

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

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DEPARTMENT OF CONSUMER AFFAIRS,

Complainant

- against -

MARWAN M. ELIGAWY,

Respondent.

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APPEAL DETERMINATION

Record Nos.:

903-2014-APPL

4559-2014-ADJC

NOH No.: LL005333249

The Department appeals from the Default Decision, dated June 23, 2014, insofar as the Judge dismissed the final charge of Administrative Code of the City of New York (“Administrative Code”) § 20-101, finding that the Department’s Notice of Hearing failed to “provide sufficient information as to give the respondent notice of the charge alleged” and did not “identify a chargeable section of law,” and failed to find him unfit to hold any Department license and revoke his process server license.

In this case, the Notice of Hearing charged the respondent, who was licensed as a process server during the time in question, with eleven violations of the Administrative Code or Title 6 of the Rules of the City of New York. Ten of these charges were based on the respondent’s failure to comply with a Department-issued subpoena, failure to maintain required records, and filing of a false affidavit of service. The eleventh charge, entitled “Lack of Fitness,” stated that, “[b]y virtue of the activities described above, Respondent violation § 20-101 of the Code by failing to maintain the standards of integrity, honesty and fair dealing required of licensees.” The “activities described above” included the Notice of Hearing’s Facts section,¹ which set forth specific information supporting the charges. Pursuant to the violation of Administrative Code § 20-101, the Notice of Hearing demanded that the respondent be found unfit to hold any Department license and his process server license be revoked.

Although Department records establish that the Notice of Hearing was properly served, the respondent defaulted in this matter by failing to appear at the scheduled hearing. In her Default Decision, the Judge dismissed the final charge of Administrative Code § 20-101, finding that “[t]he charge setting forth a

¹ See Notice of Hearing, Violation No. LL 5333249, pages 2 – 3, ¶¶ 1 – 7.

violation of Administrative Code Section 20-101 in the Notice of Hearing fails to provide sufficient information as to give the respondent notice of the charge alleged, as is required by Title 6 of the Rules of the City of New York § 6-21(b). It does not identify a chargeable section of law, rule or regulation.” The Judge added a footnote, which read: “Administrative Code Section 20-101 is a legislative intent section not a chargeable section of law.”

In its appeal, the Department claims that 1) the Judge erred in finding that the Department failed to establish a violation of Administrative Code § 20-101; 2) the Judge erred in finding that the Department failed to provide sufficient notice of the charge alleged; and 3) the Judge erred in not finding the respondent unfit to hold any Department license and not revoking his process server license.

Upon due consideration of the arguments presented, the appeal is **granted**.

“[A]n administrative agency’s construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight.” *Tommy and Tina, Inc. v. Dept. of Consumer Affairs*, 95 A.D.2d 724, 464 N.Y.S.2d 132 (1st Dept. 1983), quoting *Matter of Herzog v. Joy*, 74 A.D.2d 372, 375 (1st Dept. 1980).² As Administrative Code § 20-101 is a fundamental statute under which the Department functions, this Tribunal shall provide the greatest weight to the agency’s construction and interpretation of it.

In her Default Decision, the Judge did not support her determination that Administrative Code § 20-101 is “not a chargeable section of law” with any valid legal authority, be it a case or any law, rule, or regulation. Indeed, by dismissing Administrative Code § 20-101, she ignored decades of Tribunal decisions which found violations of Administrative Code § 20-101 for lack of fitness and ordered license revocation.³ She also ignored decades of New York state law upholding the Tribunal’s decision in which a Judge found a violation of Administrative Code § 20-101 for lack of fitness and ordered license revocation.⁴

² In addition, “The New York Consumer Protection Law seeks to protect the public from deceptive and unconscionable trade practices and should be interpreted broadly.” *Polonetsky v. Better Homes Depot, Inc.*, 185 Misc.2d 282, 712 N.Y.S.2d 801 (N.Y.Sup. 2000), quoting *Maldonado v. Collectibles Intl., Inc.*, 969 F.Supp 7, 8 (S.D.N.Y. 1997).

³ See e.g., *Dept. of Consumer Affairs v. Kudos Construction Corp.*, LL005312969, Decision and Order (April 23, 2013); *Dept. of Consumer Affairs v. Alfonso’s Home Improvement and Contractor Inc.*, LL005312956, Decision and Order (Feb. 21, 2013); *Dept. of Consumer Affairs v. Montenbih Corp. d/b/a SAPO*, LL005232650, Decision and Order (June 22, 2011); *Dept. of Consumer Affairs v. Broadway Collision & Towing Inc. and Richard Turek*, LL005206450, Decision and Order (June 11, 2011); *Dept. of Consumer Affairs v. Dents Outs Towing & Collision*, LL005206440 et al., Decision and Order (Jan. 18, 2011); *Savitry Prasad and Dept. of Consumer Affairs v. Rashad Iqbal d/b/a N&H Construction*, CD5-84377; DD5-84377, Decision and Order (Aug. 31, 2004).

⁴ See e.g., *Laureiro v. Dept. of Consumer Affairs*, 41 A.D.3d 717 (2d Dept. 2007); *Matter of V & A Towing v. City of New York*, 197 A.D.2d 386 (1st Dept. 1993); *Matter of Dolinsky v. Dept. of Consumer Affairs*, 125 A.D.2d 256 (1st Dept. 1986).

The Department correctly argues that Administrative Code § 20-101 has the force of law, as it is the legislature’s codification of the Department’s inherent authority and obligation to ensure that a business maintains required “standards of integrity, honesty and fair dealing among persons and organizations engaging in licensed activities.” Administrative Code § 20-101. There is no evidence that, by labeling Administrative Code § 20-101 “Legislative Intent,” the City Council meant to strip from the section the force of law or otherwise render it not chargeable. Such an interpretation runs contrary to the long-standing principles of an administrative agency’s ability to evaluate a licensee’s character and fitness. See Barton Trucking Corp. v. O’Connell, 7 N.Y.2d 299 (1959); C. Schmidt & Sons, Inc. v. NYS Liquor Authority, 73 A.D.2d 399 (1st Dept. 1980), Anastasio v. Waterfront Comm. of New York Harbor, 49 N.Y.2d 973 (1980), Employers Claim Control Serv. Corp. v. Workmen’s Compensation Bd., 35 N.Y.2d 492 (1974). Accordingly, it is determined that the Judge erred in find that Administrative Code § 20-101 is not a chargeable section of law.

Furthermore, it is determined that the Department established the violation of Administrative Code § 20-101 for the respondent’s lack of fitness in this case. It is well-established that the Department is empowered to supervise and regulate all licensed activities to protect the public against unfair and unconscionable practices and to promote the standards of integrity, honesty, and fair dealing. See Tommy and Tina, Inc. v. Dept. of Consumer Affairs, 95 A.D.2d 724, 464 N.Y.S.2d 132 (1st Dept. 1983). The Department, as the licensing authority, has the discretion to evaluate a licensee’s character and fitness as well as the “cognizance and control” over license revocation or suspension. New York City Charter § 2203(c); see also Barton Trucking Corp. v. O’Connell, 7 N.Y.2d 299 (1959). Courts have also recognized the Department’s broad powers in imposing fines, revoking licenses, and ordering restitution. See Aaron’s Const. Corp. v. Gould, 29 Misc.3d 1216(A), 2010 WL 4236930 (N.Y.Sup. 2010); see also New York City Charter §§ 2203(c) through 2203(g). As the Department licenses process servers,⁵ if one fails to comply with the Department’s rules and regulations, his or her license may be suspended or revoked. See Borges v. Entra America, Inc., 7 Misc.3d 1032(A) 2005 WL 1355144 (N.Y.City Civ.Ct. 2005). In this case, the Notice of Hearing charged the respondent with ten violations resulting from the respondent’s failure to comply with a Department-issued subpoena, failure to maintain required records, and filing of a false affidavit of service. Based upon the Facts and Charges recited in the Notice of Hearing, uncontested due to the respondent’s default, the Department established the violation of Administrative Code § 20-101 for the respondent’s failure to maintain the standards of honesty, integrity and fair dealing required of licensees.

⁵ See Administrative Code § 20-403.

The Department also correctly argues that the Judge erred in finding that the Notice of Hearing failed to provide sufficient notice of the charge alleged. Although she referenced 6 RCNY § 6-21(b), that rule states that “[t]he Notice of Hearing shall contain such information as to give the respondent notice of the particular charges alleged.” By citing the correct section of law and including the following information, “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,” the Notice of Hearing contained sufficient information as to give the respondent notice of the particular charge alleged.

In light of the Judge’s finding the respondent guilty of ten violations, including filing a false affidavit, the Department correctly argues that she erred in not finding the respondent unfit to hold any Department license and not revoking his process server license. This Tribunal has repeatedly held that, where a violation of Administrative Code § 20-101 is found on default, license revocation should follow. See e.g., *Dept. of Consumer Affairs v. [REDACTED]*, [REDACTED] Default Decision and Order (Aug. 28, 2013); *Dept. of Consumer Affairs v. [REDACTED]*, [REDACTED], Default Decision and Order (Sept. 4, 2013); *Scattaglia and Dept. of Consumer Affairs v. [REDACTED]*, [REDACTED] Decision and Order (July 18, 2010); *Laureiro v. Dept. of Consumer Affairs*, 41 A.D.3d 717 (2nd Dept. 2007)(upholding license revocation upon respondent’s default); see also 6 RCNY § 6-43 (“a licensee who fails to appear or answer a Notice of Violation will be considered in violation of an order of the Commissioner and may be subject to ... revocation of the license.”).

Accordingly, the Judge’s determination that the Department failed to establish a violation of Administrative Code § 20-101 is **reversed**. The Default Decision is modified to find the respondent **guilty** of violating Administrative Code § 20-101 and it is hereby ordered that the respondent is found unfit to hold any Department license.⁶

As the Department’s appeal points out, the Judge also appears either to have converted the first charge of Administrative Code § 20-101 into a violation of 6 RCNY § 1-14 without any explanation or found the respondent guilty of 6 RCNY § 1-14 for failing to appear at the hearing and ignored the first charge of Administrative Code § 20-101. In any event, the Default Decision is further amended to find the respondent **guilty** of an additional count of Administrative Code § 20-101 for failing to respond to the subpoena, as set forth in the Notice of Hearing under Charge One.⁷

⁶ As discussed above, the Default Decision should have also revoked the respondent’s process server license. However, as Department records establish that the license (no. 1403005-DCA) expired, there is no license to revoke.

⁷ See Notice of Hearing, LL 5333249, page 3 at ¶ 1 under Charges.

The Default Decision, **as modified**, is **affirmed**.

SO ORDERED:

Date: July 30, 2014

Steven T. Kelly
Director of Adjudication

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**

DEPARTMENT OF CONSUMER AFFAIRS,

Complainant,

-against-

MARWAN M. ELGIZAWY

Respondent.

DEFAULT DECISION AND ORDER

Record No.: 4559-2014-ADJC

NOH No.: LL005333249

License No.: 1403005¹

**Respondent's Address:
5407 39th Avenue
Woodside, NY 11377**

Date: June 23, 2014

The respondent is charged with the violations in the attached Notice of Hearing.

A hearing was scheduled for May 29, 2014. The respondent did not appear.

The respondent is found **guilty upon default.**

ORDER

The respondent is therefore **ordered to pay to the Department of Consumer Affairs (DCA) a TOTAL FINE of \$5000, which is immediately due and owing**, as follows:

6 RCNY Section 2-233 (\$500 per count, for 1 count)	\$500
6 RCNY Section 2-234 (\$500 per count, for 1 count)	\$500
6 RCNY Section 2-235 (\$350 per count, for 1 count)	\$500
6 RCNY Section 2-233a (\$500 per count, for 1 count)	\$500
6 RCNY Section 2-233b (\$500 per count, for 1 count)	\$500

¹ The respondent's process server license expired on February 28, 2014. Accordingly the respondent was not a licensee the date of the hearing. The respondent was a licensee when he or she failed to appear at the Department in person to answer the subpoena.

6 RCNY Section 1-16(a) (\$500 per count, for 4 counts)	\$2,000
6 RCNY Section 1-14 (\$500 per count, for 1 count)	\$500
TOTAL	\$5000

The charge setting forth a violation of Administrative Code Section 20-101 in the Notice of Hearing fails to provide sufficient information as to give the respondent notice of the charge alleged, as is required by Title 6 of the Rules of the City of New York § 6-21(b).

It does not identify a chargeable section of law, rule or regulation.² Accordingly, the charge of Administrative Code Section 20-101 is **dismissed**.

The Department will suspend any of the respondent's other DCA license(s) if the respondent fails to comply with this Decision and Order within thirty (30) days, including payment of the fine. 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. The 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.

This constitutes the Decision and Order of the Department.

**Shanet Viruet
Administrative Law Judge**

cc: Alvin Liu, [REDACTED]

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

² Administrative Code Section 20-101 is a legislative intent section not a chargeable section of law.

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 on 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 the 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 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.

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

-----X **NOTICE OF HEARING**
DEPARTMENT OF CONSUMER AFFAIRS,

Complainant,

-against-

Violation No. LL 5333249

MARWAN M. ELGIZAWY
5407 39TH AVENUE
WOODSIDE, NY 11377

License No. 1403005

Licensee/Respondent. (Process Server Individual)

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In accordance with the powers of the Commissioner of the New York City Department of Consumer Affairs ("the Department") set forth in Section 2203(f) 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 DEPARTMENT'S ADJUDICATION TRIBUNAL LOCATED AT 66 JOHN STREET, 11TH FLOOR, NEW YORK, NEW YORK 10004 AT 8:30 A.M. ON THURSDAY, MAY 29, 2014** 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 6 RCNY, 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

1. Respondent, Marwan M. Elgizawy, is licensed by the Department as an individual process server under license number 1403005.
2. Respondent's current process server license will expire on February 28, 2014.

Failure to Respond to Subpoena

3. On January 21, 2014, the Department served on Respondent a subpoena *duces tecum* ordering Respondent to produce certain required records (the "Subpoena").
4. The Subpoena ordered Respondent to produce the following records:
 - a. For the period April 1, 2013 through June 30, 2013, Respondent's bound logbook(s);
 - b. For the period April 1, 2013 through June 30, 2013, copies of all electronic records that Respondent maintains pursuant to Title 6 of the Rules of the City of New York, Section 2-233a;
 - c. For the period April 1, 2013 through June 30, 2013, all affidavits of service signed by Respondent, prepared by Respondent, or filed by Respondent with a court concerning service of process that Respondent performed;
 - d. For the period April 1, 2013 through June 30, 2013, all electronic records of the GPS location, time and date of attempted or effected service of process made by Respondent pursuant to section 2-233b(a)(2) of Title 6 of the Rules of the City of New York;
 - e. A certification from the Contractor that the GPS records produced in response to the Subpoena are true and accurate copies of the records maintained by the Contractor;
 - f. Documents sufficient to provide the Department with access to interactive electronic street maps that display the locations where Respondent's digital GPS records were recorded for the period April 1, 2013 through June 30, 2013;
 - g. For the period January 1, 2013 through the date that Respondent responds to the Subpoena, documents sufficient to identify all traverse hearings scheduled, whether or not held, concerning service of process by Respondent, and the result(s) of the hearing(s).
 - h. All documents, including communications, work orders/routing sheets, notes, affidavits of service, deposition transcripts and subpoenas, relating to court proceedings in which service of process performed by Respondent was contested (including traverse hearings held or scheduled outside of New York City) during the period January 1, 2013 through the date that you respond to this subpoena.

5. The Subpoena directed Respondent to respond no later than 12:00 p.m. on February 21, 2014.
6. As of the present date, Respondent has not produced any records in response to the Subpoena.

Signing A False Affidavit of Service

7. Respondent falsely affirmed in an affidavit of service that was filed in Queens Civil Court in the matter of *Midland Funding LLC v. Terri Grant* (Index No. 023170/13), that he served a Summons and Complaint at the defendant's place of residence on October 28, 2013 at 1:10 p.m. by Substitute Service upon Linda Grant, a person that Respondent made up.

CHARGES

Charges 1-5: Failure to Comply With Subpoena

1. Respondent violated NYC Admin Code § 20-101 by failing to respond to the subpoena. [1 count]
2. Respondent violated RCNY § 1-16(a) by failing to make available for inspection by the Department the logbook Respondent is required to maintain under 6 RCNY § 2-233. [1 count]
3. Respondent violated RCNY § 1-16(a) by failing to make available for inspection by the Department the electronic records Respondent is required to maintain under 6 RCNY § 2-233a. [1 count]
4. Respondent violated RCNY § 1-16(a) by failing to make available for inspection by the Department the affidavits of service Respondent is required to maintain under 6 RCNY § 2-235. [1 count]

5. Respondent violated RCNY § 1-16(a) by failing to make available for inspection by the Department the GPS records Respondent is required to maintain under 6 RCNY § 2-233b. [1 count]

Charges 6-9: Failure to Maintain Records

6. Respondent violated 6 RCNY § 2-233 by failing to maintain a logbook for the period of April 1, 2013 through June 30, 2013. [1 count]
7. Respondent violated 6 RCNY § 2-233a by failing to maintain electronic records for the period of April 1, 2013 through June 30, 2013. [1 count]
8. Respondent violated 6 RCNY § 2-233b by failing to create a GPS record for each service or attempted service during the period of April 1, 2013 through June 30, 2013. [1 count]
9. Respondent violated 6 RCNY § 2-235 by failing to maintain copies of signed affidavits of service for the period of April 1, 2013 through June 30, 2013. [1 count]

Charge 10: Filing a False Affidavit of Service

10. Respondent violated 6 RCNY § 2-234 by falsely affirming in an affidavit of service that was filed in Queens Civil Court in the matter of *Midland Funding LLC v. Terri Grant* (Index No. 023170/13), that he served a Summons and Complaint at the defendant's place of residence on October 28, 2013 at 1:10 p.m. by Substitute Service upon Linda Grant, a person that Respondent made up. [1 count]

LACK OF FITNESS

11. 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) revoking Respondent's process server license; 2) finding Respondent unfit to hold any Department licenses; 3) imposing maximum fines on Respondent for each and every charge set forth herein; and 4) granting such other relief as is deemed just and proper.

Dated: March 25, 2014
New York, New York

For: Alba Pico
First Deputy 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 at the DCA Adjudication Tribunal on the scheduled hearing date, you will be found guilty of the charges, you will be 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)** or by mail to DCA Adjudication 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 process_server@dca.nyc.gov or by mail to Alvin A. Liu, DCA Legal Division, 42 Broadway, 9th Floor, New York, NY 10004.

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.

REASONABLE ACCOMMODATION: If you have a disability and require a reasonable accommodation on the day of the hearing, you must send a request, with proof, before the hearing date to the Adjudication Tribunal at mycase@dca.nyc.gov or call 311 (212-NEW-YORK outside NYC) and ask for "Consumer Affairs Hearing - Reasonable Accommodation."

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

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