

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

**DEPARTMENT OF CONSUMER AFFAIRS,**

**Complainant,**

**-against-**

**ERIC RIVERA,**

**Respondent.**

**DECISION AND ORDER**

**Violation No.: LL5130923**

**License No.: 1212873**

**Respondent's Address:**

**10 Jordan Lane  
Middletown, NY 10940**

**Date: December 30, 2009**

A hearing on the above-captioned matter was held on November 17, 2009.

Appearances: For the Department: Fred Cantor and Allison Johnson, Esqs. For the Respondent: Preston A. Leschins, Esq.; Eric Rivera, respondent; Alan Aboody, witness.

The respondent is charged with violating the following:

- 1) Title 6 of the Rules of the City of New York ("6 RCNY") Section 2-233(b)(5) by not keeping records chronologically in a suitably bound and paginated volume.
- 2) 6 RCNY Section 2-233(b)(6) by failing to maintain a bound volume or log free of impermissible erasures, obliterating or redactions.
- 3) 6 RCNY Section 2-233(a)(2)(i) by failing to maintain records showing the title of the action.
- 4) 6 RCNY Section 2-233(a)(2)(iv) by failing to maintain records showing the address where service was served.
- 5) 6 RCNY Section 2-233(a)(2)(vi) by failing to showing records in which the action was commenced.
- 6) 6 RCNY Section 2-233(b)(2) by failing to maintain records of the the person or law firm from whom the process to be served was received.

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

**Findings of Fact**

The respondent is a process server licensed by the Department now for approximately four years.

The respondent maintains his log (designated a “registry ledger”) in spirally-bound volume provided by the company from whom he receives nearly all process to be served, R & A Process Serving, Inc. The format of the log pages is as provided by R & A. The format itself does not provide for inclusion of the following information: (1) the title of the action; (2) the full address where service is to be effected; and (3) the court in which the action has been commenced. The respondent otherwise did not include this information in his log.

The log pages are paginated.

In log entries dated July 13, 2007 at 6:03 p.m. and July 13, 2007 at 6:00 p.m., the respondent wrote over the dates so as to make corrections.

**Opinion**

These facts are not in dispute.

6 RCNY Section 2-233 (“Records”) provides, in pertinent part:

“(a) Duty of individual licensee to keep records. Each process server shall keep records in compliance with the provisions of [section] 89-c [relettered as 89-u] of the General Business Law, as follows:

- (1) Each process server shall maintain a legible record of *all* service made by him as prescribed in this section.
- (2) The record to be maintained shall include the following information, where applicable:
  - (i) the title of the action;
  - (ii) the name of the person served, if known;
  - (iii) the date and approximate time service was effected;
  - (iv) the address where service was effected;
  - (v) the nature of the papers served
  - (vi) the court in which the action has been commenced;
  - (vii) the index number of the action, if known.

(Emphasis added.)

There is no issue that, employing the format provided by R & A, the respondent did not include: (1) the title of the action; (2) the *full* address where service is to be effected; and (3) the court in which the action has been commenced. The faults of the respondent in not providing the required information lies primarily in the format. R & A, which has the same legal responsibilities as that of the respondent, provided the format. However, this consideration does not excuse the respondent's failures to abide by the requirements of these provisions and thus does not provide an independent basis for mitigation. See 6 RCNY Section 2-234 ("The licensee shall at all times strictly ... conform to all laws, rules, regulations and requirements of the ... municipal authorities relating to the conduct of licensees...").

While the respondent technically is liable for hundreds of violations of each of Sections 2-233(a)(2)(i), (a)(2)(iv) and (a)(2)(vi), if each is to be treated a separate violation of law, i.e., corresponding to three violations each for hundreds of services, the Department has limited the number of counts of each of the charges to only ten. First, the respondent's pattern of *repeated* actions in the same manner may be considered the entire "violation" of Section 2-233(a)(2). Second, I have found no authority to treat each sub-subsection of Section 2-233(a)(2) as a separately punishable violation of law; a violation of any one sub-subsection of Section 2-233(a)(2) properly may be considered a violation of the entire subsection, i.e., the "record to be maintained" did not include *all* of the required information. Third, I note that a violation of this provision in any respect, by itself, otherwise may result in suspension or revocation of license. (See discussion below.) I conclude that the imposition of a maximal monetary penalty for a sole violation of Section 2-233(a)(2) is warranted where the respondent's "record" of "all service" did not include required information.

6 RCNY Section 2-233(b) further provides, in pertinent part:

Licensees who serve process shall also include in their records the following:

- (2) The person or firm from whom the process served was received.
- (5) Records shall be kept in chronological order, in a bound, paginated volume.
- (6) 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. All other methods of correction, including but not limited to, erasing, opaquing, obliterating, or redacting, are prohibited.

The credible evidence establishes that the respondent complied with the requirements of 6 RCNY Section 2-233(b)(5). The Department argues that spiral binding does not comply with the binding requirement of this provision, further arguing that “bound” means “pre-bound” so as to ensure that the log book cannot later be illegally altered; I accept the Department’s argument in this respect. The Department essentially argues further that the tribunal cannot necessarily conclude that respondent’s spirally bound log book was so “pre-bound.” I determine that, as a matter of fact, the respondent’s log book was so pre-bound in that it was provided in this form to the respondent by R & A. Pagination of the volume and entries in chronological order, as required by the rules, both supports this conclusion and otherwise helps ensure that the record cannot later be illegally altered.

The credible evidence establishes that the respondent twice failed to maintain a bound volume or log free of impermissible erasures, obliterating or redactions, in two violations of 6 RCNY Section 2-233(b)(6).

The credible evidence establishes that respondent did not include in his records a designation of the “person or firm from whom the process served was received” (*e.g.*, the particular service agency, attorney or law firm), as required by 6 RCNY Section 2-233(b)(2). Nearly all of the process served by the respondent was received from R & A and not from the issuing attorneys and law firms otherwise recorded in the log. However, his records do not reflect such receipts of service from R & A. Given that one entry in his records would comply with the requirement, a penalty for one violation should be imposed.

The Department requests that respondent’s license be suspended for 30 days based on the predicates of the cited violations of its regulations. See Administrative Code Section 20-409(a) (providing that a process server license “*may* be suspended or revoked ... at any time for the failure of the licensee to comply with any rule [or] regulation ... promulgated by the commissioner” (emphasis added)).

The Department amply has demonstrated respondent’s failure to maintain required records of his service in the stringent manner required by statute and Departmental rules. However, the Department has not shown any fabrication of records or service by the respondent; has not shown any failures of the respondent in completing affidavits of service; and has not shown any inadequacy of service or a successful traverse against the respondent. Upon my inquiries, the respondent persuasively has shown his understanding and ready admission of his errors and the efforts he intends to make so as to conform his future practice with the stringent requirements of the Department’s rules. I decline to suspend the respondent’s license.

**Order**

The respondent is found **not guilty** of charge 1, and it is **dismissed**.

The respondent is found **guilty** of charges numbered 2, 3, 4, 5 and 6.

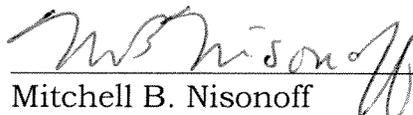
The respondent is **ordered** to pay to the Department a **TOTAL FINE of \$1,550**, as follows:

Charge 2: \$700 (\$350 per violation, for 2 violations)

Charges 3, 4 and 5: \$500

Charge 6: \$350

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

  
 Mitchell B. Nisonoff  
 Administrative Law Judge

**DECISION AND ORDER**

The recommendation of the Administrative Law Judge is **not approved in the following respects**:

Department's Exhibit "A" consisted of a photocopy of the respondent's Process Server's Registry Ledger that included records of 33 services performed between July 13, 2007 and July 31, 2007. The undisputed evidence establishes that the respondent failed to include all of the information required by 6 RCNY Sections 2-233(a)(2)(i), 2-233(a)(2)(iv), 2-233(a)(2)(vi) and 2-233(b)(2) in each of the 33 records of service. It further establishes that two of the respondent's service records contained impermissible erasures, obliterations or redactions, in violation of 6 RCNY Section 2-233(b)(6).

The evidence further establishes that the respondent used the same pre-printed form for each service record, and that form did not have fields for the entry of certain required information. This fact notwithstanding, it is determined that the respondent's failure to comply with 6 RCNY Sections 2-233(a)(2)(i), 2-233(a)(2)(iv), 2-233(a)(2)(vi) and 2-233(b)(2) *in each record of service* constitutes a separate violation of each respective rule cited. This determination would consequently result in the imposition of fines for 33 counts of violation of each of these rules. However, because the Department has limited its demand to 10 counts per violation, fines for only 10 counts per violation shall be imposed. Further, because the credible evidence establishes

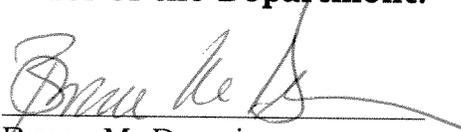
that the respondent only violated 6 RCNY Section 2-233(b)(6) in two instances, penalties for two counts of violation of this rule shall be imposed.

Accordingly, the respondent is found **guilty** of charges numbered 2, 3, 4, 5 and 6 and is **ordered** to pay to the Department a **TOTAL FINE of \$14,700**, as follows:

Charge 2:	\$700	(\$350 per violation, for 2 violations)
Charge 3:	\$3,500	(\$350 per violation, for 10 violations)
Charge 4:	\$3,500	(\$350 per violation, for 10 violations)
Charge 5:	\$3,500	(\$350 per violation, for 10 violations)
Charge 6:	\$3,500	(\$350 per violation, for 10 violations)

With regard to Charge #1, the Department did not present any statutory, regulatory or case law authority to support its claim that the respondent's spirally-bound log books do not comply with the requirements of 6 RCNY 2-233(b)(5). Accordingly, **charge #1 is dismissed.**

**This constitutes the Decision and Order of the Department.**



Bruce M. Dennis  
Deputy Director of Adjudication

cc: Fred Cantor and Allison Johnson, Esqs.

By email: [leschins@att.net](mailto:leschins@att.net)  
Preston A. Leschins, Esq.

**NOTICE TO RESPONDENT(S):** If you wish to **APPEAL** this decision, or file a **MOTION FOR REHEARING**, you must file your appeal or motion with the Director of Adjudication, Department of Consumer Affairs, 66 John Street, New York, NY 10038, **within 30 days of the date of this decision**. You must include with your appeal or motion (1) a check or money order payable to the Department of Consumer Affairs for the sum of \$25; and (2) a check or money order payable to the Department of Consumer Affairs 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, supported by evidence of financial hardship, including the most recent tax returns you have filed. In addition, you must serve a copy of your appeal or motion for rehearing, and any related documents, on the Legal Compliance and Fitness Division of the Department of Consumer Affairs, 42 Broadway, 9<sup>th</sup> Floor, New York, NY 10004.

**Mail payment in the enclosed envelope addressed to:**

NYC Department of Consumer  
Affairs  
Collections Division  
42 Broadway, 9<sup>th</sup> Floor  
New York, NY 10004



THE CITY OF NEW YORK DEPARTMENT OF CONSUMER AFFAIRS

<b>NOTICE OF HEARING</b>	<input checked="" type="checkbox"/> LL <input type="checkbox"/> WH <input type="checkbox"/> IP <input type="checkbox"/> OL <input type="checkbox"/> GL <input type="checkbox"/> HC <input type="checkbox"/> WO <input type="checkbox"/> _____	DATE MAILED: / /	1 OF
	THE BELOW ENTITY IS HEREBY CHARGED WITH THE FOLLOWING VIOLATION (S) OF:		

<input checked="" type="checkbox"/> TITLE 20 of the N.Y.C. ADMINISTRATIVE CODE (see column 1, 2 & 3)	<input type="checkbox"/> TITLE 1 of the NY CODES RULES and REGULATIONS (see column 4)
<input type="checkbox"/> TITLE 6 of the RULES of the CITY OF NEW YORK (see column 4)	<input type="checkbox"/> NEW YORK GENERAL BUSINESS LAW (see column 3)
<input type="checkbox"/> NY AGRICULTURE & MARKETS LAW ARTICLE 16 (see column 3)	<input type="checkbox"/> Other _____ (see column 3)

1 CH	2 SUBCH	3 SECTION	4 REG./RULE NO.	NATURE OF VIOLATION	COUNTS
				See attached NOA	
			2-233 (b)(5)		10
			2-233 (b)(6)		3
			2-233 (a)(2)(i)		10
			2-233 (a)(2)(iv)		10
			2-233 (a)(2)(v)		10
			2-233 (b)(2)		10
		20-101			1
					<b>TOTAL</b> 54

I/WE AFFIRM UNDER PENALTY OF PERJURY THAT I/WE OBSERVED THE ABOVE AND, ON THE DATE AND TIME LISTED ABOVE, SERVED UPON THE PERSON LISTED BELOW A TRUE COPY OF THIS DOCUMENT

CAMIS ID #	TAX ID #	LICENSE NO. 1212873	START TIME	END/SERVED TIME	CERT. # 5131923
NAME (INDIVIDUAL, PARTNERSHIP, CORPORATION) ERIC RIVERA			D B A		TELEPHONE NO
ADDRESS 10 JORDAN LANE, MIDDLETOWN, NY			BORO	ZIP 10940	INSPECTION DATE / /
BUS CODE					

TYPE OF INSPECTION (CHECK ONE)

<input type="checkbox"/> PATROL (PTL)	<input type="checkbox"/> REQUEST (REQ)	<input type="checkbox"/> SUSPENSION (SUS)	<input type="checkbox"/> REVOCATION (REV)	<input type="checkbox"/> CONSENT JUDGEMENT ORDER (CJO)	<input type="checkbox"/> POSTING ORDER (POO)	<input type="checkbox"/> POSTING ORDER FOLLOW-UP (POF)	<input type="checkbox"/>
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INSPECTION RESULT

<input type="checkbox"/> VIOLATION ISSUED	<input type="checkbox"/> LICENSED	<input type="checkbox"/> NO EVIDENCE OF ACTIVITY	<input type="checkbox"/> RESULT PENDING	<input type="checkbox"/> REINSPECTION	<input type="checkbox"/> BUSINESS PADLOCKED	<input type="checkbox"/> OBT EVIDENCE OF ACTIVITY
<input type="checkbox"/> NO VIOLATION	<input type="checkbox"/> OOB	<input type="checkbox"/> NO LICENSE REQUIRED	<input type="checkbox"/> WARNING	<input type="checkbox"/> CONFISCATION	<input type="checkbox"/> W & M ORDER	<input type="checkbox"/>

INSPECTOR'S NAME F. CAHILL	INSPECTOR'S SIGNATURE	DIV	UNIT	ID	BADGE
INSPECTOR'S NAME	INSPECTOR'S SIGNATURE	DIV	UNIT	ID	BADGE

YOU ARE HEREBY ORDERED TO APPEAR FOR A HEARING ON THE ABOVE CHARGES ON THIS DATE AND TIME AT EITHER:  THE ADJUDICATION DIVISION, 66 JOHN STREET, 11<sup>TH</sup> FLOOR, NEW YORK, NY 10038, OR  LITIGATION & MEDIATION DIVISION, 42 BROADWAY, 9<sup>TH</sup> FLOOR, NEW YORK, NY 10004

OCT 22, 2009 AT 9:30 AM OR PM

READ THE BACK OF THIS FORM FOR IMPORTANT INFORMATION

A COPY OF THIS NOTICE WAS RECEIVED BY ME

VENDOR'S NAME (PRINT)	VENDOR'S SIGNATURE	POSITION	DATE / /
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PRE-HEARING DISPOSITION

REC'DIVIST <input type="checkbox"/> Y <input type="checkbox"/> N	PLEADING LETTER \$	DATE SENT / /	BY:	DATE SETTLED / /	FINE \$	<input type="checkbox"/> PAID <input type="checkbox"/> PAR <input type="checkbox"/> DNP	SETTLEMENT OFFICER
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WHITE - ADJUDICATION    YELLOW - VENDOR    PINK - ENFORCEMENT

PLEASE BRING THIS NOTICE WITH YOU

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

-----X  
DEPARTMENT OF CONSUMER AFFAIRS,

**NOTICE OF HEARING**

Complainant,

**LL # 5130923  
License # 1212873**

-against-

Eric J. Rivera,

Eric J. Rivera  
10 Jordan Lane  
Middletown, NY 10940

Licensee/Respondent.

**(Process Server Individual)**

-----X  
**TO THE ABOVE NAMED LICENSEE:**

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 DIVISION OF THE DEPARTMENT OF CONSUMER AFFAIRS, 11TH FLOOR, 66 JOHN STREET, BOROUGH OF MANHATTAN, NEW YORK, NEW YORK 10038 on October 22, 2009 at 9:30 am** to: have charges against you heard concerning violations of the Code, found in 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), 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.

Complainant, The City of New York Department of Consumer Affairs, by its attorney, Fred Cantor, Esq., as and for its complaint upon information and belief alleges the following:

**LICENSE STATUS**

1. Respondent, Eric J. Rivera, has held an Individual Process Server license issued by the Department since on or about November 3, 2005.
2. A process server license is renewable in two-year intervals.
3. Respondent's last process server license expired on February 28, 2008.
4. Respondent's application for a renewal license, to commence on February 28, 2008 and expire on February 28, 2010, has been held in pending status until the conclusion of the Department's investigation of his process server business practices.
5. The Department has issued to Respondent temporary permission to operate until October 30, 2009.

**FACTS**

**Respondent Served with Subpoena**

- 6 On or about February 29, 2008, the Department issued to Respondent a subpoena duces tecum.
- 7 The subpoena called for Respondent's appearance and for certain of Respondent's books and records, including production of process serving logbooks that Respondent is required to maintain for a period of two years from date of service pursuant to 6 RCNY 2-233.

## **FAILURE TO COMPLY WITH RECORD-KEEPING REQUIREMENTS**

### **Failure to Keep Records of Service of Process in Properly Bound and or Paginated Volumes**

8. In response to the subpoena, the Respondent produced twenty-two (22) logbooks.
9. Respondent's logbooks are not properly bound or paginated for the following reasons:
  - a. Booklets are individual sheets of paper that could have been bound after the records were entered; and
  - b. Booklets are not paginated within the meaning of the law because stamped page numbers could have been made after the records were made.

### **Unlawful Corrections in Records of Process Served**

10. Respondent failed to make corrections in his logbooks by drawing a straight line through the original entry and instead obscures the entry he seeks to change.
11. Respondent writes over or crosses out incorrect entries.
12. Respondent's failures to make proper corrections, include, but are not limited to, the following entries in his logs:
  - a. Entry dated July 13, 2007 at 6:03PM in the logbook covering the period from July 13, 2007 to July 31, 2007;
  - b. Entry dated July 13, 2007 at 6:10PM in the logbook covering the period from July 13, 2007 to July 31, 2007;

c. Entry dated July 16, 2007 at 6:04PM, index number 108898, in the logbook covering the period from July 13, 2007 to July 31, 2007;

**Failure to Record the Title of the Action**

13. Respondent failed to record in the logbooks the title of the action for service of process effectuated by him.
14. Respondent's failures to record the title of the action include, but are not limited to, the first ten (10) pages (page 008234 to page 008244) of the logbook covering the period of July 13, 2007 to July 31, 2007.

**Failure to Record the Full Address Where Service was Effectuated.**

15. Respondent failed to record in his logbook the full address where service was effectuated.
16. Respondent failed to record the city, county, and zip code where service was effectuated.
17. Respondent's failures to record the full address where service of process was effectuated include, but are not limited to, the first ten (10) pages of the logbook covering the period of July 13, 2007 to July 31, 2007.

**Failure to Record the Name of the Court in Which the Action Was Commenced**

18. Respondent failed to set forth anywhere in his logbook the name of the court in which the action was commenced.

19. Respondent's failures to record the court in which the action was commenced include, but are not limited to, the first ten (10) pages of the logbook covering the period of July 13, 2007 to July 31, 2007.

**Failure to Record the Person or Firm from Whom Process for Service  
Was Received**

20. Respondent failed to record in his logbooks the name of the person or firm from whom Respondent received the process for service.
21. Respondent's failure to record the name of the person or firm from whom he received process for service is evident by his use of improper acronyms or the last name of an attorney in the action, or by the failure to list any name.
22. Respondent's failures to record the name of the person or firm from whom process was received include, but are not limited to, the first ten (10) pages of the logbook covering the period of July 13, 2007 to July 31, 2007.

**CHARGES**

**FAILURE TO COMPLY WITH RECORD-KEEPING REQUIREMENTS**

**Failure to Keep Record Service of Process in Properly Bound and or Paginated  
Volumes**

**Counts 1 - 10**

1. The allegations of paragraphs **8 - 9** above are incorporated by reference as though fully realleged herein.

2. Respondent failed to maintain entries in a properly bound and paginated volume or logbook in violation of the Rules of City of New York, Title 6, § 2-233 (b) (5).

**Unlawful Corrections in Records of Process Served**

**Counts 11 – 13**

3. The allegations of paragraphs **10 - 12** above are incorporated by reference as though fully realleged herein.
4. Respondent failed to maintain a bound volume or log free of impermissible erasures, obliterating or redactions, etc. in violation of the Rules of City of New York, Title 6, § 2-233 (b) (6).

**Failure to Record the Title Of The Action**

**Counts 14 - 23**

5. The allegations of paragraphs **13 - 14** above are incorporated by reference as though fully realleged herein.
6. Respondent failed to maintain records showing the title of the action in violation of the Rules of City of New York, Title 6, § 2-233 (a) (2) (i).

**Failure to Record the Full Address Where Service was Effectuated.**

**Counts 24 - 33**

7. The allegations of paragraphs **15 - 17** above are incorporated by reference as though fully realleged herein.
8. Respondent failed to maintain records showing the address where service was served, in violation of the Rules of City of New York, Title 6, § 2-233 (a) (2) (iv).

**Failure to Record the Name of the Court In Which The Action Was Commenced**

**Counts 34 - 43**

9. The allegations of paragraphs **18 - 19** above are incorporated by reference as though fully realleged herein.
10. Respondent failed to maintain records showing the court in which the action was commenced in violation of the Rules of City of New York, Title 6, § 2-233 (a) (2) (vi).

**Failure to Record the Person or Firm From Whom Process for Service Was Received**

**Counts 44 - 53**

11. The allegations of paragraphs **20 - 22** above are incorporated by reference as though fully realleged herein.
12. Respondent failed to maintain records of the person or law firm from whom he/she received the process to be served, in violation of the Rules of City of New York, Title 6, § 2-233 (b) (2).

**WHEREFORE**, THE DEPARTMENT DEMANDS THAT AN ORDER ISSUE: 1) FINDING RESPONDENT UNFIT TO HOLD FUTURE DEPARTMENT LICENSES FOR A PERIOD OF NO LESS THAN TWO (2) YEARS; 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.

**YOU HAVE THE RIGHT TO BE REPRESENTED BY COUNSEL**

IF, AFTER THE HEARING ON THESE CHARGES, YOU ARE FOUND TO HAVE VIOLATED THE LICENSING LAWS OR REGULATIONS AS CHARGED HEREINABOVE, YOU MAY BE SUBJECT TO A FINE, YOUR LICENSE MAY BE REVOKED, AND/OR OTHER PENALTIES MAY BE IMPOSED, AS AUTHORIZED BY LAW.

IF YOU DO NOT APPEAR FOR THE HEARING AS ORDERED, A DECISION MAY BE RENDERED ON DEFAULT, YOU MAY BE SUBJECT TO A FINE AND LICENSE REVOCATION, AND AN ADDITIONAL PENALTY FOR FAILING TO APPEAR MAY BE IMPOSED.

THE DATE OF THIS HEARING WILL NOT BE CHANGED UNLESS A WRITTEN REQUEST FOR AN ADJOURNMENT IS RECEIVED BY THE DIRECTOR OF ADJUDICATION OF THE DEPARTMENT, A COPY OF THAT REQUEST IS DELIVERED TO THE COUNSEL'S OFFICE OF THE DEPARTMENT AND TO ALL OTHER OPPOSING PARTIES, IF ANY, AT LEAST 3 (THREE) BUSINESS DAYS PRIOR TO THE HEARING, AND UNLESS THE REQUEST IS APPROVED. THE REQUEST WILL BE APPROVED ONLY IF THERE IS PROOF OF THE NECESSITY FOR THE ADJOURNMENT. A HEARING MAY BE ADJOURNED IF REQUESTED FEWER THAN 3 (THREE) BUSINESS DAYS BEFORE THE HEARING ONLY UPON PROOF OF AN EMERGENCY AND AFTER EVERY OPPOSING PARTY HAS BEEN NOTIFIED.

IN ORDER TO DEFEND AGAINST THESE CHARGES, YOU MUST APPEAR EITHER PERSONALLY OR THROUGH AN AGENT FAMILIAR WITH THE CASE. IF AN AGENT APPEARS WITHOUT YOU, WHAT HE OR SHE SAYS WILL BE DEEMED YOUR OWN TESTIMONY.

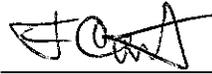
IF YOU DO NOT SPEAK FLUENT ENGLISH, YOU MAY USE THE TRANSLATION SERVICES PROVIDED BY DCA.

A BOOKLET ENTITLED "ADMINISTRATIVE HEARING GUIDE" WHICH EXPLAINS THE HEARING REGULATIONS OF THE DEPARTMENT IS AVAILABLE ONLINE ON THE DCA WEBSITE [www.nyc.gov/consumers](http://www.nyc.gov/consumers), OR CAN BE OBTAINED FOR FREE BY CALLING 311, OR BY COMING TO THE DEPARTMENT IN PERSON.

Dated: October 7, 2009  
New York, New York

For: Jonathan Mintz  
Commissioner

By: Fred Cantor, Esq.  
Senior Counsel



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Department of Consumer Affairs  
Legal Compliance & Fitness  
Division  
42 Broadway, 9th Floor  
New York, NY 10004  
Phone: (212) 361-7717



Department of  
Consumer Affairs

RESPONDENT CONTACT INFORMATION FORM

DATE: 10/8/09 VIOLATION#: LL 5130923

CASE NAME: DEPT. V ERIC RIVERA

RESPONDENT'S NAME: ERIC RIVERA

ADDRESS: 10 JORDAN LAKE, MIDDLETOWN, NY

TELEPHONE NUMBER: \_\_\_\_\_, FAX: \_\_\_\_\_

RESPONDENT'S RELATIONSHIP TO BUSINESS: LICENSED PROCESS SEWER

BUSINESS INFORMATION:

BUSINESS NAME: \_\_\_\_\_

BUSINESS ADDRESS: \_\_\_\_\_

TELEPHONE NUMBER (S): \_\_\_\_\_

FAX NUMBER(S): \_\_\_\_\_

BUSINESS E-MAIL ADDRESS: \_\_\_\_\_

DO YOU HAVE AN ATTORNEY YES  NO

ATTORNEY'S NAME: PRESTON LESCHINS

FIRM NAME: \_\_\_\_\_

MAILING ADDRESS: \_\_\_\_\_

TELEPHONE: \_\_\_\_\_, FAX: \_\_\_\_\_

EMAIL ADDRESS: leschins @ att.net

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

-----X **APPEAL DETERMINATION**  
**DEPARTMENT OF CONSUMER AFFAIRS,**

**Violation Number:**  
**LL5130923**

**Complainant**

**- against -**

**Date: March 4, 2010**

**ERIC RIVERA,**

**Respondent.**

-----X

The respondent appeals from the Decision dated December 30, 2009, insofar as it ordered the respondent to pay a total fine of \$14,700. The Department appeals from the Decision insofar as it found the respondent not guilty of violating 6 RCNY § 2-233(b)(5) and dismissed this charge.

The Decision is affirmed in part and reversed in part.

The respondent's arguments on appeal that the fines ordered by the Decision are unprecedented and are arbitrary and capricious are without merit. The Deputy Director of Adjudication correctly found that each record of service in which the respondent failed to include information required by a subdivision of 6 RCNY §2-233 constituted a separate violation for which the respondent should be ordered to pay a separate fine, and ordered the respondent to pay a total fine of \$14,700 for forty-two violations. This penalty was both appropriate and proportionate to the respondent's offense, which included *repeated* failures to include required information in his records of service. In *Matter of Barr v. Department of Consumer Affairs*, 70 N.Y.2d 821 (1987), the Court of Appeals held that a penalty of license revocation and a \$4900 fine was not disproportionate to the process server's offense, which included several counts of failing to keep records in the form mandated by the Department of Consumer Affairs rules. The court stated that the process server's "repeated disregard for the strictures of the agency's record-keeping provisions was a direct violation of the terms of his license and, further, was antithetical to the regulatory goal of assuring honest service practices." *Id.* at 823.

Accordingly, that part of the Decision that found the respondent guilty of violating 6 RCNY Sections 2-233(a)(2)(i), 2-233(a)(2)(iv), 2-233(a)(2)(vi) and 2-

233(b)(2), and ordered the respondent to pay a total fine of \$14,700, is affirmed.

The Decision dismissed the charge that the respondent violated 6 RCNY Section 2-233(b)(5) by failing to keep his records “in chronological order, in a bound, paginated volume.” The Department argues that the Decision should not have dismissed this charge because the respondent’s records, which are kept in spiral-bound books, are not properly bound and do not comply with the requirements of Section 2-233(b)(5).

The Department cited two cases at the hearing in support of its argument that the respondent’s records do not comply with the requirements of Section 2-233(b)(5). In *Masaryk Towers Corp. v. Vance*, 12 Misc. 3d 1172A, 820 N.Y.S.2d 843, 2006 NY Slip Op 51157U (Civ. Ct. New York County 2006), the court found that a process server’s log which consisted of individual sheets bound at the top by staples and plastic tape was not properly bound. In *First Commercial Bank of Memphis v. Ndiaye*, 189 Misc.2d 523 (Sup. Ct. Queens County 2001), the court found that a log book which consisted of a single continuous computer printout secured in a binder did not satisfy the requirements of Section 2-233(b)(5). In rejecting the records in each of these cases, the court cited the ease with which the records could be altered later to suit the processor server’s needs. In *Masaryk Towers*, the court noted that the individual sheets that were bound together by staples and plastic tape “could be easily altered by taking out or reshuffling pages and rebinding them.” *Id.* at 8.

In this case, the respondent’s spirally bound log is similarly susceptible to manipulation and alteration. As the Department points out, the log could be taken apart easily at any time and re-bound. Therefore, the respondent’s logs did not satisfy the requirements of 6 RCNY Section 2-233(b)(5).

Accordingly, the Decision is reversed insofar as it found the respondent not guilty of violating 6 RCNY § 2-233(b)(5) and dismissed this charge. The matter is **remanded** for a determination of the appropriate penalty for this violation. Administrative Law Judge Nisonoff may, in his discretion, order an additional hearing or additional submissions from the parties on this issue.

**SO ORDERED:**



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Nancy J. Schindler  
Director of Adjudication

## **CERTIFICATE OF MAILING**

On **March 4, 2010** an Appeal Determination was mailed to the following:

**Violation No: LL5130923**

By emailing it to:

**Preston A. Leschins, Esq.**

leschins@att.net

**Jordan Cohen, Esq.**

**Fred Cantor, Esq.**

**Allison Johnson, Esq.**

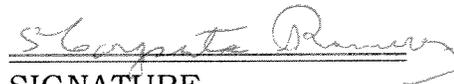
**Administrative Law Judge M. Nisonoff**

By enclosing it/them in an envelope addressed to:

**Eric Rivera**

**10 Jordan Lane**

**Middletown, NY 10940**

  
SIGNATURE

Margarita Ramirez

PRINT

CAMIS ENTRY: **Remanded**

CAMIS ENTRY DATE: **March 4, 2010**

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

**DEPARTMENT OF CONSUMER AFFAIRS,**

**Complainant,**

**-against-**

**ERIC RIVERA,**

**Respondent.**

**SUPPLEMENTAL  
DECISION AND ORDER**

**Violation No.: LL5130923**

**License No.: 1212873**

**Respondent's Address:  
10 Jordan Lane  
Middletown, NY 10940**

**Date: May 11, 2010**

A hearing on the above-captioned matter was held on November 17, 2009. In accordance with the Appeal Determination, an additional hearing, by telephone conference with the parties' attorneys, was held on April 12, 2010.

Appearances: For the Department: Fred Cantor and Allison Johnson, Esqs.; Jordan Cohen, Esq. (April 12, 2010 only). For the Respondent: Preston A. Leschins, Esq.; Eric Rivera, respondent; Alan Aboody, witness.

The respondent is charged with violating, among other charges, the following as charge 1:

Title 6 of the Rules of the City of New York ("6 RCNY") § 2-233(b)(5) by not keeping records chronologically in a suitably bound and paginated volume.

**Procedural History**

The initial Decision in this matter was issued on December 30, 2009.

The respondent appealed from the Decision insofar as it ordered the respondent to pay a total fine of \$14,700. The Department appealed from the Decision insofar as it found the respondent not guilty of violating 6 RCNY § 2-233(b)(5) and dismissed the charge.

The Appeal Determination dated March 4, 2010 affirmed that part of the Decision that ordered the respondent to pay a total fine of \$14,700; reversed the Decision insofar as it found the respondent not guilty of violating 6 RCNY § 2-233(b)(5); and remanded the matter to me for a determination of the appropriate penalty for this violation.

In response to the Department's pre-hearing subpoena, the respondent produced 22 spirally-bound logbooks. On the record, the Department had specified the number of counts of each of the charged violations as ten.

Upon this remand and in accordance with the directions set forth in the Appeal Determination, I **RECOMMEND** the following:

### **Additional Facts**

On the record of the additional hearing, the Department: (1) specified the number of counts of this charged violation as one, and (2) requested that the respondent's license be suspended for two weeks.

### **Opinion**

As the Appellate Determination states, "the [respondent's] log could be taken apart easily at any time and rebound" and "[t]herefore, the respondent's logs did not satisfy the requirements of 6 RCNY Section 2-233(b)(5)." There is no issue that the respondent employed the log book format provided by R & A, including the spiral binding. This consideration does not excuse the respondent's failure to abide by the requirements of this provision as now determined by the Appeal Determination. See 6 RCNY Section 2-234 ("The licensee shall at all times strictly ... conform to all laws, rules, regulations and requirements of the ... municipal authorities relating to the conduct of licensees...").

The Department requested that, in addition to the imposition of a fine, the respondent's license be suspended for two weeks. The Department argues that the employment of a spirally-bound log book has the "serious" potential of having its pages removed and reordered. The Department does not assert, and did not proffer any evidence, that, in actuality, respondent removed or reordered any log book pages. Accordingly, I decline to order a suspension of the respondent's license based on this violation.

### **Order**

The respondent is found **guilty** of charge 1 (one count of violation of 6 RCNY § 2-233(b)(5)).

The respondent is **ordered** to pay to the Department **an ADDITIONAL FINE of \$500**.

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

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Mitchell B. Nisonoff  
Administrative Law Judge

**SUPPLEMENTAL DECISION AND ORDER**

The recommendation of the Administrative Law Judge is **approved**.

**This constitutes the Supplemental Decision and Order of the Department.**

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Bruce M. Dennis  
Deputy Director of Adjudication

cc: Fred Cantor and Allison Johnson, Esqs.  
Jordan Cohen, Esq.

By email: [leschins@att.net](mailto:leschins@att.net)  
Preston A. Leschins, Esq.

**NOTICE TO RESPONDENT(S):** If you wish to **APPEAL** this decision, or file a **MOTION FOR REHEARING**, you must file your appeal or motion with the Director of Adjudication, Department of Consumer Affairs, 66 John Street, New York, NY 10038, **within 30 days of the date of this decision**. You must include with your appeal or motion (1) a check or money order payable to the Department of Consumer Affairs for the sum of \$25; and (2) a check or money order payable to the Department of Consumer Affairs 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, supported by evidence of financial hardship, including the most recent tax returns you have filed. In addition, you must serve a copy of your appeal or motion for rehearing, and any related documents, on the Legal Compliance and Fitness Division of the Department of Consumer Affairs, 42 Broadway, 9<sup>th</sup> Floor, New York, NY 10004.

**Mail payment in the enclosed envelope addressed to:**

NYC Department of Consumer Affairs  
Collections Division  
42 Broadway, 9<sup>th</sup> Floor  
New York, NY 10004