

**CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS
NYC DEPARTMENT OF CONSUMER
AFFAIRS,**

Complainant,

-against-

PROVIDE AUTOMOTIVE INC.,

Respondent.

DECISION AND ORDER

**Record No:
7470-2015-ADJC**

NOH No.: 05349407

License: 1439119¹

An inquest was held on the above-captioned matter on August 12 and August 17, 2015. Appearing for the Department was Mary Park, Esq. Although duly notified of the time and place of the hearing, the respondent failed to appear.²

The Notice of Hearing, as amended³, charges respondent with violating the following:

- 1) New York City Administrative Code (“Code”⁴) Section 19-169.1(a) by towing vehicles parked on private property that were not parked in a manner inconsistent with the posted instructions. (30 counts)
- 2) Code Section 19-169.1(e) by towing cars to places other than respondent’s storage location. (9 counts)

¹ Respondent’s license became inactive on or about January 23, 2015.

² See DCA#2, Affidavit of Service.

³ The Notice of Hearing (“NOH”) does not cite a section of law for the allegation of unlicensed activity; it only states an allegation in narrative form. Although the Department was given the opportunity to amend the NOH and re-serve the respondent, it declined to do so. Consequently, paragraphs #85 and #86 were withdrawn by the Department.

⁴ The Department’s abbreviations for cited law contained in the NOH have been used in this decision.

- 3) Code Section 19-169.1(a) by removing vehicles parked on private property, although no contract existed with the owner of the private property for the removal of improperly parked vehicles. (53 counts)
- 4) Code Section 19-169.1(c) and Title 6 of the Rules of the State of New York (“6 RCNY”) Section 2-377 (h) by removing vehicles from private property without having express written authorization from the owner of the private property or its agent as designated in the contract with the owner of the private property. (51 counts)
- 5) Code Section 19.169.1(c) and 6 RCNY Section 2-377 (h) by towing a vehicle from a location even though respondent was not, and never had been authorized to tow from the location. (1 count)
- 6) 6 RCNY Section 2-377 (d) for towing a vehicle from a location even though signs at the location were not properly posted. (1 count)
- 7) 6 RCNY Section 2-377(d)(3) for towing from the cited location even though the sign posted at the lot failed to include the conditions under which vehicles are subject to towing, including the hours and days when such towing may occur. (1 count)
- 8) Code Section 19-169.1(d) by towing a vehicle while someone was inside. (1 count)
- 9) Code Section 19-169.1(g) by charging consumers a disconnect fee in excess of sixty-two dollars and fifty cents to abort the towing of a vehicle which had been connected to the tow apparatus for removal but had not yet been towed from private property. (43 counts)
- 10) Code Section 19-169.1(g) by charging consumers a disconnect fee in excess of sixty-two dollars and fifty cents to abort the towing of a vehicle which had been connected to the tow apparatus for removal but released in less than 10 minutes. (10 counts)
- 11) Code Section 19-169.1(a) by charging consumers a fee in excess of one hundred twenty-five dollars to tow a vehicle that had not yet been towed to the tow company’s premises. (8 counts)
- 12) 6 RCNY Section 2-363 (m) by failing to take reasonable care to prevent damage to or loss of a consumer’s vehicle or personal property contained therein. (3 counts)
- 13) Code Section 19-169.1(h) and 6 RCNY Section 2-366 (d) by failing to provide consumers with a detailed, signed receipt and/or invoice with required information. (9 counts)
- 14) 6 RCNY Section 2-367 (b) by providing invoices that are missing required information. (36 counts)

- 15) 6 RCNY Section 2-367(b) by providing invoices that were facially deceptive or erroneous. (29 counts)
- 16) Code Section 20-700 by engaging in deceptive trade practices. (9 counts)
- 17) Code Section 20-527 by refusing to accept payment by credit card for towing services. (17 counts)
- 18) Code Section 20-101 respondent through its employees was rude and belligerent to consumers. (6 counts)
- 19) 6 RCNY Section 1-14 by failing to comply with a subpoena duces tecum. (1 count)
- 20) Code Section 20-516 by failing to make records available for inspection at the Commissioner's request at the offices of the Department. (1 count)
- 21) Code Section 20-104(e)(3) by failing to comply with a lawful order of the Department by failing to comply with a subpoena duces tecum. (1 count)
- 22) 6 RCNY Section 6-42 (c) by failing to comply with the applicable laws and rules applicable to tow licensees, as required in the Consent Order ("CO"). (322 counts)
- 23) 6 RCNY Section 6-42(c), 6 RCNY Section 2-378(a)(1), 6 RCNY Section 2-378(g)(5) by failing to comply with electronic keeping requirements, by failing to include electronic folder(s) for each tow performed and or labeling them in specified format, by failing to save electronic records to a CD-ROM at least once a week. (2 counts)
- 24) 6 RCNY Section 6-42(c) by failing to maintain electronic records; failing to comply with a lawful order of the Department; failing to provide within ten (10) days any other documents or records that the Department deems necessary to ascertain compliance with this CO upon written demand; and failing to appear at the Department for a review of its compliance with the terms of this CO and other such matters as the Department deems appropriate, upon notification from the Department. (4 counts)
- 25) Code Section 20-104(e)(3) by failing to comply with the CO, a lawful order of the Department. (1 count)
- 26) Code Section 20-101 by failing to maintain the standards of integrity, honesty and fair dealing required of licensees.

Findings of Fact

The respondent was licensed by the Department to engage in towing under license number #1439119. Respondent entered into a Consent Order (“CO”) with the Department to settle NOH # 5332070 and agreed to comply with the terms of the CO (See DCA#5). Respondent failed to comply with the CO in that it did not comply with the record-keeping requirements specifically set forth in Paragraph #4, 5, & 6 of the CO. In addition, respondent violated new charges as delineated in this NOH and which are supported by the Department’s evidence (See DCA#1-11). Respondent is guilty of the violations which are summarized as follows: unlawfully removed vehicles, unlawfully towed vehicles to places other than storage location, towed vehicles when there was no contract authorizing the tows, removed vehicles without the express authorization from the property owner, towed vehicles with improper authorization and signage, towed a vehicle when someone was inside, overcharged for disconnecting cars from the tow truck prior to the towing, overcharged for towing fees, failed to take reasonable care to prevent damage, failed to provide a receipt with required information, failed to provide an invoice form with required information, engaged in deceptive trade practices (providing misleading information to consumers concerning its authority to tow, the conditions under which it may tow, towing charges; See Paragraph #82 of NOH), refused to accept payment by credit card and harassed consumers. The respondent failed to comply with a subpoena duces tecum, failed to make records available for inspection and failed to comply with a lawful order of the Department. The total cost of restitution to the consumers is \$11,607.09. Respondent is unfit to hold a DCA license in the future.

Based on the evidence in the record, I **RECOMMEND** the following:

Opinion

The credible evidence establishes that the respondent violated all of the violations contained in the Notice of Hearing except for 322 counts of 6 RCNY Section 6-42(c) (See paragraph # 90 in NOH). Paragraph# 11 of the CO states as follows:

Specific breaches of the CO shall, in addition to a breach of this CO, constitute independent and separate violations of any applicable laws and rules. If the same conduct gives rise to both a breach of this CO and a breach of the applicable laws and rules, Respondent shall pay two (2) penalties: a \$500 fine for breach of the CO and the maximum

penalty for violation of the applicable law or rule.

It is determined that the wording of the CO as it concerns imposing fines for the same violation twice i.e. once with respect to the charges contained in the NOH and again as individual and separate breaches of the CO totaling 322 breaches, is ambiguous. The same provision could also be interpreted to mean that multiple violations could be viewed as a single breach of the CO. The provision does not specifically state that respondent will pay \$500 for *each* breach of the CO but rather a *\$500 fine for breach* of the CO and the maximum penalty for violation of the applicable law or rule.⁵ Further, by using the phrase “applicable laws and rules”, the CO creates an indefinite range of possibilities for breach of the CO. The phrase “applicable laws and rules” could even include laws and rules that may not have even been in existence at the time the CO was agreed to by the parties, thereby making the provision overbroad and vague.

Accordingly, 322 counts of 6 RCNY Section 6-42(c) are dismissed.⁶ However, it is determined that the charges which are specifically cited in the CO and which appear in paragraphs 91-93 of the NOH, are sustained.⁷

The credible evidence further established that the following consumers are entitled to restitution from the respondent in the total amount of \$11,607.09, to be paid as follows:

Everton Muirhead	\$68
Albert Meyers	\$68
Henry Martinez	\$800
Noemi Rosas	\$62
Gerard Smith	\$68
Marcia Santos	\$68
Jose Moscoso	\$114
Beverly Barfield	\$68
Marc Gorelick	\$140
Melanie Rodriguez	\$5,800
Mehran Tavakoli	\$68
Yun Pak	\$140
Carl Galye	\$57

⁵ The Department was given the opportunity to amend the NOH and re-serve the respondent, but declined to do so. It was also given the opportunity to present case law in support of its argument to sustain 322 counts of 6 RCNY Section 6-42(c) but failed to present the entire case record i.e. the actual hearing decision upon which an appeal determination was made.

⁶ See *DeMaria v. Best-Fit Bath Systems*, DCA Amended Appeal Determination, CDDD500115751, dated December 19, 2012. “It has been held that, in cases of doubt or ambiguity, a contract must be constructed most strongly against the party who prepared it, and favorable to the party who had no voice in the selection of the language.”

⁷ It should also be noted that these violations do not appear as separate violations in the NOH but only as violations of the CO.

Lucelena Cruz	\$136
Samir Khatib	\$408
Donald Gepte	\$85
Justin Landon	\$68
Maogorzata Olechowski	\$67
Victor Estavillo	\$136
Yaniry Alonzo	\$136
Yousi Edwards	\$2,000
Herman Knox	\$136
Sonia Nam	\$68
Idalia Aguero	\$136
Alan Mickens	\$136
Yi Tung	\$68
Parisis Filippatos	\$68.09
Luis Ortiz	\$136
Fridrey Uwoghiren	\$302
Total Restitution Due to Consumers	\$11,607.09

ORDER

The respondent is found **guilty upon default** with respect to the charges as set forth in the Notice of Hearing, and of violating 6 RCNY Section 1-14, and is hereby

Ordered to pay to the Department a TOTAL FINE of \$469,150.,⁸ which is immediately due and owing, as follows:

Code Section 19-169.1(a) (\$500 per count, for 30 counts)	\$15,000
Code Section 19-169.1(e) (\$500 per count, for 9 counts)	\$4,500
Code Section 19-169.1(a) (\$500 per count, for 53 counts)	\$26,500
Code Section 19-169.1 (c) and 6 RCNY Section 2-377 (h)	\$127,500 ⁹

⁸ At the Inquest, the Department was asked to state whether it was requesting recidivist penalties. As the Department made no requests, no recidivist penalties were imposed.

(\$2,500 per count, for 51 counts)	
Code Section 19-169.1 (c) and 6 RCNY Section 2-377 (h) (\$2,500 per count for 1 count)	\$2,500
6 RCNY Section 2-377 (d) (\$2,500 per count, for 1 count)	\$2,500
6 RCNY Section 2-377 (d)(3) (\$2,500 per count, for 1 count)	\$2,500
Code Section 19-169.1 (d) (\$500 per count, for 1 count)	\$500
Code Section 19-169.1 (g) (\$500 per count, for 43 counts)	\$21,500
Code Section 19-169.1 (g) (\$500 per count, for 10 counts)	\$5,000
Code Section 19-169.1 (a) (\$500 per count, for 8 counts)	\$4,000
6 RCNY Section 2-363(m) (\$2,500 per count for 3 counts)	\$7,500
Code Section 19-169.1 (h) and 6 RCNY Section 2-366 (d) (\$2,500 per count, for 9 counts)	\$22,500
6 RCNY Section 2-367 (b) (\$2,500 per count, for 36 counts)	\$90,000
6 RCNY Section 2-367 (b) (\$2,500 per count, for 29 counts)	\$72,500
Code Section 20-700 (\$350 per count for 9 counts)	\$3,150
Code Section 20-527	\$51,000

⁹ Maximum fines were imposed pursuant to the Department's request as stated in the Notice of Hearing under "Specific Relief Sought".

(\$3,000 per count for 17 counts)

Code Section 20-101	Unfit
6 RCNY Section 1-14 (\$500 per count for 1 count)	\$500
Code Section 20-516 (\$2,500 per count for 1 count)	\$2,500
Code Section 20-104 (e)(3)	Unfit
6 RCNY Section 6-42 (c) (\$500 per count for 322 counts)	(dismissed) \$0
6 RCNY Section 6-42(c); 6 RCNY Section 2-378(a)(1); 6 RCNY Section 2-378(g)(5) (\$2,500 per count for 2 counts)	\$5,000
6 RCNY Section 6-42 (c) (\$500 per count for 4 counts)	\$2,000
Code Section 20-104(e)(3)	Unfit
Code Section 20-101	Unfit
6 RCNY Section 1-14 (for failure to appear at hearing)	\$500

The Respondent is further **ORDERED to pay RESTITUTION to the Consumers in the amount of \$11,607.09 which is immediately due and owing.**

The award must be paid by certified check, money order or attorney trust account. The Respondent must provide to the Department proof of payment of the restitution to each of the above consumers within thirty (30) days of the date of this decision, to the following address: "NYC Department of Consumer Affairs, Collections Division - Accounts Receivable, 42 Broadway, 9th Floor, New York, NY 10004" or by emailing such proof to: collections@dca.nyc.gov.

Respondent is **deemed permanently unfit** to hold any licenses issued by the Department of Consumer Affairs.

This constitutes the recommendation of the Administrative Law Judge.

**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. The Department may suspend any DCA license(s) held by the respondent if the respondent fails to comply with this Decision and Order, including payment of the fine, within thirty (30) days. Payment with a check that is dishonored or a credit card transaction that is denied or reversed will not be considered compliance with this Decision and Order. Such license(s) will not be reinstated until the respondent has served any suspension period ordered in this Decision and has paid ALL fines owed to the Department.

Date: November 19, 2015

**David L. Wolfe
Acting Director of Adjudication**

cc: Mary Park, Esq., Legal Division

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 15 days to file a MOTION TO VACATE this decision. Your motion **must** include ALL of the following: 1) A check or money order for \$25 payable to the Department of Consumer Affairs; 2) the reason for your failure to appear on the hearing date; and 3) a sworn statement outlining a meritorious defense to the charge(s) in the Notice of Hearing.

BY EMAIL: Send your motion 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. **NOTE:** The determination of your motion to vacate may be sent to you by email if you choose to submit your motion to us by email.

BY REGULAR MAIL: Mail your motion and your check or money order for \$25 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 motion to: Legal Division, Department of Consumer Affairs, 42 Broadway, 9th Floor, New York, NY 10004. Make sure to include in your motion some indication or proof that you have sent a copy of the motion to DCA's Legal Division.