing Provider's alleged harassment.

5. Computation of Tenant's Rent Reduction

Tenant's Post-Hearing Memorandum attaches a Table of Damages that assigns values ranging from 1% to 7% of the rent for each of the discrepancies in Tenant's apartment. The amount of reduced rent is then multiplied by the number of months during which the discrepancies existed to compute a refund for each discrepancy. Using this method, Tenant proposes a total rent refund of $17,572.

Tenant's approach has considerable support in the decisions of the Rental Housing Commission. The Commission has held that the fact-finder is required "to make separate findings as to the impact of individual violations . . . and as to the duration and severity of each violation." *Hiatt Place P'ship v. Hiatt Place Tenants' Assoc.*, TP 21,149 (RHC May 1, 1991) at 24. This may take the form of specific dollar reductions for specific service reductions, *e.g.*

Kemp v. Marshall Heights Cmty. Dev., TP 24,786 (RHC Aug. 1, 2000) at 81, or percentage reductions. Where percentage reductions are employed, the Commission has held that the fact-finder must "assign appropriate percentages for each reduction in service." *Cascade Park Apts. v. Walker*, TP 26,197 (RHC Jan. 14, 2005) at 33.

The drawback of Tenant's approach in this case is that the sum of individual reductions that Tenant proposes would effectively reduce Tenant's rent to less than 50% of what Housing Provider demanded, or only $321.47 per month.[8] Such a severe reduction might be appropriate in certain extreme cases. *See, e.g., Chibs v. Fisher*, 960 A.2d 588, 589 (D.C. 2008) (approving a jury's finding that an apartment that was "unsafe, unsanitary, and in some rooms, uninhabitable" had no reasonable rental value). But here, where the evidence indicates that the rental unit, despite its deficiencies, was habitable, and that Tenant continued to have access to basic utilities and essential equipment, a reduction of the magnitude Tenant proposes would be inappropriate.

The principle underlying the imposition of a rollback or a rent reduction under the 2006 Amendments is that it "serves to bring the rent into line with the services the landlord actually provides." *Afshar v. D.C. Rental Hous. Comm'n*, 504 A.2d 1105, 1108 (D.C. 1986). The standard for measuring the reduction is not the market value of the rental unit but rather "the tenant's loss in terms of diminished habitability." *George I. Borgner, Inc. v. Woodson*, TP 11,848 (RHC June 10, 1987) at 14. As a guideline to this assessment, the Rental Housing Commission has attributed one third of the rent to "shelter in the narrowest sense, and the remaining two thirds as reflecting the qualitative improvements and facilities required by the

[8] The total rent Housing Provider demanded from March 2005, the statute of limitations cutoff date, through August 2008, when the apartment was renovated, is $31,395. The difference between the rent demanded and the $17,572 in rent reductions proposed by Tenant is $13,823, or 44% of the rent Housing Provider demanded. If Tenant were awarded the full amount of rent reductions she asks for, her monthly rent for the 42 months at issue would be $321.47.

[housing] regulations." *Id.* at 10, quoting *Cooks v. Fowler,* 455 F.2d 1281, 1283 (D.C. Cir. 1983); *see also Harris v. Wilson,* TP 28,197 (RHC July 12, 2005) at 5. Because none of Tenant's basic services, such as heat, water, and electricity were interrupted, and her appliances and facilities continued to be functional, I conclude that the reduction for services and facilities should be limited to approximately one third of the rent that Housing Provider would otherwise have been entitled to charge.

Tenant's proposal to assign specific percentage values to each element of reduced services and facilities is an appropriate model to use in cases where the nature of a reduction can be measured accurately and it can be quantified with some precision. In cases where tenants are deprived of access to utilities, such as heat or hot water, or equipment, such as refrigerators or sinks, it makes sense to assign a dollar or percentage value to the service or facility in question and to compute a rollback or rent refund by multiplying the value of the reduction by the number of months that the reduction lasted.

Few of Tenant's complaints here are capable of such precise evaluation. The dates assigned in Table 1 above are those supported by the record, although it is evident that many of the problems existed well before dates established in the record. For example, many of the discrepancies noted by the housing inspectors on September 25, 2007, clearly had been in existence for months, if not years, before the date of the inspection. Although Tenant testified about many of the conditions, her recollection of when they commenced was often vague and her descriptions had to be translated by an interpreter on a telephone. Moreover, many of the defects here are interrelated. For example, the housing inspector assigned three separate code violations to the dilapidated kitchen cabinet. Consequently, the assignment of dates and degree of severity in the table is, at best, a crude approximation.

However, it is not necessary to measure reductions in services and facilities with precision in order to establish a rent refund or rollback. As the Rental Housing Commission observed in *George I. Borgner, Inc. v. Woodson*, TP 11, 848 (RHC June 10, 1987) at 11, "the trier of fact will most often be left without a precise mathematical or scientific basis for fixing the value of a reduction, and will of necessity assign a value based on the nature, severity, and duration of the reduction." Because any attempt to assign specific dollar or percentage reductions to each defect would be inaccurate and misleading, I will instead assess rent reductions for Tenant based on the totality of the conditions in her apartment and the degree to which they impaired its habitability

Beginning in March 2005, I find the evidence supports a rent rollback of 25%. This assessment takes account of the abundant evidence of serious infestation by roaches, rodents, and bedbugs, which were particularly aggravating due to the painful bites they inflicted. The record also demonstrates that the apartment had already deteriorated significantly, with holes in the kitchen wall and cracks in the floor, peeling paint, and a defective bathroom door. Tenant testified that she complained frequently about these conditions, and that her complaints were ignored. Although Tenant's testimony about the dates when problems in her apartment developed was often uncertain, Housing Provider presented no testimony to controvert that the defects arose at the times she recalled or that she reported them to Housing Provider's employees and asked that they be fixed. I therefore accept Tenant's testimony concerning the conditions she described.

In 2006 there is evidence that Tenant experienced and complained of significant additional deterioration in the apartment. There were holes in the wall by the entrance to the bathroom and a hole in the wall by the bathroom ceiling with wires exposed. Paint was peeling

in the living room. As of July, 2006, the kitchen floor was damaged, the kitchen cabinet was falling apart, and the shower curtain rod was rusted. Although the record does not allow me to determine the exact dates on which the additional problems developed or to track the increase in their severity, it is clear that the overall condition of Tenant's apartment in 2006 was significantly worse than in 2005. I will therefore increase the rollback beginning in January 2006 to 30%.

Conditions continued to deteriorate during 2007. In September 2007 Housing Provider was put on notice of many additional housing code violations including the cracked and leaking tub, and holes in the wall of the bedroom and the closet. But Tenant did not prove that she gave Housing Provider notice of these conditions before the inspection. Moreover, in October 2007 Housing Provider made repairs to the bathtub, sink, and toilet and plastered over some of the holes in the walls. Housing Provider's attempts to make further repairs in January 2008 were impeded by Tenant's refusal to allow access to her apartment, although Housing Provider was at least partly responsible for the communication failures that prompted Tenant's refusal.

On balance, I conclude that the aggravation of certain conditions in Tenant's apartment in 2007 was offset by Housing Provider's repair and reduction of other conditions. In particular, there was credible testimony from Mr. Salgado that the problem with mice, roach, and bedbug infestation began to diminish as early as June 2007 and continued to diminish as a result of Housing Provider's increased extermination services. Therefore I will also roll back Tenant's rent in 2007 by 30% and will continue to apply that rollback through August, 2008.

Although I have rated Tenant's complaint about insufficient air conditioning as "moderate" because the apartment did have some air conditioning from a small air conditioner

supplied by Tenant, the absence of adequate air conditioning undoubtedly made the apartment significantly more uncomfortable during the summer months. Prior to 2007 I can make no reduction for inadequate air conditioning because it did not involve any substantial violation of the housing code and therefore is not subject to rollback under D.C. Official Code § 42-3502.08(a)(2). In the summer of 2007 the amendments to the Rental Housing Act were in effect, permitting a rent refund or rollback under D.C. Official Code § 42-3509.01(a) based on the rent charged rather than the rent ceiling.[9] Therefore I will impose an additional 5% roll back from June through August 2007. Tenant testified that Housing Provider's new air conditioner was installed in June 2008, after which the summer temperature in the apartment was comfortable. Accordingly, I will not increase the amount of the rollback in the summer of 2008.

I have already held that the rent increases imposed by Housing Provider in November 2005, August 2006, and August 2007 were invalid because they were imposed while the rental unit suffered from substantial housing code violations. The adjustment to Tenant's rent is therefore measured from the $705 rent that Tenant paid prior to November 2005.

Following is a computation of Tenant's rent reduction.

[9] The amendments did not take effect until August 5, 2006, so I will not roll back Tenant's rent on account of the inadequate air conditioning in the summer of 2006.

Table 2
Computation of Tenant's Rent Reduction

Applicable Dates	Number of Months	Permissible Rent	Rollback Reduction	Rent Reduction
Mar 05 - Dec 05	10	$705.00	25%	$176.25
Jan 06 - May 07	17	$705.00	30%	$211.50
June 07 - Aug 07	3	$705.00	35%	$246.75
Sep 07 - Aug 08	12	$705.00	30%	$211.50

This computation is based on all of the evidence in the record rather than just the evidence relating to specific defects, and it involves balancing a number of considerations. There is no doubt that the conditions in Ms. Benitez's apartment were seriously substandard and that her frequent complaints to Mr. Doyle and the other employees of Housing Provider were ignored. But Tenant continued to have access to basic utilities and facilities. The habitability of the rental unit was never reduced to the point where it became unusable or valueless. Moreover, Tenant's dissatisfaction about the condition of her apartment was not sufficiently intense to provoke her to seek help to make a written complaint until Ms. Charles insulted her in January 2008.

Housing Provider's lax supervision of the property and insensitivity to Tenant's situation were responsible both for the shabby conditions in Tenant's apartment and the long delay in correcting the problems. Mr. Doyle was in charge of the property for eight years before Housing Provider discovered his misdeeds. Then, when Housing Provider started to improve the building and Tenant sought to have her apartment repaired or renovated, Housing Provider was unresponsive because Ms. Charles assumed that Ms. Benitez was not authorized to occupy the apartment. Although Ms. Benitez's inability to speak English and her perception that Ms.

Charles was persecuting her made communication between Tenant and Housing Provider difficult, the record indicates that Housing Provider made little effort to listen to Tenant or to understand her position. For these reasons, I have applied the rent rollback through August 2008, when Tenant's apartment was finally renovated, because I conclude that Housing Provider, and not Tenant, was primarily responsible for the delay in repairs following the inspections in September 2007.

C. Tenant's Claim That the Rent Ceiling Filed with the RACD Was Improper

Tenant asserts that Housing Provider improperly adjusted the rent ceiling for Tenant's unit in 2005 by failing to perfect the annual adjustment of general applicability.[10] Prior to the 2006 amendments to the Rental Housing Act, housing providers were required to document any CPI-W increase by filing a Certificate of Election of Adjustment of General Applicability with the Rent Administrator before the rent ceiling increase could be implemented through a rent increase. The Housing Regulations required that the Certificate be filed "within thirty (30) days following the date when the housing provider is first eligible to take the adjustment." 14 DCMR 4204.10. In *Sawyer Prop Mgmt. of Md., Inc. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 104 (D.C. 2005) the Court of Appeals followed the Rental Housing Commission's decision in *Ayers v. Landow*, TP 21,273 (RHC Oct. 4, 1990) at 20, and held that the housing provider in *Sawyer* was ordinarily "first eligible" to take a CPI-W adjustment on May 1, the effective date on which housing providers were first permitted to take the rent ceiling adjustment under the Commission's rules. Because the housing provider in *Sawyer* did not file Certificates of Election of Adjustments of General Applicability until more than 30 days after the May 1 deadline, the

[10] The application of the annual CPI-W increase is explained in n.6 *infra.*

Court held that the housing provider was ineligible to implement rent increases derived from those rent ceiling adjustments.

Tenant urges that the same principle applies here. Housing Provider's Certificate of Election of Adjustment of General Applicability for 2005 was not filed until October 31, 2005, more than 30 days after the May 1, 2005 date on which housing providers were first eligible to take the CPI-W rent adjustment. PX 101. Tenant contends that Housing Provider would therefore be barred from implementing its November 1, 2005 rent increase even if the rental unit had not suffered from substantial housing code violations.

I must reject Tenant's argument in these circumstances, though, because the record indicates that Housing Provider would not have been "first eligible" to take the 2005 CPI-W rent ceiling adjustment on May 1, 2005. As the Court noted in *Sawyer*:

> There may be circumstances (not arising either in *Ayers* or the present case) under which a housing provider will not be eligible to take an adjustment of general applicability until some time after the published effective date of the adjustment. For example, a housing provider may take and perfect a rent ceiling adjustment of general applicability only once in any twelve month period. *D.C. MUN. REGULATIONS TIT 14 § 4206.3; see also D.C. Code 42-3502.06(b).* If the first adjustment is perfected on May 31, for instance, the twelve-month rule renders the provider ineligible to take the second adjustment until May 31 of the following year, thirty days later than the published effective date of that adjustment.

877 A.2d at 104 n.5.

The exception that the Court noted in *Sawyer* would seem to be the situation here. Housing Provider took and perfected its 2003 CPI-W rent ceiling adjustment as of November 1, 2004. RX 238.. Consequently, Housing Provider was not eligible to implement the calendar

year 2004 CPI-W rent ceiling adjustment until November 1, 2005. Rather than being untimely, Housing Provider's Certificate of Election of Adjustment of General Applicability filed on November 1, 2005, was filed on the earliest date that Housing Provider was first eligible to take the adjustment. PX 101.[11]

It follows that Tenant has not proven that the rent ceiling adjustment that Housing Provider filed with the RACD was improper. But the issue is moot, because I have found that Housing Provider was ineligible to take the 2005 rent increase as a consequence of the rental unit's housing code violations.

D. Tenant's Claim That The 2006 Rent Increase Was Improper on Account of Housing Provider's Failure To File the Proper Forms

Another moot issue is Tenant's contention that the 2006 rent increase was improper because Housing Provider failed to file the proper forms with the RACD. In 2006 Housing Provider implemented a $43 rent increase attributed to the partial implementation of a vacancy rent ceiling adjustment taken and perfected in 1996,[12] Tenant asserts in her Post-Hearing

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[11] Tenant submits in her reply memorandum that it is Housing Provider's obligation to produce "the line of certificates of adjustment that can be traced back to the original 'timely' filing." Pet'r's Resp. to Housing Provider's Submission at 6. I reject this contention because, as I discuss below, it is Tenant who has the burden of persuasion on this issue. Moreover, as the Court of Appeals explained in the *Kennedy* decision, 709 A.2d at 97, the Rental Housing Act's statute of limitations was intended to bar the investigation of rent ceilings more than three years before a tenant petition was filed and to treat them as "unchallengeable."

[12] Prior to its amendment in August, 2006, the Rental Housing Act of 1985 allowed a housing provider to increase the rent ceiling in an apartment that became vacant by the greater of either 12% of the existing rent ceiling or to the rent ceiling of a "substantially identical rental unit in the same housing accommodation." D.C. Official Code § 42-3502.13. But the housing provider was required to take and perfect a vacancy increase by filing an amended registration form with the Rent Administrator within 30 days of when the rental unit became vacant. 14 DCMR 4207.5; *Sawyer Prop. Mgmt. v. D.C. Rental Hous. Comm'n*, 877 A.2d 96, 109 (D.C. 2006).

Memorandum that: (1) Tenant alleged in her tenant petition that Housing Provider failed to file a copy of the 1996 Notice of Increase in Rent Charged with the Rent Administrator or to file an affidavit of service as required by 14 DCMR 4205.4; (2) Tenant's counsel alleged at the hearing that Housing Provider failed file an amended registration statement as required by 14 DCMR 4203.1(e); (3) Housing Provider produced none of these documents at the hearing; and therefore (4) the 2006 rent increase is unlawful because Housing Provider failed to file the required documents with the RACD. Pet'r's Post-Hearing Mem. at 36-37.

Tenant is correct that Housing Provider did not offer into evidence any proof that the 2006 rent increase was properly documented with the RACD. Nevertheless, Tenant has failed to sustain her burden of persuasion on this issue because, apart from allegations in the tenant petition and by counsel, Tenant presented no evidence to prove that Housing Provider failed to make the proper filings. Tenant could have introduced a certificate from the Rent Administrator that the filings were absent, or testimony from someone who had searched the Rent Administrator's files. Alternatively, Tenant could have subpoenaed the documents from Housing Provider and sought an adverse inference if Housing Provider did not produce them. As it stands, there is no evidence in the record from which it can be inferred that Housing Provider failed to make appropriate filings with the RACD to document the 1996 rent ceiling adjustment.

As the proponent who alleged that Housing Provider failed to file the proper forms with the RACD, Tenant has the burden of proof. OAH Rule 2932.1, 1 DCMR 2932.1 ("the proponent of an order shall have the burden of establishing each fact essential to the order by a preponderance of the evidence"); DCAPA, D.C. Official Code § 2-509(b) ("in contested cases . . . the proponent of a rule or order shall have the burden of proof"); *Allen v. D.C. Rental Hous. Comm'n*, 538 A.2d 752, 754 (D.C. 1988) (burden of proof "cannot be sustained simply by

showing a lack of substantial evidence to support a contrary finding"). Although I have invalidated the 2006 rent increase on other grounds, Tenant failed to prove that the increase was invalid because it was improperly documented.

E. Tenant's Claim that the Rent Charged Exceeded the Maximum Allowable Rent for Tenant's Unit

Tenant proved her claim that the rent charged exceeded the maximum allowable rent for Tenant's unit only to the extent that she proved that Housing Provider's rent increases were invalid on other grounds. Tenant has proven that Housing Provider's 2005, 2006, and 2007 rent increase were illegal because the building was not in substantial compliance with the housing code at the time of the rent increases. In addition, because I have rolled back Tenant's rent on account of excessive and prolonged housing code violations, I hold that maximum allowable rent is the rent as adjusted for the rollback. Tenant has not offered proof of any independent grounds of proof that the rent charged exceeded the maximum allowable rent.

F. Tenant's Claims of Retaliation

Tenant asserts in the tenant petition that "Retaliatory action has been directed against me/us by my/our Housing Provider, manager or other agent for exercising our rights in violation of section 502 of the [Rental Housing Act]." The Act provides:

> No housing provider shall take any retaliatory action against any tenant who exercises any right conferred upon the tenant by this chapter . . . . Retaliatory action may include any action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a

> lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

D.C. Official Code § 42-3505.02(a).

The Act creates a presumption of retaliation in situations where a housing provider engages in certain activities within six months of when a tenant exercises rights under the Act.

> (b) In determining whether an action taken by a housing provider against a tenant is retaliatory action, the trier of fact shall presume retaliatory action has been taken, and shall enter judgment in the tenant's favor unless the housing provider comes forward with clear and convincing evidence to rebut this presumption, if within the 6 months preceding the housing provider's action, the tenant:
>
> (1) Has made a witnessed oral or written request to the housing provider to make repairs which are necessary to bring the housing accommodation or the rental unit into compliance with the housing regulations;
> (2) Contacted appropriate officials of the District government, either orally in the presence of a witness or in writing, concerning existing violations of the housing regulations in the rental unit the tenant occupies or pertaining to the housing accommodation in which the rental unit is located, or reported to the officials suspected violations which, if confirmed, would render the rental unit or housing accommodation in noncompliance with the housing regulations;
> (3) Legally withheld all or part of the tenant's rent after having given a reasonable notice to the housing provider, either orally in the presence of a witness or in writing, of a violation of the housing regulations;
> (4) Organized, been a member of, or been involved in any lawful activities pertaining to a tenant organization;
> (5) Made an effort to secure or enforce any of the tenant's rights under the tenant's lease or contract with the housing provider; or
> (6) Brought legal action against the housing provider.

D.C. Official Code § 42-3505.02(b). *See also* 14 DCMR 4303.4.

The presumption applies here. At the very least, by early March 2008 Housing Provider had brought legal action against Tenant, refused to honor the leasing agreement with Tenant,

refused to renew the lease agreement, and sought to terminate her tenancy without cause. *See* D.C. Official Code § 42-3505.02(a). These acts occurred within six months of Tenant's requests for Housing Provider to make repairs, her affiliation with a tenant association, her contact with DCRA inspectors concerning violations, and her efforts to exercise her right to live in an apartment that complied with the housing code.

To rebut this presumption, Housing Provider must adduce "clear and convincing evidence." D.C. Official Code § 42-3505.02(b). Clear and convincing evidence has been described by the District of Columbia Court of Appeals as "evidence that will produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *Lumpkins v. CSL Locksmith, LLC*, 911 A.2d 418, 426 n.7 (D.C. 2006) (quoting *In re Dortch,* 860 A.2d 346, 358 (D.C. 2004)). Here, although I am persuaded for reasons I discuss below that Housing Provider did not intend to violate the law, I cannot conclude with "firm belief" that Housing Provider's acts did not constitute "retaliatory acts" under the statute. Therefore I conclude that Tenant has proven that Housing Provider engaged in acts of retaliation.

G. Tenant's Claim for Treble Damages

The Rental Housing Act provides for the award of treble damages against a Housing Provider who is found to be guilty of "bad faith." D.C. Official Code § 42-3509.01(a). In her Post Hearing Memorandum, Tenant urges that Housing Provider's failure to supervise Mr. Doyle prior to September 2007 constituted "reckless disregard" equivalent to bad faith. Tenant then urges that at least seven "egregious acts" by Housing Provider following September 2007 also justify a finding of bad faith. Although the issue is a close one, I conclude that Housing

Provider's behavior both before and after September 2007 was not sufficiently egregious to justify a finding of bad faith under the stringent standard required by the Court of Appeals.

The activities of resident manager Jim Doyle prior to the summer of 2007 would compel a finding of bad faith if his acts could be legally imputed to his employer. Housing Provider's executive vice president, Ms. Waddy, acknowledged that Mr. Doyle wasn't maintaining the building properly and was allowing it to be used for criminal activities, including drugs and prostitution. Ms. Benitez and Mr. Salgado both testified without contradiction that their frequent complaints to Mr. Doyle and the maintenance people who worked under him were repeatedly ignored. In response to one complaint about infestation, Mr. Doyle retorted that he was not a fumigating company and Mr. Salgado would have to fumigate the apartment on his own. Contrary to Housing Provider's contention, these acts were not beyond the scope of Mr. Doyle's employment. They were directly related to the management and maintenance of the building he supervised. Mr. Doyle's illegal activities and callous disregard of the tenants' rights evidence the kind of "sinister motive" and "conscious doing of a wrong because of dishonest motive or moral obliquity" that justify the imposition of treble damages for bad faith. *Third Jones Corp. v. Young*, TP 20,300 (RHC Mar. 22, 1990) at 9.

It does not follow, though, that Mr. Doyle's acts can be imputed to his employer for purposes of finding bad faith. This issue is apparently one of first impression. The Court of Appeals and the Rental Housing Commission have on occasion upheld treble damage awards against large management companies where the hearing examiner has found the housing provider to be guilty of bad faith. *E.g. Bernstein Mgmt. Corp. v. D.C. Rental Hous. Comm'n*, 952 A.2d 190 (D.C. 2008); *Cascade Park Apts. v. Walker*, TP 26,197 (RHC Jan. 14, 2005). But these cases have assumed that the management company was privy to the bad faith acts. Neither

the Court nor the Commission has analyzed the principles that may justify the imputation of bad faith acts of an employee or agent to the employer or principal.

At the request of this administrative court both parties addressed this issue in their post-hearing memoranda and both agreed that the Court of Appeals' criteria for imposition of punitive damages were pertinent to those for damages for bad faith. *See* Tenant's Post-Hearing Mem. at 21-22; Housing Provider's Submission of Proposed Findings of Fact and Brief on Punitive Damages at 13-14. The analogy of bad faith to punitive damages is reasonable because the Court of Appeals has characterized awards of treble damages as having "punitive effects." *Quality Mgmt. v. D.C. Rental Hous. Comm'n*, 505 A.2d 73, 75 (D.C. 1986). In addition, the legal standard for the award of damages for bad faith closely tracks that required to award punitive damages. *Compare Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 938 (D.C. 1995) (punitive damages require "conduct and a state of mind evincing malice or its equivalent") *and Caulfield v. Stark*, 893 A.2d 970, 979-80 (D.C. 2006) (punitive damages require "fraud, ill will, recklessness, wantonness, oppressiveness, willful disregard of the plaintiff's rights, or other circumstances tending to aggravate the injury") *with Bernstein Mgmt. Corp. v. D.C. Rental Hous. Comm'n*, 952 A.2d 190, 198 (D.C. 2008) (defining bad faith as "intent to deceive or defraud") (quoting *P'ship Placements, Inc. v. Landmark Ins. Co.*, 772 A.2d 837, 845 (D.C. 1998) and *Robinson v. Audi Aktiengesellschaft*, 56 F.3d 1259, 1266 (10th Cir. 1995)), *and Vicente v. Jackson*, TP 27,614 (RHC Sep. 19, 2005) at 12 (bad faith "requires egregious conduct, deliberate refusal to perform without a reasonable excuse, dishonest intent, sinister motive, or a heedless disregard of duty"); *but see Camacho v. 1440 Rhode Island Ave. Corp.*, 620 A.2d 242, 244 n.3 (D.C. 1993) (holding that a bad faith determination by the RACD did not require an award of punitive damages in a wrongful eviction action under principles of collateral estoppel).

The District of Columbia standard for imputing malevolent conduct by an employee to the employer is demanding. The Court of Appeals has held that for punitive damages to be assessed against a corporate employer "it must be shown that the wrongful act was authorized and ratified by the corporation, not merely perpetrated by an employee." *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 992 (D.C. 1980). This, in turn, requires either that "an executive officer of high rank participated in the misconduct," or that the employee was "carrying out corporate policy." *Id. See also Gregg v. Hay-Adams Hotel*, 942 F. Supp. 1, 10 (D.D.C. 1996) (quoting *Remeikis*); *Snow v. Capitol Terrace, Inc.*, 602 A.2d 121, 127 (D.C. 1992) (punitive damages may be assessed against a corporation if "the corporation through its officers or directors participated in the doing of the wrongful act or authorized or subsequently ratified the offending conduct with full knowledge of the facts"); *Safeway Stores v. Gibson*, 118 A.2d 386, 388 (D.C. Mun. App. 1955) *aff'd* 237 F.2d 592 (D.C. Cir. 1956) ("a principal may be held liable for exemplary damages based upon the wrongful acts of his agent only where he participated in the doing of such wrongful act or had previously authorized or subsequently ratified it with full knowledge of the facts").[13]

In light of this standard, I conclude that Jim Doyle's culpable acts may not be imputed to his employer. Mr. Doyle was not an officer, director, or executive of Cafritz Company. or the Foundation. At most, he was a managing agent, two levels removed from the company's executive vice president to whom he did not report directly.

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[13] Other jurisdictions have not adopted the District of Columbia's requirement that corporate officers or directors instigate or ratify culpable acts. In *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605, 2616 (2008), an evenly divided Court upheld the Ninth Circuit's holding that the reckless conduct of a vessel's master could be imputed to the corporate owner. The appellee in that case argued that "a majority of States allow punitive damages for the conduct of any employee, and most others follow the Restatement, imposing liability for managerial agents." (Citing 4 RESTATEMENT (SECOND) OF TORTS § 909(c) (1977).)

Tenant argues that even if Mr. Doyle's acts were not directly attributable to his corporate employer, Tenant may prove ratification of those acts by circumstantial evidence, *Franklin Inv. Co. v. Smith*, 383 A.2d 355, 360 (D.C. 1978), and by demonstrating a "general policy of reckless disregard" by Housing Provider, *Remeikis*, 419 A.2d at 992.

While the record here demonstrates lax oversight of Mr. Doyle's activities by Cafritz Company, it does not rise to the level of ratification or reckless disregard. Ratification would require proof that Housing Provider was aware of and approved of Mr. Doyle's activities. This proof is absent. Indeed, Housing Provider's dismissal of Mr. Doyle is evidence that Cafritz was not aware of his activities until the summer of 2007 and did not approve them.

"Reckless disregard" has been defined as "[c]onscious indifference to the consequences of an act" or "[t]he intentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know of facts that would lead a reasonable person to realize that the actor's conduct both creates an unreasonable risk of harm to someone and involves a high degree of probability that substantial harm will result." BLACKS LAW DICTIONARY 506 (8th ed. 2004). Cases in the District of Columbia that discuss "reckless disregard" indicate that the term connotes behavior so extreme as to amount to intent. *E.g. Duggan v. District of Columbia*, 783 A.2d 563, 568 (D.C. 2001) (defining "gross negligence" as the "wanton, willful, and reckless disregard or conscious indifference for the rights and safety of others") (quoting *District of Columbia v. Walker*, 689 A.2d 40, 440 (D.C. 1997); *Smith v. District of Columbia*, 399 A.2d 213, 219 (D.C. 1979) (defining "malice" as "the doing of an act without just cause or excuse, with such a conscious indifference or reckless disregard as to its results or effects upon the rights or feelings of others as to constitute ill will") (quoting *Ford Motor Credit Co. v. Holland*, 367 A.2d 1311, 1314 (D.C. 1977)).

Tenant argues that Cafritz's failure to supervise Mr. Doyle's activities amounted to reckless disregard because "it was clearly a part of Cafritz's practice to enforce very little oversight." Pet'r's Post-Hearing Mem. at 22. However, the evidence does not demonstrate that Housing Provider was consciously indifferent to the conditions of the tenants in the Housing Accommodation or was aware of any threat to their health or safety. Indeed, the fact that Mr. Doyle was fired and that Ms. Charles and Ms. McIntyre were charged with cleaning up the building and getting rid of illegal residents indicates that Housing Provider's disregard of Mr. Doyle's activities was not conscious, but rather merely negligent.

Tenant also details a series of purportedly "egregious acts" perpetrated by Ms. Charles and Ms. McIntyre to urge a finding of "bad faith" on account of their activities. Tenant's case for imputing bad faith to the corporate housing provider is stronger here, both because Ms. Waddy, Housing Provider's executive vice president, was aware of the problems with the Housing Accommodation, and because Ms. Benitez and other tenants complained in writing about their perceived abuse by Ms. Charles. PXs 109, 110 – 113, 114, 120; RX 228. Nevertheless, I conclude that Ms. Charles's behavior, while insensitive and uninformed, did not reflect the "sinister motive" and "conscious doing of a wrong because of dishonest motive or moral obliquity" that is required for bad faith. *Third Jones Corp. v. Young*, TP 20,300 (RHC Mar. 22, 1990) at 9. I review Tenant's specific charges here.

(1) Tenant asserted that Ms. Charles refused to allow Tenant and other tenants to use an interpreter. The testimony on this point was conflicting. Ms. Benitez testified that Ms. Charles refused to let her daughter interpret for her on key occasions and Mr. Salgado testified that Ms. Charles would demand that he speak English on occasion or would use interpreters who were poorly qualified to translate for him. Ms. Charles testified that she used Mr. Gonzalez and Mr.

Ruiz to interpret for her whenever a resident complained about conditions in the building in addition to having letters and notices translated into Spanish. Notwithstanding these protestations, the evidence indicates that there were many occasions when Ms. Charles was short tempered and refused to let Ms. Benitez or other tenants explain their complaints fully through an appropriate interpreter. I conclude, however, that these incidents do not manifest a sinister motive, conscious wrongdoing, dishonest motive, or moral obliquity.

(2) Tenant contends that Housing Provider submitted "duplicitous" temporary transfer agreements to Ms. Benitez and the other tenants because the agreements required the tenants to waive all claims. It is undisputed that the transfer agreements contained a clause that the agreement "[w]aives any and all claims as a result of the condition of [the apartment]." PX 174. Still, there was no evidence that the inclusion of this clause was motivated by malice or duplicity. It is more likely that the clause was boilerplate meant to protect Housing Provider against redundant claims. It is significant that the transfer agreements specifically did not seek to waive the tenants' rights to claims with respect to matters arising after the transfer. PX 174.

(3) Tenant characterizes Housing Provider's suit for possession in February 2008 as "baseless" and arising from "dishonest methods of communicating with tenants." Tenant is correct to characterize Cafritz's refusal to accept Tenant's February 2008 rent as "due to their own negligence and poor management." Still, proof of the malice or evil motive required for bad faith is absent here. Although it is clear that Mr. Doyle was aware that Ms. Benitez had a right to occupy her apartment, PX 103, Ms. Charles's testimony that Housing Provider had no record of Ms. Benitez in its database is evidenced by Housing Provider's 2006 Notice of Increase in Rent Charged, which is addressed to Efrain Benitez. PX 102. On January 28, 2008 Ms. Charles sent Efrain Benitez a notice stating that Tenant was not the leaseholder and demanding that the lease

violation be corrected within seven days. RX 231. On the following day Tenant sent Housing Provider a letter that made no reference to the lease violation. It accused Housing Provider's employees of violating her privacy and forbade them from entering her unit without authorization. RX 232. Thus, Ms. Charles's belief that Tenant was occupying the apartment illegally, and her consequent refusal to accept Tenant's proffer of the February rent, was not wholly without foundation. Tenant had lived in a building that contained a number of illegal tenants for nearly ten years without seeking to put the lease in her own name. Further, Tenant did not respond to notice that the lease needed to be corrected. While a more astute resident manager might have resolved the situation without giving rise to eviction proceedings, the record does not demonstrate that Housing Provider's suit for possession was motivated by bad faith.

(4) Tenant notes that Ms. Charles interfered with Mr. Salgado's attempts to organize the tenants by tearing down flyers posted about a tenant meeting and refusing to let the tenants meet. Tenant acknowledges, though, that Ms. Charles was overruled by Ms. McIntyre and the tenants were allowed to post flyers and to meet. The record indicates that Ms. Charles's acts were motivated by her misunderstanding of the law rather than by bad faith attributable to Housing Provider.

(5) Tenant asserts that after September 2007 Housing Provider "exhibited a heedless disregard for making repairs in Ms. Benitez's apartment." The record demonstrates that Housing Provider's delay was due to lassitude rather than to malice or ill will. Tenant's apartment was cited for multiple housing code violations on September 25, 2007. PXs 111, 112, 113. On October 1, 2007, Housing Provider repaired a few of the more serious violations involving the leaking tub, defective toilet, and leaking faucets. RX 219, 220. At the end of October 2007 Housing Provider repaired at least some of the plaster damage in the apartment, and commenced

a building-wide extermination RX 221, 222. In November 2007 Housing Provider replaced a broken light fixture in Tenant's apartment. RX 215. In February 2008, when Tenant complained in writing of the leak in her bathroom ceiling, Housing Provider repaired the plumbing the following day, although Housing Provider did not plaster the hole in the ceiling until the renovation in August. RX 216, 217. Other efforts to make repairs to Tenant's unit were delayed because Tenant refused to allow workmen to access the apartment without prior permission, RX 226, 227, and because following the dismissal of Housing Provider's suit for possession on March 26, 2008, Tenant and Housing Provider began negotiation of an agreement for Tenant to transfer to another apartment while her unit was renovated. In sum, although Housing Provider could have been more diligent in making the necessary repairs to Tenant's apartment, Housing Provider's laxity does not evidence the degree of willful obdurateness or callous contempt required for a finding of bad faith.

(6) Tenant asserts that Ms. Waddy ignored complaints from tenants concerning Ms. Charles's alleged discrimination against the tenants and then misrepresented to tenants and to Councilmember Jim Graham that she had investigated the allegations when she had not conducted a proper investigation. While it is true that Ms. Waddy's testimony was not always consistent concerning Housing Provider's investigation of the tenants' complaints, the evidence does not show that Ms. Waddy intentionally misled either the tenants or the councilmember. Ms. Waddy and Ms. McIntyre testified that Ms. Charles was asked about the tenant complaints on multiple occasions and was counseled to treat the tenants with respect. Ms. Waddy responded to Mr. Salgado's complaints in a letter that confirmed Housing Provider's belief that "Ms. Charles is going to work with you in a friendly manner." RX 244. Although Housing Provider might have done more to follow up on the tenants' complaints concerning Ms. Charles and the

condition of the Housing Accommodation, the record does not suggest that any omissions were so reckless or wanton as to constitute bad faith.

(7) Finally, Tenant asserts that Housing Provider engaged in misrepresentations to tenants and public officials because Ms. McIntyre stated in a letter of September 6, 2008, to Mr. Salgado, copied to Councilmember Jim Graham, that "to my knowledge there are no code violations." RX 208. Because Ms. McIntyre was not an executive officer or director of Cafritz Company, this act could not impute bad faith to Housing Provider even if it were an intended deceit. In context, I do not find that the letter asserts a misrepresentation. Ms. McIntyre was responding to a letter from Mr. Salgado that specifically discussed code violations relating to security and infestation. PX 109. Ms. McIntyre's statement that there were no code violations "to my knowledge" follows a discussion of how Housing Provider was "addressing each unit individually about sanitation, infestation, and overcrowding," and precedes an invitation for the tenants "to report any concerns immediately to the rental office." PX 109. In context, it indicates that Ms. McIntyre was not aware of specific code violations but was working to identify the problems that needed correction. The record does not evidence any evil motive sufficient to justify a finding of bad faith.

H. Tenant's Claims of Willful Misconduct

The Rental Housing Act provides that: "Any person who wilfully [sic] . . . (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $5,000 for each violation." D.C. Official Code § 42-3509.01(b).

Willfulness, like bad faith, is a factual determination that arises out of a defined legal standard. While the two concepts have much in common, a determination of willfulness focuses more on the actor's knowledge that he is violating the law than on his motive for doing it. *See Miller v. D.C. Rental Hous. Comm'n*, 870 A.2d 556, 558 (D.C. 2005) (holding that a fine may be imposed where the Housing Provider "intended to violate or was aware that it was violating a provision of the Rental Housing Act"); *Quality Mgmt., Inc. v. D.C. Rental Hous. Comm'n*, 505 A.2d 73, 76 n.6 (D.C. 1986) (holding that "willfully" implies intent to violate the law and a culpable mental state); *Hoskinson v. Solem*, TP 27,673 (RHC July 20, 2005) at 5 ("'willfully' in § 42-3509.1(b) relates to whether or not the person committing the act intended to violate the law"); *Recap – Bradley Gillian v. Powell*, TP 27,042 (RHC Dec. 19, 2002) at 9 (quoting *Ratner Mgmt. Co. v. Tenants of Shipley Park,* TP 11,613 (RHC Nov. 4, 1988) at 4-5, holding that a finding of willfulness requires a showing that "the landlord's conduct was intentional, or deliberate or the product of a conscious choice").

It might seem that retaliation, a word that in its popular sense seems to require intent, would necessarily be "willful." But, in the strange world of rental housing law, retaliation does not have to be willful. The presumption of retaliation imposed by the Act and the regulations may require a finding of retaliation whenever a certain sequence of events occurs, irrespective of the Housing Provider's intent. A finding of willfulness, on the other hand, requires proof of Housing Provider's intent to violate the law. Consequently, the Rental Housing Commission and the District of Columbia Court of Appeals have held that the failure of a housing provider to rebut a presumption of retaliation does not establish the heightened culpability necessary to support imposition of a fine. Rather "before a fine may be imposed the ALJ must make specific findings that the retaliation, like any violation, was committed with intent to violate the Act or at

least with awareness that this will be the outcome." *Miller v. D.C. Rental Hous. Comm'n*, 870 A.2d 556, 559 (D.C. 2005).

The record here does not demonstrate that the acts of Ms. Charles that support the presumption of retaliation were taken with intent to violate the law. I credit Ms. Charles's explanation, however misguided, that she believed Ms. Benitez may not have been an authorized resident of the apartment and that her refusal to accept the February rent and her demand that Tenant execute a new lease and a transfer agreement before the apartment would be renovated were motivated by a good faith effort to gain control of the building's administration and improve the level of safety. Therefore, I will not impose a fine on Housing Provider on account of retaliation.

For similar reasons, I conclude that Tenant has not proven that Housing Provider's other violations of the Rental Housing Act were willful. Although Housing Provider allowed substantial housing code violations to exist unabated for many years and imposed rent increases while Tenant's apartment contained substantial housing code violations, the record does not demonstrate that this conduct was intentional. Rather, as indicated in my discussion of Tenant's treble damages claim, the evidence shows that Housing Provider's failures arose from lax management that, while negligent, did not rise to the level of intentional misconduct or reckless disregard.

I. Tenant's Award

Tenant's rent refund is derived by first computing Tenant's adjusted rent, which involves subtracting the appropriate reduction for services and facilities from the $705 rent that Housing Provider could legally charge. The adjusted rent changed from time to time to accommodate the

changes in the services and facilities. See Table 2 above. The adjusted rent is then subtracted from the rent Tenant was charged to compute the amount of the rent overcharge for each month.

The Rental Housing Commission Rules implementing the Rental Housing Act provide for the award of interest on rent refunds at the interest rate used by the Superior Court of the District of Columbia from the date of the violation to the date of issuance of the decision. 14 DCMR 3826.1 – 3826.3; *Marshall v. D.C. Rental Hous. Comm'n*, 533 A.2d 1271, 1278 (D.C. 1987).

Table 3 below computes the amount of Tenant's rent refund including interest at the 4% per annum rate in effect on the date of this decision.

Table 3
Rent Refund and Interest Computation

Dates	Rent Charged	Adjusted Rent	Amount of Overcharge	Months Held by Housing Provider	Monthly Interest Rate	Interest Factor	Interest Due
Mar 05	$705.00	$528.75	$176.25	49	0.0033	0.1633	$28.79
Apr 05	$705.00	$528.75	$176.25	48	0.0033	0.1600	$28.20
May 05	$705.00	$528.75	$176.25	47	0.0033	0.1567	$27.61
June 05	$705.00	$528.75	$176.25	46	0.0033	0.1533	$27.03
July 05	$705.00	$528.75	$176.25	45	0.0033	0.1500	$26.44
Aug 05	$705.00	$528.75	$176.25	44	0.0033	0.1467	$25.85
Sep 05	$705.00	$528.75	$176.25	43	0.0033	0.1433	$25.26
Oct 05	$705.00	$528.75	$176.25	42	0.0033	0.1400	$24.68
Nov 05	$715.00	$528.75	$186.25	41	0.0033	0.1367	$25.45
Dec 05	$715.00	$528.75	$186.25	40	0.0033	0.1333	$24.83
Jan 06	$715.00	$493.50	$221.50	39	0.0033	0.1300	$28.80
Feb 06	$715.00	$493.50	$221.50	38	0.0033	0.1267	$28.06
Mar 06	$715.00	$493.50	$221.50	37	0.0033	0.1233	$27.32
Apr 06	$715.00	$493.50	$221.50	36	0.0033	0.1200	$26.58
May 06	$715.00	$493.50	$221.50	35	0.0033	0.1167	$25.84
June 06	$715.00	$493.50	$221.50	34	0.0033	0.1067	$23.63
July 06	$715.00	$493.50	$221.50	33	0.0033	0.1100	$24.37
Aug 06	$758.00	$493.50	$264.50	32	0.0033	0.1067	$28.21
Sep 06	$758.00	$493.50	$264.50	31	0.0033	0.1033	$27.33
Oct 06	$758.00	$493.50	$264.50	30	0.0033	0.1000	$26.45
Nov 06	$758.00	$493.50	$264.50	29	0.0033	0.0967	$25.57
Dec 06	$758.00	$493.50	$264.50	28	0.0033	0.0933	$24.69
Jan 07	$758.00	$493.50	$264.50	27	0.0033	0.0900	$23.81
Feb 07	$758.00	$493.50	$264.50	26	0.0033	0.0867	$22.92
Mar 07	$758.00	$493.50	$264.50	25	0.0033	0.0833	$22.04
Apr 07	$758.00	$493.50	$264.50	24	0.0033	0.0800	$21.16
May 07	$758.00	$493.50	$264.50	23	0.0033	0.0767	$20.28
June 07	$758.00	$458.25	$299.75	22	0.0033	0.0733	$21.98
July 07	$758.00	$458.25	$299.75	21	0.0033	0.0700	$20.98
Aug 07	$758.00	$458.25	$299.75	20	0.0033	0.0667	$19.98
Sep 07	$758.00	$493.50	$264.50	19	0.0033	0.0633	$16.75
Oct 07	$758.00	$493.50	$264.50	18	0.0033	0.0600	$15.87
Nov 07	$795.00	$493.50	$301.50	17	0.0033	0.0567	$17.09
Dec 07	$795.00	$493.50	$301.50	16	0.0033	0.0533	$16.08
Jan 08	$795.00	$493.50	$301.50	15	0.0033	0.0500	$15.08
Feb 08	$795.00	$493.50	$301.50	14	0.0033	0.0467	$14.07
Mar 08	$795.00	$493.50	$301.50	13	0.0033	0.0433	$13.07
Apr 08	$795.00	$493.50	$301.50	12	0.0033	0.0400	$12.06
May 08	$795.00	$493.50	$301.50	11	0.0033	0.0367	$11.06
June 08	$795.00	$493.50	$301.50	10	0.0033	0.0333	$10.05
July 08	$795.00	$493.50	$301.50	9	0.0033	0.0300	$9.05
Aug 08	$795.00	$493.50	$301.50	8	0.0033	0.0267	$8.04
Total			**$10,421.25**				**$912.37**
Total Award							**$11,333.62**

Tenant's total award is $11,333.62, consisting of $10,421.25 in rent refunds, and $912.37 in interest.

J. Roll Back of Rent

The Rental Housing Act provides for the rollback of rents, in addition to rent refunds, where illegal rent increases have been imposed. D.C. Official Code § 42-3509.01(a). Because I concluded that Housing Provider's rent increases in November 2005, August 2006, and August 2007 were illegal on account of the rental unit's substantial and continuing housing code violations, I will roll back Tenant's rent to $705, the rent that was in effect three years before the tenant petition was filed, as of September 1, 2008, the date by which renovations to Tenant's apartment were completed.

IV. Order

Accordingly, it is this **31st** day of **March, 2009,**

ORDERED that TP 29,189 is **GRANTED IN PART AND DENIED IN PART**, and it is further

ORDERED that Housing Providers Ogden Gardens, Inc., Cafritz Company, and the Morris & Gwendolyn Cafritz Foundation/Ambassador, Inc., jointly and severally, shall pay Tenant Pastora Benitez **ELEVEN THOUSAND, THREE HUNDRED AND THIRTY-THREE DOLLARS AND SIXTY-TWO CENTS ($11,333.62)** and it is further

ORDERED that Tenant's rent is rolled back retroactively from February 2005 through August 2008 in accord with the Conclusions of Law set forth above; and it is further

ORDERED that Tenant's rent is **ROLLED BACK TO SEVEN HUNDRED AND FIVE DOLLARS ($705)** as of September 1, 2008; and it is further

ORDERED that the appeal rights of any party aggrieved by this Final Order are set forth below.

Nicholas H. Cobbs
Administrative Law Judge

APPENDIX A

Petitioner's Exhibits in Evidence

Exhibit No.	Pages	Description
101	13	Certificate of Adjustment of General Applicability dated 10/31/05
102	1	Notice of Increase in Rent Charged dated 6/28/06
103	1	Letter from Jim Doyle to whom it may concern dated 11/3/99
106	1	Letter from Veronica Chavez to whom it may concern dated 3/27/07
107	1	Rent receipt/money order for 5/1/98 rent
109	6	Letter from tenants of 1445 Ogden Street NW to Ogden Gardens, Inc. dated 8/27/07
110	1	Notice of Violation No. 126964 3 dated 9/25/07
111	3	Notice of Violation No. 126962 1 dated 9/25/07
112	2	Notice of Violation No. 126962 3 dated 9/25/07
113	2	Notice of Violation No. 126962_15 dated 9/25/07
114	2	Letter from Pastora Benitez to Ogden Gardens Inc. dated 1/1/08
115	2	Letter from Pastora Benitez to Ogden Gardens Inc. dated 1/18/08
119	1	Complaint for Possession of Real Estate, L&T No. 005405-08, dated 2/13/08
120	5	Letter from Jose Salgado to Ogden Gardens, Inc. dated 2/12/08
121	7	Letter from Tenants of 1445 Ogden St. to Patricia Waddy dated 2/14/08
123	1	Letter from Pastora Benitez to Patricia Waddy dated 3/17/08
126	1	Photo
131	1	Photo
133	1	Photo
134	1	Photo
136	1	Photo
137	1	Photo
138	1	Photo
139	1	Photo
140	1	Photo
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148	1	Photo
149	1	Photo
151	1	Photo

Exhibit No.	Pages	Description
152	1	Photo
153	1	Photo
156	1	Photo
157	1	Photo
160	1	Photo
161	1	Photo
163	1	Photo
165	1	Photo
167	1	Photo
169	1	Photo
170	1	Photo
171	1	Photo
172	1	Photo
173	1	Photo
174	3	Letter from Deidra T. McIntyre to Luis Tobar dated 3/5/08
177	4	Fax cover and letter from Carlos Sanchez to Otis Gardens, Inc. dated 2/1/08
178	1	Letter from Jim Graham to Patricia Waddy dated 2/8/08
180	1	Letter from Patricia Waddy to Carlos Sanches dated 2/15/08

APPENDIX B

Respondent's Exhibits in Evidence

Exhibit No.	Pages	Description
200	1	Photo
205	10	Fax cover from American Pest Management and bedbug treatment preparation instructions
206	33	American Pest Management extermination records
208	1	Letter from Tammi McIntyre to Jose Salgado dated 8/27/07
210	1	Letter from Patricia Waddy to Jose Salgado dated 2/15/08
211	1	Letter from Patricia Waddy to Jim Graham dated 3/11/08
212	1	Letter from Patricia Waddy to Jose Salgado dated 3/20/08
213	1	Letter from Tenants of 1445 Ogden St. to Ogden Gardens, Inc. dated 3/20/06
214	1	Work Order No. 00000566 requested 7/19/07
215	1	Work Order No. 00000813 requested 11/16/07
216	1	Work Order No. 00001058 requested 2/14/08
217	1	Letter from Pastora Benitez to Tivoli Garden Apartments dated 2/14/08
219	1	Purchase order No. 111370 dated 10/1/07
220	1	Williamson's Plumbing Invoice No. 7659 dated 10/2/07
221	1	Purchase order No. 117665 dated 10/23/07
222	1	Cliff Home Improvement Invoice No. 1486 dated 10/25/07
223	1	Letter from Angela Charles to Resident #214 dated 12/28/07
224	2	Letter from Pastora Benitez to Ogden Gardens, Inc. dated 1/10/08
225	1	Letter from Angela Charles to Efrain Benitez dated 1/16/08
226	1	Note from Pastora Benitez to Angela Charles dated 1/18/08
227	3	Letter from Pastora Benitez to Ogden Gardens, Inc. dated 1/18/08
228	3	Fax cover and letter from Pastora Benitez to Ogden Gardens, Inc. dated 1/23/08
229	1	Letter from Angela Charles to resident, Apt. 214, undated.
231	1	Letter from Angela Charles to Efrain Benitez dated 1/28/08
232	2	Letter from Pastora Benitez to Ogden Gardens, Inc. dated 1/29/08
233	1	Letter from Patricia Waddy to Jim Graham dated 3/11/08
234	1	Letter from Pastora Benitez to Patricia Waddy dated 3/7/08
235	1	Letter from Patricia Waddy to Pastora Benitez dated 3/12/08
236	1	Letter from Pastora Benitez to Patricia Waddy dated 3/17/08
237	2	Handwritten note not to enter Apartment 214
238	11	Letters from Michelle R. Blodgett to Efrain Benitez dated 3/26/03, 9/28/03, 9/26/04, and 9/26/05, and attachments
243	1	Letter from Angela Charles to Efrain Benitez dated 1/28/08

Exhibit No.	**Pages**	**Description**
244	5	Letter from Patricia Waddy to Jose Salgado dated 2/27/08 and cover sheets and attachments
245	2	Letter from Jose Salgado to Patricia Waddy dated March 19, 2008
246	1	Letter from Patricia Waddy to Jose Salgado dated 3/20/08
247	1	Photograph

MOTIONS FOR RECONSIDERATION

Any party served with a final order may file a motion for reconsideration within ten (10) days of service of the final order in accordance with 1 DCMR 2937. When the final order is served by mail, five (5) days are added to the 10 day period in accordance with 1 DCMR 2811.5.

A motion for reconsideration shall be granted only if there has been an intervening change in the law; if new evidence has been discovered that previously was not reasonably available to the party seeking reconsideration; if there is a clear error of law in the final order; if the final order contains typographical, numerical, or technical errors; or if a party shows that there was a good reason for not attending the hearing.

The Administrative Law Judge has thirty (30) days to decide a motion for reconsideration. If a timely motion for reconsideration of a final order is filed, the time to appeal shall not begin to run until the motion for reconsideration is decided or denied by operation of law. If the Judge has not ruled on the motion for reconsideration and 30 days have passed, the motion is automatically denied and the 10 day period for filing an appeal to the Rental Housing Commission begins to run.

APPEAL RIGHTS

Pursuant to D.C. Official Code §§ 2-1831.16(b) and 42-3502.16(h), any party aggrieved by a Final Order issued by the Office of Administrative Hearings may appeal the Final Order to the District of Columbia Rental Housing Commission within ten (10) business days after service of the final order, in accordance with the Commission's rule, 14 DCMR 3802. If the Final Order is served on the parties by mail, an additional three (3) days shall be allowed, in accordance with 14 DCMR 3802.2.

Additional important information about appeals to the Rental Housing Commission may be found in the Commission's rules, 14 DCMR 3800 et seq., or you may contact the Commission at the following address:

District of Columbia Rental Housing Commission
941 North Capitol Street, N.E.
Suite 9200
Washington, D.C. 20002
(202) 442-8949

Certificate of Service:

By Priority Mail / Delivery Confirmation

Alysia Robben, Esq.
University of the District of Columbia
David A. Clarke School of Law
Housing and Consumer Law Clinic
4200 Connecticut Avenue NW
Washington, DC 20008

Robert Clayton Cooper, Esq.
1625 Massachusetts Avenue NW, Suite 425
Washington, DC 20036

By Inter-Agency Mail:

District of Columbia Rental Housing Commission
941 North Capitol Street, NE, Suite 9200
Washington, DC 20002

Keith Anderson, Acting Rent Administrator
District of Columbia Department of Housing and Community Development
Housing Regulation Administration
1800 Martin Luther King Jr. Avenue SE
Washington, DC 20020

I hereby certify that on 4-1, 2009, this document was caused to be served upon the above-named parties at the addresses and by the means stated.

Benedicta Rhames
Clerk / Deputy Clerk