DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION

TP 26,197

In re: 4248 6th Street, S.E., Unit 102
4283 6th Street, S.E., Unit 202
4285 6th Street, S.E., Unit 202
4287 6th Street, S.E., Unit 102
4291 6th Street, S.E., Unit 301
4297 6th Street, S.E., Unit 201
4297 6th Street, S.E., Unit 202

Ward Eight (8)

CASCADE PARK APARTMENTS
Housing Provider/Appellant/Cross Appellee

v.

URNA WALKER , et al.
Tenants/Appellees/Cross Appellants

DECISION AND ORDER

January 14, 2005

LONG, COMMISSIONER. This case is on appeal from the Department of Consumer and Regulatory Affairs (DCRA), Office of Adjudications (OAD), to the Rental Housing Commission (Commission). The applicable provisions of the Rental Housing Act of 1985 (Act), D.C. OFFICIAL CODE §§ 42-3501.01-3509.07 (2001), the District of Columbia Administrative Procedure Act (DCAPA), D.C. OFFICIAL CODE §§ 2-501-510 (2001), and the District of Columbia Municipal Regulations, 14 DCMR §§ 3800-4399 (1991) and its amendments, govern the proceedings.

I. PROCEDURAL HISTORY

On January 11, 2001, Urna Walker filed Tenant Petition (TP) 26,197 on behalf of herself and ten other tenants who resided at the Cascade Park Apartments (Cascade). Cascade is an

expansive apartment complex situated on six acres of land. The complex consists of five separate buildings, with numerous entrances, twenty different addresses, and 132 rental units. The Washington Technology Group (WTG)[1] purchased the housing accommodation from the United States Department of Housing and Urban Development on August 26, 1996.

When the tenants filed the petition, they alleged: the housing accommodation was not properly registered; the rent ceilings filed with RACD were improper; the housing provider increased their rents by nearly 100% in violation of the provisions of the Act; the housing provider failed to provide adequate heat; some units lacked air conditioning; the ceilings in their units leaked and often caved in; the interiors of some of the units were in horrible condition; and the conditions in the units did not warrant the substantial rent increases.

On October 2, 2001, the University of the District of Columbia, David Clark School of Law Legal Clinic entered its appearance on behalf of the tenants. The tenants' counsel filed a motion to amend the tenant petition to include the following additional claims: The housing provider failed to provide a proper thirty day notice for the January 2001 and July 2001 rent increases, reduced services and facilities, improperly calculated the tenants' rent ceilings following a period of exemption, and improperly contended that the rents listed on the tenants' leases constituted the rent charged. The Rent Administrator granted the tenants' motion to amend the petition to include the additional claims.

After a series of continuances, Hearing Examiner James Harmon convened the

[1] WTG changed its name to Ascend Communities after it purchased the housing accommodation. During the evidentiary hearing, the owner of Cascade Park Apartments was identified as WTG and Ascend. The hearing examiner used the name Ascend Communities when it described the owner of Cascade Park Apartments in the findings of fact.

evidentiary hearing on October 2, 2001. Attorney Edward Allen and Student Attorneys Tamala Earle and Earlene White Rosenburg represented the tenants. Seven of the eleven tenants, who filed the petition, appeared for the hearing. The tenants who appeared and testified as parties were Alston Cyrus, 4248 6th Street, S.E., Unit 102; Errol Smith, 4283 6th Street, S.E., Unit 202; Constance Jackson, 4285 6th Street, S.E., Unit 202; Francis Walker, 4287 6th Street, S.E., Unit 102; Clem Young 4291 6th Street, S.E., Unit 301; Urna Walker, 4297 6th Street, S.E., Unit 201; and Raymond Frazier, 4297 6th Street, S.E., Unit 202. Martin Marcus, a former tenant, and Robin Imer, the former Asset Manager at Cascade, testified on behalf of the tenants. During the hearing, the tenants introduced seventy-five exhibits.

Attorney Stephen Hessler represented the housing provider and presented the following witnesses during the hearing: Eric Fedawa, the President of WTG; Julie Henson, WTG's in-house counsel; Sharon Williams Johnson, the Assistant Property Manager; Michael Poresky, the Regional Commercial Account Manager for Terminix Pest Control Company; and Eric Von Salzen, who served as the housing provider's counsel for matters related to rent control. The housing provider introduced forty-one exhibits.

The hearing examiner received the parties' oral and documentary evidence during eighteen hearings dates held between October 2, 2001 and May 9, 2002. At the conclusion of the hearing, the hearing examiner invited the parties to submit proposed findings of fact and conclusions of law. The attorneys for the tenants and the housing provider submitted proposed decisions and orders. Thereafter, the hearing examiner issued the decision and order, which contained 103 findings of fact and the following conclusions of law:

1. The Petitioners have proven, by a preponderance of the evidence, that the Respondent has demanded rent increases that were larger than any applicable provision of the Rental Housing Emergency [sic] Act of 1985.

2. The Petitioners have failed to prove, by a preponderance of evidence, that the Respondent has charged rent that exceeds the legally calculated rent ceilings for their rental units.

3. The Petitioners have proven, by a preponderance of law [sic], that the Respondent has filed rent ceilings with the Rental Accommodations and Conversion Division that are improper, in violation of D.C. Code Section 42-3502.05(f) (2001 ed.) and the Rental Housing Act of 1985.

4. The Petitioner [sic] has failed to prove, by a preponderance of evidence, that the subject housing accommodations are not properly registered with the Rental Accommodations and Conversion Division.

5. The Petitioners have proven, by a preponderance of law [sic], that the Respondent substantially reduced related services/facilities relating to security for all Petitioners and heat for Petitioners Raymond Frazier, Urna Walker and Errol Smith, in violation of D.C. Code Section 42-3502.11 (2001 ed.) and the Rental Housing Act of 1985.

6. The Petitioners have failed to prove, by a preponderance of evidence, that the Respondent has substantially reduced related services/facilities relating to the control of rodents, maintenance of air conditioners, cleaning of common areas and the repair of leaky pipes, in violation of D.C. Code Section 42-3502.11 (2001 ed.) and the Rental Housing Act of 1985.

7. The Petitioners have proven, by a preponderance of evidence, that the Respondent has served invalid and improper 30-days [sic] notices of rent increase on the Petitioners, in violation of D.C. Code Section 42-3502.08 (2001 ed.) and the Rental Housing Act of 1985.

8. The Petitioners Urna Walker and Clem Young have proven, by a preponderance of evidence, that the Respondent has improperly calculated their rent ceilings, in violation of D.C. Code Section 42-3502.09 (2001 ed.) and the Rental Housing Act of 1985.

9. The evidence has demonstrated that the Respondent has engaged in bad faith by knowing [sic] and willingly [sic] failing to repair an adequate [sic] security system for the Petitioners and for knowingly and willingly [sic] failing to

provide adequate heat to Petitioners Raymond Frazier, Urna Walker, and Errol Smith, in violation of the Rental Housing Act of 1985.

Walker v. Cascade Park Apartments, TP 26,197 (OAD Sept. 30, 2002) at 24-25.

The housing provider and tenants filed motions for reconsideration on October 17, 2002 and October 18, 2002, respectively. The tenants filed an opposition to the housing provider's motion for reconsideration on October 31, 2002. The hearing examiner denied the motions for reconsideration on October 31, 2002.

Thereafter, the parties appealed the hearing examiner's decision. The housing provider filed a notice of appeal on November 19, 2002. In the notice of appeal, the housing provider stated that it was appealing the decision and order and the order denying reconsideration.[2] On November 20, 2002, the tenants filed a notice of appeal from the September 30, 2002 decision and the November 6, 2002 order concerning attorney's fees. The Commission held the appellate hearing on April 8, 2003.

II. ISSUES

The tenants and the housing provider raised several issues in the notices of appeal. The tenants raised the following issues in their joint notice of appeal.

A. The Hearing Examiner erred by failing to make findings of fact and conclusions of law on all issues which the petitioners raised in their proposed decision.

B. The Hearing Examiner erred by his failure to find that Clem Young's rent ceiling in 4291 6th St. should have been substantially lower and correspond to the units of other similarly situated tenant petitioner [sic] in this matter.

[2] "The denial of a motion for reconsideration is not subject to reconsideration or appeal." 14 DCMR § 4013.3 (1991).

C. The Hearing Examiner erred by his failure to find a reduction in services occasioned by the Housing Provider's failure to adequately address severe rodent infestation. Although the Hearing Examiner made substantial findings as to the infestation, he erred by his failure to find that rodent infestation increased and the exterminator was inadequate, and services deteriorated during much of the time at issue. The Hearing Examiner also failed to make findings as to uncontroverted testimony of both the tenants and the housing provider's witnesses, which stated that this rodent infestation was egregious and had deteriorated during the time at issue.

D. The Hearing Examiner erred by his failure to find a reduction in services occasioned by the Housing Provider's failure to repair the air conditioning, by his finding that the service did not deteriorate within the three year statute of limitations, and by his failure to make findings or conclusions as to the Housing Provider's registration statements, which stated that the Housing Provider provided air conditioning within the statute of limitations, and by his failure to conclude that the hearing examiner [sic] had to provide those services enumerated in registration statements.

E. The Hearing Examiner erred by his failure to find a reduction in services occasioned by the Housing Provider's failure to adequately maintain the common areas of the apartments.

F. The Hearing Examiner erred and abused his discretion by his failure to find damages for the housing provider's reduction in services regarding security. The de minimis damages found by the Hearing Examiner do not correspond to existing case law considering that the hearing examiner found substantial reductions in this service.

G. The Hearing Examiner erred by his failure to find treble damages, specifically because the housing provider attempted to increase the rent ceilings in bad faith during the time at issue in the tenant petition and by his failure to find that the Housing Provider in bad faith demanded illegal rent increases in 2001.

H. The Hearing Examiner erred by his failure to find damages and treble damages for the Housing Provider's reduction in services in the areas of common areas, rodent infestation and air conditioning, and leaky pipes.

I. The Hearing Examiner erred by his failure to make adequate findings

for the testimony of Ms. Johnson, Ms. Imer, and the Terminix expert witness, Mr. Poresky.

J. The Hearing Examiner erred by his failure to find that the persistent leaking in the tenants' apartments was a reduction in service.

K. The Hearing Examiner erred by his overall failure to consider persistent and serious housing code violations as a reduction in service or other actionable ground to refund rent to the petitioners. That is, under the hearing examiner's analysis, egregious, unsafe, unsanitary, and even life-threatening conditions are not actionable at R.A.C.D. unless they have deteriorated within the statute of limitations. This analysis is contrary to existing case law and public policy.

L. The hearing examiner erred by his failure to find that there were substantial housing code violations at the time of all 2001 rent increases, including heat, rodents, leaking, security, and common area violations.

M. The hearing examiner erred in his conclusion that tenants place trash in the common areas. Although some witnesses [sic] third persons put trash in the common areas, there was no positive identification of those persons as tenants.

N. The hearing examiner erred by assuming that if tenants placed trash in the common areas, that he should not find a reduction in services. Only if the tenant petitioners placed trash in the hallways would the housing provider be absolved from the common area trash.

O. The hearing examiner erred by his failure to find that the number of maintenance persons had been reduced, that there [sic] quality was often poor, and that both findings lead to a conclusion that services had been reduced.

P. Finally the hearing examiner erred in his Order (request for attorney's fees) by failing to find that Tamala Earle was not entitled to attorney's fees.

Q. The hearing examiner erred and abused his discretion in his Order, dated November 6, 2002 by his failure to award fees for the hours submitted on behalf of Tamala Earle. The hearing examiner erred and abused his

discretion in his severe reduction of Judson Powell's hours.

Tenants' Notice of Appeal at 1-5.

The housing provider raised the following issues in the notice of appeal.

A. Treble damages entered by the Examiner in favor of Ms. Walker, Mr. Smith, Mr. Frazier, and Mr. Young should be reversed because the legal elements of knowing, and willful are absent from this record. In addition, as previously briefed by the Housing Provider, there was no claim made, or notice provided, during the evidentiary portion of the proceedings, that treble damages would be sought or factual assertions would be made, or litigated, involving willfulness or knowing violations of the Act as predicates to treble damages.

B. The fine in the amount of $5,000 for alleged substantial reduction of services or facilities should be reversed as being beyond the claims made in the petition and, in any event, as unsupported as a matter of law because of the dearth of factual support for willfulness, malice, or knowing violations of the Act.

C. For the reasons set forth in the preceding paragraph, the fine in the amount of $2,500.00 for alleged demand of rent increases should be vacated and dismissed. As argued in its brief, landlord did not request any "increase" and in any event a fine is unsupportable in this case.

D. For the reasons previously stated and incorporated herein, Housing Provider requests that the fine in the amount of $2,500 for "filing improper rent ceilings" should be vacated and reversed. There is no factual support for willfulness, knowing violation of the Act in this regard, nor is there any discernible basis for the amount of this arbitrary award.

E. For the reasons stated in the previous paragraph and incorporated herein, the fine in the amount of $2,500.00 should be vacated and reversed for the "serving improper and invalid notices of rent increase."

F. The Decision and Order with respect to rent reduction and rollback for Tenant Petitioners' claim of lack of heat should be reversed because of a lack of credible evidence to support a "lack of heat," failure of Petitioners to meet their burden of proof in demonstrating that the heat was actually insufficient, using the DCMR as a yardstick, and because in any event Petitioners could have employed or used space heaters furnished by landlord in their apartment and chose not to do so, thus failing to mitigate their damages and/or contributory negligence.

G. The Tenant Petitioners who did receive refunds or rollbacks due to diminished services and facilities relating to security failed to demonstrate a relative reduction of such security from the point in time when this landlord acquired the property at a point which is not barred by the statute of limitations (December 1997 – January 1998), and in any event failed to provide credible factual support for the claim.

H. The January 2001 notice provided to the tenants was not a notice of "rent" increase but rather, was termination of a rent concession.

I. The finding that security was diminished should be reversed and reconsidered, because the "evidence demonstrates that in January 1998 such fence was (already) in a state of disrepair." (Decision at 21, emphasis added).

J. Any finding that Housing Provider diminished heat should be reversed, especially based upon only the unsupported and unquantified allegation that a particular person "felt like an Eskimo." The findings in favor of Ms. Walker, Mr. Fletcher [sic] and Mr. Smith should likewise be reconsidered and reversed as without factual support.

K. Any finding of treble damages or willfulness should be reconsidered and reversed, for the reasons previously set forth in Housing Provider's Motion to Strike such claims as not having been made in the petition during the hearings thereof, and because Respondent was not on notice of such treble damages or enhanced claims based upon willfulness or bad faith.

L. The Commission should reconsider and vacate all findings of willful violations of the Act for the reasons set forth in Respondent's motion and because the evidence, considered together, does not support a finding of such willfulness and Petitioners did not bear their burden of proof on the subject.

M. The Order entered by the Hearing Examiner on November 6, 2002 granting attorney['s] fees to Tenant Petitioners will be appealed and is hereby appealed in its entirety because Housing Provider was not provided the minimum five days time period within which to respond [sic] the "Motion" by Tenant Petitioners for attorney fees, given the extension of time which the Hearing Examiner granted to Tenant Petitioners through October 31, 2002 within which to file an affidavit for Ms. Earle; the legal effect of Hearing Examiner's extension of time to October 31, 2002 for the filing of this affidavit thus extended beyond November 6, the minimum five-day period within which to respond, plus three days for mailing, not counting weekends. Accordingly, the

attorney fee award was entered prematurely and prior to the expiration of the minimum period of time during which Housing Provider could have responded.

N. In addition, Tenant Petitioners were not the "prevailing party" and the Hearing Examiner committed error by misapplying the clear provisions of 14 DCMR 3825.8. In particular, the Hearing Examiner committed error by misapplying the clear provisions of 14 DCMR 3825.8. In particular, the Hearing Examiner misapplied subsection (b) by failing to reduce the Petitioners' attorney fee claim pursuant to subparagraph (8) "the amount involved and the results obtained." In addition, subparagraph (13) does not warrant such an award in favor of Tenant Petitioners, where they did not prevail on a substantial number of issues and, in fact three of the four Tenant Petitioners recovered nothing at all.

O. In addition, the Hearing Examiner, based upon the entire record, should have reduced or eliminated all attorney fees to the Tenant Petitioners pursuant to 14 DCMR 3825.4 because the equities do not indicate that Tenant Petitioners should recover such a large fee award, in proportion to the actual dollars which were awarded directly to them by the Hearing Examiner.

Housing Provider's Notice of Appeal at 1-5.

III. TENANTS' APPEAL ISSUES

A. Whether the hearing examiner erred by failing to make findings of fact and conclusions of law on all issues which the petitioners raised in their proposed decision.

The tenants claim that the hearing examiner failed to issue findings of fact and conclusions of law concerning the issues raised in the proposed decision and order. The DCAPA does not require hearing examiners to issue findings of fact and conclusions of law concerning issues in a party's proposed decision and order. The DCAPA mandates the inclusion of findings of fact and conclusions of law in all decisions issued by the agency. D.C. OFFICIAL CODE § 2-509(e) (2001). "The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. Findings of fact and conclusions of law shall be supported by and in

accordance with the reliable, probative, and substantial evidence" presented during the hearing. Id.

The DCAPA requires hearing examiners to issue finding of fact and conclusions of law upon each contested issue. The findings of fact and conclusions of law must be based upon the substantial record evidence. In accordance with the DCAPA, the hearing examiner issued 103 findings of fact and 9 conclusions of law based upon his analysis of the contested issues that were raised in the tenant petition. The hearing examiner is not empowered by the Act or the DCAPA to issue findings of fact and conclusions of law based on the issues that a party raises in a proposed decision and order. Accordingly, the Commission denies Issue A.

B. Whether the hearing examiner erred when he failed to find that Clem Young's rent ceiling in 4291 6th Street, S.E., unit 301 should have been substantially lower and correspond to the units of other similarly situated tenant petitioners in this matter.

The hearing examiner did not err when he failed to find that Clem Young's rent ceiling should have been substantially lower and correspond to the units of other tenants in this matter.

The rent ceiling is the maximum amount that a housing provider may legally demand for a rental unit. 14 DCMR § 4200.1 (1991); see also D.C. OFFICIAL CODE § 42-3501.03(29) (2001) (defining rent ceiling as that amount defined in or computed under § 42-3502.06).[3]

[3] § 42-3502.06. Rent ceiling

(a) Except to the extent provided in subsections (b) and (c) of this section, no housing provider of any rental unit subject to this chapter may charge or collect rent for the rental unit in excess of the amount computed by adding to the base rent not more than all rent increases authorized after April 30, 1985, for the rental unit by this chapter, by prior rent control laws and any administrative decision under those laws, and by a court of competent jurisdiction. ...

(b) On an annual basis, the Rental Housing Commission shall determine an adjustment of general applicability in the rent ceiling established by subsection (a) of this section. This adjustment of general applicability shall be equal to the change during the previous calendar year, ending each December 31, in the Washington, D.C., Standard

Each rental unit, which is covered by the rent stabilization provisions of the Act, has a unique rent ceiling. The rent ceiling for each rental unit is established by adding to the base rent,[4] the various rent ceiling adjustments permitted by the Act. D.C. OFFICIAL CODE § 42-3502.06 (2001). The base rent, which also varies from unit to unit, may be increased in accordance with § 42-3502.06.

Rent ceilings may also be established for rental units that were previously exempt from the rent stabilization provisions of the Act. D.C. OFFICIAL CODE § 42-3502.09(a) (2001). In the instant case, the rental units were previously exempt pursuant to § 42-3502.05(a)(1),[5] because the

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Metropolitan Statistical Area Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) for all items during the preceding calendar year. No adjustment of general applicability shall exceed 10%. A housing provider may not implement an adjustment of general applicability, or an adjustment permitted by subsection (c) of this section for a rental unit within 12 months of the effective date of the previous adjustment of general applicability, or instead, an adjustment permitted by subsection (c) of this section in the rent ceiling for that unit.

(c) At the housing provider's election, instead of any adjustment authorized by subsection (b) of this section, the rent ceiling for an accommodation may be adjusted through a hardship petition under § 42-3502.12. ...

(d) If on July 17, 1985 the rent being charged exceeds the allowable rent ceiling, that rent shall be reduced to the allowable rent ceiling effective the next date that the rent is due. This subsection shall not apply to any rent administratively approved under the Rental Accommodations Act of 1975, the Rental Housing Act of 1977, or the Rental Housing Act of 1980, or any rent increase authorized by a court of competent jurisdiction. The housing provider shall notify the tenant in writing of any decrease required under this chapter before the effective date of the decrease.

(e) A tenant may challenge a rent adjustment implemented under any section of this chapter by filing a petition with the Rent Administrator under § 42-3502.16. No petition may be filed with respect to any rent adjustment, under any section of this chapter, more than 3 years after the effective date of the adjustment, except that a tenant must challenge the new base rent as provided in § 42-3501.03(4) within 6 months from the date the housing provider files his base rent as required by this chapter.

[4] "'Base rent' means that rent legally charged or chargeable on April 30, 1985, for the rental unit which shall be the sum of rent charged on September 1, 1983, and all rent increases authorized for that rental unit by prior rent control laws or any administrative decision issued under those laws, and any rent increases authorized by a court of competent jurisdiction." D.C. OFFICIAL CODE § 42-3501.01(4) (2001).

[5] § 42-3502.05. Registration and coverage

(a) Sections 42-3502.05(f) through 42-3502.19, except § 42-3502.17, shall apply to each rental unit in the District except:

United States Department of Housing and Urban Development (HUD) owned the housing accommodation. The housing provider, WTG, purchased the housing accommodation from HUD. WTG, which is a private company, had to establish rent ceilings for each rental unit, because the housing accommodation was no longer exempt from the rent stabilization provisions of the Act. The housing provider attempted to establish the tenants' rent ceilings in accordance with § 42-3502.09 by adding 5% to the average rent charged.[6] Each tenant, who is a party to the instant case, lived in a different rental unit and paid varying amounts of rent. When the housing provider increased the rent by 5% to establish the rent ceiling, each tenant's rent ceiling was different. Consequently, the tenants' rent ceilings did not "correspond."

In the petition, the tenants alleged that their rent ceilings were improper. The hearing examiner evaluated the rent ceilings to determine whether they were correct. The hearing examiner determined that Clem Young's rent ceiling was incorrect.[7] "In the absence of any evidence presented by the [housing provider] to show the proper calculations of the rent ceilings, the [e]xaminer determined that the rent ceiling is that rent that was charged [Clem Young] when

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(1) Any rental unit in any federally or District-owned housing accommodation or in any housing accommodation with respect to which the mortgage or rent is federally or District-subsidized except units subsidized under subchapter III; ....

[6] § 42-3502.09. Rent ceiling upon termination of exemption and for newly covered rental units

(a) Except as provided in subsection (c) of this section, the rent ceiling for any rental unit in a housing accommodation exempted by § 42-3502.05, except subsection (a)(2) or (a)(7) of that section, upon the expiration or termination of the exemption, shall be the average rent charged during the last 6 consecutive months of the exemption, increased by no more than 5% of the average rent charged during the last 6 consecutive months of the exemption. The increase may be effected only in accordance with the procedures specified in §§ 42-3502.08 and 42-3509.04.

[7] The hearing examiner also determined that Urna Walker's rent ceiling was incorrect. The tenants did not challenge this finding on appeal.

the [housing provider] acquired the subject housing accommodation, i.e., $575.00." Decision at 19.

Clem Young testified that his rent was $575.00. (OAD Hearing CD-ROM, Dec. 18, 2001). In addition, he submitted his Rental Concession Agreement, T. Exh. 16, which reflected that his rental amount was $575.00. On appeal, the tenants argue that Clem Young's rent ceiling should have been substantially lower and correspond to the other tenants' rent ceilings. As indicated above, each tenant's rent and rent ceiling is unique. There is no record basis to support the assertion that Clem Young's rent ceiling should have been lower than $575.00 or correspond to the other tenants' rent ceilings. As a result, the Commission denies Issue B.

C. Whether the hearing examiner erred when he failed to find a reduction in services occasioned by the housing provider's failure to adequately address severe rodent infestation. Although the hearing examiner made substantial findings as to the infestation, he erred by his failure to find that rodent infestation increased and the exterminator was inadequate, and services deteriorated during much of the time at issue. The hearing examiner also failed to make findings as to uncontroverted testimony of both the tenants and the housing provider's witnesses, which stated that this rodent infestation was egregious and had deteriorated during the time at issue.

Throughout the hearing, the tenants and the housing provider's witnesses testified that the housing accommodation was infested with rodents. Each tenant and the tenants' witnesses offered testimony concerning the presence of mice and rats in their rental units. Moreover, several of the housing provider's witnesses testified that the property was infested with rodents.

The Assistant Property Manager, Sharon Williams Johnson testified that the property has been infested with rodents since she was hired on October 25, 1999. She stated that the residents were permitted to have pets and many had cats. As a result, the problem was not as bad when

she was first hired in October 1999. In response to a question from Stephen Hessler, the housing provider's attorney, she stated, "It's pretty rough now but we are working on it. Terminix comes twice a month and places poison behind the refrigerators and stoves, puts traps down. It's pretty rough, but we are getting there ... Terminix - it is working. It's not going to work as fast, maybe it could if we could get them out more than twice a month. It has worked; it is working." (OAD Hearing CD-ROM, Mar. 19, 2002).

Attorney Hessler asked Ms. Johnson to describe the level of infestation in the tenants' units on a scale of 1 to 10. Mr. Hessler described 1 as being not very bad and 10 being the worst level of infestation.

When asked about the level of infestation in Urna Walker's unit, Ms. Johnson responded, "She has mice. Everybody has mice around there. ... She is about a 6 or a 7." Ms. Johnson testified that she saw droppings, and she saw where the rodents came through the walls, light fixtures, behind the stove, and cabinets. On cross-examination by the tenants' attorney, Ms. Johnson described the rodent problem in Urna Walker's unit in the following way.

> June 2001 ... that time we had rodents/mice but it's not as bad as what we are having now. ... It's worse now, it wasn't that bad back then. But she seems to have always had the problem, but it wasn't as bad as it is now. There's a big difference ... for the past six months or seven months it's really, really bad. But not back then it was bad, but not like it is now. She did have a problem but we worked on her unit. ... We didn't have Terminix and she wasn't a stay on. Omega did extermination at that time.

Id.

Ms. Johnson rated the level of infestation in Francis Walker's unit as 3 or 4. She testified that she had been in his units several times. Ms. Johnson stated that she knew he had a problem

with mice. She indicated that she had not seen any droppings and stated that Mr. Walker is not home very often.

Ms. Johnson stated that she had been to Alston Cyrus' unit a couple of times. She rated the level of infestation in his unit as 3 to 4. She described his unit as clean and stated that he did not complain as much about the mice.

When describing Raymond Frazier's unit she rated it as 6 to 7 and stated the mice problem was very visible in the unit. She stated, "I see more droppings. It's there, it's visible."

Ms. Johnson described Clem Young's unit as neat and clean and rated the rodent infestation as 3 to 4.

When asked about the tenant, Constance Jackson, Ms. Johnson described her unit as filthy and indicated that the housing provider sent a notice instructing her to clean her unit. Ms. Johnson indicated that Ms. Jackson's unit was infested and rated it between 8 and 9.

Ms. Johnson described Errol Smith's unit as clean and rated his unit in the range of 3 to 4. Ms. Johnson testified that she saw no evidence of rodents in Errol Smith's unit. However, she stated that Mr. Smith contacted the office and made complaints concerning the rodents in his unit.

Ms. Johnson testified that Terminix comes to Cascade Park twice a month. Units which are designated as "stay ons," are serviced twice a month. Units become "stay ons" when management receives constant complaints and there are more droppings "than normal" in cabinet draws, window sills, flowers, plants, and when rodents come out and do not move when you walk past them. She indicated that Urna Walker, Errol Smith and Raymond Frazier are stay ons.

She described Alston Cyrus' unit as a possible stay on, and stated Francis Walker and Clem Young are not stay ons.

The housing provider also called Michael Poresky, the Regional Commercial Account Manager for Terminix, as a witness. He testified that Terminix took over pest and rodent control in May 2001. He stated there was an "extremely bad infestation of mice as well as a problem with roaches in a percentage of the units throughout the property." (OAD Hearing CD-ROM, Apr. 22, 2002). Mr. Poresky stated that the infestation was caused by "sanitation problems, exclusion problems, and the prior company was not doing the job correctly." Id. Mr. Poresky testified that he continually finds sanitation problems in certain units and in the common areas, such as hallways and exit ways with trash and food scraps.

When Terminix secured the contract, they performed a cleanout for all rental units, common areas, and crawl spaces. In July 2001, the problem with infestation was still ongoing. Mr. Poresky testified that it takes 90-120 days for the population to decrease. He stated, "When you have a rodent infestation you have an awful lot of rodents." Id. Terminix services the housing accommodation twice a month. However, Terminix does not service every unit twice a month. Approximately 20 units are serviced twice a month.

The tenants called Robin Imer as a rebuttal witness. Ms. Imer served as the Asset Manager at Cascade from June 1, 2001 until January 10, 2002, when her position was terminated for what she described as financial reasons. She testified that the mouse problem was pretty bad. She stated that tenants often came to the office to complain about mice climbing up curtains, getting in baby's cribs, and eating the diapers.

After reviewing the record evidence, the hearing examiner issued the following pertinent findings of fact.

3. The Petitioner RF [Raymond Frazier] has had constant and persistent "mice problems" in his unit since 1998. The rodent problem is so bad in RF's unit that he cannot leave food unattended because the mice will get into the food.

4. The Petitioner RF is concerned about the mice droppings and urine in his unit because of his infant granddaughter. Because of the unsanitary conditions caused by the mice droppings and urine the Petitioner must keep shoes on his granddaughter's feet.

5. The Tenant RF notified management, i.e., Sharon Johnson, who is the Property Manager at Cascade Apartments, beginning in 1998, The Petitioner specifically notified Sharon Johnson about the persistent problem with mice in January, July, August, October 2001 and December 2001.

6. Beginning in November 2001, the management at Cascade Park Apartments provided the Petitioner with glue stick traps in an attempt to rid the unit of mice.

....

13. The Petitioner AC [Alston Cyrus] has had a constant and persistent rodent problem since January 1998.

14. In January 2001, the Petitioner AC trapped approximately ten (10) mice per week using glue traps.

15. Since the rodent problem began, he has notified the management about the problem on a regular basis and management has provided him with glue traps.

16. When the Petitioner AC's daughter came to visit him in the summer of 2001, the Petitioner has approximately twenty (20) glue traps spread throughout his apartment.

....

28. The Petitioner CY [Clem Young] has had a rodent problem since January 1998 and such problem was constant and persistent in 1998, 1999, 2000 and 2001.

29. The Petitioner CY has reported on a regular basis the rodent problem to the management since the problem began in January 1998. The Petitioner admits that he did not report the rodent problem to management in 2000.

30. When he complained to management about the rodent problem, management provided the Petitioner CY with glue traps.

31. During the spring of 2000, the Petitioner CY caught mice every night. In 2001, the Petitioner CY caught approximately 2-3 mice per week.

....

43. The Petitioner CJ [Constance Jackson] has had a constant and persistent problem with rat infestation since 1998. The Petitioner has provided notice to management about the rat problem and has provided such notice from the onset of the problem.

44. In 1999, the Petitioner observed rat droppings on the stove and throughout the kitchen. In 2000, there were droppings in the kitchen, living room and bedroom.

45. Petitioner admits that management has provided extermination and treatment for the problem.

....

55. During 1998, the Petitioner FW [Francis Walker] saw rats every night in his rental unit. The Petitioner FW reported the rodent problem to the management (i.e., Ms. Sutton in 1998).

56. In 1999, the Petitioner FW had rodent problems and complained to and requested management's assistance with the problem.

57. While the rat problem was somewhat abated in January 2001, the Petitioner FW still heard the rats in his walls.

....

62. The Petitioner UW [Urna Walker] has had a rodent problem in her apartment that in [sic] 1998, 1999, 2000, 2001 and 2002. A rat bit the Petitioner in 1999, requiring her to be treated with antibiotics and causing her to miss work for two (2) days.

63. In 1999, the Petitioner UW [sic] a dead rat was found near a closet and another one in her sofa.

64. During 2000 and 2001, the Petitioner UW observed a rat every night in her apartment.

65. The Petitioner complained to the management about the rodent problem in her apartment.

....

79. From January 1998 to the date of his testimony, i.e., on February 2, 2002, the Petitioner ES [Errol Smith] has had problems with mice. The Petitioner ES's wife, Constance Smith, has given notice of the rodent problem to the management regularly since January 1998.

80. The Respondent has provided the Petitioner ES with traps, but the rodent problem still exists.

....

96. Terminix provides service to the apartment complex twice a month and Terminix personnel visit each apartment.[8]

97. Ms. Johnson observed that the apartment of Tenant Petitioner Constance Jackson is not clean, that it is infested, and that there is food, trash and dirty dishes in the rental unit. Ms. Johnson observed that all of the other Petitioners maintained there [sic] apartments in a clean manner.

....

100. Robyn Imer worked as the Asset Manager at the subject apartment complex from June 2001 to January 2002, when she was terminated by Ascend Communities.

101. Ms. Imer was aware of the severe mice infestation at the apartment complex.

Decision at 8-15.

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[8] During the hearing, the housing provider's witnesses testified that Terminix serviced the housing accommodation twice a month. However, they did not visit each unit twice a month. Ms. Johnson testified that Terminix only serviced the units identified as stay ons twice each month.

After issuing twenty-eight findings of fact, which chronicled the severe rodent infestation in each tenant's unit, the hearing examiner inexplicably concluded as a matter of law that the tenants failed to prove, by a preponderance of evidence, that the housing provider substantially reduced related services relating to the control of rodents. Conclusion of Law 6. The conclusion of law did not rationally flow from the findings of fact, and it was not supported by the substantial record evidence.

In the body of the decision, the hearing examiner wrote the following:

> [T]he Tenant/Petitioners have offered no evidence to demonstrate that the extermination services at the subject housing accommodations have been substantially reduced. Contrariwise, the evidence establishes that there has always been some type of professional exterminating service at the subject property.
>
> The evidence in the case at bar does not demonstrate that there has been a substantial reduction or diminution in the control of the rodent problem at the subject housing accommodations. While the Examiner believes that the evidence has demonstrated that there is a pervasive rodent problem at the Petitioners' housing accommodations, the question presented is whether there has been a reduction in services by the Respondent in attempting to control the rodent problem. The evidence does not demonstrate that the Respondent has reduced extermination services to control the rodent problem.

Decision at 22 and 23 (emphasis added).

When the hearing examiner listed all of the claims raised in the tenant petition, he stated the reduction in service claim was:

> Whether the [h]ousing [p]rovider reduced the services and/or facilities provided in connection with the rental of the units including a security system for the main entrance and individual apartment buildings; whether their [sic] was an extensive rat/rodent problem; whether the hallways were no longer kept clean and carpeted; whether the current owner was obligated to supply tenants with air conditioning units and yearly maintenance of such units; and whether the pipes in the bathroom ceiling constantly leaked;

Decision at 3.

The above quoted text closely mirrors the reduction in service claim that the tenants raised concerning the rodent infestation. Instead of resolving the reduction in services claim that was premised upon rodent infestation, the hearing examiner modified the issue, ignored the substantial record evidence that supported the tenants' claim, and determined that the evidence did not demonstrate that the housing provider reduced extermination services.

The services and facilities provision of the Act provides:

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

D.C. OFFICIAL CODE § 42-3502.11 (2001). The Act defines related services as "services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse." D.C. OFFICIAL CODE § 42-3501.03(27) (2001). The reduction in services provision of the Act "was drafted to ensure that housing providers provide services required by [the] D.C. Housing Code." Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993) at 20.

> "[S]ubstantial compliance with the housing code" means the absence of any substantial housing violations as defined in §103(35) of the Act, including but not limited to, the following:
>
> (i) Infestation of insects or rodents;
>
> ....

and

(u) 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 (1991) (emphasis added).

The oral and documentary evidence submitted by the tenants and the housing provider evidenced severe rodent infestation. The unabated rodent infestation constituted a reduction in services, because the housing provider did not provide services required by the housing code. See Shapiro supra; 14 DCMR § 4216 (1991) (providing that substantial compliance with the housing code means the absence of any substantial housing violations including rodent infestation).

In Hiles v. Kim, TP 21,210 (RHC June 28, 1991), the Commission affirmed the hearing examiner's finding that the tenants suffered a substantial reduction in services because they were subject to the loss of heat for a substantial period of time. On appeal, the Commission found that notwithstanding the housing provider's efforts to cure the heating problem by making repairs, the tenants still suffered the loss of an essential service for 18 days, which the Commission described as an extended period of time. Similarly, the tenants in the instant case suffered a reduction in services because they were subjected to severe rodent infestation for several years. The housing provider's ineffectual efforts to alleviate the infestation by providing extermination services, does not obviate the substantial reduction in services the tenants faced when they were subjected to rodent infestation for a substantial period of time.

The housing provider's witness, Ms. Johnson, testified that each tenant's unit was

infested with rodents. When the housing provider failed to abate the infestation, the housing provider failed to provide the repair service, which the tenants' were entitled to in exchange for the tenants' rent. "It is axiomatic that in a lease agreement (which is nothing more than a contract), the services and facilities which are provided with the basic shelter are an integral component of the 'package of goods and services' which the landlord contracts to provide in exchange for the rent which the tenant pays. It follows then that rent regulation is meaningless if integral services and facilities are not also regulated. We have held that an uncompensated reduction in services is equivalent to an increase in rent ...." Sendar v. Burke, HP 20,213 & TP 20,772 (RHC Apr. 6, 1988) at 19 (citation omitted).

The hearing examiner erred when he failed to find a substantial reduction in services based on the substantial record evidence and findings of fact that evidenced the chronic rodent infestation. The hearing examiner also erred when he failed to award the tenants rent refunds and/or rent roll backs[9] as compensation for the reduction in services they suffered. Accordingly, the Commission grants Issue C, reverses the hearing examiner, and remands this matter for a calculation of the rent refund and/or rent roll back for each tenant.

D. Whether the hearing examiner erred by his failure to find a reduction in services occasioned by the housing provider's failure to repair the air conditioning, by his finding that the service did not deteriorate within the three year statute of limitations, and by his failure to make findings or

[9] The penalty provision of the Act, § 42-3509.01, provides:

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

conclusions as to the housing provider's registration statements, which stated that the housing provider provided air conditioning within the statute of limitations, and by his failure to conclude that the housing provider had to provide those services enumerated in the registration statements.

The hearing examiner erred when he failed to find a reduction in services occasioned by the housing provider's failure to provide air conditioning, which was a related service that was listed on the housing provider's registration statements and included in the tenant's rent.

The tenants testified that their units were equipped with air conditioning units. When HUD owned the building, it supplied yearly maintenance on the air conditioning units. The tenants testified that their air conditioners did not function while WTG owned the building, and WTG refused to make repairs.

Eric Christian Fedawa, the President of WTG, testified that he spoke with HUD about the air conditioners before WTG purchased the housing accommodation. Mr. Fedawa stated that HUD informed him that the rental units contained "cut areas" for air conditioners, but most of the air conditioners did not work. Mr. Fedawa testified that the units were owned by HUD, they were not given to the new owner, and WTG did not own the air conditioners when they purchased the property. He testified that it was his understanding that they had no obligation with respect to air conditioners, and WTG took no steps to repair the air conditioners. Mr. Fedawa testified that if the property managers repaired any air conditioners, they did so without his knowledge.

The tenants maintain that the housing provider reduced their services when they failed to maintain the air conditioners. In order to prove that air conditioning was a service included in

their rents, the tenants introduced four (4) registration forms filed by WTG. The second page of each form contains a section which reads: "Services and Facilities Provided: Check [ ] if provided." A list of services and facilities follows with a bracket in front of each. On each of the four registration forms, the housing provider, WTG, indicated that it provided the following services and facilities: cooking range, refrigerator, air conditioner, security guards, laundry room, coin operated washer, coin operated dryer, outdoor parking, and a storage room. The housing provider or its agent signed each form and certified that the information provided on the forms was complete and accurate.

The tenants introduced Tenants' Exhibit (T. Exh.) 55, which was an Amended Registration Form that WTG filed on January 24, 1997. The housing provider indicated that the form was filed for 4281 through 4287 6th Street, S.E., which included 4283 6th Street, S.E., unit 202, 4285 6th Street, S.E., unit 202, and 4287 6th Street, S.E., unit 102. The housing provider placed check marks in the brackets for the services and facilities provided in connection with the rental units. T. Exh. 55 shows that the housing provider placed a check mark in front of air conditioner, which indicated that it was one of the services and facilities provided in connection with the rental units.

The tenants also introduced T. Exh. 58, which was a Corrected Amended Registration Form filed on June 14, 1999 for 4281 through 4287 6th Street, S.E. The registration form included 4283 6th Street, S.E., unit 202, 4285 6th Street, S.E., unit 202, and 4287 6th Street, S.E., unit 102. T. Exh. 58 reflects that the housing provider provided the air conditioning service.

Similarly, the tenants introduced T. Exhs. 67 and 71. T. Exh. 67 is an

Amended Registration Form filed on January 24, 1997 for 4291 through 4297 6th Street, S.E., and included 4297 6th Street, S.E., unit 201 and 4297 6th Street, S.E., unit 202. T. Exh. 71 is a Corrected Amended Registration Form, which WTG filed on June 14, 1999.[10] The addresses included in T. Exh. 71 are 4291 through 4297 6th Street, S.E., which covered 4291 6th Street, S.E., unit 301, 4297 6th Street, S.E., unit 201, and 4297 6th Street, S.E., unit 202. The housing provider also listed air conditioning as a service on T. Exhs. 67 and 71. On four separate registration forms, WTG listed air conditioning as one of the services provided in connection with the rental units.

The Commission has repeatedly held that housing providers are required to provide the services and facilities that are listed in the housing provider's registration files. Pinnacle Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000); Bonheur v. Oparaocha, TP 22,970 (RHC Feb. 4, 1994). Moreover, the "lease is a contract which incorporates as a matter of law the terms of the Landlord Registration Statement. If the Landlord Registration Statement lists certain services and facilities, the landlord is contractually obligated to provide them. ... Any substantial reduction in services or facilities ... is compensable under § 212." Hagans Mgmt. Co. v. Hawkins, TP 11,811 (RHC July 29, 1987) at 5. See also Marshall v. District of Columbia Rental Hous. Comm'n, 533 A.2d 1271 (D.C. 1987) (holding that a reduction in service was caused by the loss of air conditioning and awarding the tenants $55.00 per month, because the housing

[10] In the text of the decision and order, the hearing examiner stated that the three year statute of limitations precluded the tenants from raising the air conditioning claim, because the evidence demonstrated that the housing provider, WTG, did not provide air conditioning after 1996 and the tenants filed the air conditioning claim in 2001. The hearing examiner's position fails, inter alia, because the registration statements demonstrated that the housing provider, WTG, provided air conditioning as late as 1999. See Majerle Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, No. 02-AA-427 (D.C. Dec. 30, 2004) (holding that action was not barred by the Act's limitations period when the housing provider made admissions in RACD filings within the statutory period).

provider did not provide air conditioning).

WTG filed four amended registration forms wherein they indicated that air conditioning was a service provided in connection with the rental units. See n.10 supra. The housing provider's witness, Eric Fedawa testified that WTG did not provide the air conditioning service. The record evidence reflects that the housing provider failed to provide air conditioning or maintain the air conditioning units. The hearing examiner erred when he held that the tenants' failed to prove that the housing provider substantially reduced the air conditioning service. Accordingly, the hearing examiner is reversed. This matter is remanded for the hearing examiner to calculate the damages due each tenant for the reduction in the air conditioning service.

E. Whether the hearing examiner erred by his failure to find a reduction in services occasioned by the housing provider's failure to adequately maintain the common areas of the apartments.

M.[11] Whether the hearing examiner erred in his conclusion that tenants placed trash in the common areas. Although some witnesses testified that third persons put trash in the common areas, there was no positive identification of those persons as tenants.

N. Whether the hearing examiner erred by assuming that if tenants placed trash in the common areas, that he should not find a reduction in services. Only if the tenant petitioners placed trash in the hallways would the housing provider be absolved from the common area trash.

O. Whether the hearing examiner erred by his failure to find that the number of maintenance persons had been reduced, that their quality was often poor, and that both findings lead to a conclusion that services had been reduced.

[11] The Commission combined various issues that contained related allegations of error. In order to assist the parties in identifying the issues, which were not reviewed in the order in which they appeared in the notices of appeal, the Commission maintained the ranking of the issues instead of re-lettering the issues. For example, Issues M, N, and O, were grouped with Issue E. As a result, the practice of adhering to strict alphabetical order was suspended throughout the decision and order.

The hearing examiner erred when he failed to find a reduction in services occasioned by the housing provider's failure to maintain the common areas of the housing accommodations. During the hearing, the tenants and the housing provider's witnesses testified that common areas of the housing accommodation were filthy and not adequately maintained.

The Assistant Property Manager, Sharon Johnson, testified that one to two porters were responsible for cleaning the entire housing accommodation. She stated that the housing provider fired one of the two porters two and a half weeks before the date of her testimony. She could not remember if there were one or two porters in 1999, but she believed there were two. She indicated that in 2000 and 2001 the porters did not clean the housing accommodations on the weekend. Ms. Johnson testified that the hallways are "a mess after the weekend." (OAD Hearing CD-ROM, Mar. 19, 2002). She stated that it "looks like they had a field day, like an army went through it." Id. She indicated that buildings, which used to be locked, 52, 54, and 38 were the cleanest. However, the rest of the buildings were "a sight." She stated that she saw syringes, used condoms, trash, and evidence that people slept and defecated in the hallways. When the tenants' attorney asked Ms. Johnson, if she would live at the housing accommodation, Ms. Johnson responded no. Ms. Johnson stated that she would not reside in the housing accommodation because, there is "too much traffic in the hallways and we have a rodent problem .... there is filthiness in hallways." Id. Ms. Johnson testified she was not sure who caused the conditions in the common areas, because no one had been identified. However, she was certain none of the tenants' children were involved in the destruction. (OAD Hearing CD-ROM, Apr. 1, 2002).

Michael Poresky, the exterminator who testified on behalf of the housing provider, stated that he continually found sanitation problems in the common areas of the housing accommodations, such as hallways and exit ways with trash and food scraps. (OAD Hearing CD-ROM, Apr. 22, 2002).

When the hearing examiner issued the decision and order, he found "based on the substantial evidence presented at the hearing, the following facts:"

> 22. The common areas in his [Alston Cyrus] apartment building are filthy and have been so since January 1998.
>
> ....
>
> 50. There exists loitering by non-tenants in the hallways on a daily basis of the Petitioner CJ's building, and there is urine in the hallways.
>
> 51. The hallways in the Petitioner CJ's housing accommodation are not cleaned on a regular basis.
>
> ....
>
> 84. The Petitioner (ES) has observed that the common areas in his apartment building are not properly cleaned.
>
> ....
>
> 98. Hallways are cleaned on a regular basis by management.
>
> ....
>
> 102. Ms. Imer observed that the security at the subject apartment complex was poor and that the common areas needed better maintenance. Because of the expense involved, security guards were not considered as an option at the subject apartment complex.

Decision at 8, 9, 11, 14-15 (emphasis added).

In the face of the damaging testimony offered by the housing provider and the tenants,

and finding that the common areas were filthy, not properly cleaned, and in need of better maintenance, the hearing examiner inexplicably concluded as a matter of law, that the tenants failed to prove that the housing provider substantially reduced related services relating to the cleaning of the common areas.

Pursuant to the DCAPA, D.C. OFFICIAL CODE § 2-509(e) (2001), the hearing examiner's decision must meet the following three criteria: "(1) the decision must state findings of fact on each material, contested, factual issue; (2) those findings must be based on substantial evidence; and (3) the conclusions of law must follow rationally from the findings." Perkins v. District of Columbia Dep't of Employment Servs., 482 A.2d 401, 402 (D.C. 1984) (emphasis added). In the instant case, the conclusion of law did not flow rationally from the findings of fact.

Housing providers are required, by the Act and the housing regulations, to provide related services and facilities to each tenant. Related services include "repairs, decorating and maintenance, ... janitorial services, and the removal of trash and refuse." D.C. OFFICIAL CODE § 42-3501.03(27) (2001). When a housing provider substantially reduces related services or related facilities supplied for a housing accommodation, the Rent Administrator may increase or decrease the rent ceiling, as applicable, to reflect proportionally the value of the change in services or facilities. D.C. OFFICIAL CODE § 42-3502.11 (2001). Moreover, when "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 the housing provider has failed to correct the violations, the Rent Administrator 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." D.C. OFFICIAL CODE § 42-3502.08(a)(2) (2001). A violation is deemed substantial when it directly relates to health and affects every tenant. Weaver Brothers, Inc. v. Pelkey, TP 11,570 (RHC Aug. 17, 1988).

In the instant case, the substantial record evidence and the findings of fact led to the inescapable conclusion that the housing provider failed to maintain the common areas of the housing accommodations and thereby substantially reduced the tenants' services and facilities. Accordingly, the Commission grants the issues related to the common areas of the housing accommodation. The Commission reverses the hearing examiner on these issues and remands these issues for the assessment of damages in accordance with D.C. OFFICIAL CODE §§ 42-3502.08(a)(2) and 42-3509.01 (2001).

F. Whether the hearing examiner erred and abused his discretion when he failed to find damages for the housing provider's reduction in services regarding security. The de minimis damages found by the hearing examiner do not correspond to existing case law considering that the hearing examiner found substantial reductions in this service.

In George I. Borgner, Inc. v. Woodson, TP 11,848 (RHC June 10, 1987), the Commission reviewed the Rent Administrator's role in assessing the value of reduced services and facilities. The Commission held that "evidence of the existence, duration, and severity of a housing code violation is competent evidence on which to find the dollar value of the rent abatement which flows from the violation." Id. at 11. The Commission also noted, "the court suggested consideration be given to 'the nature, duration and seriousness of [housing code] defects and whether they might endanger or impair the health, safety or well being of the occupants,' when

placing a value on code defects." Borgner at 14 (quoting McKenna v. Begin, 362 N.E.2d 548 (Mass.App. 1977)).

The hearing examiner determined that a 3% reduction in rent was reasonable for the substantial reduction in security. In Borgner, the Commission determined the "percentage reduction in use approach" was proper. Id. at 13. In addition, it is appropriate to "measur[e] the tenant's loss in terms of diminished habitability." Id. at 14. The hearing examiner's failure to find a reduction in services and award compensation for chronic rodent infestation, persistent leaking pipes and collapsed ceilings,[12] the cessation of air conditioning, and the failure to maintain the common areas of the housing accommodation, reflected a want of appreciation of the severity of the housing code violations.

Since the Commission reversed the hearing examiner and ordered a refund for the myriad reductions in service, the Commission directs the hearing examiner to revisit the award for the reduced security service, when he calculates the rent refunds and rent rollbacks for the numerous reductions in service. If the hearing examiner continues to employ the percentage reduction in use approach, it will be necessary to assign appropriate percentages for each reduction in service and "fairly compute damages on a percentage reduction basis upon consideration of the evidence [of the nature of the violations] already before him." George I. Borgner, Inc. supra at 12 (quoting McKenna supra at 553).

G. Whether the hearing examiner erred when he failed to find treble damages, specifically because the housing provider attempted to increase the rent ceilings in bad faith during the time at issue in the tenant petition and by his failure to find that the housing provider in bad faith demanded illegal rent increases in 2001.

[12] See discussion infra Part III.J.

The hearing examiner did not err when he did not award treble damages for the rent ceiling violations. The penalty provision of the Act, D.C. OFFICIAL CODE § 42-3509.01 (2001), permits the Rent Administrator or the Commission to award treble damages when a housing provider demands rent in excess of the rent ceiling or substantially reduces services and facilities. The Rent Administrator is not empowered to award treble damages when the housing provider improperly increases the tenant's rent ceiling.

The penalty provision of the Act provides:

> (a) Any person who knowingly (1) demands or receives any rent for a rental unit in excess of the maximum allowable rent applicable to that rental unit under the provisions of subchapter II of this chapter, or (2) substantially reduces or eliminates related services previously provided for a rental unit, shall be held liable by the Rent Administrator or Rental Housing Commission, as applicable, for the amount by which the rent exceeds the applicable rent ceiling or for treble that amount (in the event of bad faith) and/or for a roll back of the rent to the amount the Rent Administrator or Rental Housing Commission determines.
>
> (b) Any person who wilfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $ 5,000 for each violation.

D.C. OFFICIAL CODE § 42-3509.01 (2001).

As illustrated by the penalty provision of the Act, a fine, not treble damages, is the appropriate sanction, when a housing provider willfully violates the Act by establishing an improper rent ceiling.

For the foregoing reasons, the Commission denies Issue G.

H. Whether the hearing examiner erred when he failed to find damages and treble damages for the housing provider's reduction in services in the areas of common areas, rodent infestation, air conditioning, and leaky pipes.

In order to find that the housing provider acted in bad faith, and is consequently liable for treble damages, the record evidence must show that the housing provider knowingly violated the Act and engaged in egregious conduct. The tenant has the burden of proving there was a knowing violation of the Act. Knowing only requires knowledge of the essential facts which brings the conduct within the purview of the Act, and from such conduct, the law presumes knowledge of the resulting legal consequences. Quality Mgmt. Co. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73 (D.C. 1986) cited in Third Jones Corp. v. Young, TP 20,300 (RHC Mar. 22, 1990). The second prong of the analysis is whether the housing provider's conduct was sufficiently egregious to warrant the additional finding of bad faith. Fazekas v. Dreyfuss Brothers, Inc., TP 20,394 (RHC Apr. 14, 1989). Bad faith is a continuing, heedless disregard of a duty. Third Jones Corp. v. Young, TP 20,300 (RHC Mar. 22, 1990).

Mere knowledge of housing code violations does not automatically constitute bad faith sufficient to justify an award of treble damages. The record must demonstrate that the housing provider knew the unabated housing code violations were substantial. Fazekas v. Dreyfuss Brothers, Inc., TP 20,394 (RHC Aug. 16, 1993).

The record is replete with evidence that the housing provider knew that substantial housing code violations existed throughout the housing accommodation. In addition, the record reveals a continuing, heedless disregard of the duty to keep the rental units and common areas in substantial compliance with the housing regulations. The hearing examiner issued numerous

findings, where he determined, as a matter of fact, that the housing provider failed to maintain the common areas, abate the rodent infestation, provide air conditioning, and correct the source of the recurring leaks in the rental units. However, the hearing examiner erred when he failed to find a reduction in services. Further the hearing examiner erred when he failed to issue findings of fact concerning the bad faith evidenced by the record, and he erred when he failed to award treble damages for the housing provider's reduction in services in the common areas, rodent infestation, air conditioning, and leaking pipes.

The record revealed substantial evidence of chronic rodent infestation, constantly recurring trash, debris, and waste in the common areas, continual leaking pipes and collapsing ceilings, and the failure to provide air conditioning. Individually, these conditions evince a continuing and heedless disregard of the duty not to reduce services in a manner that affects the health, safety and security of the tenants. Third Jones Corp. v. Young, TP 20,300 (RHC Mar. 22, 1990); 14 DCMR § 4211 (1991). The evidence surrounding each reduced service is sufficiently egregious to warrant the additional finding of bad faith. In totality, the conditions under which the tenants lived, and the housing provider's failure to abate the conditions, far exceed the standard for the imposition of treble damages.

Accordingly, the Commission remands this matter for a finding of reduction in services, the imposition of rent refunds and/or rent rollbacks trebled,[13] and findings of fact and conclusions of law to support trebled damages for the reduction of services for the common

[13] D.C. OFFICIAL CODE § 42-3509.01 (2001), empowers the Rent Administrator and the Commission to award treble damages when a housing provider demands rent in excess of the rent ceiling or substantially reduces services and facilities.

areas, rodent infestation, air conditioning, and leaking pipes.

I. Whether the hearing examiner erred by his failure to make adequate findings for the testimony of Ms. Johnson, Ms. Imer, and the Terminix expert witness, Mr. Poresky.

The DCAPA requires the hearing examiner to issue findings of fact on each material, contested factual issue. Braddock v. Smith, 711 A.2d 835, 838 (D.C. 1998); Newsweek Magazine v. District of Columbia Comm'n on Human Rights, 376 A.2d 777, 784 (D.C. 1977); Voltz v. Pinnacle Realty Mgmt. Co., TP 25,092 (RHC Sept. 28, 2001); Tyler v. Byrd, TP 21,821 (RHC Nov. 27, 1991); Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1988). A material issue is one that the parties raised in the petition and the agency has to consider when rendering a decision. The DCAPA only requires the hearing examiner to issue findings of fact on material issues. Daro Realty, Inc. v. District of Columbia Zoning Comm'n, 581 A.2d 295 (D.C. 1990). The hearing examiner is not required to issue findings of fact and conclusions of law on collateral issues, which may be in the testimony of each witness. Lee v. District of Columbia, 411 A.2d 635 (D.C. 1980). Therefore, the hearing examiner did not err when he did not issue findings of fact for Ms. Johnson's, Ms. Imer's, and Mr. Poresky's testimony, which was not equivalent to a material issue. Accordingly, the Commission denies Issue I.

J. Whether the hearing examiner erred by his failure to find that the persistent leaking in the tenants' apartments was a reduction in service.

The hearing examiner erred when he failed to find that the persistent leaking in the tenants' apartments was a reduction in service. The hearing examiner issued several findings of fact that lead to the inescapable conclusion that the housing provider violated D.C. OFFICIAL CODE § 42-3502.11 (2001). The record was replete with evidence that several tenants endured

persistent leaking in their ceilings and walls. The leaks often resulted in the collapse of the ceilings and falling plaster. The hearing examiner found that the substantial record evidence led to the following findings of fact concerning the leaks in the tenants' units:

> 23. The bathroom ceiling in the Petitioner's [Alston Cyrus] rental unit has fallen on two (2) occasions, once in the Fall of 1998 and the other occasion in the Spring of 2000. The bathroom that fell in the Spring of 2000 was reported to management and was repaired within 2-3 days.
>
> 24. After the Petitioner AC reported the damaged ceiling to management, management repaired the bathroom ceiling in approximately two (2) weeks.
>
> ....
>
> 46. On December 25, 1998 or January 1, 1999, the living room ceiling fell in the Petitioner CJ's [Constance Jackson's] unit.
>
> 47. In 1999, the Petitioner CJ's bathroom ceiling was leaking, but was repaired within 2 to 3 days.
>
> 48. In January 2001, CJ's [sic] had a leaking ceiling and the property manager was notified.
>
> ....
>
> 58. On February 3, 2000, FW's [Francis Walker's] bathroom ceiling fell and it took management two (2) weeks to make the repairs.
>
> 59. In September 2001, one of FW's bedrooms was unavailable for one (1) week because of a damaged ceiling which was not repaired.
>
> ....
>
> 75. In 1999 and 2000, the Petitioner UW's [Urna Walker's] bathroom ceiling fell. In 1998, the bathroom adjacent [to the] kitchen leaked. After repairs were made in 1998, the same bathroom leaked in 1999.
>
> 76. In 2001, the whole bathroom ceiling fell in Petitioner UW's apartment. The Respondent repaired the fallen ceiling in two (2) weeks.

Decision at 9, 11-13.

In addition to the leaking and collapsed ceilings chronicled in the above quoted findings of fact, several other tenants offered testimony and photographs that depicted crumbling plaster, holes and collapsed ceilings that resulted from recurring leaks.

On February 5, 2002, Errol Smith, Sr., who resides at 4283 6th Street, S.E., Unit 201 with his wife, two daughters and one son, testified concerning the myriad housing code violations in his rental unit. He testified that he experienced leaks and collapsed ceilings in both bathrooms in his rental unit. Mr. Smith testified that the ceiling in the bathroom, which is closest to the living room, collapsed in August 1998 and was repaired three days later. In addition, the ceiling collapsed in the spring and summer of 1999 and was repaired three days later. In December 2001, three-fourths of the ceiling fell in, and it took a week to repair.

Mr. Smith testified that the ceiling in the bathroom that is closest to the kitchen leaked and collapsed in the summer of 1999 and was repaired within a couple of days. Mr. Smith offered several photographs, which depicted the condition of the bathroom ceilings. T. Exh. 38 depicts the ceiling above the bath tub in the bathroom closest to the living room. The photograph clearly depicts the entire ceiling that was taken down following the collapse of three-fourths of the ceiling in December 2001. The photograph shows the exposed beams and pipes and depicts the magnitude of the collapse.

In addition, Mr. Smith introduced T. Exh. 39, which he described as a photograph of the bathroom ceiling. The exhibit shows a gaping section of the ceiling with exposed pipes, beams and dangling dry wall. The photograph also depicts peeling paint on the walls and ceiling. The

tenant testified that the ceiling was in this condition for a week and a half. Mr. Smith also introduced T. Exhs. 40 and 41, which were photographs of the small bathroom closest to the kitchen. The photographs, taken in 1999, show a long crack in the ceiling, what appears to be two smaller holes, and peeling paint and plaster on the ceiling and wall. Mr. Smith testified that the rental office told him and his family to use one bathroom at a time for fear something may fall down.

In light of the testimony and the findings of fact, the hearing examiner erred when he concluded, as a matter of law that the tenants failed to prove that the housing provider substantially reduced their services and facilities. See Perkins v. District of Columbia Dep't of Employment Servs., 482 A.2d 401 (D.C. 1984) (holding conclusions of law must flow rationally from the findings of fact). The tenants endured excessive violations of the housing code which affected their health and safety as well as the habitability of their rental units. The substantial evidence on the record of the proceedings proved the tenants suffered a substantial reduction in services when the housing provider failed to remedy the cause of the leaking pipes, and prevent the recurring leaks, collapsed ceilings and falling debris. Moreover, the tenants suffered reduced facilities when they were unable to use their bathrooms while the ceilings were in disrepair.

Accordingly, the Commission grants Issue J, reverses Conclusion of Law 6 and remands this matter to the hearing examiner to assess damages, award rent refunds and/or rent roll backs to each tenant who offered evidence of leaking, collapsed ceilings, and peeling paint and plaster.

K. Whether the hearing examiner erred by his overall failure to consider persistent and serious housing code violations as a reduction in service or other actionable ground to refund rent to the petitioners. That is, under the hearing examiner's analysis, egregious, unsafe, unsanitary, and even life-threatening conditions are

not actionable at RACD unless they have deteriorated within the statute of limitations. This analysis is contrary to existing case law and public policy.

The hearing examiner erred by his overall failure to consider persistent and serious housing code violations as reductions in services. Although the findings of fact chronicled egregious, unsafe, and unsanitary conditions, the hearing examiner failed to conclude as a matter of law that the chronic rodent infestation, filthy common areas, leaking and collapsed ceilings, and the absence of air conditioning constituted substantial reductions in service. The conditions about which the tenants testified, and the housing provider's witnesses confirmed, constituted substantial reductions in services.

Contrary to the tenants' assertion in Issue K, the hearing examiner did not conclude that the tenants were not entitled to compensation because of the statute of limitations. The hearing examiner concluded that the tenants failed to prove, by a preponderance of the evidence, that the housing provider substantially reduced related services and facilities in the control of rodents, maintenance of air conditioners, cleaning of common areas, and the repair of leaky pipes. Conclusion of Law 6, Decision at 24. The failure to find a reduction in services was contrary to the Act, case law, public policy, and the substantial record evidence.

The tenants and the housing provider's witnesses testified at great length about the myriad ways in which the housing provider's failure to abate housing code violations reduced services and affected the health, safety and security of the tenants. See 14 DCMR § 4211 (1991).

The rodent infestation was described as rampant by the tenants, the housing provider's exterminator, and the assistant property manager. One tenant described being bitten by a rat and finding dead rats in her sofa and under her bed. Others testified that they saw mice and rats

running throughout their living rooms, kitchens and bedrooms and leaving droppings on their kitchen stoves and cabinets. They described rats eating their food, clothing, and running freely throughout their homes. Many of the tenants testified about the adverse affect the rodents had on their wives, children, and grandchildren who resided in the rental units.

The tenants, the assistant property manager, and exterminator described the recurring problems of trash and other filth in the common areas. The description of the non-residents sleeping and urinating in the halls, leaving condoms, syringes and trash invited the finding of a reduction in services in the common areas.

The oral and documentary evidence concerning defective plumbing, recurring leaks and collapsed ceilings, and the obvious danger imposed by falling dry wall, paint and plaster, constituted a substantial reduction in services. Finally, the housing provider's admission that it did not provide air conditioning, which it repeatedly listed in its registration statements, mandated a finding of a reduction in the air conditioning service.

The conditions in the tenants' units and common areas are violations of the housing code. The regulation, 14 DCMR § 4216 (1991) lists the conditions that reveal an absence of compliance with the housing code. Many of the conditions in the tenants unit appear in § 4216, which provides:

> "[S]ubstantial compliance with the housing code" means the absence of any substantial housing violations as defined in §103(35) of the Act, including but not limited to, the following:
>
> (c) Frequent lack of sufficient heat;
>
> ....

(g) Leaks in the roof or walls;

(h) Defective drains, sewage systems, or toilet facilities;

(i) Infestation of insects or rodents;

....

(m) Accumulation of garbage or rubbish in common areas;

(n) Plaster falling or in immediate danger of falling;

....

(p) Floors walls or ceilings with substantial holes;

....

(r) Doors lacking required locks;

....

and

(u) 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 (1991) (emphasis added).

The reduction in services and facilities provision of the Act, D.C. OFFICIAL CODE § 42-3502.11 (2001), was drafted to ensure that housing providers provide services required by the housing code. If the hearing examiner allows housing providers to escape providing those services, he will permit the housing provider to defeat the Council's objective to provide decent housing to renters in the District of Columbia. Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993). Such a result is not tenable.

The housing provider does not deny the existence of the conditions that the tenants allege constituted substantial reductions in services. The housing provider, through counsel, suggests that the tenants have not suffered a reduction in services, because they did not offer temperature readings or mitigate their damages by using space heaters. The housing provider admitted it did not maintain the air conditioners, and testified that it did not supply air conditioning in the face of registration statements to the contrary. In the area of security, the housing provider testified that it did not provide the security guards listed in the registration statements, acknowledged removing locks from the entrance doors, and its inability to maintain the security gate. In addition, the housing provider's witnesses acknowledged rodent infestation, dirty common areas, and leaking ceilings.

The housing provider offered its efforts to correct the violations, and the actions of non-parties in defeating its efforts, as evidence to defeat the tenants' claims. Confronted with a similar scenario in Interstate General Corp. v. District of Columbia Rental Hous. Comm'n, 501 A.2d 1261 (D.C. 1985), the court held: "These matters are irrelevant to the question of whether the tenants were substantially deprived of a service which the landlord contracted to provide." The court rejected the housing provider's argument that § 42-3502.11 "is couched in such a way as to imply that the landlord's conduct must constitute willful neglect or affirmative wrongdoing *before a reduction in service can be termed substantial.* This is not the case." Id. (emphasis in original).

"The thrust of § [42-3502.11] of the ... Act is clear: to protect tenants from or compensate them for some reductions in services ... The section is triggered ... by a substantial

change or, to use the words of the Act, when related services 'are substantially increased or decreased.'" Washington Realty Co. v. Rowe, TP 11,802 (RHC May 14, 1986).

In the instant case, the substantial record evidence and the findings of fact revealed that the tenants suffered substantial reductions in services. The hearing examiner erred when he failed to find reductions in services or compensate the tenants for the reductions they suffered.

For the reasons articulated throughout this decision and order, the Commission reverses Conclusion of Law 6 in which the hearing examiner concluded that the tenants failed to prove, by a preponderance of the evidence, that the housing provider substantially reduced related services and facilities in the control of rodents, maintenance of air conditioners, cleaning of common areas, and the repair of leaky pipes. The Commission instructs the hearing examiner to compensate the tenants for the substantial reductions in services in accordance with this decision.

L. Whether the hearing examiner erred by his failure to find that there were substantial housing code violations at the time of all 2001 rent increases, including heat, rodents, leaking, security, and common area violations.

The hearing examiner did not err when he failed to find that the housing accommodation was not in substantial compliance with the housing code at the time of the 2001 rent increases, because the tenants did not raise this claim in the tenant petition.

When the tenants filed the initial petition, they completed the Rent Administrator's tenant petition/complaint form. The form petition contains several possible complaints involving rent increases. The petition contains brackets for the tenants to select the claims which they intend to allege in the petition. One of the possible claims was an allegation that a rent increase was taken when the units were not in substantial compliance with the housing code. In the instant case, the

tenants did not select this claim when they filed the petition. Moreover, the tenants did not raise the claim when they amended the petition, after they retained counsel.

Accordingly, the Commission denies Issue L, because the hearing examiner did not err when he failed to issue findings of fact concerning a claim that the tenants did not raise.[14]

P. Whether the hearing examiner erred in his Order (request for attorney's fees) by failing to find that Tamala Earle was entitled to attorney's fees.

Whether the hearing examiner abused his discretion in his Order dated November 6, 2002 by his failure to award fees for the hours submitted on behalf of Tamala Earle.

On October 15, 2002, the tenants submitted a Memorandum in Support of Petitioner's Motion for Attorney's Fees. The motion contained five documents entitled Affidavit in Support of Petitioner's Motion for Attorney's Fees. The purported affidavit for Tamala Earle was not signed by Ms. Earle or notarized. On October 31, 2002, the tenants submitted an affidavit[15] that contained Ms. Earle's signature. However, the affidavit was not notarized. According to the document, Ms. Earle was employed by the United States Department of Justice in Denver, Colorado. In a handwritten note at the bottom of the affidavit, she apologized for the delay in signing the affidavit. She indicated that she was unable to sign the affidavit before October 21, 2002, because she was in training. The tenants' attorneys have offered no explanation for the

[14] Although the hearing examiner did issue findings of fact on the claim that was not before him, he commented upon the substantial housing code violations that existed when the housing provider increased the rent. When the hearing examiner addressed the tenants' rent increase notice claim, he found that that notice was defective. He stated that the defect could not be cured, because the housing provider could not certify that the units were in substantial compliance with the housing code since the units were infested with rodents in July and September 2001. Decision at 17.

[15] The Commission's use of the term affidavit is merely descriptive and not meant to imply that the document constituted a legally sufficient affidavit.

failure to notarize the affidavit.

When the hearing examiner issued the order on attorneys' fees, he stated that he granted the tenants' request for a two-week extension to file an executed affidavit for Ms. Earle. He noted that the document, which the tenants filed two weeks later on October 31, 2002, was not notarized. The hearing examiner cited 14 DCMR § 3825.7 (1998),[16] which provides" "An award of attorney's fees ... shall be based on an affidavit executed by the attorney of record...." The hearing examiner found that Ms. Earle did not satisfy the requirements of § 3825.7, because she did not submit an affidavit. An affidavit is a "written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such an oath." BLACK'S LAW DICTIONARY 54 (5th ed. 1979). Since Ms. Earle did not submit an affidavit, she did not satisfy the requirements of 14 DCMR § 3825.7 (1998). The hearing examiner did not err when he denied Ms. Earle's request for attorney's fees, because she failed to submit an affidavit required to support the award.

Accordingly the Commission denies Issue P.

Q. Whether the hearing examiner erred and abused his discretion in his severe reduction of Judson Powell's hours.

The hours that student attorneys employ before the Rent Administrator are compensable, provided that the student is supervised by an attorney. Zenith Trust v. Tenants of 3217 Connecticut Ave., N.W., TP 20,510 (RHC Dec. 11, 1989); 14 DCMR § 3825.5 (1998). However, the Commission will not decide fee applications for work that students perform before the Rent Administrator. The work performed before the Rent Administrator must be judged and

[16] D.C. Register, Vol. 45, No. 6 at 684-686 (Feb. 6, 1998).

evaluated by that tribunal, since the hearing examiner was in the best position to judge the nature and quality of the services rendered at the evidentiary level. Alexander v. Lenkin Co. Mgmt., Inc., TP 11,831 (July 20, 1989).

The Commission notes that the hearing examiner reduced Student Attorney Judson Powell's requested hours from 238.1 hours to 39 hours. According to Mr. Powell's affidavit, he was assigned to TP 26,197 from May 2, 2002 until August 6, 2002. In the three months he was assigned to the case, Mr. Powell asserted that he devoted 238.1 hours to the case. Student Attorney White-Rosenburg requested 191.3 hours for five months, Shannon Ford requested 38 hours for less than two months, and Tamala Earle requested 131.9 hours for five months.

When Mr. Powell submitted the affidavit, he calculated the number of hours required to perform various tasks. The hearing examiner reviewed and evaluated each task and found that many of Mr. Powell's hours were redundant and excessive. Since the Commission is an appellate tribunal, it will not invade the province of the hearing examiner to exercise his discretion when awarding attorney's fees. The hearing examiner was in the best position to evaluated Mr. Powell's request for attorney's fees at the evidentiary level. Alexander supra. Confronted with a large disparity in the number of hours requested by Mr. Powell as compared to the hours submitted by the other student attorneys, the hearing examiner did not abuse his discretion when he ruled that Mr. Powell's request was excessive and redundant. In the absence of proof that the hearing examiner abused his discretion, the Commission denies Issue Q.

IV. THE HOUSING PROVIDER'S APPEAL ISSUES

A. Whether treble damages entered by the hearing examiner in favor of Ms. Walker, Mr. Smith, Mr. Frazier, and Mr. Young should be reversed

because the legal elements of knowing, and willful are absent from this record. In addition, as previously briefed by the housing provider, there was no claim made, or notice provided, during the evidentiary portion of the proceedings, that treble damages would be sought or factual assertions would be made, or litigated, involving willfulness or knowing violations of the Act as predicates to treble damages.

The Commission begins its review of Issue A by addressing the later portion of the issue. In Middleton v. William J. Davis, Inc., TPs 22,268 & 23,065 (RHC Nov. 17, 1994), the Commission rejected the housing provider's argument that it is entitled to notice that a tenant is requesting treble damages. The penalty provision of the Act provides for treble damages when the housing provider's conduct rises to the level of bad faith. D.C. OFFICIAL CODE § 42-3509.01(a) (2001). The Act does not require notice as a prerequisite for the award of treble damages.

In order to award treble damages there must be a knowing violation of the Act. See Quality Mgmt. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73 (D.C. 1986) cited in Third Jones Corp. v. Young, TP 20,300 (RHC Mar. 22, 1990). After the tenant proves a knowing violation of the Act, there must be record evidence that the housing provider's conduct was sufficiently egregious to warrant the additional finding of bad faith. Fazekas v. Dreyfuss Bros., Inc., TP 20,394 (RHC Apr. 14, 1989). "[I]n order to maintain treble damages the finding of bad faith[17] must be based upon specific findings of fact that will show this higher level of culpability." Velrey v. Wallace, TP 20,431 (RHC Sept. 11, 1989) at 2.

There was substantial record evidence to support the treble damages entered by the hearing examiner in favor of Ms. Walker, Mr. Smith and Mr. Frazier, because the record was

[17] In Velrey, the Commission noted that Black's Law Dictionary defined bad faith as "not simply bad judgement [sic]

replete with evidence to support the legal elements of knowing and willful conduct. In the text of the decision and order, the hearing examiner discussed and applied the definitions of knowing and willful to the evidence, and determined that the housing provider acted knowingly and willfully. Decision at 25-27. After evaluating the evidence, the hearing examiner issued the following conclusion of law:

> The evidence has demonstrated that the Respondent has engaged in bad faith by knowing [sic] and willingly [sic] failing to repair an adequate [sic] security system for the Petitioners and for knowingly and willingly [sic] failing to provide adequate heat to Petitioners Raymond Frazier, Urna Walker and Errol Smith, in violation of the Rental Housing Act of 1985.

Conclusion of Law 9, Decision at 25. However, the hearing examiner did not issue findings of fact on the issue of bad faith.

In Citizens Assoc. of Georgetown, Inc. v. District of Columbia Zoning Comm'n, 402 A.2d 36 (D.C. 1979), the court ruled that there must be findings of fact on each contested issue; the decision must rationally flow from the facts; and there must be sufficient evidence in the record to support each finding of fact. See also Velrey v. Wallace, TP 20,431 (RHC Sept. 11, 1989);[18] D.C. OFFICIAL CODE § 2-509(e) (2001).[19] In the instant case, there was record evidence concerning the housing provider's conduct, and the hearing examiner discussed the evidence in

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or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity."

[18] In Velrey, the Commission reversed the award of treble damages, because the record did not contain substantial evidence to support the award. In the instant case, the record contains evidence that supports the award. Missing from the hearing examiner's decision are findings of fact to support the award of treble damages.

[19] The District of Columbia Administrative Procedure Act, D.C. OFFICIAL CODE § 2-509(e) (2001), provides:

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

the body of the decision and order. However, the hearing examiner erred when he failed to issue findings of fact on what evidence constituted bad faith. See Hedgman v. District of Columbia Hackers' License Appeal Bd., 549 A.2d 720, 723 (D.C. 1988); Wheeler v. District of Columbia Bd. of Zoning Adjustment, 395 A.2d 85, 88 (D.C. 1978) (holding that a summary of the evidence, without specific findings of fact did not meet the requirements of the DCAPA).

The Commission reviewed a similar scenario in Baccous v. Matthews, TPs 24,470 & 24,471 (OAD Oct. 12, 2001). The record before the hearing examiner read like a textbook example of bad faith. After reviewing the evidence, the hearing examiner imposed treble damages. However, the hearing examiner did not issue findings of fact on the issue of bad faith. In Kamerow v. Baccous, TPs 24,470 & 24,471 (RHC Sept. 26, 2002), the Commission noted the abundance of record evidence to support the treble damage award. However, the Commission remanded the petitions for findings of fact on the issue of bad faith, to support the award of treble damages.

Similarly, the Commission affirms the rent refund, vacates the award of treble damages, and remands this issue for findings of fact that support the hearing examiner's decision to award treble damages.

B. Whether the fine in the amount of $5,000 for alleged substantial reduction of services or facilities should be reversed as being beyond the claims made in the petition and, in any event, as unsupported as a matter of law because of the dearth of factual support for willfulness, malice, or knowing violations of the Act.

In accordance with the penalty provisions of the Act, the Rent Administrator may impose a fine of not more than $5000.00 for each violation of the Act. D.C. OFFICIAL CODE § 42-3509.01(b) (2001) provides:

> Any person who wilfully (1) collects a rent increase after it has been disapproved under this chapter, until and unless the disapproval has been reversed by a court of competent jurisdiction, (2) makes a false statement in any document filed under this chapter, (3) commits any other act in violation of any provision of this chapter or of any final administrative order issued under this chapter, or (4) fails to meet obligations required under this chapter shall be subject to a civil fine of not more than $ 5,000 for each violation.

The housing provider urges the Commission to reverse the fine. The housing provider argues that the fine is beyond the claims made in the petition and unsupported as a matter of law, because of the dearth of factual support for willfulness, malice or knowing violations of the Act. The Commission disagrees.

In the text of the decision, the hearing examiner conducted a thorough analysis of the penalty provision of the Act. The hearing examiner evaluated the housing provider's conduct in the context of whether the housing provider knowingly and willfully violated the Act. After conducting the analysis, the hearing examiner determined that the housing provider acted knowingly and willfully, and he imposed a fine in the amount of $5000.00. However, the hearing examiner did not issue findings of fact or conclusions of law concerning whether the housing provider willfully violated the Act. See Meyers v. Smith, TP 26,129 (RHC Mar. 17, 2003) (holding that the hearing examiner must issue findings of fact and conclusions of law on whether the housing provider acted willfully). Since the hearing examiner did not issue findings of fact and conclusions of law on the issue of willfulness, the Commission vacates the fine and

remands this matter for findings of fact and conclusion of law on the issue of willfulness.

C. **Whether, for the reasons set forth in the preceding paragraph, the fine in the amount of $2500.00 for alleged demand of rent increases should be vacated and dismissed. As argued in its brief, the housing provider did not request any "increase" and in any event a fine is unsupportable in this case.**

D. **Whether, for the reasons previously stated and incorporated herein, the fine in the amount of $2500.00 for "filing improper rent ceilings" should be vacated and reversed, because there is no factual support for willfulness, knowing violation of the Act in this regard, nor is there any discernible basis for the amount of this arbitrary award.**

E. **Whether for the reasons stated in the previous paragraph and incorporated herein, the fine in the amount of $2500.00 should be vacated and reversed for the "serving improper and invalid notices of rent increase."**

The housing provider argues that the hearing examiner erred when he imposed three fines in the amount of $2500.00 each, because there was no finding of willfulness.

The Act empowers the hearing examiner to impose fines when a housing provider willfully violates the Act. A prerequisite to the imposition of a fine is a finding of willful conduct. In Quality Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, 505 A.2d 73 (D.C. 1986), the court discussed the meaning of the term willful. The court stated:

> Section [42-3509.01(b)] prohibits anybody from collecting rent increases that have been disapproved, making false statements in filing rent control documents, or otherwise behaving in a manner contrary to the rent control statute. A $5,000 fine is provided for each occasion on which [§ 42-3509.01(b)] is "willfully" violated. From the context it is clear that the word "willfully" as used in [§ 42-3509.01(b)] demands a more culpable mental state than the word "knowingly" as used in [§ 42-3509.01(a)]. This interpretation is buttressed by reference to the legislative history ....

Id. at 76 n.6. The court also quoted the following portion of the legislative history concerning the

distinction between the terms knowingly and willfully.

> "Willfully" goes to intent to violate the law. "Knowingly" is simply that you know what you are doing. A different standard. If you know that you are increasing the rent, the fact that you don't intend to violate the law would be "knowingly ". If you also intended to violate the law, that would be "willfully".

Id. (quoting Council of the District of Columbia, Council Period 3, Second Session, 43rd Legislative Session at 88-93 (Nov. 14, 1980)).

The hearing examiner did not discuss the three $2500.00 fines in the text of the decision, and he did not issue findings of fact or conclusions of law concerning whether the housing provider willfully violated the Act. The primary purpose of findings of fact and conclusions of law is to enable the reviewing tribunal to decide whether the decision flows as a matter of law from the facts and whether the facts are supported by the substantial record evidence. Woodbridge Nursery Sch. v. Jessup, 269 A.2d 199 (D.C. 1970).

The hearing examiner ordered the housing provider to pay a fine in the amount of $2500.00 for demanding improper rent increases, filing improper rent ceilings, and serving improper and invalid rent increase notices. Decision at 49. However, the hearing examiner did not issue findings of fact and conclusions of law to demonstrate that the fines were warranted.

The Commission reverses the three fines in the amount of $2500.00 each and remands this matter for findings of fact and conclusions of law concerning willfulness as embodied in D.C. OFFICIAL CODE § 42-3509.01(b) (2001). The hearing examiner shall issue findings of fact concerning the presence or absence of bad faith surrounding the rent increases, improper rent ceilings, and invalid rent increase notices.

G. Whether the tenants who did receive refunds or rollbacks due to diminished services and facilities relating to security failed to demonstrate a relative reduction of such security from the point in time when this landlord acquired the property at a point which is not barred by the statute of limitations (December 1997 – January 1998), and in any event failed to provide credible factual support for the claim.

I. Whether the finding that security was diminished should be reversed and reconsidered, because the evidence demonstrates that in January 1998 such fence was already in a state of disrepair.

When the tenants testified concerning the diminished security service, they did not limit their claim to the point in time that the housing provider acquired the property or to the security fence. The tenants complained about the housing provider's failure to provide proper security in the three years immediately proceeding, January 11, 2001, the date that they filed their claim.[20]

The tenants introduced four RACD registration forms in which the housing provider indicated that it provided security guards. The housing provider or its agent signed each form and certified that the information provided on the forms was complete and accurate. The tenants introduced T. Exh. 55, which is an Amended Registration Form that WTG filed on January 24, 1997, T. Exh. 58, which is a Corrected Amended Registration Form filed on June 14, 1999, T. Exh. 67, which is an Amended Registration Form filed on January 24, 1997, and T. Exh. 71, a Corrected Amended Registration Form filed on June 14, 1999. On four separate registration forms, WTG listed security guards as one of the services provided in connection with the rental

[20] In Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993) the Commission held that any "failure to provide the standard services and facilities amounted to a reduction in services and facilities, notwithstanding the date the violation commenced." The District of Columbia Court of Appeals affirmed the Commission's decision in Mudd v. District of Columbia Rental Hous. Comm'n, 546 A.2d 440 (D.C. 1988). See also Mudd v. Davis, TP 12,036 (RHC Apr. 23, 1987).

units. The Commission has repeatedly held that housing providers are required to provide the services and facilities that are listed in the housing provider's registration files. Pinnacle Mgmt. Co. v. Marsh, TP 24,827 (RHC Sept. 7, 2000); Bonheur v. Oparaocha, TP 22,970 (RHC Feb. 4, 1994).

The housing provider testified concerning its security measures during the three years immediately proceeding the date that the tenants filed the petition. In addition, the housing provider filed RACD registration forms in 1999, which was within the three year period, stating that it provided security guards. See Majerle Mgmt., Inc. v. District of Columbia Rental Hous. Comm'n, No. 02-AA-427 (D.C. Dec. 30, 2004) (holding that action was not barred by the Act's limitations period when the housing provider made admissions in RACD filings within the statutory period).

The hearing examiner issued the following findings of fact, which he reached after analyzing the testimony concerning the myriad security lapses within the statutory period.

Findings of Fact

9. During the Summer of 2000, management took the lock off of the main entry door to his apartment building located at 4297 – 6th Street, SE. The Tenant Petitioner spoke to the maintenance person regarding replacing the lock, but management failed to replace such lock.

....

20. The Petitioner AC is very concerned about the lack of security at his apartment building.

21. The front entry door to the Petitioner AC's apartment building has been broken since 1997.

....

36. The Petitioner CY, who works late and returns home at approximately 12:30 a.m., has found persons who are not tenants loitering in the hallways of his building when he returns home from work late at night.

37. In the fall of 1999, the Petitioner found a person sleeping in front of his door.

38. The Petitioner CY did not complain to management about there being no locks to his building. The Petitioner did not complain to management about broken locks or the lack of security in 1999, 2000 and 2001.

....

52. The problems with security in the Petitioner CJ's apartment building have become worse since the Respondent terminated the security guards.

....

72. The lock on the Petitioner UW's entry door to her building was broken in 2000 and, as of the date of her testimony, January 17, 2002 had not been repaired.

73. During the period from approximately January 2001 to April 2001, there have been approximately 11 fires set in front of the Petitioner UW's apartment.

74. The presence of security guards when the apartment complex was operated by HUD made the Petitioner UW "feel good."

....

82. The lock on the main entry door to the Petitioner ES's apartment building is broken and never been repaired.

83. Because of the lack of security, the Petitioner ES does not feel safe in his unit.

....

88. At the time of the purchase of the Cascade Park Apartments, security was provided by a security company whose security officers patrolled the housing accommodations and the grounds.

89. Ascend Communities decided to terminate the security company, which provided security guards who patrolled the apartment complex, and to install steel gates and fences. The new gates and fences were installed several months after the Ascend Communities purchased the Cascade Park Apartments.

90. The landlord prior to the Respondent, employed full-time security guards. Eric Fedawa, who is the President of Ascend Communities testified that the security guards were terminated because the Respondent did not believe that it was getting the proper service for the monies paid.

91. A Seventh District police substation was established at the subject apartment complex but was discontinued.

....

95. Ms. Johnson conceded that some of the gates on the security system that was installed by the Ascend Communities are not operable, and that some of the locks on entry doors to apartment complexes are broken.

....

102. Ms. Imer observed that the security at the subject apartment complex was poor and that the common areas needed better maintenance. Because of the expense involved, security guards were not considered as an option at the subject apartment complex.

103. The Petitioners have notified management about the broken and security gates since at least January 1998.

Decision at 8-15.

The findings of fact are supported by the substantial record evidence on the issue of security. The tenants did not limit their claim to the security fence, and the evidence supported the finding that the reduction in security occurred during the statutory period. Accordingly, the Commission denies Issues G and I.

H. Whether the January 2001 notice provided to the tenants was a notice of "rent" increase but rather, was termination of a rent concession.

When the hearing examiner issued the decision and order, he evaluated and analyzed the January 2001 notice in the body of the decision. Decision at 16. In the text of the decision, the hearing examiner determined that the January 2001 notice was a rent increase notice. However, the hearing examiner did not issue findings of fact concerning the rent increase notice. Hearing examiners must issue findings of fact on all contested issues. D.C. OFFICIAL CODE § 2-509(e) (2001). Failure to issue findings of fact on a contested issue is reversible error. See Braddock v. Smith, 711 A.2d 835, 838 (D.C. 1998); Newsweek Magazine v. District of Columbia Comm'n on Human Rights, 376 A.2d 777, 784 (D.C. 1977); Tyler v. Byrd, TP 21,821 (RHC Nov. 27, 1991); Lustine Realty v. Pinson, TP 20,117 (RHC Jan. 13, 1988).

In accordance with the DCAPA and applicable case law, the Commission remands Issue H and directs the hearing examiner to issue findings of fact concerning the January 2001 notice.

> **J. Whether any finding that the housing provider diminished heat should be reversed, especially based upon only the unsupported and unquantified allegation that a particular person "felt like an Eskimo." The findings in favor of Ms. Walker, Mr. Frazier and Mr. Smith should likewise be reconsidered and reversed as without factual support.**
>
> **F. Whether the decision and order with respect to rent reduction and rollback for the tenants' claim of lack of heat should be reversed because of a lack of credible evidence to support a "lack of heat," failure of tenants to meet their burden of proof in demonstrating that the heat was actually insufficient, using the DCMR as a yardstick, and because in any event the tenants could have employed or used space heaters furnished by the housing provider in their apartments and chose not to do so, thus failing to mitigate their damages and/or contributory negligence.**

The hearing examiner did not err when he found that Urna Walker, Raymond Frazier and Errol Smith suffered a reduction in services when the housing provider failed to supply adequate

heat to their rental units. Each tenant offered testimonial evidence to support their claims.

Urna Walker testified that problems with the boiler led to insufficient heat in her unit from 1998 through the winter of 2001. She testified that the heat was on at times and off at other times in the fall of 1998, and there were problems throughout the winter. Ms. Walker testified that there was always something wrong with the heat, so she had to use electric space heaters. In the winter of 1999, she was cold when she awoke each morning. She reported the problem to Ms. Johnson, but no one came to repair the heat, because they told her there was a problem with the boiler. She continued to experience problems throughout her unit in the winters of 2000 and 2001. She testified that she complained to Ms. Johnson and Ms. Sutton. She testified that she purchased additional space heaters. The lack of heat affected the use and enjoyment of her unit, and she was forced to use electric heaters and pay increased electricity bills. (OAD Hearing CD-ROM, Jan. 17, 2002).

Mr. Frazier testified that during the winter it felt as if there was no heat in the kitchen, bathrooms, and his bedroom. He testified that he reported the problems in 1998 through 2001. He indicated that management bled the radiators, but he still did not have heat. He testified that he used the oven to heat the apartment from November through February 1999 and November through February 2000. In October 2000, he reported the problem to Ms Johnson, but he continued to have problems after November 17, 2001. He said that the lack of heat caused him to live like an Eskimo. (OAD Hearing CD-ROM, Dec. 5, 2001).

On February 5, 2002, Errol Smith testified concerning the absence of heat in every room in his three bedroom rental unit, from 1998 through 2001. He testified that he called the rental

office a hundred times. He said management used to send people to bleed the radiators, but then they stopped. Mr. Smith testified that he had to use electric heaters, but the rental unit was still cold. He used the oven for heat, but he was afraid to leave it on too long, and he did not want to go to sleep with heaters on. In addition, he placed a pot of water in the oven to create steam. In 1999, Mr. Smith had the problem throughout the winter, especially when the temperature was really low. He testified that he contacted management about the heat two times per week. In 2000, he used a lot of blankets. Mr. Smith testified that he complained one to two times per week, and his wife called; but no one showed up. In 2001, it was still cold. He used the oven and the heater, but he could only use the heater a couple of hours because he did not want to take chances. He described his unit as being uncomfortable from 1998 to 2001, and he and his family could not sit around their home.

On appeal, the housing provider urges the Commission to reverse any finding of diminished heat, because the finding was based upon only the unsupported and unqualified allegation that a particular person felt like an Eskimo. In Hiles v. Kim, TP 21,210 (RHC June 28, 1991), the Commission rejected the notion that the tenants have to "quantify" the degree of heat loss. In Hiles, the Commission stated: "The housing provider argues that none of the tenants took temperature readings in their units on the dates cited in the petition, therefore, we have no way to determine the degree of their inconvenience. We do not find this point significant .... [I]t would not be reasonable to expect that a tenant would keep handy a thermometer to take a temperature reading whenever their building's heating system broke." Id. at 5-6. In George I. Borgner, Inc. v. Woodson, TP 11,848 (RHC June 10, 1987), the Commission

rejected the housing provider's argument that the tenants must take temperature readings and offer evidence that the temperature fell below the legal minimum temperature prescribed by the housing regulations. The Commission held that the tenants' testimony concerning the use of ovens, space heaters, and sweaters sufficient to establish the fact of reduced heat.

As illustrated by the Commission's holdings in Hiles and Borgner, the tenants' claims are not without factual support, simply because they did not use a thermometer to "quantify" their claims. Each tenant testified concerning the absence of adequate heat in their units, the use of space heaters, ovens, and blankets, as well as the effect inadequate heat had on the habitability of their units.

After considering the record evidence, the hearing examiner issued the following findings of fact and conclusion of law concerning the inadequate heat in Urna Walker, Raymond Frazier and Errol Smith's rental units.

Findings of Fact

7. The Tenant Petitioner [Raymond Frazier] was without sufficient heat in his apartment during the winter months of 1998, 1999, 2000 and 2001. Such lack of heat was reported to management November/December 1998; November 1999; October 2000 and November 2000. Because of the lack of heat in his apartment, the Tenant Petitioner "felt like an [E]skimo" and used his oven to stay warm.

....

66. In 1998 Petitioner [Urna Walker] complained about the insufficient heat in her unit. In 1998, management did respond by bleeding the radiators.

67. In 1999 and 2000 the Petitioner UW had insufficient heat in her apartment during the winter months. The Petitioner complained to management each year that she did not have adequate heat for her apartment. In 1999, no one from management responded to her complaints about insufficient heat in her apartment. In 2000, management did

respond by sending someone to bleed the radiators, but that did not fix the problem regarding insufficient heat.

68. In 1998 and 1999, the Petitioner UW was informed by management that there was a problem with the boiler.

69. In 2000, the Petitioner UW's daughter purchased two (2) electric heaters for her mother.

70. In 2001, the Petitioner complained to the management that the heat was too high in her apartment.

....

81. During the winter months in 1998, 2000 and 2001, the Petitioner ES [Errol Smith] had insufficient heat in his apartment and such problem was reported to management. In 1998, the Petitioner had to use electric heaters and the oven to heat his unit. In 2000 and 2001, the Petitioner placed a pot of hot water in the oven to keep his unit warm.

Decision at 8, 12-14.

Conclusion on Law

5. The Petitioners have proven, by a preponderance of law [sic], that the Respondent substantially reduced related services/facilities relating to ... heat for Petitioners Raymond Frazier, Urna Walker and Errol Smith, in violation of D.C. [Official] Code Section 42-3502.11 (2001 ed.) and the Rental Housing Act of 1985.

Decision at 24.

In Issue F, the housing provider argued:

The [d]ecision and [o]rder with respect to the rent reduction and rollback for the tenants' claim of lack of heat should be reversed because of a lack of credible evidence to support a "lack of heat," failure of tenants to meet their burden of proof in demonstrating that the heat was actually insufficient, using the DCMR as a yardstick, and because in any event the tenants could have employed or used space heaters furnished by the housing provider in their apartments and chose not to do so, thus failing to mitigate their damages and/or contributory negligence.

Notice of Appeal at 2.

In accordance with D.C. OFFICIAL CODE § 42-3502.16(h) (2001), the Commission affirms the hearing examiner's finding of a reduction in service, rent reduction and rent rollback, because they are supported by the substantial evidence on the record of the proceedings. The tenants offered substantial evidence to support their claims, and they were not required to introduce temperature readings to prove the heat was inadequate. Hiles and Borgner supra.

Finally, the housing provider's contention that the tenants were required to mitigate their damages to avoid contributory negligence by using space heaters is misplaced. The Act does not place a burden upon the tenants to mitigate damages when the housing provider reduces services and facilities. Moreover, the legal doctrine of contributory negligence is simply not applicable in the agency's regulatory scheme.

In exchange for the monthly rent, the tenants are entitled to the services and facilities provided in connection with their rental units. "'Rent' means the entire amount of money, money's worth, benefit, bonus, or gratuity demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit, its related services, and its related facilities." D.C. OFFICIAL CODE § 42-3501.03(28) (2001) (emphasis added). "'Related services' means services provided by a housing provider, required by law or by the terms of a rental agreement, to a tenant in connection with the use and occupancy of a rental unit, including repairs, decorating and maintenance, the provision of light, heat, hot and cold water, air conditioning, telephone answering or elevator services, janitorial services, or the removal of trash and refuse." D.C. OFFICIAL CODE § 42-3501.03(27) (2001) (emphasis added).

In exchange for the tenants' monthly rent, the housing provider contracts to provide related services and facilities. The housing provider's failure to provide the standard heating service is a reduction in services and facilities. Shapiro v. Comer, TP 21,742 (RHC Aug. 19, 1993). When the housing provider reduces services or facilities, the housing provider must compensate the tenant for the reduction. Washington Realty Co. v. Rowe, TP 11,802 (RHC May 14, 1986). The tenants are not required to increase their obligations under the tenancy by purchasing space heaters and paying increased utility costs for a service covered by their rent.

"The thrust of § [42-3502.11] of the ... Act is clear: to protect tenants from or compensate them for some reductions in services...." Id. at 3. The purpose of the Act is not to deplete the resources of low to moderate income tenants by imposing upon them a requirement to incur additional costs to mitigate damages or face a charge of contributory negligence. See D.C. OFFICIAL CODE § 42-3501.02 (2001).[21]

For all of the foregoing reasons, the Commission denies Issues F and J.

K. Whether any finding of treble damages or willfulness should be reconsidered and reversed, for the reasons previously set forth in housing provider's motion to strike such claims as not having been made in the petition during the hearings thereof, and because the housing provider was not on notice of such treble damages or enhanced claims based upon willfulness or bad faith.

The housing provider urges the Commission to reverse the award of treble damages

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[21] § 42-3501.02. Purposes

> In enacting this chapter, the Council of the District of Columbia supports the following statutory purposes:
> (1) To protect low- and moderate-income tenants from the erosion of their income from increased housing costs;
>
> ....

because the tenant did not request treble damages in the tenant petition. The Commission considered and rejected a similar argument in Middleton v. William J. Davis, Inc., TPs 22,268 & 23,065 (RHC Nov. 17, 1994). The Commission held that the Act does not require a tenant to request treble damages in order for the hearing examiner to award treble damages. The hearing examiner must evaluate the record evidence and determine whether there is substantial evidence to support a finding of bad faith. If there is evidence of bad faith, the hearing examiner may award treble damages pursuant to D.C. OFFICIAL CODE § 42-3509.01(a) (2001). See discussion supra Part IV.A. Accordingly, the Commission denies Issue K.

L. Whether the Commission should reconsider and vacate all findings of willful violations of the Act for the reasons set forth in the housing provider's motion and because the evidence, considered together, does not support a finding of such willfulness and the tenants did not bear their burden of proof on the subject.

The Commission's regulations require the parties to submit a clear and concise statement of the alleged errors in the Rent Administrator's decision and order. 14 DCMR § 3802.5(b) (1991). The Commission has repeatedly held that it cannot review issues that are vague, overly broad, or that do not clearly allege a specific error in the Rent Administrator's decision. Parreco v. Akassy, TP 27,408 (RHC Dec. 8, 2003); Voltz v. Pinnacle Mgmt. Co., TP 25,092 (RHC Sept. 28, 2001); Hagner Mgmt. Corp. v. Brookens, TP 3788 (Feb. 4, 1999).

The Commission cannot review Issue L, because it is both vague and overbroad. The housing provider contends that the Commission should reconsider and vacate every finding of willfulness. However, the housing provider failed to identify any specific findings of willfulness. In addition, the housing provider alleges that the tenants did not bear their burden of proof on the

subject. However, the allegation, without more, lacks the clarity and precision mandated by 14 DCMR § 3802.5 (1991). For the foregoing reasons, the Commission dismisses Issue L.

M. The order entered by the hearing examiner on November 6, 2002 granting attorney's fees to the tenants will be appealed and is hereby appealed in its entirety because the housing provider was not provided the minimum five days time period within which to respond to the motion by the tenants for attorney's fees, given the extension of time which the hearing examiner granted to the tenants through October 31, 2002 within which to file an affidavit for Ms. Earle; the legal effect of the hearing examiner's extension of time to October 31, 2002 for the filing of this affidavit thus extended beyond November 6, 2002 the minimum five-day period within which to respond, plus three days for mailing, not counting weekends.

The housing provider's counsel states that he is appealing the attorneys' fee award "in its entirety," because the housing provider was not given five days to respond to the tenants' October 31, 2002 "motion." Housing Provider's Notice of Appeal at 5. The housing provider's position is without merit.

On October 15, 2002, the tenants filed a memorandum of law in support of their motion for attorneys' fees. The voluminous memorandum contained case law, time sheets, and affidavits in support of the motion for attorneys' fees. The memorandum filed on October 15, 2002, contained an affidavit for Student Attorney Tamala Earle. However, the affidavit was not signed or notarized.

In accordance with 14 DCMR § 4008.1 (1991), the housing provider was granted five days, after service, to respond to the tenants' October 15, 2002 motion for attorneys' fees. During that five day period, the housing provider could have challenged the affidavit, which was not signed or notarized. However, the housing provider did not respond to the tenants' motion.

On October 31, 2002, the tenants filed an Affidavit in Support of Petitioner's Motion for Attorneys' Fees. As the title of the filing suggests, the tenants were not filing a new motion, they were re-filing the unsigned affidavit which they originally attached to their October 15, 2002 motion for attorneys' fees. On October 31, 2002, the tenants' filed what appeared to be an identical copy of the affidavit in support of the fee application for Tamala Earle. The affidavit was signed by Ms. Earle; however, it was not notarized. On November 6, 2002, the hearing examiner issued the order on the tenants' motion for attorneys' fees. The hearing examiner granted reduced fees to two student attorneys and the supervising attorney, and denied fees for two student attorneys, including Ms. Earle. The hearing examiner denied Ms. Earle's request for attorney's fees, pursuant to 14 DCMR § 3835.7 (1998),[22] because she did not submit a notarized affidavit.

The housing provider did not oppose the October 15, 2002 motion, which contained the affidavit that was not signed or notarized. After receiving an order to pay attorneys' fees, the housing provider is appealing the entire fee award on the basis that the hearing examiner did not provide him five days to respond to the tenants' October 31, 2002 submission. The title of the pleading clearly reflects that the October 31, 2002 filing was not a new motion, but simply a resubmission of the defective, yet unchallenged, affidavit filed on October 15, 2002. When the hearing examiner issued the fee award, he denied the award to Ms. Earl and did not include the

[22] The regulation, 14 DCMR § 3825.7 (1998), D.C. Register, Vol. 45, No. 6 at 685 (Feb. 6, 1998), provides:

> An award of attorney's fees by the Rent Administrator or the Commission shall be based on an affidavit executed by the attorney of record itemizing the attorney's time for legal services and providing the applicable information listed in section 3825.8. The affidavit shall be made part of the agency's official file.

hours reflected in the tenants' October 31, 2002 submission, because the affidavit was not notarized.

Accordingly, the housing provider's claim that it suffered harm, when it was not given five days to respond to the October 31, 2002 filing is moot and inconsequential to the entire fee award, because the hearing examiner denied Ms. Earle's request for attorney's fees.

N. Whether the tenants were the prevailing party and whether the hearing examiner committed error by misapplying the provisions of 14 DCMR § 3825.8., in particular, subsection (b) by failing to reduce the tenants' attorneys' fee claim pursuant to subparagraph (8) "the amount involved and the results obtained." In addition, subparagraph (13) does not warrant such an award in favor of the tenants, where they did not prevail on a substantial number of issues and, in fact three of the four [sic] tenants recovered nothing at all.

O. Whether the hearing examiner, based upon the entire record, should have reduced or eliminated all attorney fees to the tenants pursuant to 14 DCMR § 3825.4 because the equities do not indicate that tenants should recover such a large fee award, in proportion to the actual dollars which were awarded directly to them by the hearing examiner.

The attorney's fee provision of the Act, D.C. OFFICIAL CODE § 42-3509.02 (2001), provides for the award of reasonable attorney's fees to the prevailing party. In Ungar v. District of Columbia Rental Hous. Comm'n, 535 A.2d 887, 892 (D.C. 1987), the court reviewed the attorney's fee provision of the Act. In Ungar and subsequent cases, the court held, "'the purposes of the attorney's fee provision are to encourage tenants to enforce their own rights, in effect acting as private attorneys general, and to encourage attorneys to accept cases' brought under the rental housing act. Accordingly, we concluded that the attorney fees award section 'creates a presumptive award of attorney's fees to the prevailing party -- which may be withheld, in the court's discretion, if the equities indicate otherwise.'" Alexander v. District of Columbia Rental

Hous. Comm'n, 542 A.2d 359, 360 (D.C. 1988) (quoting Ungar, 535 A.2d at 892).

When the hearing examiner issued the order on attorneys' fees, he conducted an exhaustive analysis of the case law and regulations governing attorney's fees. The first inquiry the hearing examiner tackled was whether the tenants were the prevailing parties. A prevailing party is defined as "a party in whose favor a judgment is rendered, regardless of the amount of damages awarded...." BLACKS LAW DICTIONARY, 1145 (7th ed. 1999). The hearing examiner found that the tenants were the prevailing parties, because they prevailed in the majority of the issues raised in the tenant petition. The Commission agrees. The hearing examiner's award was consistent with the definition of a prevailing party and the underlying purpose of the attorney's fee provision of the Act.

The housing provider maintains that the hearing examiner erred by misapplying the regulation governing attorney's fees, 14 DCMR § 3825.8(b) (1998), by failing to reduce the tenants' attorneys' fee claim pursuant to subparagraph (8), "the amount involved and the results obtained." In addition, the housing provider argues that the tenants' award was not justified under subparagraph (13), because they did not prevail on a substantial number of issues and several tenants recovered nothing at all.

In Slaby v. Bumper, TPs 21,518 & 22,521 (RHC Sept. 21, 1995), the Commission held that it was not necessary to prevail on all issues in order to be a prevailing party. The party merely has to "succeed on any significant issue which achieves some of the benefit the parties sought in bringing the suit." Id. at 14 (citations omitted). In the instant case, the supervising attorney and student attorneys represented seven tenants who resided in different units in several

buildings of the housing accommodation. Each tenant raised multiple claims and presented tremendous amounts of oral and documentary evidence. The case involved substantial reductions in essential services such as heat, air conditioning, and security. The tenants offered evidence of rent control violations and severe rodent infestation.

Following the evidentiary hearing, the majority of the tenants prevailed on several significant issues such as the security issue, rent increase issue, the rent ceiling issue, and several tenants recovered on the issue of inadequate heat. The results obtained by the tenants, while grossly inadequate in light of the record evidence, were more than sufficient to justify the attorneys' fee award, which was less than 50% of the requested fee amount. After the Commission reviewed the tenants' issues on appeal, the Commission determined that the tenants were successful in the overwhelming majority of their claims.

The hearing examiner delineated the thirteen factors found at § 3825.8(b) and substantially reduced the attorneys' hours after applying the factors and relevant case law. He denied all of the hours submitted by Student Attorneys Ford and Earle. He reduced Student Attorney White-Rosenburg's hours from the requested amount of 191.3 hours to 117.8 hours, he reduced Student Attorney Powell's requested 238.1 hours down to 39 hours, and he reduced Supervising Attorney Allen's hours from 103.7 hours to 68 hours.

The hearing examiner evaluated the tenants' attorneys' fee application in accordance with 14 DCMR § 3825 (1998) and applicable case law. He applied the factors listed in § 3825.8 and exercised his discretion to reduce the attorneys' hours. The fee award, which was substantially lower than the requested amount, was warranted in light of § 3825.8(b)(13), since the tenants

prevailed on the significant issues and a majority of their claims. The fee award was warranted by the results obtained prior to the appeal.

Accordingly, the Commission denies Issues N and O.

V. CONCLUSION

The Commission affirms the hearing examiner's decision in part, reverses it in part, and remands this matter for action consistent with this decision.

A. Reductions in Services

The hearing examiner erred by his overall failure to consider persistent and serious housing code violations as substantial reductions in services. Although the findings of fact chronicled egregious, unsafe, and unsanitary conditions, the hearing examiner failed to conclude as a matter of law that the chronic rodent infestation, filthy common areas, leaking and collapsed ceilings, and the absence of air conditioning constituted reductions in service.

The hearing examiner erred when he failed to find a substantial reduction in services based on the substantial record evidence and findings of fact that evidenced the chronic rodent infestation. The hearing examiner also erred when he failed to award the tenants rent refunds and/or rent roll backs as compensation for the reduction in services they suffered. Accordingly, the Commission reverses the hearing examiner, and remands this matter for a calculation of the rent refund and/or rent roll back for each tenant.

The hearing examiner erred when he failed to find a reduction in services occasioned by the housing provider's failure to provide air conditioning, which was a related service that was listed on the housing provider's registration statements and included in the tenant's rent. The

hearing examiner erred when he held that the tenants' failed to prove that the housing provider substantially reduced the air conditioning service. Accordingly, the hearing examiner is reversed. This matter is remanded for the hearing examiner to calculate the damages due each tenant for the reduction in the air conditioning service.

The hearing examiner erred when he failed to find a substantial reduction in services occasioned by the housing provider's failure to maintain the common areas of the housing accommodations. The Commission grants the issues related to the common areas of the housing accommodation, reverses the hearing examiner on these issues and remands these issues for the assessment of damages.

The hearing examiner erred when he failed to find that the persistent leaking in the tenants' apartments was a substantial reduction in service. The Commission reverses Conclusion of Law 6 and remands this matter to the hearing examiner to assess damages, award rent refunds and/or rent roll backs to each tenant who offered evidence of leaking, collapsed ceilings, and peeling paint and plaster.

Since the Commission reversed the hearing examiner and ordered a refund for the myriad reductions in service, the Commission directs the hearing examiner to revisit the award for the reduced security service, when he calculates the rent refunds and rent rollbacks for the numerous reductions in service. If the hearing examiner continues to employ the percentage reduction in use approach, it will be necessary to assign appropriate percentages for each reduction in service and fairly compute damages on a percentage reduction basis upon consideration of the evidence already before him.

B. Treble Damages

The hearing examiner issued numerous findings, where he determined, as a matter of fact, that the housing provider failed to maintain the common areas, abate the rodent infestation, provide air conditioning, and correct the source of the recurring leaks in the rental units. The hearing examiner erred when he failed to find that these conditions constituted reductions in services. Further the hearing examiner erred when he failed to issue findings of fact concerning the bad faith evidenced by the record, and he erred when he failed to award treble damages for the housing provider's reduction in services in the common areas, rodent infestation, air conditioning, and leaking pipes.

The record revealed substantial evidence of chronic rodent infestation, constantly recurring trash, debris, and waste in the common areas, continual leaking pipes and collapsing ceilings, and the failure to provide air conditioning. The evidence surrounding each reduced service is sufficiently egregious to warrant the additional finding of bad faith. Accordingly, the Commission remands this matter for a finding of reduction in services, the imposition of rent refunds and/or rent rollbacks trebled, and findings of fact and conclusions of law to support trebled damages for the reduction of services for the common areas, rodent infestation, air conditioning, and leaking pipes.

There was substantial record evidence to support the treble damages entered by the hearing examiner in favor of Ms. Walker, Mr. Smith and Ms. Frazier, because the record was replete with evidence to support the legal elements of knowing and willful conduct. In the text of the decision and order, the hearing examiner discussed and applied the definitions of knowing

and willful to the evidence, and determined that the housing provider acted knowingly and willfully. However, the hearing examiner erred when he failed to issue findings of fact on what evidence constituted bad faith. The Commission affirms the rent refund, vacates the award of treble damages, and remands this issue for findings of fact that support the hearing examiner's decision to award treble damages.

C. Fines

In the text of the decision, the hearing examiner conducted a thorough analysis of the penalty provision of the Act. The hearing examiner evaluated the housing provider's conduct in the context of whether the housing provider knowingly and willfully violated the Act. After conducting the analysis, the hearing examiner determined that the housing provider acted knowingly and willfully, and he imposed a fine in the amount of $5000.00 for substantial reductions in service. However, the hearing examiner did not issue findings of fact or conclusions of law concerning whether the housing provider willfully violated the Act. Consequently, the Commission vacates the fine and remands this matter for findings of fact and conclusion of law on the issue of willfulness.

The hearing examiner ordered the housing provider to pay a fine in the amount of $2500.00 for demanding improper rent increases, filing improper rent ceilings, and serving improper and invalid rent increase notices. However, the hearing examiner did not issue findings of fact and conclusions of law to demonstrate that the fines were warranted. The Commission reverses the three fines in the amount of $2500.00 each and remands this matter for findings of fact and conclusions of law concerning willfulness.

D. Rent Increase Notice

When the hearing examiner issued the decision and order, he evaluated and analyzed the January 2001 notice in the body of the decision and determined that the January 2001 notice was a rent increase notice. However, the hearing examiner did not issue findings of fact concerning the rent increase notice. Consequently, the Commission remands this issue and directs the hearing examiner to issue findings of fact concerning the January 2001 notice.

The hearing examiner shall issue the decision and order based on the existing record. The hearing examiner shall not conduct a hearing or receive additional evidence. See Wire Properties v. District of Columbia Rental Hous. Comm'n, 476 A.2d 679 (D.C. 1984).

SO ORDERED.

RUTH R. BANKS, CHAIRPERSON

RONALD A. YOUNG, COMMISSIONER

JENNIFER M. LONG, COMMISSIONER

MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (1991), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (1991), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

JUDICIAL REVIEW

Pursuant to D.C. OFFICIAL CODE § 42-3502.19 (2001), "[a]ny person aggrieved by a decision of the Rental Housing Commission ... may seek judicial review of the decision ... by

filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the D.C. Court of Appeals. The Court's Rule, D.C. APP. R. 15(a), provides in part: "Review of orders and decisions of an agency shall be obtained by filing with the clerk of this court a petition for review within thirty days after notice is given, in conformance with the rules or regulations of the agency, of the order or decision sought to be reviewed ... and by tendering the prescribed docketing fee to the clerk." The Court may be contacted at the following address and telephone number:

D.C. Court of Appeals
Office of the Clerk
500 Indiana Avenue, N.W.
6th Floor
Washington, D.C. 20001
(202) 879-2700

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Decision and Order in TP 26,197 was mailed by priority mail with delivery confirmation, postage prepaid, this day of January 2005 to:

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