CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

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DEPARTMENT OF CONSUMER AFFAIRS,

Complainant

- against -

HOWARD D. CLARKE,

Respondent.

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APPEAL DETERMINATION

Violation Number:
LL005307562

License Number:
1352346

The respondent appeals from the Decision dated March 19, 2013 which ordered the respondent to pay a fine $53,000 and revoked respondent's license.[1]

After a full review of the record, and due consideration of the arguments presented in the respondent's appeal and the Department's reply the appeal is **denied**.

The respondent incorrectly argues that the evidence in the record does not support the Judge's finding that it violated two counts of Title 6 of the Rules of the City of New York (6 RCNY) § 2-234, as well as § 2-236(a) and § 2-236(c)(2). A review of the record demonstrates that the Department presented sufficient evidence to establish the violations, which the respondent did not rebut,[2] and that the Judge properly sustained the violations in light of all of the credible testimony and evidence. *See* Smith v. New York State Dept. of Health, 66 A.D.3d 1144, 887 N.Y.S.2d 294 (3d Dept. 2009), *quoting* Matter of Kosich v. New York State Dept. of Health, 49 A.D.3d 980, 854 N.Y.S.2d 551 (3d Dept. 2008)(credibility determinations, as well as the weight to be accorded to evidence presented, are matters solely within the province of the administrative fact finder).

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[1] The Department withdrew charges 6, 9, and 10.

[2] The evidence in the record includes an affidavit of service sworn to by the respondent that he served "John Lewis, a relative of the Defendant" (Dept. Exhibit 2), the unrebutted testimony of Odelia Lewis, the individual allegedly served by substituted service, that she has no relative named "John Lewis" and no one by that name resides at her residence. Transcript of hearing held February 14, 2013 at page 24-27. Also admitted in evidence is a Decision in the traverse hearing for *Discover Bank* v. *Deidre Mahoney* 84480/10 Civ Ct, [Kings County] finding that service was improper wherein the respondent testified that he served a "John Mahoney", relative of the defendant. (Dept. Exhibit 3).

As hearsay is admissible in this jurisdiction,[3] the Judge properly considered the Decision resulting from the traverse hearing conducted in *Discover Bank* v. *Deidre Mahoney*, 84480/10, Civ Ct, [Kings County].[4] Furthermore, it has been held that hearsay evidence can be sufficient to establish a violation. *See Matter of Today's Lounge of Oneonta, Inc. v. New York State Liquor Authority*, 193 A.D.3d 1082, 962 N.Y.S.2d 430 (3d Dept. 2013), *quoting Matter of JMH, Inc. v. New York State Liquor Authority*, 61 A.D.3d 1269, 877 N.Y.S.2d 737 (3d Dept. 2009)(uncontroverted hearsay evidence may form the sole basis of an agency's determination).

The respondent further claims that the Judge impermissibly shifted the burden of proof to him, relied solely on his admission in sustaining the charges, and violated his due process rights. However, these claims are also without merit. The Department submitted sufficient evidence in the form of Shannon Bermingham's affidavit[5] to establish a prima facie case. During the course of objecting to the admission of the affidavit, the respondent admitted he was aware of the traverse hearing scheduled to be conducted in *American Express Bank FSB v. Fishbein*, 100824/10, Civ Ct, [Kings County].[6] The respondent's due process rights were not violated during the instant administrative proceeding in that the respondent received sufficient notice of all charges pending against him, was informed of his right to an attorney, and was afforded an opportunity to be heard. As established by the record, the Judge acted in a fair and impartial manner, considered all of the evidence presented, and made rulings on the relevance and admissibility of evidence and the credibility of the witnesses. *See Karakus and Cycle Stone v. NYC Dept. of Consumer Affairs*, 38 Misc.3d 1222(A) (N.Y.Sup., 2013).

The respondent next argues that the Decision incorrectly sustained ten counts of 6 RCNY § 2-235 for his failure to maintain copies of ten specific affidavits of service. He bases this argument on the fact that he was able to present copies of the affidavits at the hearing. However, this argument is also without merit. 6 RCNY § 2-235 states, in relevant part that "*the licensee* shall *maintain* a copy of every affidavit of service for at least seven years in electronic form or paper copy" (emphasis added). The record establishes that the affidavits in question were maintained, not by the respondent, but by "24-Hour Process Servers, Inc.", one of the process serving agencies for which he worked.[7] [8] Accordingly, the Judge properly sustained the ten counts of violation.

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[3] *See* 6 RCNY § 6-35(b).
[4] Department's Exhibit 3.
[5] Department's Exhibit 4.
[6] Transcript of Hearing held February 14, 2013 page 49 line 25 through page 50 line 3. The Department dismissed one count each of violating charges 6 RCNY sections 2-234, 2-236(a) and 2-236(c)(2) based on the respondent's testimony that he was unaware of the traverse hearing in *Ranice Christmas v. Kyle Myricks* 38427/10, Fam Ct [Kings County].
[7] Hearing Transcript dated February 28 at page 7 line 3.
[8] The respondent also admits this in his appeal. *See* Respondent's appeal at page 24, under the section captioned "Charge 7": "Upon demand, the Appellant was able to produce the proper documents, with respect to these counts, *and although he did not maintain copies of the*

The respondent next asserts that the Department failed to prove that he violated 6 RCNY § 2-233(a)(1) for failing to record one service of process in his log book. According to the respondent's own electronic ("GPS") record of service,[9] he served or attempted service on one "John Levy" on June 14, 2012 at 1:15 pm. Although the respondent admitted he failed to make the log entry at the hearing,[10] he now argues that, as a prerequisite to establishing the violation, the Department had to first prove the accuracy of the GPS record. However, he submits no legal authority in support of this argument. In light of the foregoing, the Judge's determination on this charge shall not be disturbed.

The respondent next argues that the charges that he violated both 6 RCNY § 2-233(a)(1) and 6 RCNY § 2-233(b)(8)[11] are duplicative because they concerned the same logbook entries. This argument is also without merit. 6 RCNY § 2-233(a)(1) requires process servers to maintain a legible record of each service. 6 RCNY § 2-233(b)(8) sets forth specific instructions on how to make corrections in records. A review of the nine records at issue establishes that the respondent made improper record corrections, rendering those records illegible. By doing so, the respondent violated the requirements of both 6 RCNY § 2-233(a)(1) and 6 RCNY § 2-233 (b)(8). Therefore, the Judge properly sustained those violations.

Next the respondent claims that the finding that it violated 6 RCNY § 2-233 (b)(6) should be dismissed because there is no separate section in its logbook chart to insert the name of the process server organization. However, the Department correctly argues that there was room enough on the chart to write the process server organization's name, either above the organization's license number or outside the chart area. Furthermore, 6 RCNY § 2-233 does not require the use of any particular logbook format. However, it does require that all of the enumerated information set forth in the rule be clearly included in each service record.

The respondent argues for dismissal of one count of violation of 6 RCNY § 2-233(b)(6), which charges that the log entry pertaining to a service on 6/1/12 at 9:50 does not include the name of the process service organization. He claims that there is no such log entry and that, "as such, the count is facially insufficient and must be overturned." However, his log does include an entry pertaining to a service on 6/1/12 at 9:59, which also fails to include the name of the process service organization. 6 RCNY § 6-21(b) states that "[t]he Notice of Violation shall contain such information as to give the respondent notice of the particular charges alleged."

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affidavits at his home, he was aware that 24 Hours Process Service was keeping copies of the affidavits and he would be able to access those affidavits if he needed to, which is evidenced by his ability to get the correct documents and provide them at the hearings" (emphasis added).

[9] *See* 6 RCNY § 2-233b.

[10] Transcript of hearing held February 28 at page 32 line 16.

[11] 6 RCNY § 2-233(a)(1)states, "Each process server shall maintain a legible record of all service made by him as prescribed in this section." 6 RCNY § 2-233 (b)(8) states, "Corrections in records shall be made only by drawing a straight line through the inaccurate entry and clearly printing the accurate information directly above the inaccurate entry."

In light of all of the foregoing, it is determined that the Amended Notice of Hearing gave sufficient notice of this particular count, and that it is not "facially deficient". Accordingly, the count shall not be dismissed.

The respondent's next claim that he complied with 6 RCNY 2-233(a)(2)(i) by entering "WC" as an abbreviation for workers compensation and that he merely placed the abbreviation in the wrong column is without merit. 6 RCNY 2-233(a)(2)(i) requires "the title of the action or a reasonable abbreviation thereof." As the abbreviation "WC" does not describe "the title of the action," the Judge correctly sustained the violation.

The respondent cites *Hecker v. Department of Consumer Affairs of the City of New York*, 131 Misc.2d 280 (N.Y. Sup., 1986) in support of his claim that the imposed penalties are excessive. However, that case is distinguishable from facts and circumstances in the instant case.[12]

In light of the finding that the respondent violated two counts of 6 RCNY 2-234 for falsely attesting to two services of process, revocation of the respondent's license is appropriate. The New York State Appellate Division has held that "since the truthfulness of the statements in the documents signed by (a process server) is the sine qua non of the faithful performance of his duties, and proper performance of those duties is essential to the integrity of the judicial process, a punishment less severe than license revocation will not suffice." *Bialo v. Meyerson*, 44 A.D.2nd 796, 355 N.Y.S2d 130 (1st Dept. 1974). Furthermore, as the respondent was found to have violated over100 counts of other rules governing process servers, it is determined that the fines imposed by the Decision are not shocking to one's sense of fairness. Furthermore, as the fines imposed are within the statutory range, the Judge's determination shall not be disturbed on appeal. *See Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 234 (1974); *U.S. v. ITT Cont'l Baking Co.*, 420 U.S. 223 (1975).

SO ORDERED:

Date: September 10, 2013

_____
David L. Wolfe
Appeals Judge

[12] In *Hecker*, the appellant- process server was 62 years of age, had only been acting as a part-time process server for less than two years and sought a supplementary pension.

There will be no further agency action in this matter. Should the respondent wish to pursue the matter, it may attempt to do so pursuant to Article 78 of the Civil Practice Law and Rules. If the respondent decides to proceed, it may find it useful to consult with the Clerk of the New York State Supreme Court or its attorney. The Department of Consumer Affairs cannot render assistance to persons who are contemplating suit against it.

CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS
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DEPARTMENT OF CONSUMER AFFAIRS,	**DECISION AND ORDER**
Complainant,	**Violation No.: LL005307562**
– against –	**License No.: 1352346**
HOWARD D. CLARKE,	**Respondent's Address:**
Respondent.	**564 East 93 Street** **Brooklyn, NY 11236**

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A hearing on the above-captioned matter was held on February 14 and February 28, 2013.

Appearances: For the Department: Alvin A. Liu, Esq.; Odelia N. Lewis, witness (February 14, 2013). For the Respondent: Howard D. Clarke.

The Amended Notice of Hearing charged the respondent with violating[1]:

1. Title 6 of the Rules of the City of New York ("6 RCNY") Section 2-234 by falsely affirming in an affidavit of service that a Summons and Complaint had been served. (1 count)

2. 6 RCNY Section 2-234 by falsely affirming in an affidavit of service that a Summons and Complaint had been served. (1 count)

3. 6 RCNY Section 2-236(a) by failing to report to the Department the scheduling of 2 traverse hearings within ten (10) days of receiving notice that a court had scheduled the hearings. (2 counts)

4. 6 RCNY Section 2-236(c)(2) by failing, within one hundred (100) days after the scheduled date of 2 traverse hearings, to report to the Department either the final result of the hearings or that he made attempts to learn the final results of the traverse hearings but was unable to do so. (2 counts)

5. 6 RCNY Section 2-236(c)(1) by failing to attempt to learn the results of 2 traverse hearings in accordance with the procedures specified in 6 RCNY Section 2-236(c)(1). (2 counts)

6. 6 RCNY Section 2-233b(a)(2)(i) by failing to create a GPS record for each service and attempted service that he made. (10 counts)

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[1] The amendment to the Notice of Hearing ("NOH") consisted of changing the hearing date to February 14, 2013.

7. 6 RCNY Section 2-235 by failing to maintain copies of any affidavits of service that he signed for 24 Hour Process Servers Inc. for the period of May 1, 2012 through July 31, 2012. (10 counts)

8. 6 RCNY Section 2-235 by failing to include his license number on at least 10 affidavits of service that he signed. (10 counts)

9. 6 RCNY Section 2-235 by failing to include the process serving agency's license number on at least 10 affidavits of service that he signed. (10 counts)

10. 6 RCNY Section 2-235 by failing to include the process serving agency's address on at least 10 affidavits of service that he signed. (10 counts)

11. 6 RCNY Section 2-233(a)(1) by failing to create a logbook entry for each service or attempted service that he made. (1 count)

12. 6 RCNY Section 2-233(b)(1) by failing to maintain all of his logbook entries in chronological order. (10 counts)

13. 6 RCNY Section 2-233(a)(1) by making entries in his logbook that are not legible. (10 counts)

14. 6 RCNY Section 2-233 (b)(8) by making improper corrections in his logbook. (10 counts)

15. 6 RCNY Section 2-233 (b)(6) by failing to include the name of the entity or individual from whom the process served was received in his logbook entries. (10 counts)

16. 6 RCNY Section 2-233(a)(2)(i) by failing to include the title of the action or a reasonable abbreviation thereof in his logbook entries. (10 counts)

17. 6 RCNY Section 2-233(a)(2)(iii) by failing to include the time of attempted or effected service in his logbook entries. (10 counts)

18. 6 RCNY Section 2-233(a)(2)(v) by failing to include the nature of the papers served in his logbook entries. (4 counts)

19. 6 RCNY Section 2-233 (a)(2)(vi) by failing to include the court in which the action was commenced in his logbook entries. (10 counts)

20. 6 RCNY Section 2-233(a)(2)(vii) by failing to include the index number of the action in his logbook entries. (8 counts)

21. Administrative Code of the City of New York ("Administrative Code") Section 20-101 by failing to maintain the standards of integrity, honesty and fair dealing required of licensees.

Based on the evidence in this case, I **RECOMMEND** the following:

Findings of Fact:

The respondent has been a licensed process server since May 5, 2010.

On October 17, 2011, respondent did not serve a party named Odelia Lewis by substituted service but affirmed in an affidavit of service that he had. Respondent also affirmed that he had completed substitute service in the matter of Discover Bank v. Deidre Mahoney, Index No. 84480/10 when he had not.

With respect to a traverse hearing held in connection with American Express Bank, FSB v. Michael Fischbein (100824/10, Kings County Civil Court), respondent had notice of such hearing but did not report the hearing to DCA. He also did not attempt to learn the result of the hearing or report the result to DCA. With respect to a traverse hearing on Ranice Christmas v. Kyle Myricks ("Ranice Christmas"), respondent had no notice of the hearing.

Respondent did not maintain copies of 10 affidavits of service that he signed while working for "24 Hour Process Servers Inc." from May 1, 2012 through July 31, 2012. He did not include his license number on 10 affidavits of service that he signed and also did not create a logbook entry for one service or attempted service. He did not maintain all of his logbook entries in chronological order pertaining to 10 entries. Respondent made 9 logbook entries that were not legible in addition to 9 entries that were not corrected by drawing a line through the mistaken entry and writing the corrected version above. For 10 logbook entries respondent did not include the name of the entity or individual from whom the process served was received in his logbook. For another 10 logbook entries respondent did not include the title of the action or an abbreviation which clearly identifies the title of the action in his logbook. For 10 entries respondent did not include the time of attempted or effected service in his logbook entries. Respondent did not include the nature of the papers served in 4 logbook entries and did not include the court in which the action was commenced in 10 logbook entries. For 8 entries he did not include the index number of the action.

At the hearing, the Department withdrew the following charges:

Charge 3, 4, 5: 6 RCNY Section 2-236(a) (1 count); 6 RCNY Section 2-236(c)(2) (1 count); 6 RCNY Section 2-236(c)(1) (1 count) as it relates to Ranice Christmas.

Charge 6: 6 RCNY Section 2-233b(a)(2)(i) (10 counts)

Charge 9 and 10: 6 RCNY Section 2-235 (10 counts) and 6 RCNY Section 2-235 (10 counts).

Charge 13: 6 RCNY Section 2-233(a)(1) count 3 is withdrawn.

Charge 14: 6 RCNY Section 2-233(b)(8) count 3 is withdrawn.

Opinion:

The respondent did not dispute the following charges:

Charge 8: 6 RCNY Section 2-235 (10 counts)

Charge 13: 6 RCNY Section 2-233(a)(1) count 4

Charge 14: 6 RCNY Section 2-233(b)(8) count 4

Charge 17: 6 RCNY Section 2-233(a)(2)(iii) (10 counts)

Charge 18: 6 RCNY Section 2-233 (a)(2)(v) (4 counts)

Charge 19: 6 RCNY Section 2-233 (a)(2)(vi) (10 counts)

Charge 20: 6 RCNY Section 2-233(a)(2)(vii) (8 counts)

The Department established by a preponderance of the evidence the following charges:

Charge 1: 6 RCNY Section 2-234 (1 count)

Odelia Lewis established, through detailed and consistent testimony, that neither she nor anyone at her residence received any service of process from respondent, either by mail or by substituted service. Ms. Lewis testified that no-one named "John Lewis" personally accepted service from respondent on her behalf. The respondent failed to rebut the Department's case with any credible evidence. Accordingly, the charge shall be sustained.

Charge 2: 6 RCNY Section 2-234 (1 count)

The Department established that respondent falsely affirmed in an affidavit that he had served a Summons and Complaint by substitute service. In the decision following a traverse hearing in Discover Bank v. Deidre Mahoney ("Mahoney"), the court held that respondent falsely affirmed in an affidavit that he had served a summons and complaint in connection with the action. Respondent's bare assertion that the Mahoney decision is incorrect

does not credibly rebut the Department's case. Accordingly, the charge shall be sustained.

Charges 3, 4, 5: 6 RCNY Section 2-236(a) (1 count); 6 RCNY Section 2-236 (c)(2) (1 count); 6 RCNY Section 2-236(c)(1) (1 count)

The Department established one count each of charges 3, 4, and 5, with respect to American Express Bank FSB v. Fischbein ("American Express"). Respondent claims that although he was aware of the hearing he was out of town when it was conducted. He further claims that he did not report the traverse hearing to DCA or inquire of the outcome after his return because he was unaware of the requirement to do so. Respondent fails to establish a meritorious defense since, as a licensee, he is charged with knowing the rules which pertain to his license. Therefore, the charges are sustained.

Charge 7: 6 RCNY Section 2-235 (10 counts)

The Department established that respondent failed to maintain copies of signed affidavits of service for his records (see DCA #6). Respondent's claim, that signed copies of the affidavits were with the process serving company he worked for, does not absolve him of maintaining his own records so that they can be produced upon demand. That respondent produced signed copies of affidavits as evidence at the hearing does not establish that he satisfied the requirement to maintain records. Accordingly, respondent has not established a meritorious defense and the charge is sustained.

Charge 11: 6 RCNY Section 2-233(a)(1) (1 count)

The Department established that respondent failed to make a logbook entry for service on "John Levy" on June 14th, 2012 at 1:15 P.M. Respondent's claim that the missing entry was due to human error does not establish a meritorious defense. Accordingly, the charge is sustained.

Charge 12: 6 RCNY Section 2-233(b)(1) (10 counts)

The Department established that respondent did not make logbook entries in chronological order (see DCA #9). Respondent admitted to the first 2 counts but claims that, with respect to the remaining 8 counts, they are chronologically correct as a class or group. Respondent's claim is without merit since the entries are not in the correct order in relation to every other entry in his logbook and therefore does not satisfy the cited section. Accordingly, the charge is sustained.

Charge 13: 6 RCNY Section 2-233(a)(1) (9 counts)
and Charge 14: 6 RCNY Section 2-233 (b)(8) (9counts)

As indicated previously, the Department withdrew count 3 and respondent admitted to count 4. The Department established by a preponderance of the evidence the remaining 8 counts for charges 13 and 14. Respondent's claim

that the entries were legible is not supported by the credible evidence. It is determined, from a review of the evidence, that the entries in question are illegible and obscured. Further, respondent concedes that he did not make corrections as required pursuant to 6 RCNY Section 2-233(b)(8) which requires that a correction be made by drawing a line through the error and placing the correction above the line. Accordingly, the charges are sustained.

Charge 15: 6 RCNY Section 2-233(b)(6) (10 counts)

6 RCNY Section 2-233(b)(6) requires that both the name and the license number of the process server organization from whom the process served was received must be included in respondent's logbook. Respondent only included the agency's license number and not its name. Therefore, he has not fully complied with the requirement. Accordingly, the charge is sustained.

Charge 16: 6 RCNY Section 2-233(a)(2)(i) (10 counts)

The Department established that respondent failed to include the full title of the action in his logbook in ten instances. Respondent testified that he believed he did not have to do so where it was a Worker's Compensation case. He also testified that a notation of "WC" in the "document served" column of his logbook satisfied the cited section. Both claims fail to establish a meritorious defense since "WC" neither clearly identifies the title to the action nor appears in the appropriate column of the logbook. Accordingly, the charges are sustained.

Charge 21: Administrative Code Section 20-101

The Department established by a preponderance of the credible evidence that respondent failed to maintain the standards of integrity, honesty and fair dealing required of licensees in light of all of the foregoing repeated errors and omissions. Respondent's claim that he was only a process server for a short period of time and unfamiliar with many of the rules and regulations is of no merit.

In light of the foregoing, the charge shall be sustained and the respondent's license is hereby revoked.

RECOMMENDED DECISION:

The respondent is found **guilty** and is, hereby, **ordered** to pay to the Department a **TOTAL FINE** of **$53,000** as follows:

Charge 1: $500 (1 count)

Charge 2: $500 (1 count)

Charge 3: $500 (1 count)

Charge 4: $500 (1 count)

Charge 5: $500 (1 count)

Charge 6: withdrawn

Charge 7: $5,000 ($500 per count, for 10 counts)

Charge 8: $5,000 ($500 per count, for 10 counts)

Charge 9: withdrawn

Charge 10: withdrawn

Charge 11: $500

Charge 12: $5,000 ($500 per count, for 10 counts)

Charge 13: $4,500 ($500 per count, for 9 counts)

Charge 14: $4,500 ($500 per count for 9 counts)

Charge 15: $5,000 ($500 per count, for 10 counts)

Charge 16: $5,000 ($500 per count, for 10 counts)

Charge 17: $5,000 ($500 per count, for 10 counts)

Charge 18: $2,000 ($500 per count, for 4 counts)

Charge 19: $5,000 ($500 per count, for 10 counts)

Charge 20: $4,000 ($500 per count, for 8 counts)

Charge 21: Revocation of License

The respondent's license is REVOKED effective immediately. The respondent is directed to surrender the license document immediately in person or by mail to DCA's Licensing Center which is located at 42 Broadway, New York, NY 10004.

If respondent operates while the license is revoked, the respondent will be subject to criminal prosecution and/or civil penalties of at least $100 per day for each and every day of unlicensed activity, as well as the closing of the respondent's business and/or the removal of items sold, offered for sale, or utilized in the operation of such business, pursuant to Administrative Code Sections 20-105 and 20-106 (the "Padlock Law").

This constitutes the recommendation of the Administrative Law Judge of the Department.

N. Tumelty
Administrative Law Judge

DECISION AND ORDER

The recommendation of the Administrative Law Judge is approved.

This constitutes the Decision and Order of the Department. Failure to comply with this order within thirty (30) days may result in the suspension of any other Department of Consumer Affairs license(s) held by the respondent.

Date: 19 March 2013

James M. Plotkin
Deputy Director of Adjudication

cc: Alvin Liu, Esq.
Via email: aliu@dca.nyc.gov

Mail payment of fine in the enclosed envelope addressed to:
NYC Department of Consumer Affairs
Collections Division
42 Broadway, 9th Floor
New York, NY 10004

APPEAL INFORMATION

You have **30 days** to file an **APPEAL** of this decision. You must include with your appeal **all** of the following: (1) a check or money order payable to DCA for the sum of $25; and (2) a check or money order payable to DCA for the amount of the fine imposed by the decision, or an application for a waiver of the requirement to pay the fine as a requisite for an appeal, based upon financial hardship. The application must be supported by evidence of financial hardship, including the most recent tax returns you have filed.

BY EMAIL: Send your appeal to **myappeal@dca.nyc.gov** and, at the same time, mail the $25 appeal fee to: DCA Administrative Tribunal, 66 John Street, 11th Floor, New York, NY 10038. (Make sure to write the violation number(s) on your check or money order.) You may pay the fine online at www.nyc.gov/consumers, or mail a check or money order to: DCA, Collections Division, 42 Broadway, NY, NY 10004.

BY REGULAR MAIL: Mail your appeal and the $25 appeal fee to: Director of Adjudication, Department of Consumer Affairs, 66 John Street, 11th Floor, New York, NY 10038. You must also mail a copy of your appeal to: DCA, Legal Division, 42 Broadway, 9th Floor, New York, NY 10004. Make sure to include in your appeal some indication or proof that you have sent a copy of the appeal to DCA's Legal Division. You may pay the fine online at www.nyc.gov/consumers, or mail a check or money order to: DCA, Collections Division, 42 Broadway, NY, NY 10004.

CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

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DEPARTMENT OF CONSUMER AFFAIRS

Complainant,

-against-

HOWARD D. CLARKE
[redacted]

Licensee/Respondent.

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AMENDED NOTICE OF HEARING

LL005307562

License # 1352346

(Process Server Individual)

In accordance with the powers of the Commissioner of the New York City Department of Consumer Affairs ("the Department") set forth in Section 2203(e) of Chapter 64 of the Charter of the City of New York and Section 20-104 of the Administrative Code of the City of New York ("the Code"), **YOU ARE HEREBY ORDERED TO APPEAR FOR A HEARING AT THE ADJUDICATION TRIBUNAL OF THE DEPARTMENT OF CONSUMER AFFAIRS, 11TH FLOOR, 66 JOHN STREET, NEW YORK, NEW YORK 10038 AT 9:00 A.M. ON THURSDAY, FEBRUARY 14, 2013** to have charges against you heard concerning violations of Chapter 1 of the Code, beginning at Section 20-101 (known as the License Enforcement Law); Chapter 2 of the Code, Subchapter 23, beginning at Section 20-403 (known as the Process Servers Law); Title 6 of the Rules of the City of New York ("6 RCNY"), beginning at Section 1-01 (known as the License Enforcement Rules); and Title 6 of the Rules of the City of New York, Chapter 2, Subchapter W, beginning at Section 2-231 (known as the Process Servers Rules);

AND SHOW CAUSE why your license to operate as an individual process server should not be suspended or revoked, why monetary penalties should not be imposed on you and why you should not be prohibited, based on lack of fitness, from holding any license issued by the Department on the grounds specified herein.

FACTS AND APPLICABLE LAW

1. Respondent, HOWARD D. CLARKE, has been licensed by the Department as an individual process server under license number 1352346 since on or about May 5, 2010.
2. Respondent's current process server license will expire on February 28, 2014.
3. Respondent served or attempted to serve process at least 1000 times during the period May 1, 2012 through July 31, 2012.

"Sewer Service" and Filing False Affidavits of Service with a Court

4. Respondent falsely affirmed in an affidavit of service that was filed in Kings County Civil Court in the matter of *Atlantic Credit & Finance Inc. v.* [redacted], Index No. 70004/11, that he had served a Summon and Verified Complaint at the defendant's place of residence on October 17, 2011 at 10:25 a.m. by substitute service upon "John" Lewis, a person that Respondent made up.
5. Respondent falsely affirmed in an affidavit of service that was filed in Kings County Civil Court in the matter of *Discover Bank v.* [redacted], Index No. 84480/10, that he had served a Summon and Verified Complaint at the defendant's place of residence on September 24, 2010 at 12:15 p.m. by substitute service upon "John" Mahoney, a person that Respondent made up.

Traverse Hearings Reporting Violations

6. On information and belief, in or about 2011, process was distributed to Respondent for service in the matter of [redacted] v. [redacted] (U-38427/10, Kings County Family Court) ("[redacted]") and thereafter an affidavit of service executed by Respondent in which he attested that he had served such process in [redacted] was filed with the clerk of the court.

7. The court in [redacted] scheduled a traverse hearing for January 5, 2012 concerning the service of process allegedly made by Respondent.
8. Respondent received notice of the scheduling of the traverse hearing in [redacted].
9. Respondent did not report to the Department that a traverse hearing had been scheduled in [redacted].
10. Respondent did not attempt to learn the result of the traverse hearing in [redacted] in accordance with the procedures specified in 6 RCNY § 2-236(c)(1).
11. Respondent did not report to the Department the result of the traverse hearing or that Respondent made attempts to learn the result of the traverse hearing and was unable to do so in [redacted].
12. On information and belief, in or about 2010, process was distributed to Respondent for service in the matter of American Express Bank, FSB v. [redacted] (100824/10, Kings County Civil Court) ("American Express") and thereafter an affidavit of service executed by Respondent in which he attested that he had served such process in American Express was filed with the clerk of the court.
13. The court in American Express scheduled a traverse hearing for April 10, 2012 concerning the service of process allegedly made by Respondent.
14. Respondent received notice of the scheduling of the traverse hearing in American Express.
15. Respondent did not report to the Department that a traverse hearing had been scheduled in American Express.
16. Respondent did not attempt to learn the result of the traverse hearing in American Express in accordance with the procedures specified in 6 RCNY § 2-236(c)(1).

17. Respondent did not report to the Department the result of the traverse hearing or that Respondent made attempts to learn the result of the traverse hearing and was unable to do so in American Express.

GPS-Related Violations

18. Pursuant to 6 RCNY § 2-233b(a)((1)(i), every process server licensed by the Department must obtain a mobile device, such as a telephone or personal digital assistant, that utilizes software that "make[s] an electronic record of the location where, and the time and date when, the record is made as determined by Global Positioning System ("GPS") technology or Assisted-Global Positioning System ("A-GPS") technology, and labels the record with the network date and time maintained by the mobile device, the DCA license number of the process server, the DCA license number of the process serving agency that has distributed the process for service, the name of the plaintiff or petitioner, the name of the defendant or respondent, the docket number (if any), the name of the person to whom process is delivered and a unique file identifier of the process being served.

19. Pursuant to section 20-410 of the Code and 6 RCNY § 2-233b((a)(2)(i), on every occasion that a licensed process server attempts or effects service of process, the process server must ensure that the mobile device makes an electronic record of the GPS location, time and date of the attempted or effected service immediately after attempting or effecting service.

20. Respondent failed to create a GPS record for the following attempts or services (logbook dates and times):

    5/2/12 @ 12:58;

    5/11/12 @ 11:48;

5/11/12 @ 11:55;

5/15/12 @ 11:40;

5/23/12 @ 10:10;

5/23/12 @ 11:03;

6/14/12 @ 12:44;

7/30/12 @ 8:52;

7/30/12 @ 9:24; and

7/30/12 @ 10:03.

Affidavits of Service Violations

21. For the period May 1, 2012 through July 31, 2012, Respondent signed at least 10 affidavits of service concerning services he performed in New York City for 24 Hour Process Servers Inc.

22. For the period May 1, 2012 through July 31, 2012, Respondent failed to maintain copies of any affidavits of service that he signed for 24 Hour Process Servers Inc.

23. Respondent failed to include his license number on the following affidavits of service:

6/30/12 @ 11:02 ([redacted]);

6/30/12 @ 11:02 ([redacted]);

6/30/12 @ 11:23 ([redacted]);

6/30/12 @ 12:32 ([redacted]);

7/3/12 @ 18:07 ([redacted]);

7/19/12 @ 12:46 ([redacted]);

7/19/12 @ 12:46 ([redacted]);

7/31/12 @ 14:31 ([redacted]);

7/31/12 @ 16:46 ([redacted]); and

7/31/12 @ 16:46 ([redacted]).

24. Respondent failed to include the process serving agency's license number on the following affidavits of service:

6/30/12 @ 11:02 ([redacted]);

6/30/12 @ 11:02 ([redacted]);

6/30/12 @ 11:23 ([redacted]);

6/30/12 @ 12:32 ([redacted]);

7/3/12 @ 18:07 ([redacted]);

7/19/12 @ 12:46 ([redacted]);

7/19/12 @ 12:46 ([redacted]);

7/31/12 @ 14:31 ([redacted]);

7/31/12 @ 16:46 ([redacted]); and

7/31/12 @ 16:46 ([redacted]).

25. Respondent failed to include the process serving agency's address on the following affidavits of service:

6/30/12 @ 11:02 ([redacted]);

6/30/12 @ 11:02 ([redacted]);

6/30/12 @ 11:23 ([redacted]);

6/30/12 @ 12:32 ([redacted]);

7/3/12 @ 18:07 ([redacted]);

7/19/12 @ 12:46 ([redacted]);

7/19/12 @ 12:46 ([redacted]);

7/31/12 @ 14:31 ([redacted]);

7/31/12 @ 16:46 ([redacted]); and

7/31/12 @ 16:46 ([redacted]).

Logbook Violations

26. Respondent failed to create a logbook entry for the following attempts or services:

    6/14/12 @ 13:15 (GPS Date and Time).

27. Respondent failed to maintain logbook entries for the following attempts or services in chronological order:

    4/28/12 @ 10:00;

    5/4/12 @ 11:15;

    5/7/12 @ 9:17;

    5/7/12 @ 9:25;

    5/7/12 @ 9:33;

    5/7/12 @ 9:44;

    5/7/12 @ 9:55;

    5/7/12 @ 10:04;

    5/7/12 @ 10:11; and

    5/7/12 @ 10:19.

28. Respondent created illegible logbook entries for the following attempts or services:

    5/23/12 @ 11:03;

    5/23/12 @ 11:09;

    5/26/12 @ 15:20;

    5/29/12 @ 9:54;

    5/30/12 @ 14:58;

    6/2/12 @ 11:09;

6/4/12 @ 9:09;

6/11/12 @ 18:53;

6/18/12 @ 8:45; and

6/18/12 @ 10:41.

29. Respondent made improper corrections to the following entries in his logbooks:

5/23/12 @ 11:03;

5/23/12 @ 11:09;

5/26/12 @ 15:20;

5/29/12 @ 9:54;

5/30/12 @ 14:58;

6/2/12 @ 11:09;

6/4/12 @ 9:09;

6/11/12 @ 18:53;

6/18/12 @ 8:45; and

6/18/12 @ 10:41.

30. Respondent failed to include in his logbook the name of the entity or individual from whom the process served was received for the following attempts or services:

5/11/12 @ 10:10;

5/23/12 @ 9:23;

5/24/12 @ 13:04;

6/1/12 @ 9:50;

6/1/12 @ 10:38;

6/1/12 @ 11:08;

6/30/12 @ 11:23;

7/11/12 @ 18:19;

7/12/12 @ 15:06; and

7/21/12 @ 12:58.

31. Respondent failed to include in his logbook the title of the action or a reasonable abbreviation thereof for the following attempts or services:

5/4/12 @ 11:23;

5/11/12 @ 10:52;

5/11/12 @ 11:55;

5/21/12 @ 13:25;

6/7/12 @ 10:26;

6/7/12 @ 10:33;

6/7/12 @ 17:15;

6/29/12 @ 10:26;

6/29/12 @ 10:36; and

6/29/12 @ 13:02.

32. Respondent failed to include in his logbook the time of attempted or effected service for the following attempts or services:

5/26/12 between 9:16 and 9:28;

6/20/12 between 11:35 and 12:06;

6/25/12 between 9:54 and 10:11;

7/17/12 between 8:57 and 10:27;

7/21/12 between 13:23 and 13:31;

8/21/12 between 13:01 and 8/22/12 (4 serves); and

8/28/12 between 13:02 and 13:13.

33. Respondent failed to include in his logbook the nature of the papers served for the following services:

5/2/12 @ 12:58;

5/4/12 @ 11:23;

5/11/12 @ 11:55; and

7/12/12 @ 16:26.

34. Respondent failed to include in his logbook the court in which the action was commenced for the following attempts or services:

4/30/12 @ 18:30;

5/2/12 @ 18:30;

5/3/12 @ 11:16;

5/4/12 @ 11:23;

5/7/12 @ 11:21;

5/11/12 @ 11:48;

5/21/12 @ 13:25;

5/25/12 @ 14:16;

5/30/12 @ 18:23; and

5/31/12 @ 13:41.

35. Respondent failed to include in his logbook the index number of the action for the following attempts or services:

5/2/12 @ 12:58;

5/11/12 @ 11:48;

6/1/12 @ 9:42;

6/7/12 @ 10:33;

6/29/12 @ 10:26;

6/29/12 @ 13:02;

7/5/12 @ 15:33; and

8/14/12 @ 16:44.

CHARGES

"Sewer Service" and Filing False Affidavits of Service with a Court

36. Respondent violated 6 RCNY § 2-234 by falsely affirming in an affidavit of service that was filed in Kings County Civil Court in the matter of *Atlantic Credit & Finance Inc. v.* [redacted], Index No. 70004/11, that he had served a Summon and Verified Complaint at the defendant's place of residence on October 17, 2011 at 10:25 a.m. by substitute service upon "John" Lewis, a person that Respondent made up. [1 count]

37. Respondent violated 6 RCNY § 2-234 by falsely affirming in an affidavit of service that was filed in Kings County Civil Court in the matter of *Discover Bank v.* [redacted] Index No. 84480/10, that he had served a Summon and Verified Complaint at the defendant's place of residence on September 24, 2010 at 12:15 p.m. by substitute service upon "John" Mahoney, a person that Respondent made up. [1 count]

Traverse Hearings Reporting Violations

38. Respondent violated 6 RCNY § 2-236(a) by failing to report to the Department the scheduling of 2 traverse hearings within ten (10) days of receiving notice that a court had scheduled the hearings. [2 counts]

39. Respondent violated 6 RCNY § 2-236(c)(2) by failing to, within one hundred (100) days after the scheduled date of 2 traverse hearings, report to the Department either

(a) the final result of the traverse hearings; or (b) that he made attempts to learn the final results of the traverse hearings but was unable to do so. [2 counts]

40. Respondent violated 6 RCNY § 2-236(c)(1) by failing to attempt to learn the results of 2 traverse hearings in accordance with the procedures specified in 6 RCNY § 2-236(c)(1). [2 counts]

GPS-Related Violations

41. Respondent violated 6 RCNY § 2-233b(a)(2)(i) by failing to create a GPS record for each service and attempted service that he made. [10 counts]

Affidavits of Service Violations

42. Respondent violated 6 RCNY § 2-235 by failing to maintain copies of any affidavits of service that he signed for 24 Hour Process Servers Inc. for the period May 1, 2012 through July 31, 2012. [10 counts]
43. Respondent failed to include his license number on at least 10 affidavits of service that he signed, in violation of 6 RCNY § 2-235. [10 counts]
44. Respondent failed to include the process serving agency's license number on at least 10 affidavits of service that he signed, in violation of 6 RCNY § 2-235. [10 counts]
45. Respondent failed to include the process serving agency's address on at least 10 affidavits of service that he signed, in violation of 6 RCNY § 2-235. [10 counts]

Logbook Violations

46. Respondent violated 6 RCNY § 2-233(a)(1) by failing to create a logbook entry for each service or attempted service that he made. [1 count]
47. Respondent violated 6 RCNY § 2-233(b)(1) by failing to maintain all of his logbook entries in chronological order. [10 counts]

48. Respondent violated 6 RCNY § 2-233(a)(1) by making entries in his logbook that are not "legible." [10 counts]

49. Respondent violated 6 RCNY § 2-233(b)(8) by making improper corrections in his logbook. [10 counts]

50. Respondent violated 6 RCNY § 2-233(b)(6) by failing to include the name of the entity or individual from whom the process served was received in his logbook entries. [10 counts]

51. Respondent violated 6 RCNY § 2-233(a)(2)(i) by failing to include the title of the action or a reasonable abbreviation thereof in his logbook entries. [10 counts]

52. Respondent violated 6 RCNY § 2-233(a)(2)(iii) by failing to include the time of attempted or effected service in his logbook entries. [10 counts]

53. Respondent violated 6 RCNY § 2-233(a)(2)(v) by failing to include the nature of the papers served in his logbook entries. [4 counts]

54. Respondent violated 6 RCNY § 2-233(a)(2)(vi) by failing to include the court in which the action was commenced in his logbook entries. [10 counts]

55. Respondent violated 6 RCNY § 2-233(a)(2)(vii) by failing to include the index number of the action in his logbook entries. [8 counts]

LACK OF FITNESS

56. By virtue of the activities described above, Respondent violated § 20-101 of the Code by failing to maintain the standards of integrity, honesty and fair dealing required of licensees.

WHEREFORE, the Department demands that an order issue: 1) suspending or revoking Respondent's license; 2) imposing maximum fines on Respondent for each and every charge set forth herein; and 3) granting such other relief as is deemed just and proper.

Dated: January 7, 2013
New York, New York

For: **Jonathan Mintz**
Commissioner

By: Alvin A. Liu

Alvin A. Liu
Senior Staff Attorney
Legal Division

IMPORTANT INFORMATION FOR RESPONDENTS

You have been charged with violating Laws and Rules of the New York City Department of Consumer Affairs.

FAILURE TO APPEAR AT THE HEARING: If you do not appear on the scheduled hearing date, a default decision will be issued in which you will be found guilty of the charges and ordered to pay a fine, and your DCA license(s) may be revoked.

ADJOURNMENTS: Requests for adjournments must be received at least three (3) business days prior to the hearing date. **You may submit your request by e-mail to adjournmentrequests@dca.nyc.gov (preferred method)**; by fax to 212-361-7766; or by mail to: DCA Administrative Tribunal, 66 John Street, 11th Floor, New York, NY 10038. Make sure to include the violation number in your request. In addition, you must send a copy of your request to aliu@dca.nyc.gov; or by mail to Alvin A. Liu, DCA Legal Division, 42 Broadway, 9th Floor, New York, NY 10004.

SETTLEMENTS: If you wish to discuss a possible settlement of the charges in this Notice of Hearing, contact Alvin A. Liu at aliu@dca.nyc.gov at least 5 business days prior to the hearing date.

REPRESENTATION: Although it is not required, you may choose to bring a lawyer or authorized representative to the hearing.

TRANSLATION SERVICES: DCA will provide translation services at the hearing for you and your witnesses. You may not use your own interpreter at the hearing.

For additional information, visit DCA's website at www.nyc.gov/consumers or call 311.