DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION

SMITH PROPERTY HOLDINGS VAN NESS, L.P., **2 North Riverside Plaza, Suite 400** **Chicago, IL 60606** **Appellee/Housing Provider,** v. **GABRIEL FINEMAN,** **Appellant/Tenant.**	)	**Case No. 2016 DHCD TP 30,842** **In re: 3003 Van Ness Street, NW Apt. W-1131**

OPPOSITION BRIEF OF APPELLEE/HOUSING PROVIDER

Over the past three years, Smith Property Holdings Van Ness, L.P. ("Housing Provider") has been defending itself against the claims of Gabriel Fineman, a former tenant who filed a Tenant Petition in July 2016 with a single request – a re-do of his September 2015 RAD Forms 8 and 9. Shortly after filing his petition, Fineman moved out of 3003 Van Ness rendering his claims moot. Yet Fineman has continued his vendetta against Housing Provider, pursuing his claims through the OAH, RHC, back to the OAH, and now again before the RHC. When Fineman missed the deadline to submit a brief on May 29, 2019, Housing Provider thought that perhaps Fineman had accepted that his four-year-old forms would not be revised. However, on June 26, 2019 Fineman submitted an untimely brief asserting a litany of arguments in a rambling, disorganized 19-page appeal brief. Despite this lengthy attack, Fineman fails to show why the decision of ALJ below was wrong and should be overturned.

I. BACKGROUND

A. Brief Summary of This Litigation.

Fineman resided at 3003 Van Ness from December 22, 2013 through December 8, 2016.

(10/2/18 Order at 4.) On July 12, 2016, Fineman filed a tenant petition against Flousing Provider complaining that in September 2015 the Housing Provider provided an incorrect RAD form 8 to him and an incorrect RAD form 9 to RAD. (*Id.* at 1.) Fineman's Petition sought no adjustment to the rent for his unit, W-1131. Fineman also did not complain about any RAD form for his unit prior to 2015 nor after 2015 because he moved out of 3003 Van Ness on December 8, 2016. Accordingly, as Fineman frankly admitted in his Petition, this case was always about the "rent charged" amount reflected on a single year's RAD forms and whether those forms need a do-over.[1]

The procedural history of this case since July 2016 is protracted. Fineman moved for summary judgment at the OAH and lost. (10/2/18 Order at 2.) Fineman then appealed this decision to the RHC, which reversed and remanded to the OAH on February 8, 2018. (*Id.*) Housing Provider then moved to reconsider, which was denied by the RHC on March 13, 2018. (*Id.*) Housing Provider appealed to the District of Columbia Court of Appeals, which dismissed the appeal on the basis that there was no final order to review. (*Id.*) The Court of Appeals, however, noted that "[I]t is unclear what impact, if any, [Tenant's] decision to vacate the subject property has on the underlying tenant petition and remand order." *Smith Property Holdings Van Ness, L.P.* v. *D.C. Rental Housing Comm%* No. 18-AA-364 (D.C. June 5, 2018).

Shortly after remand, Fineman moved for summary judgment in the OAH requesting that the ALJ order Housing Provider to reissue and refile the corrected RAD Forms 8 and 9 for 2015. (10/2/18 Order at 3.) Housing Provider opposed the motion on the basis that the OAH lost jurisdiction of the case since the claim was moot and any opinion would be an advisory opinion. (*Id.*) On October 2, 2018 the ALJ entered a Final Order After Remand and found that she did

[1] Although Fineman sought relief for "other tenants," that request was rejected by the OAH for lack of standing and never appealed by Fineman. (3/16/17 OAH Final Order at 16.)

not have the authority to order the requested remedy – that is, for Housing Provider to correct, reissue, and refile Fineman's 2015 RAD forms. The ALJ also concluded that the case is moot because Fineman no longer lives at the property, no money damages were sought, and no interest has been identified that a former tenant has in receiving corrected and reissued RAD forms. In addition, the ALJ found that she lacked subject matter jurisdiction and Fineman lacked standing.

Fineman noticed an appeal of the Final Order After Remand on October 22, 2018. The RHC noticed it for hearing on May 24, 2019, making any brief due on May 29, 2019, but Fineman did not submit his brief until June 26, 2019.

B. Rental Housing Act Developments Since 2018.

The Commissioners last considered an issue in this matter in early 2018. Since that time, and perhaps in response to the prompting by Commissioner Szegedy-Maszak in his concurrence in the January 18, 2018 RHC Opinion, the D.C. City Council enacted the "Rent Charged Definition Clarification Amendment Act of 2018" on December 4, 2018 ("2018 Amendment"). The change to the Act adopted a new definition of "rent charged" (as the amount a tenant must actually pay) and directed the Rental Housing Commission to adopt regulations to implement these changes. The 2018 Amendment became effective on March 13, 2019. The 180-day period for the Rental Housing Commission to adopt new regulations (including new RAD forms) commenced on the effective date. Once new Forms 8 and 9 are available with the new definition of "rent charged" and "prior rent," all housing providers for rent-controlled properties in DC will have new direction for completing these forms and calculating allowable increases.

In light of the consideration and passage into law of the 2018 Amendment and that law's directive that the Rental Housing Commission issue new rules and update all relevant housing provider forms within 180 days of the effective date, Housing Provider has, prior to March 1, 2019, done the following at 3003 Van Ness:

- Eliminated the use of rent concessions (i.e., the difference between the maximum lawful rent under the Rental Housing Act of 1985 and the market rate of rent for a unit);
- Eliminated the website disclosure referencing rent concessions;
- Begun calculating renewal increases based upon the amount paid per month by a tenant;
- Taken all other steps necessary to comply with the new law.

II. FINEMAN'S BRIEF IS UNTIMELY AND SHOULD BE STRICKEN.

In matters before the Rental Housing Commission, "[pjarties may file briefs in support of their position within five (5) days of receipt of notification that the record in the matter has been certified." 14 D.C.M.R. § 3802.7. In this case, the Rental Housing Commission entered its Notice of Certification of Record on May 24, 2019. Accordingly, any brief in this matter was due on May 29, 2019. Appellant failed to serve a brief on that day, or any day thereafter until four weeks later on June 26, 2019. Because Appellant filed his brief 28 days late, it should be stricken as untimely. *See Wine Bottle Recycling, LLC* v. *Niagara Sys. LLC*, 2013 U.S. Dist. LEXIS 138896, at *5-6 (N.D. Cal. Sep. 26, 2013) (striking untimely brief).

III. THE ALJ PROPERLY FOUND THAT FINEMAN'S CASE IS MOOT BECAUSE THERE IS NO LIVE CONTROVERSY.

The ALJ properly held that Fineman's case is moot because she could not issue an order to Housing Provider to correct, re-file, and re-issue the RAD forms. (10/2/18 Order at 12.) Fineman claims that the controversy here is "still very real," (Br. at 13), but fails to explain what is still live in this "very real" controversy besides his own obstinate desire to re-do the forms. Fineman has not lived in the building for over two and a half years. The forms in question are almost 4 years old and are being replaced in the very near term by new RAD forms that make clear what information is to be supplied. Although Fineman claims that the tenants who occupied the apartment after him will then receive updated forms, that is not correct. (Br. at 13-14.) The ALJ found in 2017 that he did not have standing to seek relief for other tenants and

Fineman never appealed that decision. (3/16/17 OAH Final Order at 16.)

When a petitioner in a landlord-tenant dispute stops being a tenant, his/her claims for a declaratory judgment concerning statutory violations allegedly committed by the landlord are moot. *Brown* v. *District of Columbia Housing Authority*, Civil Action No. 2016-1771 (D.C. 5/31/17). In *Brown*, a tenant filed suit against the DCHA over health, safety, sanitation, and treatment issues at Section 8 apartments owned by the District. Within a year, the tenant relocated to New York City. Finding that the relocation eliminated any "judicial remediable right" for the tenant, the District Court dismissed the action for lack of subject matter jurisdiction. Here, Fineman's move out of 3003 Van Ness on December 8, 2016 had precisely the same effect on the alleged deprivation of his "right" to proper forms in September 2015. The ALJ cited numerous cases that supported her finding and she properly concluded the only interest remaining of Fineman was an "interest in feeling vindicated," thus there is no live legal issues presented. (10/2/18 Order at 11 (quoting *Cropp v. Williams*, 841 A.2d 328, 330 (D.C. 2004)).)

Fineman attempts to distinguish the numerous cases cited by the ALJ in support of her mootness finding. (Br. at 12-17.) Fineman's efforts fall flat. First, *Cropp* v. *Williams* is applicable to the facts here. In that case, the court found that a matter involving the qualifications of the inspector general was no longer ripe when that person resigned from the post. 841 A.2d 328, 330 (D.C. 2004). The rationale of that court is persuasive here:

> The Mayor argues that this case is moot because the sole legal dispute between himself and the Council – whether the new qualifications which the Act contains can be applied to Mr. Maddox – has been resolved by the incumbent's resignation and departure from office. Although this court has not had occasion to consider a similar question, those jurisdictions that have agree that the resignation of an incumbent officeholder moots an appeal from an underlying action seeking to remove that individual. We concur, and hold that Mr. Maddox's resignation has mooted any question of whether the Act's new qualifications may be applied to

> him. The Council contends that the matter is not moot because Mr. Maddox's individual status is not the only issue between the parties; rather, the Council is seeking a broader determination that the Mayor violated his duty to enforce the law. "The Mayor's Charter duty to enforce the law," the Council asserts, "and the Council's right to have the Court determine whether the Mayor violated that duty is not rendered moot by the prospective resignation of a subordinate agency head." We are unwilling, however, to address an issue of competing authority between the Mayor and the Council in so abstract a context rather than in the concrete setting of a decision by the Mayor that continues to have live consequences.

Id (citations omitted). Likewise here, Fineman is seeking an advisory opinion "to address an issue...so abstract a context" that has no live consequences and was properly found moot by the ALJ.

Second, Fineman's effort to distinguish *Clarke* v. *United States* should be rejected because he relies on a never before asserted factual claim. The *Clarke* case held that a case became moot where a regulation was superseded and therefore the situation had resolved itself. (Br. at 14.) Fineman claims that his moving out is ***not*** an intervening event because it was a "constructive eviction."[2] Fineman is wrong. He has never – over the course of three years of litigation – made a claim for constructive eviction. In December 2016, Fineman made the voluntary choice to move out of 3003 Van Ness to Florida, which as in *Clarke*, thus resolved this situation.[3] (10/2/18 Order at 5.) Moreover, the situation here has further resolved itself because the D.C. Council enacted the 2018 Amendment which directs the RHC to issue new rules and RAD forms thereby eliminating any ambiguity about what information is required on the forms.

Third, Fineman again relies on his newly minted constructive eviction theory to

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[2] Fineman repeatedly argues that he was constructively evicted from his unit at 3003 Van Ness. (Br. at 3-4, 11 n.32, 15, 16, 17.) He characterizes this as the ALJ "ignoring facts," but given that this purported fact was never stated before it is unclear how the ALJ could ignore it. Further, Fineman never made a claim until now that "Landlord demanded that the Tenant pay a rent that exceeded the market rent for the Apartment." (Br. at 17.) There is absolutely no evidence that Fineman was constructively evicted from his unit.

[3] Fineman apparently splits his time between Florida and Chevy Chase, Maryland.

distinguish *Thorn* v. *Walker* to claim that an "involuntary departure" from a property does not "render an appeal moot." (Br. at 15-16.) This argument should be ignored. Fineman never argued that he was constructively evicted, and he has never put forth any evidence attempting to prove constructive eviction. This argument is nothing but a theory concocted after the fact to try to salvage his appeal.

Fourth, Fineman claims that the Commission should rule on substantive grounds because in another matter the "RHC refused to decide the case on procedural grounds when it could be decided on its merits" in *Holbrook Street, LLC v. Seegers*, RH-TP-14-30,571 (RHC July 15, 2016) . (Br. at 17.) While true that the RHC in *Holbrook* did reach a decision on substantive issues, that case was different because the RHC opted not to dismiss the appeal in its entirety because of appellant's failure to comply with an escrow order (the so-called "procedural" issue). (10/2/18 Order at 11.) That is not the case here where the entire case is moot, thus there is nothing substantive for the Commission to decide.

IV. THE ALJ PROPERLY FOUND THAT FINEMAN LACKS STANDING.

The ALJ properly held that she lacked subject matter jurisdiction over this matter and Fineman lacked standing because Fineman "no longer has an immediate and personal stake in the rent for the apartment." (10/2/18 Order at 14.) In particular, the ALJ found that Fineman only has an "academic interest in the problem" of the RAD forms because he no longer lives or pays rent at the property, and thus has no actual or imminent injury that was attributable to Housing Provider or capable of redress. {*Id.* at 13-14.) The ALJ also acknowledged that Fineman never sought overcharge of rent and thus does not have an immediate and personal stake in the rent for the apartment.

Although buried in his brief, Fineman concedes that he has a standing problem by admitting that he has filed another tenant petition "to recover overcharged rents during the term

of his occupancy of the unit." (Br. at 18 n.55.) This second petition is obviously too little too late, and Housing Provider will be moving to dismiss on a variety of grounds including statute of limitations and waiver. In addressing the ALJ's decision on standing, Fineman claims that "OAH improperly conflated the requirements for initiating a petition (that there be some connection with the housing accommodation) with the requirements to pursue a petition (none)." (Br. at 10.) Fineman then performs a meandering analysis of the Tenant Petition/Complaint form[4] and identifies what he believes to be the requirements for filing a petition. (Br. at 10-11.) This analysis is irrelevant to the question of whether Fineman has standing ***now*** to pursue his complaints.

Fineman also challenges the ALJ's holding on subject matter jurisdiction on the grounds that "even if there were no unresolved issues, there was still a need for an order from the OAH." (Br. at 7-9.) This argument makes no sense as the OAH in fact did enter an Order – the very one that Fineman appeals here. Further, Fineman fails to recognize that standing can be raised at any point in a case and, because it goes to the court's subject matter jurisdiction, may be raised *sua sponte* by the court. *Steffan* v. *Perry*, 41 F.3d 677, 697 n.20 (D.C. Cir. 1994). Fineman seems to suggest that if subject matter jurisdiction exists at the filing of the petition, it must exist throughout the life of the case. This is contrary to well-established law. *Cierco* v. *Mnuchin*, 857 F.3d 407, 415 (D.C. Cir. 2017) ("Standing can be raised at any point in a case proceeding"). The ALJ properly found that although Fineman had standing when he filed his Tenant Petition in July 2016, he lost standing when he chose to move out in December 2016. (10/2/18 Order at 13-16.) Fineman offers no compelling reason to overturn this finding.

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[4] Fineman also claims that the "OAH arbitrarily chose not to recognize issues arising from a 'tenant complaint' (as opposed to 'tenant petition')...." (Br. at 4.) Fineman does not cite to any part of the ALJ's Order or identify any argument raised by him that the ALJ ignored. Thus, it is unclear the point of this argument and the Commission should pay no heed to this argument.

V. THE ALJ PROPERLY FOUND THAT SHE LACKED AUTHORITY TO ORDER HOUSING PROVIDER TO CORRECT, REISSUE, AND REFILE RAD FORMS.

Fineman makes three arguments addressing the ALJ's conclusion that she cannot order a re-do of Fineman's RAD forms. (10/2/18 Order at 7-10.) First, Fineman argues that the ALJ has "ignor[ed] lateness" because his facts have not changed since the ALJ's March 16, 2017 Order and the ALJ should have made this finding in that Order. (Br. at 3 ("Surely its own purported lack of authority was known to the OAH at the time of the issuance of the Initial Order and was certainly germane to the resolution of the case at that stage of the process.").) Fineman thus seems to suggest that the ALJ waived her ability to make the determination now, but cites no authority supporting this position.

Second, Fineman claims that the ALJ "ignor[ed] [her] authority to order the relief sought" and points to the enumerated powers under D.C. Code § 2-1831.09(b)(5), (10), and (13) to "[i]ssue interlocutory orders and orders," "[pjerform other necessary and appropriate acts in the performance of his or her duties and properly exercise any other powers authorized by law," and "[ejxercise any other lawful authority." (Br. at 5 n.9; *see also* Br. at 4-7.) Fineman fails to explain or identify any authority supporting his interpretation that these "powers" allow an ALJ to order a private entity to correct, reissue, and refile government forms. The ALJ specifically considered these powers in her Order and concluded that they did not provide her the authority to order Housing Provider to re-do the forms. (10/2/18 Order at 9.) What's more, it is a complete over-statement for Fineman to say that the ALJ stated that the "OAH has no authority to order anyone to do anything." (Br. at 5.) In fact, the ALJ stated that "[t]here does not appear to be any specific authorization to order ***an applicant to the RAD*** to do anything." (10/2/18 Order at 10.)

Third, Fineman then goes on to claim that the OAH "ignores the many cases where the OAH has provided relief where there was no explicit statutory or regulatory provision for doing

so." (Br. at 5.) Yet despite the claim of "many" cases, Fineman cites to exactly zero cases. Fineman also tries, but fails, to distinguish *D.C. Office of Tax and Rev. v. Shuman*, 82 A.3d 58 (D.C. 2013), a case relied upon by the ALJ in her October 2 Order. (Br. at 5-7.) In that case, the Court of Appeals found that the OAH's powers are not identical to those of courts in the judicial branch because ALJs "only possess narrowly defined statutory and regulatory powers." Fineman misinterprets that opinion and claims that the Court of Appeals did not have a problem with an ALJ issuing an order to "do something." (Br. at 6.) Fineman is wrong. The *Shuman* court specifically held that the ALJ lacked the authority to order the Office of Taxation and Revenue to fix its computers. 82 A.3d at 70. Likewise here, the ALJ could not order Housing Provider to fix the forms.[5]

VI. FINEMAN IMPROPERLY TRIES TO BROADEN HIS RELIEF THREE YEARS INTO THIS LITIGATION.

As a closing salvo, Fineman inexplicably changes the relief sought from his July 2016 Tenant Petition.[6] The record is clear for the past three years in this case that Fineman has sought to have his 2015 RAD Forms 8 and 9 corrected. (*Compare* 10/2/18 Order at 4 (discussing September 2015 RAD forms reflecting rent of $3,114) *with* 7/12/16 Tenant Petition (discussing RAD forms reflecting rent as $3,114).) Now, for the first time, he tries to seek correction of the

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[5] Fineman also claims that all he was asking for was for the OAH "to direct the Landlord to do exactly what the Landlord was already required to do under the Act – obey the law and produce correct notices." (Br. at 6.) This is nonsensical. A litigant cannot be ordered to "obey the law." As for producing correct notices, the law pertaining to RAD forms recently changed. Indeed, the RHC has been directed to implement regulations and new RAD forms pursuant to the 2018 Amendments. There is no reason provided by Fineman for Housing Provider to change forms that are now outdated and update them almost four years after the fact.

[6] Fineman also makes the throwaway point that the OAH did not make a factual finding about willfulness. This misstates her decision. She specifically acknowledges that "[willfulness is a factual determination," and then concludes that "there is no basis to conclude that Housing Provider willfully violated the Act." (10/2/18 Order at 5 n.4.)

RAD Form 8s and 9s for 2014, 2015, and 2016. (Br. at 19.) This belated request is improper and Fineman long ago waived such relief in this appeal or any new petition filed by him. *See Tenants of Minnesota Gardens, Inc.* v. *District of Columbia Rental Housing Com.*, *570* A.2d 1194, 1195-96 (D.C. 1990) (finding that tenants who failed to raise an argument at the time of the original petitions waived their right to assert the challenge in a collateral tenant petition).

CONCLUSION

For the foregoing reasons, the decision of the Administrative Law Judge should be affirmed, and the Commissioners should put an end to this vendetta of Fineman that has wasted countless hours of time and resources.

Dated: July 15, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CAREY S. BUSEN, certify that on the 15th of July 2019, the foregoing ***Brief of Appellee*** was filed via hand delivery at:

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In addition, a copy was served via electronic mail and United States mail on the following:

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