**DISTRICT OF COLUMBIA RENTAL HOUSING COMMISSION**

RH-TP-10-29,874

In re: 3133 Connecticut Ave, N.W.
Unit 518

Ward 3

**B.F. SAUL COMPANY**
Housing Provider/Appellant

v.

**MARC DAVID[*] BLOCK**
Tenant/Appellee

**DECISION AND ORDER**

December 7, 2023

**GREGORY, INTERIM CHIEF ADMINISTRATIVE JUDGE:** This case is on appeal to the Rental Housing Commission ("Commission") from a final decision issued by the Office of Administrative Hearings ("OAH"), based on a petition filed in the Rental Accommodations Division ("RAD") of the Department of Housing and Community Development ("DHCD").[1] The applicable provisions of the Rental Housing Act of 1985 ("Act"), D.C. Law 6-10, D.C. Official Code § 42-3501.01 *et seq.* (2001 ed. & 2012 Repl.), the District of Columbia Administrative Procedure Act ("DCAPA"), D.C. Official Code § 2-501 *et seq.* (2012 Repl.), and the District of Columbia Municipal Regulations ("DCMR"), 1 DCMR §§ 2800-2899 (2016), 1

[*] *See* Tr. at 3:11-19 (Dec. 13, 2016); R. at Tab 67 (explaining "Marc David" is tenant/petitioner/appellee's two-word first name).

[1] OAH assumed jurisdiction over tenant petitions from the Rental Accommodation and Conversion Division ("RACD") of the Department of Consumer Regulatory Affairs ("DCRA") pursuant to the OAH Establishment Act, D.C. Official Code § 1831.03(b-1) (2007 Repl.).

DCMR §§ 2920-2941 (2016), and 14 DCMR §§ 3800-4399 (2004),[2] govern these proceedings. For the following reasons, we reverse the OAH decision in part and affirm in part.

## I. PROCEDURAL HISTORY

On April 20, 2010, tenant/appellee Mark David Block ("Tenant") filed tenant petition 29,874 ("Tenant Petition") with the RAD against housing provider/appellant B.F. Saul Company ("Housing Provider"). The Tenant Petition made the following allegations that the Housing Provider violated the Act:

1. The rent increase was larger than the increase allowed by any applicable provisions of the Act;
2. There was no proper 30-day notice of rent increase before the increase was charged;
3. The landlord (housing provider) did not file the correct rent increase forms with the RACD;
4. The rent exceeds the legally calculated rent ceiling for my/our units;
5. The rent ceiling filed with RACD for my/our unit is improper;
6. The building where my/our rental unit(s) is located is not properly registered with the RACD;
7. The landlord (housing provider), manager, or other agent has taken retaliatory action against me/us in violation of Section 502 of the Act; and
8. A Notice to Vacate has been served on me/us, which violates Section 501 of the Act.

Tenant Petition at 2-4; R. at Tab 1.

On October 20, 2011, the evidentiary hearing commenced before Administrative Law Judge Caryn L. Hines ("ALJ Hines"). On December 15 and 16, 2011, the evidentiary hearing

[2] On December 31, 2021, new rules took effect to amend the applicable chapters of Title 14 of the DCMR. Pursuant to 14 DCMR § 3800.10 (2021), the Commission applies the prior rules to the facts of this case and to its procedures on appeal.

resumed, and more testimony was taken. The Tenant's case-in-chief did not conclude on December 16, 2011. Five years went by, ALJ Hines left OAH, and the case was assigned to Principal ALJ Erica Pierson ("ALJ Pierson"). ALJ Pierson held four status conferences in 2016 and attempts were made unsuccessfully to settle the case. On April 3 and 4, 2018, six and a half years after it began, the evidentiary hearing resumed and was concluded before ALJ Pierson. The parties filed written closing arguments. *See* Petitioner's Written Closing Argument; R. at Tab 2 ("Tenant's Closing Argument");[3] Housing Provider's Closing Argument; R. at Tab 96.

On November 12, 2019, ALJ Pierson, in accordance with the DCAPA, D.C. Official Code § 2-509(d), issued a proposed final order. R.Supp.[4] at Tab 2 ("First Proposed Order"). ALJ Pierson left OAH before the parties filed their exceptions and objections to the proposed order on December 13, 2019. Ultimately, the case was reassigned to Principal ALJ Vytas Vergeer ("ALJ Vergeer" or "the ALJ"), who issued another proposed final order on December 9, 2020, again allowing the parties to file exceptions and objections. R. at Tab 105 ("Second Proposed Order").

On February 12, 2021, ALJ Vergeer issued a final order: Block v. B.F. Saul Co., 2010-DHCD-00081, TP 29,874 (OAH Feb. 12, 2021) ("Final Order"); R. at Tab 107. The Final Order awarded the Tenant a rent refund for January 2008 through December 2010 for unlawful demands for two separate rent surcharges, with trebling of damages for bad faith, plus interest, for a total of $56,935.31. ALJ Vergeer ordered a rent rollback to $1,280 per month from March 1, 2016, until such time as Housing Provider properly implements a rent increase. ALJ Vergeer

[3] The Tenant's Closing Argument appears to have been mis-ordered in the record due to a barely legible OAH date stamp being misread as "2010" rather than "2018."

[4] Certain documents were discovered to be missing from the original certified record transmitted to the Commission by OAH. A supplemental record was transmitted after the missing documents were located.

found that the Housing Provider had willfully violated the Act by retaliating against the Tenant with January 2008, 2009, and 2010 notices of rent adjustments, based on a $233 rent surcharge, and imposed fines totaling $1,500. The ALJ denied all of the Tenant's other claims related to the rent increases and reductions in related services or facilities.

The Housing Provider filed a notice of appeal with this Commission on February 24, 2021 ("Notice of Appeal"). The Notice of Appeal raises the following issues:

1. The [ALJ] erred by imposing the burden of proof on the Housing Provider;
2. The [ALJ] erroneously concluded that the Housing Provider ceased charging the Capital Improvement Surcharge of $179 per month during the 3-year period which is the subject of the [Tenant] Petition;
3. The [ALJ] erroneously assessed damages for implementation of the $233 Capital Improvement Surcharge;
4. The [ALJ] erred by assessing a fine for retaliation;
5. The [ALJ] erred in awarding treble damages; and
6. The [ALJ] erred in order[ing] a roll back of rent to $1,280.

Notice of Appeal at 1-2. The Housing Provider filed its brief on appeal on August 25, 2022 ("Housing Provider's Brief"), and the Tenant filed his responsive brief on September 16, 2022 ("Tenant's Brief"). The RHC hearing was conducted on September 29, 2022.

## II. ISSUES ON APPEAL

A. Whether the ALJ erred in awarding rent refunds and rollbacks for the two CI surcharges

   1. Notice of claims against the Housing Provider
   2. Withdrawal of $179 surcharge
   3. Continuing demands for $233 surcharge
   4. Rent rollback amount
   5. Treble damages

B. Whether the ALJ erred in imposing a fine for retaliation

6. Housing Provider's action

7. Housing Provider's presumed intent

8. Willful violation of the Act

## III. STANDARD OF REVIEW

The Commission's standard of review is found at 14 DCMR § 3807.1 and provides as follows:

> The Commission shall reverse final decisions of the [OAH] which the Commission finds to be based upon arbitrary action, capricious action, or an abuse of discretion, or which contain conclusions of law not in accordance with the provisions of the Act, or findings of fact unsupported by substantial evidence on the record of the proceedings before the [OAH].[5]

The Commission will uphold an ALJ's findings of fact so long as there is substantial evidence on the record to support them. *See* Fort Chaplin Park Assocs. v. D.C. Rental Hous. Comm'n, 649 A.2d 1076, 1079 n.10 (D.C. 1994) (defining "substantial evidence" as "such relevant evidence as a reasonable mind might accept as able to support a conclusion"). The Commission's role is not to make credibility determinations or weigh competing evidence, only to determine whether substantial evidence supported the ALJ's findings. "[T]he relevant inquiry is whether the [ALJ's] decision was supported by substantial evidence, not whether an alternative decision might also have been supported by substantial evidence." Gary v. D.C. Dep't of Emp't. Servs., 723 A.2d 1205, 1209 (D.C. 1998) (quoting McEvily v. D.C. Dep't of Emp't. Servs., 500 A.2d 1022, 1024 n.3 (D.C. 1985)); *see* Notsch v. Carmel Partners, LLC, RH-TP-06-28,690 (RHC May 16, 2014) (explaining that where an ALJ's findings are supported by substantial evidence, the findings will not be overturned even if substantial evidence exists to the contrary).

[5] *See supra* at n.1 regarding the transfer of the hearing function from the Rent Administrator to OAH.

The Commission will, however, review questions of law raised regarding an ALJ's interpretation of the Act de novo. United Dominion Mgmt. Co. v. District of Columbia Rental Hous. Comm'n, 101 A.3d 426, 430-31 (D.C. 2014). "We review mixed questions of law and fact under our usual deferential standard of review for factual findings and apply de novo review to the ultimate legal conclusions based on those facts." C.R. Calderon Construction, Inc. v. Grunley Construction Co., 257 A.3d 1046, 1051 (D.C. 2021) (cleaned up).

## IV. DISCUSSION

### A. Whether the ALJ erred in awarding rent refunds and rollbacks for the two CI surcharges

The Housing Provider makes several, interrelated assertions of error regarding the rent surcharges that the ALJ found to be unlawful. Generally, the Housing Provider frames the problem as being that the ALJ implicitly shifted the burden of proof by awarding refunds based on violations of the Act that the Tenant never clearly articulated and, in that context, made findings of fact that were unsupported by substantial evidence. Housing Provider's Brief at 1-8. We agree with the Housing Provider that the ALJ erred and reverse on the issue of the unlawful rent demands and vacate the rent refund for the following reasons.

#### 1. Notice of claims against the Housing Provider

First, we are persuaded that the Housing Provider did not have adequate notice of the claim that the surcharges were unlawfully demanded on rent increase forms after their initial implementation. Of the "multitude of reasons why a tenant could complain" that a rent increase violates the Act, our review of the record shows that the Tenant never articulated the legal reasoning adopted by the ALJ in the Final Order, and the Housing Provider was deprived of the

opportunity to respond. Parreco v. D.C. Rental Hous. Comm'n, 885 A.2d 327, 334 (D.C. 2005).[6] Our review of the record shows that the Tenant only ever argued that the several rent increases at issue were unlawful because the wrong corporate entity served him the notices.

A housing provider may be held liable for violations of the Act alleged in a tenant petition when the "theory of recovery" is stated clearly enough that the housing provider may be "prepared to defend on that ground." *Id*. (quoting Autocomp, Inc. v. Publishing Computer Serv., Inc., 331 A.2d 338, 340 (D.C. 1975)); *see* SCF Mgmt. v. 2724 11th St. Tenants' Ass'n, Inc., RH-TP-15-30,690 (RHC Feb. 18, 2020) at 7-8. By analogy to Super. Ct. Civ. R. 15(b), a particular claim for relief may also be adjudicated if it was "tried by the parties' express or implied consent" at the evidentiary hearing. Parreco, 885 A.2d at 334; SCF Mgmt., RH-TP-15-30,690 at 12-13. "The clearest indications of a party's implied consent to try an issue lie in the failure to object to evidence, or in the introduction of evidence which is clearly apposite to the new issue but not to other matters specified in the pleadings." Moore v. Moore, 391 A.2d 762, 768 (D.C. 1978).

"Review of the sufficiency of notice in administrative proceedings . . . is not the adequacy of the original notice or pleading but is the fairness of the whole procedure," so we begin with a review of what transpired, in relevant part, from the Tenant Petition to the Final Order. Watergate Improvement Assocs. v. Pub. Serv. Comm'n, 326, A.2d 778, 786 (D.C. 1974); *see also* Ozburn-Hessey Logistics, LLC v. Nat'l Labor Relations Bd., 939 F.3d 777, 785-87 (6th

[6] The Housing Provider's Brief mixes its discussion of the Tenant's purported failure to present evidence, the ALJ's purported shifting of the burden of proof, and the Tenant's purported failure to raise claims about unlawful rent increase. Nonetheless, the Housing Provider's Brief, at 2, cites, and the Housing Provider repeatedly cited before OAH, Parreco, 885 A.2d 327, a case which, in our view, is squarely on point with the error by the ALJ here. Interestingly, counsel for the housing provider in Parreco also framed the issue as one of a misplaced burden of proof, but the DCCA decided the matter as an issue of notice. *Id*. at 333 n.9. Similarly, we construe the Housing Provider's appeal issues here to be primarily about the failure of the Tenant to articulate the basis of his challenge to the rent increases.

Cir. 2019) (relevant due process considerations to adequacy of notice include explicit statements, close connections of subject matter, and common sense). On the Tenant Petition form, the Tenant checked six boxes alleging that a rent increase was taken in violation of the Act in some way. Tenant Petition at 2. The narrative "complaint details" portion of the Tenant Petition alleged failures to post notices, excessive rent increases, and unlawful, capital improvement-based rent surcharges ("CI surcharges").[7] *Id*. At the start of the evidentiary hearing, counsel for the Tenant gave a short opening statement that mentioned only "rent increase issues for various legal reasons" that would be addressed. Tr. at 6:15-7:17 (Oct. 20, 2011); R. at Tab 25.

During the evidentiary hearing, two CI surcharges were addressed: a $179 per month charge, based on petition CI 20,794,[8] implemented in May 2006, and a $233 per month charge, based on petition CI 20,797, implemented in January 2008. RX 208; RX 201. For simplicity, we will refer to each of these surcharges by their dollar amount. Evidence also showed that the Tenant's rent was subsequently increased pursuant to the annual, inflation-based adjustment of general applicability ("CPI-W increase")[9] on January 1, 2009 and January 1, 2010, with an amended notice (reducing the rent based on the Act's age exemption) for 2010 issued on May 25, 2010. PX 101G; PX 101E; PX 101D.[10] These basic facts are not in dispute.

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[7] *See* D.C. Official Code § 42-3502.10.

[8] The Commission has recently held, after years of protracted litigation, that CI 20,794 should have been approved by the Rent Administrator in a lower amount of $175 per month per unit. Klingle Corp. v. Tenants of 3133 Conn. Ave., NW, CI 20,794 (RHC May 21, 2023). However, the approval of that CI surcharge was not stayed pending appeal, the Tenant here is not a party to that separate case, he has not raised any challenge to the amount of that surcharge in this matter, and, as the ALJ concluded, it was initially implemented outside the statute of limitations for this case. Therefore, for the purposes of this decision, we treat the $179 amount as correct.

[9] *See* D.C. Official Code § 42-3502.06(b).

[10] In this decision, because the parties do not dispute the ALJ's conclusions on this point, we treat the May 2010 retroactive rent reduction as effective back to January 2010, and any reference to the January 2010 rent adjustment means the lower, 4.8% rent increase.

The Tenant's Closing Argument contains two pages discussing the allegation that the 2008, 2009, and 2010 rent increases were unlawful, asserting that the Housing Provider violated the Act for one reason only: that the notices of rent adjustment identified the wrong corporate entity (B.F. Saul Company) as the managing agent of the housing accommodation. Tenant's Closing Argument at 4-5. The Tenant further argued, in the context of his claim of retaliation, that the $233 CI surcharge was implemented without administrative approval. *Id*. at 9. Finally, the Tenant requested treble damages, but only with respect to his claims for reductions in related services or facilities. *Id*. at 12.

The Housing Provider responded accordingly. After a short recitation of the facts regarding the rent increases at issue, Housing Provider's Closing Argument at 3-5, the Housing Provider argued that the identification of B.F. Saul Company on the rent increase notices did not violate the Act and that the Tenant was reformulating what was essentially a misregistration claim that he had previously, voluntarily withdrawn, *id*. at 5-10. The Housing Provider further asserted that it was entitled to implement the $233 CI surcharge at the time it did. *Id*. at 10. With respect to treble damages, the Housing Provider addressed the issue, albeit briefly, in the context of the rent increases, not the reductions in services or facilities, but argued simply that there was "not a scintilla of evidence" to meet the Tenant's burden of proof. *Id*. at 33.

ALJ Pierson then issued the First Proposed Order. As noted, the parties filed exceptions and objections, and ALJ Vergeer issued a Second Proposed Order. The Second Proposed Order was virtually identical to the First Proposed Order. The Housing Provider again filed (virtually identical) exceptions and objections to the Second Proposed Order. ALJ Vergeer then issued the Final Order, which virtually identical to the First and Second Proposed Orders. We note that, in each set of objections, the Housing Provider argued that the proposal erroneously placed the

burden of proof on the Housing Provider, rather than the Tenant, and that the Tenant had not identified the basis for his challenges to the rent increases that the ALJ ultimately relied on.

In the Final Order, the ALJ rejected the Tenant's claim that the wrong entity served and filed the notices of rent adjustments. Final Order at 20. The ALJ further denied the Tenant's claim, raised during the April 4, 2018 hearing, that the rent increases were invalid because the housing accommodation was not in substantial compliance with the housing code, *see* D.C. Official Code § 42-3502.08(a), because it was not raised at any time before the last day of the evidentiary hearing and the Housing Provider therefore lacked notice of the issue. Final Order at 20-21 (citing Parreco, 885 A.2d at 334). However, the ALJ went on to state:

> Oddly, Tenant did not make any other arguments in his written Closing Argument to establish that the rent increases in question were higher than allowed by the Act. Thus, Housing Provider, in its Closing Argument, states that Tenant has not met his burden of proof. However, despite the deficiency of the written Closing Argument, during the hearing, Counsel for Tenant argued that the rent increases were improper because they included the $233 CI increase that had not been approved. *See* Transcript (Tr.) Dec. 16, 2011 at 60-65. This is the real issue in this case.

Final Order at 21.

We note, initially, that it is highly unusual for the ALJ to have determined something to be "the real issue in this case" when it was never raised by a party, particularly one represented by counsel. *See* Devita v. District of Columbia, 74 A.3d 714, 725 (D.C. 2013) ("no violation of due process so long as the administrative law judge 'does not act as counsel'" (quoting Richardson v. Perales, 402 U.S. 389, 410 (1971)). Odder still is the contradiction between the ALJ's decision to disallow the housing code claim because it was raised too late, even though it may have been evident in the record, but to then address this issue that the Tenant never raised at all.

Moreover, our review of the portion of the hearing transcript that the ALJ cites – about whether the later rent increases "included the $233" – contradicts the ALJ's description of the

argument made by counsel for the Tenant. *See* Tr. at 59:20-64:8 (OAH Dec. 16, 2011). Counsel for the Tenant was not questioning the witness about the $233 surcharge because he was arguing that the subsequent rent increases were unlawful demands on their faces and should be refunded. Rather, he sought to discuss the continued inclusion of the $233 surcharge on rent increase notices as part of the Tenant's retaliation claim. *Id.* (responding to Housing Provider's objection to question about continued inclusion of $233 on notices: "it's our position, and we will summarize it at the close of our evidence, that the demand for that $233 surcharge was an act of, basically, harassment or retaliation"); R. at Tab 35. Throughout the long-delayed proceedings on this case, the Tenant was represented by the same attorney, and, when written closing arguments were submitted – at the Tenant's request – the Tenant only advanced one, completely different theory as to why any rent refund should be ordered. *See* Tenant's Closing Argument at 4-5 (addressing privity of contract); Tr. at 5:15-6:18 (OAH Apr. 3, 2018) ("[I]t's definitely the tenant's preference that we have a written summation. I think there are cases where it's not necessary. I don't think this is one of those cases.").

Ultimately, we cannot square the ALJ's decision with Parreco's requirement for a tenant-petitioner to state, with reasonable specificity, the claimed legal basis for invalidating a rent increase. As to initial notice, the theory of recovery that the ALJ called "the real issue" was never raised by the Tenant before or during the evidentiary hearing. Nothing submitted by the Tenant or his counsel's opening statement at the hearing clearly articulated the argument that the 2009 and 2010 CPI-W rent increases were invalid, in whole or in part, because the listed "rent charged" included CI surcharges that were (purportedly) not actually being charged.

Nor do we see any express or implied consent to litigating the ALJ's theory of the "real issue in this case" during or after the evidentiary hearing. As noted above, the portions of the

hearing transcript cited by the ALJ actually show that the Tenant's counsel expressly argued that testimony about the 2009 and 2010 rent increase notices went to the originally-pled claim of retaliation. Tr. at 59:20-64:8 (OAH Dec. 16, 2011). Counsel for the Tenant made one, somewhat ambiguous statement about rent demands including "all related monies," Tr. at 61:3-8 (OAH Dec. 16, 2011),[11] but this is not "clearly apposite to the new issue but not to other matters specified in the pleadings." Moore, 391 A.2d at 768. Counsel for the Housing Provider, on the other hand, specifically objected that questions about the inclusion of the $233 surcharge in later years' rent increase notices was not relevant to any issue in the case. Tr. at 59:10-22 (OAH Dec. 16, 2011); *cf*. Moore, 391 A.2d at 768 ("clearest indications of a party's implied consent to try an issue lie in the failure to object to evidence"); SCF Mgmt., RH-TP-15-30,690 at 14-15 & n.10 (consent to litigation of claims for entire statute of limitations period, rather than shorter period stated in tenant petition, where housing provider repeatedly objected to evidence only as predating 3-year limit, not lack of notice of claims).

Although the record contains discussion of the $233 surcharge being implemented without approval in 2008, the Tenant also acknowledged that the Housing Provider ceased to demand it from the Tenant almost immediately. *See, e.g.,* Tr. at 63:10-16 (OAH Dec. 16, 2011) ("I believe it's already been stated that the $233 was withdrawn. And I do think . . . that the $233 has not, in a large part, been paid by [the Tenant]."). When the evidentiary hearing resumed in 2018, the Tenant, on cross-examination, was asked how many times he was charged the $233, but he was evasive and questioned the meaning of the term "charged." Tr. at 70:22-81:9 (OAH

[11] It is likely counsel was referring to the DCCA's decision in Kapusta v. D.C. Rental Hous. Comm'n, 704 A.2d 286 (D.C. 1997), which held that a tenant may receive a "refund" of rent "demanded," whether or not actually received by a housing provider.

Apr. 4, 2018). Indeed, the ALJ found in the Final Order that the Tenant "never testified as to how much rent he was being charged or paid and was intentionally vague on this issue." Final Order at 27. Although the Housing Provider asked the Tenant about the $233's inclusion on the later CPI-W notices, he testified that he "did not understand how the [H]ousing [P]rovider came to the [November] 2009 increase figure. I didn't say it was incorrect." *Id*. at 81:3-9; *see also* Tr. at 100:6-11 (OAH Apr. 3, 2018) (Tenant testimony on direct that "I couldn't figure out how the [H]ousing [P]rovider had gotten to the increase they got to. I'm not saying they did something incorrect. I'm just saying I didn't understand." (emphasis added)); R. a Tab 89.[12] Moreover, our review of the record does not reveal any complaint at all by the Tenant about the inclusion of the $179 surcharge. We cannot infer from any of the questions, objections, and testimony that the Housing Provider consented to litigate this case on the theory of recovery applied by the ALJ in the Final Order.

Accordingly, the Final Order is reversed on the issue of unlawful rent demands and rent refund is vacated.

[12] We observe that the ALJ relied, in part, on the Commission's decision in Fineman v. Smith Prop. Holdings Van Ness, LP, RH-TP-16-30,842 (RHC Jan. 18, 2018), in which the Commission held, that, in the context of so-called "rent concessions," notices of rent increases must state the actual "rent charged," rather than a "preserved," higher rent level. But this case presents a more complicated issue. For one, the standard form notices published by RAD at the time did not provide for a separate accounting of the "rent charged" and any CI surcharges. *See* PX 101D, E, F, & G. Furthermore, the Commission specifically declined in Fineman to address whether a housing provider may "preserve" CI surcharges on the RAD forms. Fineman v. Smith Prop. Holdings Van Ness, LP, RH-TP-16-30,842 (RHC Mar. 13, 2018) (Order Denying Reconsideration) at 23 (noting that case did not present the question of whether "previously-implemented capital improvement surcharge for which [housing provider] has not yet recovered all costs . . . might validly be preserved on the RAD Forms notwithstanding a reduction in the rent actually charged"). There is no allegation that the Housing Provider violated the Act by computing the CPI-W adjustments by including the CI surcharges, *see* D.C. Official Code § 42-3502.10(c)(3), and the ALJ allowed the CPI-W adjustments to the extent the tenant's baseline rent was properly adjusted. *See* Final Order at 22. The applicability of Fineman to these facts would be a nuanced enough issue that the Housing Provider cannot fairly be said to have been on notice of the claim before the hearing, based on the testimony elicited at the hearing, or in the closing arguments.

### 2. Withdrawal of $179 surcharge

In the alternative, assuming for the sake of argument that the Housing Provider had notice of or consented to the actual litigation of the claim that the $179 surcharge was unlawfully charged for some period, we agree with the Housing Provider that a critical finding of fact was not supported by substantial evidence. *See* Housing Provider's Brief at 2-3.[13] In the Final Order, the ALJ concluded that the Housing Provider unlawfully, falsely included the $179 surcharge in rent increase notices after it withdrew the surcharge in September 2007. Final Order at 14 & 23. Because there is no substantial record evidence showing that the Housing Provider withdrew the $179 surcharge – the evidence actually shows that the Housing Provider continued to charge the $179 for the entire relevant period – and because there is no allegation that the Housing Provider was not entitled to charge the $179 (the original implementation of it being beyond the statute of limitations), we conclude that the $179 surcharge's inclusion on the rent increase forms was accurate and lawful, and the Tenant is therefore not entitled to a rent refund.

In the Final Order, the ALJ made the following, relevant finding of fact:

> On March 24, 2004, the Rent Administrator granted Housing Provider's capital improvement petition (CI 20,794) authorizing rent surcharges of $179. RX 208. Housing Provider implemented the CI increase of $179 in the rents charged in May 2006. In September 2007, Housing Provider withdrew the $179 increase[,] which is reflected in Housing Provider's Rent Ledger for Tenant's unit (Rent Ledger) as a credit for the affected months. Testimony of Benjamin Underwood (Underwood),

[13] The Tenant argues that the Housing Provider has waived any complaint that the findings of fact are unsupported by substantial evidence because it could have, but did not, file a motion for reconsideration under OAH Rule 2828.5(d). Tenant's Brief at 4-5 (citing Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1302 (D.C. 1990)). The procedural posture of Goodman is somewhat convoluted, but DCCA's decision ultimately relied on the Supreme Court's decision in Garment Workers v. Quality Mfg. Co., 420 U.S. 276 (1975), which rejected an argument of "unfair surprise" by a party that lost before an administrative agency because the party failed to move for reconsideration. 573 A.2d at 1302-03. The relevant legal principle in both decisions is that a reviewing court will not consider arguments that were not presented before an administrative agency in the first instance. *Id*. While the Commission generally follows this same principle in its review of OAH decisions, our review of the record here shows that the Housing Provider raised this exact issue in both the first and second exceptions and objections to the proposed orders. We are therefore satisfied that the issue is properly before us on appeal.

> Apr. 4, 2018; RX 218s, 220A, 220B. Housing Provider continued to include the $179 in the rent charged filed with the RAD.

Final Order at 14 (finding of fact 23). Our review of findings of fact by an ALJ is generally deferential. Nonetheless, reviewing the cited exhibits and testimony, we conclude that the ALJ's finding that the $179 was withdrawn is not supported.[14] We also note that the Tenant had the burden of proving any fact that would entitle him to relief under the Act, *see* OAH Rule 2932.1; D.C. Official Code § 2-509(b). As described above, the Tenant never alleged that the $179 was withdrawn and was "intentionally vague" on the issue of how much rent he was actually charged.[15]

As cited by the ALJ, at the April 4, 2018 evidentiary hearing, the Housing Provider's witness, Benjamin Underwood, vice president of B.F. Saul Company, testified about charges and credits to the Tenant's rent, as documented in a ledger from the Housing Provider's accounting system, RX 220A and 220B ("Ledger"). The Ledger includes the Tenant's rent, other charges, payments, and credits from September 2005 to January 2011. Each month, the Tenant was billed a baseline amount of rent, starting at $2,310 and increasing eventually to $2,550. The Ledger also shows a monthly billing of $179 labeled "CISWI" or "Window Surcharge."[16] Mr. Underwood was never asked about the $179 surcharge. Rather, counsel for the Housing

[14] The Housing Provider argues we should afford less deference to the ALJ because he did not directly observe the witnesses' demeanor. Housing Provider's Brief at 11. Although the transfer of this case to a new ALJ perhaps explains the error described herein, we do not need to decide whether a change of ALJ should limit our deference on this issue because we are not presented with a witness credibility determination and the finding was plainly unsupported by the documentary evidence and related testimony. *Cf.* Wright v. Off. Of Wage Hour., No. 22-AA-0225, slip op. at 23-24 (D.C. Sept. 7, 2023) (affording "special deference" to ALJ's resolution of conflicting testimony to explain incomplete invoices).

[15] The Tenant's Brief does not meaningfully assert that there was substantial evidence to support the ALJ's finding of fact on the withdrawal of the $179. The only reference to the $179 surcharge veers into discussion of the statutory presumption of retaliation and burden shifting in D.C. Official Code § 42-3505.02(b). Tenant's Brief at 3. The burden of proofing the fact that rent was demanded, however, rests with the Tenant.

[16] CI 20,794 requested surcharges to recoup the costs of the replacement of windows throughout the building. *See generally* Klingle Corp., CI 20,794.

Provider and Tenant asked him about when the Tenant was charged or credited back the $233 surcharge. Tr. at 108:14-109:11, 112:12-113:21, & 118:3-13 (OAH Apr. 4, 2018).

The ALJ nonetheless made a finding of fact that the $179 ceased to be charged in September 2007. This is not supported by the record, although we see the source of the error. Mr. Underwood was asked to explain the "payment" column and the "adjustment" column of the Ledger. *See* Tr. at 111-113 (OAH Apr, 4, 2018). At several points, he described entries in both columns as "credits" to the Tenant's balance, but he further explained that a "payment" would have been money actually received from the Tenant, while an "adjustment" would have been a reduction to the balance entered by the Housing Provider. *Id.* However, the copy of the Ledger in the certified record transmitted to the Commission by OAH has a hand-written note at the top of the third page, identifying the "payment" entry of $179 as a "credit," and a hand-written checkmark next to the billing entry for $179 on September 1, 2007. The only apparent reason for that specific entry to be marked is that, during Mr. Underwood's testimony, his attention was directed to the page of the Ledger that "begins with September of 2007," *id.* at 111:18, because that is the page on which the $233 surcharge first appears, *id*. at 111:13-16. Within that short exchange where counsel and the witness were literally trying to get on the same page, counsel for the Housing Provider and Mr. Underwood referred to both the $233 surcharge and the relevant page of the Ledger as "it," which makes reading the transcript somewhat confusing. *Id*. at 111:16 ("it's on the third page"). But, on careful reading of the full line of questioning, it is clear that Mr. Benjamin was *not* testifying that the first entry on that page was an "adjustment" by the Housing Provider that, in effect, withdrew the $179 surcharge; none of the questions or answers involved the $179 at all.

There is no evidence that the Housing Provider ceased to demand the $179 CI surcharge in September 2007 or at any other point. Rather, the $179 surcharge appears in every subsequent month in the Ledger, and there is no corresponding credit or adjustment. Therefore, to the extent the listed "rent charged" on the RAD forms included the $179, the Housing Provider did not violate the Act by including false information, and the Tenant is not entitled to a refund of an unlawful demand for $179 per month for any period.

Accordingly, in the alternative to the conclusion above in issue 1, the ALJ's finding of fact on this point is reversed, and the rent refund is vacated to the extent it is based on the $179 surcharge.

### 3. Continuing demands for $233 surcharge

Again in the alternative, assuming for the sake of argument that the Housing Provider had notice of or consented to the actual litigation of the claim that the $233 surcharge should be refunded,[17] we conclude that the ALJ's conclusion of law did not rationally flow from the findings of fact, incorrectly applying the Commission's precedent. Potomac Elec. Power Co. v. D.C. Dep't of Empl. Servs., 77 A.3d 351, 354 (D.C. 2013) (under DCAPA, decision will be affirmed if conclusions of law rationally flow from findings of fact that are supported by substantial evidence). Our review of this issue is de novo, as a mixed question of law and fact. Calderon Construction, 257 A.3d at 1051. Essentially, the ALJ appears to have viewed the

[17] We note that the Housing Provider's Closing Argument, at 10, argued that a CI surcharge may be implemented 60 days after the filing of a request for approval, suggesting that it had notice that the validity of the $233 surcharge's implementation was contested. While we recognize this is a closer call as to consent to litigation of an issue, we think this is best understood as a response to the Tenant's claim of retaliation, which, unlike a claim to invalidate the increase and receive a refund, was actually advanced in the Tenant's Closing Argument, at 9, and at the evidentiary hearing, Tr. at 63-64 (OAH Dec. 16, 2011) (arguing evidence of rent demands goes to retaliation). The Tenant did not raise any specific argument about the lack of administrative approval of the $233 surcharge to invalidate the increase. We address the issue of retaliation below.

existence of a "charge" or "demand" for rent as a legal term of art, defined by precedent; we conclude, however, that it is a question of fact, albeit one that, in this case, turns on contractual terms between the parties. Ultimately, the ALJ's findings of fact and conclusions of law are contradictory on whether a demand occurred.

The ALJ determined that the Housing Provider violated the Act by implementing the $233 surcharge in January 2008, before the Housing Provider's capital improvement petition was approved. Final Order at 23-26. The ALJ further found that:

> Housing Provider testified, and Tenant did not refute, that Tenant was charged the $233 CI increase for two months only, because in February 2008, Tenant signed a 70% Voluntary Agreement which included an agreement that he would not be charged the $233 CI increase while Housing Provider sought approval of the 70% Voluntary Agreement. Housing Provider refunded to Tenant the two months paid and did not in the future request the $233, but continued to include it in the calculation of the rent charged filed with the RAD. Thus, on January 1, 2008, Tenant's legal rent was $2,310, his rent before the $179 and $233 CI increases. However, Housing Provider did not file any forms with the RAD adjusting Tenant's rent to remove either the $233 or $179 surcharge.

*Id*. at 26 (emphasis added). The 70% voluntary agreement,[18] which the Housing Provider filed for administrative approval, provided in relevant part as follows:

> I have signed the 70% Voluntary Agreement based on the understanding that Klingle Corporation will defer payment of the $233 surcharge which is due to commence January 1, 2008 while it attempts to secure approval of the 70% Voluntary Agreement. I understand that Klingle Corporation is not waiving its entitlement to the surcharge and that in the event it is unable to secure approval of the 70% Voluntary Agreement within a such period of time as it deems reasonable, it reserves the right [to] demand payment of the surcharge in full retroactively to January 1, 2008.

RX 218.

Despite the agreement to indefinitely not charge the Tenant the $233, the ALJ concluded, citing the Commission's decision in 1773 Lanier Place, N.W. Tenants' Assoc. v. Laurence Drell,

[18] *See* D.C. Official Code § 42-3502.15.

TP 27,344 (RHC Aug. 31, 2009), that the surcharge was never completely and permanently rescinded and therefore continued to be demanded by its inclusion in the "rent charged" listed on the 2009 and 2010 rent increase notices. *Id*. at 28-30. Further, although the first two months of the $233 surcharges were refunded by the Housing Provider before the Tenant Petition was filed, the rent refund awarded by the ALJ included January and February 2008. *Id*. at 30.

On appeal, the Housing Provider argues:

> The facts here are not analogous to [*Drell*], because here the parties entered into an agreement that articulates that no present demand is being made, but rather that the right to make a demand in the future only is being preserved. No further demand was ever made, and Mr. Block clearly knew that.

Housing Provider's Brief at 4 (emphasis added).[19] We agree with the Housing Provider for the following reasons that the ALJ erred, because Drell is inapposite and, per the parties' written agreement, the $233 was not actually demanded.

First, we disagree with the ALJ's application of the Commission's decision in Drell. The Commission and DCCA have held that, under D.C. Official Code § 42-3509.01(a), a tenant may be awarded a "refund," in effect damages, of rent that has been demanded, whether or not the rent was paid by the tenant or received by the housing provider. Kapusta v. D.C. Rental Hous. Comm'n, 704 A.2d 286, 287 (D.C. 1997). In Drell, TP 27,344, the Commission affirmed an award of rent refunds based on an illegal rent increase "because the housing provider did not rescind or revoke its demand for increased rents (but only temporarily suspended its demand),

[19] The Housing Provider also argues that the $233 was not prematurely implemented because it was allowed to charge the increase 60 days after filing the CI petition. Housing Provider's Brief at 5-7. Because we conclude that the record does not support the finding of any rent demands after the initial, refunded first two months, we do not need to address that argument here. However, we discuss it below with respect to the issue of retaliation, which was actually litigated and does not turn on whether the inclusion of the surcharge on the form was a "rent demand" for the purposes of D.C. Official Code § 42-3509.01(a).

even though the tenants did not pay the increased rents to the housing provider." In that case, the housing provider had sent notice to the tenants of CPI-W rent increases on February 1, 2001, to take effect March 1, 2001. Those increases were unlawful because of housing code violations in the building and because the notices were issued less than 30 days before the effective date. The housing provider sent notices initially delaying the increase until April 1, 2001 and, at some point, sent notices stating that the increases were "temporarily on hold." The ALJ awarded the tenants trebled rent refunds for only March, April, and May 2001. Noting that the "temporary hold" memorandum in the record was undated and that the 2001 CPI-W adjustment was later used in the basis for computing the amount of the 2002 CPI-W adjustment, the Commission reversed the ALJ's limited award and remanded for recalculation to include June 2001 and later months in the refunds.

The Commission "further note[d] that, to contest the award of damages, the housing provider was required by the Act to show that his 'temporarily on hold' correspondence operated to withdraw, revoke or otherwise negate its continuing 'demand' for the 2001 rent increases." *Id*. at 55-56. This statement cited no statutory, regulatory, or decisional rule that would shift the ordinary burden of proof from a tenant to a housing provider in a tenant petition. In our view, this portion of Drell is best understood as the Commission dealing as best it could with plain error in factual findings and with vague, unexplained legal conclusions made by the ALJ; its precedential value is thus limited. Moreover, unlike this case, the rent reduction – or hold, suspension, or however it should be described – in Drell did not stem from the mutual agreement of the tenant(s) and housing provider.

Second, in this case the Tenant and Housing Provider entered into an agreement that $233 would not be charged, in exchange for the Tenant's signature on a 70% voluntary

agreement. The ALJ concluded that the $233 surcharge had been unlawfully demanded at the outset, was withdrawn as to the Tenant two months later, and the "Tenant was *actually being charged* the correct legal rent of $2,310 as a condition of occupancy" afterwards. Final Order at 27 (emphasis added). But the ALJ also held that the inclusion of the $233 on the RAD forms constituted a demand for rent. *Id.* at 30.[20] It cannot logically be both ways, however: either 1) the $233 was actually demanded, and thus not falsely included on the RAD Forms; or 2) it was not actually demanded or received, and thus not refundable under D.C. Official Code § 42-3509.01(a).

There is no other evidence in the record that arguably constitutes demands for the $233 surcharge after February 2008, except that the RAD forms that include it, albeit inaccurately, on the "rent charged" lines. The Tenant testified that he was confused the second time he received a CPI-W increase notice that included the $233 surcharge, but his subsequent discussions with the Housing Provider's employees seeking clarification resulted in a rent reduction based on his age, not a demand that he pay the surcharge. Final Order at 16-17, *see* Tr. at 109-112 (OAH Apr. 3, 2018).

[20] The ALJ correctly noted that, in Fineman, RH-TP-16-30,842 (RHC Jan. 18, 2018), the Commission determined that a housing provider may not use RAD forms – specifically notices of rent adjustments to tenants or certificates of rent adjustments filed with RAD – to "preserve" an amount of "rent charged" for future use that it is not actually demanding or receiving from the tenant. *See* Final Order at 26. In Fineman, the housing provider and tenant executed a "concession addendum" to the lease that substantially reduced the amount of rent the tenant was actually required to pay, but the housing provider continued to include the un-charged portion on its RAD forms. RH-TP-16-30,842 (RHC Jan. 18, 2018) at 31-32. The Commission held that, "[i]n determining what amount of rent has been charged, the Commission looks to the course of dealings between a tenant and a housing provider to determine how much money or value was demanded or received as a 'condition of occupancy' of a particular rental unit." *Id.* at 32 (quoting D.C. Official Code § 42-3501.03(28) (defining "rent")). In denying reconsideration of the decision in Fineman, the Commission further explained that "charge" and "demand" are essentially synonymous for the purposes of the Act. RH-TP-15-30,842 (RHC Mar. 3, 2018) at 5-6 (collecting dictionary definitions). In short, the Commission concluded that the lack of any actual demand for the higher rent that was disclaimed by the concession addendum meant that the amount stated on the RAD forms was not actually the "rent charged."

At most, the inclusion of the $233 on the RAD forms in this case appears to have been an attempt to preserve the surcharge in case the 70% voluntary agreement was rejected or, as discussed below, to threaten or coerce the Tenant into not taking action to oppose it (although the Housing Provider eventually abandoned both that application and the CI 20,797 petition). We have doubts that it would have been lawful for the Housing Provider to act upon its purported "reserve[d] right" to actually demand the surcharge retroactively, but that was never done. Thus, although the RAD forms may have been partly erroneous,[21] in the context of the deal struck between the Housing Provider and Tenant to withdraw the $233 surcharge, those notices did not constitute a demand for rent.

Finally, with respect to the first two months, January and February 2008, when the $233 was undisputedly demanded and received, but also undisputedly refunded, we have little explanation from the ALJ as to why this was included in the refund order and little argument from the parties on this narrow point. The ALJ found as a fact that the surcharge was refunded voluntarily, *see* Final Order at 15, but included those months in the computation of the refund, *see* Final Order at 30. The Housing Provider mentions in its brief that those months' surcharges were refunded, a point the Tenant's Brief does not address. The ALJ's computation of the refund may have followed from his reliance on Drell and the view that the rent demands were ongoing from the date of their implementation, although Drell did not involve any voluntary refunds. The Housing Provider, for its part, seems to have focused more before OAH on the argument that it was allowed to charge the $233 after 60 days, even without administrative approval.

[21] As noted above, the ALJ concluded that the CPI-W increases themselves were not invalid, because the Housing Provider had appropriately calculated the new rent by excluding the CI surcharges from the "prior rent charged." Final Order at 32 (citing Guerra v. Shannon & Luchs Co., TP 10,939 (RHC Apr. 2, 1986)).

On appeal, the parties primarily address the initial implementation of the $233 under the rubric of retaliation, which we discuss below. The Housing Provider also maintains that the initial implementation was lawful pursuant to the 60-day rule in D.C. Official Code § 42-3502.10(e). Although we disagree that it was lawful, *see infra* at 27-28, we nonetheless vacate the order to pay a rent refund for the first two months of the surcharge because a refund was voluntarily made almost immediately, leaving the Tenant whole.[22]

Accordingly, in the alternative to the conclusion above in issue 1, the ALJ's conclusion of law on this point is reversed, and the rent refund is vacated to the extent it is based on the $233 surcharge.

**4. Rent rollback amount**

Additionally, the ALJ's directive that the rent must be rolled back to $1,280 is plainly inconsistent with the findings of fact and conclusions of law. *See* Final Order at 59. The Tenant acknowledged as much at our hearing. There was no basis for ordering a rent rollback to any amount lower than the rent charged minus the allegedly unlawful rent demands. *See* Afshar v. D.C. Rental Hous. Comm'n, 504 A.2d 1105, 1108 (D.C. 1986); 14 DCMR § 4217.1 (2021). For the lack of any apparent basis in the record, we assume the $1,280 figure is a scrivener's error. The rent rollback, if one were appropriate, should not have been less than the Tenant's baseline rent at the start of the three-year period allowed by the statute of limitations, plus the lawful CPI-W adjustments taken in 2009 and 2010. In any event, because we reverse the ALJ's conclusions

[22] We do not hold that anytime a housing provider voluntarily refunds rent it will negate a claim for a refund made later in a tenant petition or excuse any other violation of the Act. That question is not presented. We are presented only with an unusual set of circumstances and an unexplained decision by an ALJ awarding relief that was not asked for by the Tenant.

that the Housing Provider made unlawful demands for the $179 and $233 surcharges and no other rent reductions were ordered, this issue is moot.

### 5. Treble damages

In the Final Order, the ALJ concluded that the Housing Provider acted in bad faith by demanding the CI surcharges. Final Order at 37-38; *see* D.C. Official Code § 42-3509.01(a). As with Issue 1, above, this issue was not properly raised by the Tenant before OAH; the only argument for bad faith that is apparent in the record related to reductions in related services and facilities, *see* Tenant's Closing Argument at 12-13, but the ALJ concluded that the Tenant did not prove those claims, *see* Final Order at 49. In any event, because we conclude above that the underlying violations, i.e., the claim for a single rent refund, were not properly raised, or because, in the alternative, we conclude above that the CI surcharges were not unlawfully demanded, there is no refund to treble, and this issue is moot.

## B. Whether the ALJ erred in imposing a fine for retaliation

In the Tenant's Closing Argument, the Tenant argued that the Housing Provider took several retaliatory actions against the Tenant, including the "repeated demand" for the $233 surcharge discussed above.[23] In the Final Order, the ALJ concluded that the Housing Provider willfully retaliated against the Tenant for his participation in a tenant association each time the $233 was "demanded" and fined the Housing Provider $500 for each instance, totaling $1,500. Final Order at 52-59.

[23] The Tenant alleged several other actions were retaliatory, including the service of a 120-day notice to vacate, and, although the Final Order begins discussing the notice to vacate and finds that it was presumptively retaliatory, no fines were imposed for any actions except the $233 surcharge. *See* Final Order at 55-58. The Tenant does not appeal the failure to impose any fines except for the surcharge.

The Housing Provider makes three arguments on appeal as to why its actions were not retaliatory: first, that the implementation of the $233 surcharge was lawful; second, that there was no evidence the Housing Provider was aware of the Tenant's participation in the tenant association; and third, that there was no evidence that the Tenant was singled out for his other protected conduct, namely, complaints regarding construction. Housing Provider's Brief at 5-6 & 8-9.

The Commission has consistently explained that the determination of retaliation is a two-step process. First, the ALJ must determine whether a housing provider committed an act that can be considered retaliatory under D.C. Official Code § 42-3505.02(a). The Act provides that retaliatory actions may include:

> [A]ny action or proceeding not otherwise permitted by law which seeks to recover possession of a rental unit, action which would unlawfully increase rent, decrease services, increase the obligation of a tenant, or constitute undue or unavoidable inconvenience, violate the privacy of the tenant, harass, reduce the quality or quantity of service, any refusal to honor a lease or rental agreement or any provision of a lease or rental agreement, refusal to renew a lease or rental agreement, termination of a tenancy without cause, or any other form of threat or coercion.

*Id.* (emphasis added); *see* Wilson v. D.C. Rental Hous. Comm'n, 159 A.3d 1211, 1218 n.6 (D.C. 2017); Novak v. Sedova, RH-TP-15-30,653 (RHC Sept. 28, 2018) at 14-15 (discussing substantiality of action required to establish "harassment, threats, or coercion"); *see also* 14 DCMR § 4303.2 (2021). The DCCA has explained that, although the statutory language related to "unlawful" action may be confusing, retaliation "is not limited to situations where the landlord acts illegally. In other words, a retaliatory motive may 'taint' an action that would otherwise be lawful." Gomez v. Independence Mgmt. of Del., Inc., 967 A.2d 1276, 1290 (D.C. 2009).

Second, the ALJ must determine whether a housing provider acted with retaliatory intent, which must be presumed if the tenant establishes that the housing provider's conduct occurred within six months of the tenant performing one of the six kinds of protected acts listed in D.C.

Official Code § 42-3505.02(b). *See*, *e.g.*, Jackson v. Peters, RH-TP-07-28,898 (RHC Feb. 3, 2012) at 15-17. "When the statutory presumption comes into play, it will not suffice merely to articulate a legitimate, non-retaliatory reason, because the legislature has assigned a substantial burden of proof ('clear and convincing evidence') to the landlord." Gomez, 967 A.2d at 1291 (citing Robinson v. Diamond Housing Corp., 463 F.2d 853, 865 (1972) ("once the presumption is established, it is then up to the [housing provider] to rebut it by demonstrating that he is motivated by some legitimate business purpose")); *see, e.g.,* Smith v. Christian, RH-TP-05-27,661 (RHC Sept. 23, 2005) at 22-23 (presumption not sufficiently rebutted where the housing provider testified that it increased all tenants' rent to reflect building-wide expenses but did not explain why tenant's increase was disproportionate to other units); Kornblum v. Charles E. Smith Residential Realty, TP 26,155 (RHC Mar. 11, 2005) (presumption sufficiently rebutted where housing provider testified that it removed the tenant's belongings from area outside of storage unit because they presented a fire hazard).

**6. Housing Provider's action**

As an initial matter, we agree with the Housing Provider's argument, discussed above in Issue 3, that the inclusion of the $233 surcharge on the 2009 and 2010 rent increase notices did not constitute demands for rent. The Tenant maintains on appeal, however, that both the initial, 2008 demand and the subsequent inclusion on rent increase notices were acts of coercion – "a sword hanging over [his] head." Tenant's Brief at 7; *see* D.C. Official Code § 42-3505.02(a) ("Retaliatory action may include . . . any other form of threat or coercion."). The ALJ found that there was "significant evidence" that the $233 surcharge was initially demanded "as a means of coercing Tenant to sign a 70% Voluntary Agreement," which he ultimately did. Final Order at 55. As discussed above, the voluntary agreement provision withdrawing the actual, present

demand for the $233 surcharge contained terms whereby the surcharge could be reimposed – even retroactively – if the agreement was not approved by 70% of tenants and the Rent Administrator, and the CI petition and voluntary agreement approval application were not withdrawn until sometime later. *See* RX 218. Therefore, we are satisfied that the inclusion of the $233 on 2009 and 2010 rent increase forms – although not a rent demand – was a repeated or continuing threat or coercion against the Tenant that a rent increase – and substantial back rent – would be demanded if tenant opposition derailed the Housing Provider's voluntary agreement application.

The Housing Provider further argues that its action was lawful, asserting that D.C. Official Code § 42-3502.10(e) authorizes CI surcharges to be implemented 60 days after a petition is filed but not acted upon by the Rent Administrator or OAH. We disagree.

D.C. Official Code § 42-3502.10(e) states that, 60 days after filing a CI petition on which the Rent Administrator (or OAH) does not timely issue a decision "shall operate to allow the petitioner to proceed with a capital improvement." "Capital improvement" is defined by the Act as "an improvement or renovation other than ordinary repair, replacement, or maintenance[.]" D.C. Official Code § 42-3501.03(6). "Improvement or renovation" is not a "rent adjustment," and when the Council intended to specifically refer to "a rent adjustment to cover the cost of capital improvements" it did so. *See* D.C. Official Code § 42-3502.10(a).

We also note that the Commission has recently clarified by rulemaking that the 60-day rule in D.C. Official Code § 42-3502.10(e) only allows a housing provider to begin the physical modifications to a building; it does not authorize rent surcharges without administrative approval. *See* 14 DCMR § 4210.5 (2021). We do not think, however, that the prior rules were ambiguous on this point: 14 DCMR §§ 4204.3, 4208.1, and 4210.1 (2004) clearly listed CI

petitions among those rent ceiling adjustments for which written approval of the Rent Administrator was required before the adjustment could be taken. Nothing in the text of the Act or the prior regulations states that the 60-day rule authorizes rent (or, originally, rent ceiling) increases without that approval. The CI petition rules, following D.C. Official Code § 42-3502.10(e), allows only that a housing provider "may proceed with the improvement subject to any rent adjustments *subsequently ordered* by the Rent Administrator;" it does not say subject to the pending, requested rent adjustments. 14 DCMR § 4210.11 (2004) (emphasis added).

We observe that two of the cases the Housing Provider relies on, Cafritz Co. v. D.C. Rental Hous. Comm'n, 615 A.2d 222 (D.C. 1992), and Hampton House North Tenants' Assoc. v. Shapiro, CI 20,689 & 20,670 (RHC Sept. 6, 1996), do not support its position, as the ALJ correctly explained. *See* Final Order at 23-25. Neither case dealt with the implementation of rent (or rent ceiling) adjustments prior to written, administrative approval. The Housing Provider, however, accurately points on appeal to the Commission's decision in 1841 Columbia Rd., LP v. 1841 Columbia Rd. Tenant Assoc., CI 20,082 (RHC Dec. 23, 1987), which concluded that D.C. Official Code § 42-3502.10(e) was ambiguous and stated, seemingly in dicta, that the plain meaning of the 60-day rule would be absurd to apply, because the Act is only directed towards regulating rent, not physical construction, repairs, or other modifications to a structure. We agree that the plain meaning, restricting the start of the improvement itself, is somewhat anomalous, given that the primary purpose of the Act is to regulate rents. It adds a layer of review to a work-permitting process otherwise administered by (the former) DCRA. Although D.C. Official Code § 42-3502.10(e) may produce some limited delay of debatable value, it does not produce results that are so absurd, self-contradictory, or manifestly unjust that we would ignore the Act's plain meaning.

### 7. Housing Provider's presumed intent

As to the Housing Provider's argument that its employees/agents were not aware of the Tenant's participation in the tenant association, we are not persuaded that the ALJ erred. First, the Housing Provider argues, essentially, that it was the Tenant's initial burden to prove the Housing Provider's knowledge of the Tenant's protected acts. Housing Provider's Brief at 9 ("Without a way for the Housing Provider to know of [Tenant's] advocacy, the burden must shift back to [him]."). But that is not the statutory scheme. D.C. Official Code § 42-3505.02(b)(4) commands, in relevant part, that "the trier of fact shall presume retaliatory action has been taken . . . if within the 6 months preceding the housing provider's action, the tenant: . . . [has] [o]rganized, been a member of, or been involved in any lawful activities pertaining to a tenant organization." There is no predicate requirement of notice to or knowledge by a housing provider of the protected action for a tenant to benefit from the presumption of retaliatory purpose. *See* Gomez, 967 A.2d at 1291 ("the statutory presumption relieves the tenants of the burden of establishing a prima facie case of retaliatory action"); *cf.* D.C. Official Code § 42-3505.02(b)(1) & (3) (requiring written or witnessed oral notice to housing provider). This makes good sense, as retaliatory purpose is a question of the subjective state of mind of a housing provider and is likely difficult for a tenant to prove, particularly in a forum where pre-hearing discovery is circumscribed. *See id.* at 1291 n.19; OAH Rule 2825. Once the presumption is established, a housing provider might prevail by demonstrating that it could not have had a retaliatory purpose because it was not aware of a tenant's protected acts, but the burden of proving such a fact – by clear and convincing evidence – is on the housing provider. *See* Robinson, 463 F.2d at 865.

There is no dispute that the Tenant met his initial burden to prove that he was a member of and participant in the tenant association less than six months before the $233 surcharge was

implemented and each time it was later included on the RAD forms. *See* Final Order at 54. That was sufficient to shift the burden of proof to the Housing Provider. The ALJ concluded that the Housing Provider's claim to have no knowledge of his involvement was not persuasive and was outweighed by the Tenant's credible testimony "that he participated in at least two, and led one, meeting that the [association] held with representatives of Housing Provider regarding the proposed renovations before the 501(f) Application was filed [in July 2009]." *Id.* at 54-55. The Housing Provider points to the testimony of Ms. Marhefka that she did not know when the Tenant joined the association. Tr. at 24:3-8 (Oct. 20, 2011); R. at Tab 25. But that answer was immediately followed by testimony she was "under the impression that he had" joined the association. *Id*. at 24:7-12. Whatever the evidentiary value of her first statement, it is not enough, in its full context, for us to say that the ALJ erred in failing to find that the Housing Provider produced clear and convincing evidence to rebut the presumption of retaliation.

Second, as to the Housing Provider's argument that the Tenant was not singled-out for the imposition of the $233 surcharge, the Housing Provider again misassigns the burden of proof. In some situations, evidence that a particular tenant was not targeted may suffice to rebut the presumption of retaliatory motive. *See* Gomez, 967 A.2d at 1291 (noting "a great deal of force" to argument that housing provider "did not single out [tenant association members] for special treatment; rather, it sought possession of every occupied dwelling unit in the building"); Gural v. Equity Residential Mgmt., RH-TP-16-30,855 (RHC Feb. 18, 2020) at 32-35 (affirming finding that automated late fee assessment by computer system rebutted presumption of retaliation). But it was the Housing Provider's burden to prove "some legitimate business purpose." Robinson, 463 F.2d at 865. That is, the Housing Provider must clearly and convincingly break the causal

chain from the Tenant's exercise of a protected right to the Housing Provider's own action. *Cf.* Arthur Young & Co. v. Sutherland, 631 A.2d 354, 368-69 (D.C. 1993).

The Housing Provider's Brief, at 9-10, emphasizes that there was no evidence that only the Tenant was charged the $233. The Tenant's Brief, at 7, asserts that the demand for the surcharge to other tenants was only suggested circumstantially. We are satisfied that the record, including all reasonable inferences from the evidence, indicates that other tenants were presented with the same VA-or-CI proposition, and that non-signatories to the voluntary agreement were charged the $233 unless and until they signed the agreement. But the record does not provide more detail on the exact scope of the surcharges. The presumption here is triggered by the Tenant's participation in the tenant association, and the burden therefore rests on the Housing Provider to give sufficient, exculpatory context to its actions. *See* Christian, RH-TP-05-27,661, at 22-23. Did all or only tenant association members refuse (at least initially) to sign the voluntary agreement? Were some association members treated differently? When did the Housing Provider decide to make the (coercive) VA-or-CI proposition? These questions are not apparently answered by the evidentiary record, and we cannot say that the ALJ erred in concluding that the presumption of retaliation was not rebutted by clear and convincing evidence.

Accordingly, we affirm the ALJ's conclusion that the initial implementation and subsequent inclusion of the $233 surcharge on rent adjustment forms constituted retaliatory actions.

### 8. Willful violation of the Act

Finally, the Housing Provider argues that the ALJ erred by imposing fines for its retaliatory actions, because fines may only be imposed where a housing provider "willfully"

violates the Act. D.C. Official Code § 42-3509.01(b); Miller v. D.C. Rental Hous. Comm'n, 870 A.2d 556. In cases of retaliation, the Commission has held, and the DCCA has affirmed, that:

> [T]he failure alone of a housing provider to rebut the presumption of retaliation does not establish the heightened culpability necessary to support imposition of a fine. Rather, . . . before a fine may be imposed the ALJ must make specific findings that the retaliation, like any violation, was committed with *intent to violate the Act or at least with awareness that this will be the outcome*.

Miller, 870 A.2d at 559 (emphasis added). "The standards of willfulness and bad faith have much in common, but a determination of willfulness focuses more on the actor's knowledge that he is violating the law than on his motive for doing it." SCF Mgmt., RH-TP-15-30,690, at 45 (internal quotations omitted). An ALJ is permitted to draw an inference of willfulness from a housing provider's experience in the business, because such experience may include familiarity with applicable regulations. *See id.* at 46.

Here, the ALJ cited the above language and correctly recognized that, before a fine can be imposed, "I must make specific findings that the retaliation, like any violation, was committed with intent to violate the Act or at least with awareness that this will be the outcome." Final Order at 58. The ALJ then found as follows:

> As I discussed above in relation to the implementation of the $233 CI Increase, I do not credit the argument of Housing Provider's counsel that Housing Provider implemented the CI increase before it was authorized in reliance on two Court of Appeals cases.[24] There was no testimony presented by Housing Provider's witnesses, Ms. Marhefka and Mr. Underwood, which established Housing Provider believed it was permitted to implement the CI increase. Rather, counsel for Housing Provider submitted two cases and stated that Housing Provider relied on these two cases in implementing the CI increases. Neither of those cases authorized the implementation of a capital improvement increase that had not been authorized by the Rent Administrator or this administrative court. Housing Provider is a large and experienced Housing Provider that has implemented other capital improvement increases. Without evidence to the contrary, I conclude that Housing Provider knew it was violating the Act.

[24] Cafritz, 615 A.2d 222; Shapiro, CI 20,689 & 20,670.

*Id*. at 58-59. Relatedly, the ALJ concluded, in awarding trebled rent refunds because of bad faith, that the "Housing Provider is an experienced Housing Provider who has implemented other capital improvement increases and therefore, knew or should have known, that it could not implement a capital improvement surcharge that has not been authorized, Housing Provider's intent to violate the Act can be inferred." *Id*. at 37.

The entirety of the ALJ's discussion of the Housing Provider's knowledge of the law relates to the implementation of the $233 CI surcharge itself, not to whether it was done for the purpose of retaliating against the Tenant and whether the Housing Provider "intended to violate or was aware that it was violating" *the retaliation provisions* of the Act. *See* Miller, 870 A.2d at 559. We observe that the relevant language in Miller is somewhat ambiguous regarding fines for retaliatory actions. The ALJ appears to have read it to say that a housing provider's retaliatory action must itself have been a willful violation of the Act for a fine to be imposed. The Housing Provider seems to read it to say that retaliatory action can result in a fine only if a tenant meets the burden to show retaliatory intent, independent of the statutory presumption. The Commission's underlying decision in Miller provides little guidance because the Commission simply struck the fine because the hearing examiner applied the wrong standard. Borger Mgmt., Inc. v. Miller, TP 27,445 (RHC Mar. 4, 2004). The DCCA remanded on that last point, concluding the proper course for the Commission had been to remand for the application of the correct legal standard to the record evidence. Miller, 870 A.2d at 559.

We are satisfied that the ALJ did not commit reversible error for two reasons. First, contrary to the Housing Provider's view, we think that the heightened culpability standard in D.C. Official Code § 42-3509.01(b) does not obviate the command in D.C. Official Code § 42-3505.02(b) that the finder of fact must presume retaliatory motive in certain cases. Nor do we

think that Miller goes so far as to hold that only conduct that willfully violates some other provision of the Act can be sanctioned as retaliatory; as noted above, Gomez explains that otherwise-lawful conduct may become a violation of the Act if it was done with retaliatory intent. The relevant question, therefore, as to whether presumptively retaliatory action can be fined is whether the housing provider knew of the statutory prohibition on retaliation but took the action anyway. As the ALJ noted, the Housing Provider is a large, experienced landlord, and the entire context of this case is the Housing Provider's various attempts to navigate (or evade certain limits of) the Act's rent stabilization program. Given the record of the Housing Provider's knowledge and experience of the Act generally, we are satisfied that it cannot plausibly deny knowing that retaliation is prohibited. *See* Miller, 870 A.2d at 560 (Schwelb, J., concurring) (noting "reasonable inference that Borger's retaliatory action was willful" unless evidence showed that "Borger, a major landlord, really did not know that it was against the law to condition Mr. Miller's right to have a dog on not joining a tenant organization").

Second, even if there were no substantial evidence that the Housing Provider willfully retaliated against the Tenant, we are satisfied that substantial evidence supports the ALJ's determination that the Housing Provider willfully violated the Act by demanding the $233 surcharge and by continuing to include it on rent increase notices without approval of its CI petition, independently of whether doing so was retaliatory.[25] As explained above, the ALJ correctly concluded that the two cases the Housing Provider relied on, Cafritz, 615 A.2d 222, and Shapiro, CI 20,689 & 20,670, do not authorize a housing provider to implement a surcharge

[25] Unlike the claim for rent refunds based on the inclusion of the $233 surcharge on rent notices, discussed above in Issue 1, the Housing Provider does not argue on appeal that it lacked notice of the claim that it should be fined for its actions, albeit under the theory that they were retaliatory actions. Rather, as we have discussed, the Housing Provider devotes a substantial amount of its brief, as it did its closing arguments and exceptions to the proposed final orders, to arguing that the surcharge was lawfully imposed.

without administrative approval, even if the Rent Administrator has not acted on a petition within 60 days. *See* D.C. Official Code § 42-3502.10(e)(2); 14 DCMR § 4208.1 (2004). Moreover, the ALJ correctly concluded that the Housing Provider had not introduced evidence of its actual reliance (whether reasonable or not) on those cases but had proffered only counsel's ex post facto argument. Final Order at 58. On appeal, the Housing Provider also points to 1841 Columbia, CI 20,082, a case that does suggest CI surcharges can be implemented without approval after 60 days. Although we think that suggestion by the Commission was wrong, we could hardly fault a housing provider that actually relied on it with willfully violating the Act. However, on this record the Housing Provider faces the same problem as with Cafritz and Shapiro: we have only the arguments of counsel on appeal, not record evidence of actual reliance on 1841 Columbia. Thus, the ALJ was left to weigh 1) the reasonable inference that the Housing Provider, being experienced in CI surcharges, knew it could not implement the surcharge immediately under the plain language of D.C. Official Code § 42-3502.10(e), against 2) no evidence to the contrary. We see no error in the ALJ's weighing of the evidence to conclude that the violation was willful.

Accordingly, the imposition of $1,500 in civil fines is affirmed.

## V. CONCLUSION

For the foregoing reasons, we reverse the order to pay rent refunds, trebled refunds, and interest. This claim was not raised by the Tenant or litigated with the consent of the Housing Provider. Alternatively, we reverse the order to pay refunds, trebled refunds, and interest because the $179 surcharge was not illegally demanded and because the $233 surcharge was not actually demanded after the first two months, the charges for which were refunded voluntarily. We affirm the conclusion that the initial imposition of the $233 surcharge and its continued inclusion on rent

increase forms was a retaliatory action and affirm that the action was a willful violation of the Act, warranting the total fine of $1,500 imposed by the ALJ.

**SO ORDERED.**

LISA M. GREGORY, INTERIM CHIEF ADMINISTRATIVE JUDGE

ADAM HUNTER, ADMINISTRATIVE JUDGE

TOYA CARMICHAEL, ADMINISTRATIVE JUDGE

## MOTIONS FOR RECONSIDERATION

Pursuant to 14 DCMR § 3823 (2004), final decisions of the Commission are subject to reconsideration or modification. The Commission's rule, 14 DCMR § 3823.1 (2004), provides, "[a]ny party adversely affected by a decision of the Commission issued to dispose of the appeal may file a motion for reconsideration or modification with the Commission within ten (10) days of receipt of the decision."

## JUDICIAL REVIEW

Pursuant to D.C. Official Code § 42-3502.19 (2012 Repl.), "[a]ny person . . . aggrieved by a decision of the Rental Housing Commission . . . may seek judicial review of the decision . . . by filing a petition for review in the District of Columbia Court of Appeals." Petitions for review of the Commission's decisions are filed in the District of Columbia Court of Appeals and are governed by Title III of the Rules of the District of Columbia Court of Appeals. The court may be contacted at the following address and telephone number:

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

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **DECISION AND ORDER** in RH-TP-10-29,874 was sent electronically on this **7th** day of **December, 2023,** to:

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