DISTRICT OF COLUMBIA
Office of Administrative Hearings

GABRIEL FINEMAN, Tenant/Petitioner, V. SMITH PROPERTY HOLDINGS VAN NESS L.P., Housing Provider/Respondent	:	Case No.: 2016 DHCD TP 30,842 3003 Van Ness Street, N.W., Apt. W-1131 Administrative Law Judge: Ann C. Yahner

TENANT'S MOTION FOR SUMMARY JUDGMENT ON REMAND

Tenant/Petitioner Gabriel Fineman (the "**Tenant**"), submits this Motion for Summary Judgment. Tenant hereby states:

I. BACKGROUND

A. The Tenant filed a Tenant Petition (the "**Petition**") asking for the Housing Provider (the "**Landlord**") to be required to correct its "Housing Provider's Notice to Tenant of Adjustment in Rent Charged" notice ("**form 8**") and its "Certificate of Notice to RAD of Adjustment in Rent Charged" ("**form 9**") filings with the RAD relating to unit W-1131 (the "**Apartment**"). The Tenant then filed a Request for Summary Judgment on the Tenant Petition (the "**Request**"). The Petition required a determination of what was meant by the term "rent charged" as used in the Rental Housing Act (the "**Act**") as amended by the Rent Control Reform Amendment Act of 2006 (the "**2006 Amendments**") and, in particular, in the Form 8 and Form 9 where the Housing Provider is required to disclose the "Current Rent Charged." The OAH issued a final order holding that the term "current rent charged" was a term of art and denying the Tenant's claim. The Tenant appealed to

the Rental Housing Commission (the "**RHC**"). The Rental Housing Commission (the "**RHC**") in its decision dated February 18, 2018 (the "**Decision**") held that the term "rent charged" meant the actual rent paid by the Tenant after any discount. The Landlord moved for reconsideration and the RHC issued a second decision dated March 13, 2018 captioned "Order Denying Reconsideration" (the "**Reconsideration Decision**") upholding the Decision and clarifying it in some detail. The case was remanded to the Office of Administrative Hearings (the "**OAH**") for further proceedings consistent with those two decisions (together, the "**RHC Decisions**") and their accompanying orders. The Landlord filed a Notice of Appeal (the "**Appeal**") with the District of Columbia Court of Appeals (the "**DCCA**") and Tenant moved to dismiss the Notice of Appeal because the order of the OAH was not final. The Landlord objected saying that the order was final because nothing remained to be decided by the OAH and that its issuing of a new final order was purely ministerial.[1] The Appeal was dismissed by the DCCA on June 5, 2018,[2] ruling that the Landlord had "failed to demonstrate that the proceedings on remand . . in this case would be purely ministerial."

II. TENANT'S REQUESTED RELIEF

A. Consistent with his original petition, the Tenant hereby requests that the OAH order the Landlord to issue corrected RAD Form 8's and refile corrected RAD Form 9's for the Apartment.

B. This case does not involve any issues of disputed material facts and therefore can be decided on the basis of this summary judgment motion.

[1] In its opposition to the Tenant's motion to dismiss its Appeal at the DCCA, the Landlord stated that all that remained to be done by the OAH was the purely administrative act of ordering the Landlord to correct its notices. A true and complete copy of that Opposition (without the 49 pages of exhibits) is attached as Exhibit 1.
[2] A true and correct copy of this dismissal is attached as Exhibit 2

III. THE PERTINENT HOLDING IN THE RHC DECISIONS.

A. The primary holding was that the definition of "rent charged" as used since the 2006 Amendments meant the actual rent charged after any discount and not a rent ceiling or what was stated as rent in a lease.

> The Commission determines, to the contrary, that the meaning of the phrase "rent charged" in the Act's sometimes-conflicting text should, ordinarily, be construed based on the Act's definition of "rent" as the "entire amount of money, money's worth, benefit, bonus, or gratuity" that is actually "demanded, received, or charged by a housing provider as a condition of occupancy or use of a rental unit." D.C. OFFICIAL CODE § 42-3501.03(28) (2012 Repi.); see Kapusta, 704 A.2d at 287; Winchester Van Buren, 550 A.2d at 53. To the extent the context of a particular statutory or regulatory use of the term "rent" or "rent charged" only makes sense as a legal limit (for example, the vacancy adjustment or the rent refund provisions), the Commission is satisfied that those few circumstances can be addressed individually, in their unique contexts, and in a manner consistent with the overarching "remedial purposes of the Act,
> Decision, III.A, page 31

B. A second holding was that the 2006 Amendments actually did what it purported to do and did away with rent ceilings. That is, the concept of maximum legal rent did not exist since 2006 and that leases could not accumulate (and bank) unimplemented rent increases for future use.

> The Commission concluded that the Act does not permit a housing provider to use the RAD Forms to preserve a maximum legal rent in excess of what is actually charged. Decision and Order at 31-32.
> Reconsideration Decision page 3

> But the 2006 Committee Report demonstrates that the abolition of rent ceilings was meant to limit increases in rent actually charged and to prevent a housing provider from accumulating an array of large rent increase options, as was previously permitted.
> Reconsideration Decision page 18

> For the reasons just stated, the Commission remains unpersuaded that the Act establishes and preserves a maximum legal rent; the Act instead directly regulates increases to the rent actually demanded or received from a tenant
> Reconsideration Decision page 19

C. A secondary level holding following from this second holding about the abolition of rent ceilings is:

1. Leases (including concession leases) with a stated rent increase that was greater than a single allowed increase (stacking) have not been allowed under the Act since the Unitary Adjustment Act of 1997.

> In that decision [Godfrey], the Commission found that tenants were better protected from rapidly rising rents if housing providers were permitted to delay implementation of rent ceiling adjustments and raise the rent charged for a rental unit by the full, available amount later, rather than restricting rent charged increases to the amount of a single rent ceiling adjustment in any six month period. … That decision was affirmed by the DCCA … as a reasonable interpretation of the text of the Act. The Council disagreed with the Commission's view, and … Godfrey was effectively overturned by the Unitary Adjustment Act.
> Reconsideration Opinion, page 19

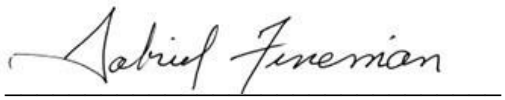
D. A third holding applied directly to the RAD Form 8 (and 9). It found that the "rent charged" to be used on the RAD forms was the actual rent charged.

> For the reasons just described in Part A, the Commission determines that the "rent charged" that must be used as the basis for calculating and reporting rent adjustments on the RAD Forms, in accordance with the statutory meaning of the term "rent" in the Act, is the amount actually demanded, received, or charged as a condition of occupancy of a rental unit, rather than a maximum legal limit that may be preserved by a housing provider.
> Decision, pages 31-32

IV. SUMMARY

There is no dispute about the material facts in this case. For the reasons stated above, judgment should be entered for the Tenant, and the relief sought and such other relief as the court feels appropriate should be granted. Finally, the Tenant urges OAH to remind the Landlord that the RHC Decisions have not been stayed and have the force of law, making any violation of the RHC Decisions a willful violation of the Rental Housing Act of 1985.

Respectfully submitted,
Tenant/Petitioner



Dated: June 20, 2018

Gabriel Fineman
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Summary Judgment on Remand, including Exhibits 1-3 was served on June 20, 2018, by first class mail, postage pre-paid upon the attorneys for the Housing Provider:

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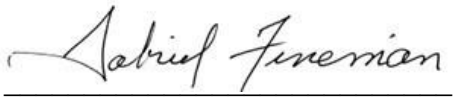

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EXHIBIT 1

Landlord's Opposition to Dismissal of Appeal by DCCA

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 18-AA-0364

SMITH PROPERTY HOLDINGS VAN NESS, L.P.,	)	
Petitioner,	)	Agency No. RH-TP-16-30,842
v.	)	
D.C. RENTAL HOUSING COMMISSION,	)	
Respondent,	)	
and	)	
GABRIEL FINEMAN,	)	
Intervenor.	)	

PETITIONER'S OPPOSITION TO MOTION TO DISMISS PETITION FOR REVIEW

The Motion To Dismiss The Petition For Review should be denied because review is appropriate under the "ministerial act" exception to the finality requirement. Intervenor Gabriel Fineman's ("Fineman") Motion To Dismiss is based solely upon the non-final character of the Rental Housing Commission ("RHC") Decision And Order of January 18, 2018 and the Order Denying Reconsideration of March 13, 2018. Smith Property Holdings Van Ness, L.P. ("Smith") does not dispute that ordinarily an order remanding a case to an administrative agency for further action is not a final order. Smith also does not dispute that the Court of Appeals typically lacks jurisdiction to review non-final agency orders or decisions. However, review is appropriate in this case under the "ministerial act" exception to the finality requirement. Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62, 68 (1948); District of Columbia v. Trustees of Amherst College, 499 A.2d 918, 920 (DCCA 1985).

Fineman's Tenant Petition/Complaint dated July 12, 2016 (copy attached as Exhibit 1) is based solely upon a RAD Form 8 sent to him on September 18, 2015 and sought only the following forms of relief:

- Correction of the 2015 RAD Form 8 for apartment W-1131 at 3003 Van Ness St., N.W. to show rent charged as $2,169.00. (Id. at 4.)
- Proper computation of the RAD Form 8 in the future for Fineman's unit and all other units. (Id.)
- A fine for $5,000.00 for Smith's willful violation for DC Code §42-3509.01(b)(2). (Id.)

No individual monetary relief was sought. Fineman vacated the apartment on December 8, 2016 and moved to Florida. (1/18/18 Decision And Order, p. 4) By reason of Fineman's move, the 2015 RAD Form 8 was the last one he received that addressed his rent for apartment W-1131. He has no standing to challenge other RAD Form 8's for apartment W-1131, or, as explained below, any other apartment.

In the final order of Administrative Law Judge Yahner dated March 16, 2017 (copy attached as Exhibit 2), Fineman's attempt to pursue claims for other tenants was rejected, and a finding was made that the Housing Provider did not intentionally file a false RAD Form 8. (Exhibit 2, pp. 15-16). Fineman did not appeal these decisions, and they were not considered by the RHC. (*See* Fineman Notice of Appeal dated March 30, 2017, copy attached as Exhibit 3). Accordingly, the only relief at stake in Fineman's appeal to the RHC was the "correction" of the RAD Form 8 he received on or about September 18, 2015.

Based upon the foregoing record in this case, and in light of the RHC's remandment of the case for further proceedings in its January 18, 2018 Decision And Order, all that remains to be done at the administrative level is the entry of an order directing Smith to correct the September 18, 2015 RAD Form 8 for apartment W-1131 at 3003 Van Ness St., N.W. to reflect

the "current rent charged" as $2,329.00 instead of $3,114.00. This is a "ministerial" act which does not affect the finality of the RHC orders that are the subject of the Petition For Review. "Thus, a 'practical rather than a technical construction' standard has been adopted for the purpose of identifying those judgments which are final and those which are not." District of Columbia v. Tschudin, 390 A. 2d 986, 988 (DCCA 1978), quoting Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 69 S.Ct. 1221, 1226, 93 L. Ed. 1528 (1949) (order of expunction of arrest records becomes final on the date stay expires rather than date of subsequent order directing exact method of carrying out expunction).

Because the only act remaining to be performed by the administrative law judge in this case is the entry of an order directing the correction of a 2015 RAD form, the January 18, 2018 Decision And Order and the March 13, 2018 Order Denying Reconsideration should be treated as final and appealable. Accordingly, the Motion To Dismiss should be denied.

One of the attorneys for Petitioner,
Smith Property Holdings Van Ness, L.P.

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EXHIBIT 2

Dismissal of Landlord's Appeal to the

DCCA

District of Columbia
Court of Appeals

No. 18-AA-364

SMITH PROPERTY HOLDINGS
VAN NESS, L.P.,

Petitioner,

v. **RH-TP-16-30,842**

DISTRICT OF COLUMBIA
RENTAL HOUSING COMMISSION,

Respondent,

and

GABRIEL FINEMAN,

Intervenor.

BEFORE: Fisher and McLeese, Associate Judges, and Nebeker, Senior Judge.

O R D E R

On consideration of the petition for review, intervenor's motion to dismiss the petition for review, and petitioner's opposition thereto, it is

ORDERED that intervenor's motion to dismiss is granted and the petition for review is hereby dismissed because no final order exists for this court to review. *See Warner v. District of Columbia Dep't of Emp't Servs.*, 587 A.2d 1091, 1093-94 (D.C. 1991) (explaining that this court has jurisdiction to review only agency orders or decisions that are final, and that agency orders remanding for further administrative proceedings are ordinarily not final); *see also Washington Hosp. Ctr. v. District of Columbia Dep't of Emp't Servs.*, 712 A.2d 1018, 1020 (D.C. 1998) (finding that this court lacked jurisdiction to review merits of petition seeking review of agency order remanding for further findings of fact and conclusions of law). Petitioner has failed to demonstrate that the proceedings on remand ordered by the agency in this case would be purely ministerial, as respondent's order remanded the case "for further proceedings consistent with [its] decision and order." Additionally, it is unclear what impact, if any, the intervenor's decision to vacate the subject property has on the underlying tenant petition and remand order. This dismissal is without prejudice

to the filing of a new petition for review with this court after entry of a final order on remand.

PER CURIAM

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