CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

DEPARTMENT OF CONSUMER AFFAIRS,

-and

STEPHEN PONTERIO and ELAINE PONTERIO,

Complainants,

-against-

CSPN PALIURAS CONSTRUCTION CORP.

-and

SPIRODON PALIURAS,

Respondent.

DECISION AND ORDER

Record Nos.: CD500134514-ADJC
DD500134514-ADJC

NOH No.: CD500134514
DD500134514

License Nos.: 1215331(HIC)
1215329(HIS)

Respondent's Address:
121 Village Road
Manhasset, NY 11030

A hearing on the above-captioned matter was held on December 13, 2013, January 7, 2014, February 20, 2014, April 24, 2014, May 8, 2014 and June 5, 2014.

Appearances: For the complainants: Stephen Ponterio and Elaine Ponterio; Dennis Marc Reisman, attorney. For the respondents, Spirodon Paliuras; Joseph P. Asselta, attorney.

The Notice of Hearing[1] charges the respondents with violating the following:

1. Respondent company with violating Administrative Code of the City of New York ("Admin Code") § 20-393(1) by materially deviating from or disregarding the plans or specifications or any terms and conditions agreed to under a home improvement contract (1 count);

2. Respondent company with violating Admin Code § 20-393(11) by failing to perform work under a home improvement contract in a skillful and competent manner (1 count);

[1] The consumers' motion at hearing was granted to allow the Department to amend the Notice of Hearing on behalf of the consumer post hearing. At hearing the respondent was given an opportunity to object and declined to do so. The Department was granted an extension to amend the Notice of Hearing by September 2, 2014 and the respondent was allowed an additional opportunity to respond until September 16, 2014 and declined to do so.

3. Respondent company with violating Title 6 of the Rules of the City of New York ("6 RCNY") § 2-223(a) by failing to secure or see to the securing of a certificate of occupancy and permit necessary to the proper completion of its contracts in accordance with applicable state or local building laws (2 counts);

4. Respondents with violating 6 RCNY § 2-221(a)(1) by failing to include in the Contract the home improvement contractor's license number; and the salesperson's name of record with the Department and license number (2 counts);

5. Respondents with violating 6 RCNY § 2-221(a)(2) by failing to include in the Contract the approximate or estimated dates on which the Contract work would begin; a statement of any contingencies that would materially change the approximate or estimated completion date; and a statement of whether or not the parties had determined a definite completion date to be of the essence (2 counts);

6. Respondents with violating 6 RCNY § 2-221(a)(4) by failing to include in the contract a notice to the owner that the contractor or subcontractor who performs on the contract and is not paid may have a claim against the owner which may be enforced against the property in accordance with the applicable lien laws (2 counts);

7. Respondents with violating 6 RCNY § 2-221(a)(5) by failing to include in the contract a notice to the owner that the home improvement contractor is legally required to deposit all payments received prior to completion in accordance with subdivision four of § 71-a of the New York State Lien Law and that, in lieu of such deposit, the home improvement contractor may post a bond or contract of indemnity with the owner guaranteeing the return or proper application of such payments to the purposes of the Contract (2 counts);

8. Respondents with violating 6 RCNY § 2-221(a)(8) by failing to include in the contract a clause wherein the contractor agrees to furnish the buyer with a Certificate of Workers' Compensation Insurance prior to commencement of work pursuant to the Contract (2 counts);

9. Respondents with violating 6 RCNY § 2-221(a)(9) by failing to include in the contract a clause wherein the contractor agrees to procure all permits required by law (2 counts);

10. Respondents with violating 6 RCNY § 2-221(a)(10) by failing to include in the contract, in immediate proximity to the space reserved for the signature of the buyer and in bold face type of a minimum size of 10

points, a statement that the buyer has the right to cancel the transaction at any time prior to midnight of the third business day after the date of the transaction. (2 counts);

11. Respondents with violating 6 RCNY § 2-221(b) by failing to provide a separate Notice of Cancellation to the owner. (2 counts); and

12. Respondents with violating Admin Code § 20-101 of the Code by failing to maintain the standards of integrity honesty and fair dealing required of licensees.

Post hearing orders and submissions

Pursuant to 6 RCNY § 6-35, the parties were advised at the final hearing that the record would be held open for various post hearing submissions.

Pursuant to the interim order dated July 1, 2014, the record was held open to allow the respondents to submit evidence to explain and correct discrepancies between respondents' exhibits 5 and 6, documents prepared by a third party, in the form of an affidavit from the preparer, corrected documents, and any other evidence with respect to exhibits 5 and 6 or in support of its assertion that the HVAC installed conformed to ACCA Manual J or similar method as approved in the Residential Code of New York State[2] and other post hearing submissions by consumers and respondents. Pursuant thereto, the respondents and consumers made submissions. It was also ordered that any party may object to these post hearing submissions or make an application for an additional hearing on additional evidence by August 13, 2014. The respondents and consumers did not object or make an application for an additional hearing on the additional evidence.

Pursuant to the interim order dated September 29, 2014, the record was held open to allow the consumer to submit estimates and/or payments from/to third parties for restitution sought included in pre-hearing discovery provided to the respondents by the consumers, discussed in testimony, referenced in other exhibits, which were offered into evidence and provided to the tribunal at hearing.[3] It was also ordered that any party may object to these post hearing

[2] On June 12, 2014, the Tribunal received modified duplicates from the respondent of exhibits 5 and 6 and asserts that the modifications constitute edits made by the third party preparer "Home Energy Solutions." However, as the respondent's assertion is unsupported by affidavit by the preparer or other evidence, this submission will not be considered. The parties were noticed at the hearing that the record would be held open for the preceding purposes. The parties did not object at hearing to the record being held open for these purposes, though given an opportunity to do so.

[3] The consumers offered the entire pre hearing discovery packet which was bound and pre-marked for evidence. In the interest of judicial efficiency, these documents, submitted to the Administrative Law Judge, were de-bound and remarked at hearing, rather than adjourning

submissions or make an application for an additional hearing on additional evidence by October 27, 2014. The respondents did not make an application for an additional hearing on the additional evidence. On October 27, 2014, the respondents submitted to the tribunal several general and specific objections to the additional evidence.

The respondents' objection in the conclusion of its October 27, 2014 submission that "the Administrative Law Judge should render her decision based solely upon the testimony and evidence actually presented at the hearing," which would bar consideration of respondents' post hearing submissions as well as the consumers' if sustained, is overruled for the following reasons.

The respondents' specific and general objections on the grounds of heresay and lack of foundation are overruled. The Rules of the City of New York pertaining to this Tribunal allow any relevant evidence to be admitted without regard to the technical or formal rules or laws in effect in the courts of the State of New York, except for rules relating to privileged communications. Additionally, hearsay evidence is explicitly admissible. *See* 6 RCNY § 6-35(b).

The respondents' objections to the interim order and post hearing submissions that "once a trial/hearing is completed, a party should not be entitled to supplement and change its case thereafter" is also overruled. The Rules of the City of New York pertaining to this Tribunal specifically allows for the record to be held open by the Administrative law Judge to obtain or allow for production of additional evidence post hearing, and both parties elected to do so pursuant to orders requesting production.[4]

Additionally the claim that either party "supplemented or changed its case after the hearing" or that the "[tribunal attempts] to assist complainants by allowing them to submit evidence *for the first time after the hearing*," is also without merit. The consumers in fact offered the entire pre hearing discovery file including the exhibits at issue as evidence at trial, which was furnished to both the tribunal and to the respondents before the hearing.[5] All substantive

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solely for the purpose of the respondent doing so. For this reason, some documents discussed at length were not *formally* remarked, offered and moved into evidence during this process. However all of these documents were reviewed as part of prehearing discovery by both parties, offered and provided to the tribunal as evidence, and discussed in direct and cross examination by the parties.

[4] 6 RCNY § 6-35(h) provides the hearing officer may hold the record of the proceeding open…in order to obtain or allow for production of additional evidence to aid him or her in reaching a determination. The respondent was offered a third opportunity to correct defects of unreliable exhibits post hearing, which it elected to do.

[5] As explicitly delineated in the interim order, the items in the discovery packet needed to be de-bound and "*formally* re-marked and moved into evidence" one by one, which was done at hearing in the interest of judicial efficiency to avoid adjournment solely for that purpose. It was

matters and issues regarding these documents were addressed at length during the hearing. The estimates and invoice documents at issue were substantively addressed during the consumers' direct testimony and cross examination by the respondents. Accordingly, the consumers did not change their case nor did the respondents change their substantive defenses or objections, or was the respondents otherwise denied an opportunity to cross examine the sole witnesses on the estimates; the consumers.[6]

For the above mentioned reasons, the respondents' claim that "allowing the respondents to submit documents after the hearing completely deprives CSPN of a full and fair opportunity to litigate the merits of the documents and to cross examine the appropriate witnesses" is also without merit. Furthermore, it was ordered that any party may make an application for an additional hearing on additional evidence and the respondents declined to do so. Finally, as substantive matters and issues regarding these "post hearing submissions" are part of the record as testimony, I may reach a determination based on the testimony regarding estimates. Notwithstanding, I elect to hold the record open for *additional documentary evidence at my sole discretion to aid me in reaching a determination* pursuant to 6 RCNY §6-35 for the above mentioned reasons.

The respondents' specific objections to exhibits UU are overruled for the reasons explained above.

The respondents' specific objection to exhibits VV and WW, that the consumers failed to "explain…relevancy of these estimates…including but not limited to *where in the relevant contracts this work is provided for, as it is for work completed after the certificate of occupancy was issued,*" is sustained.

The respondents' specific objection to the itemized paid invoice from Dundee Plumbing[7] is overruled. The respondents did not provide any evidence to support its assertion that it is not a "proper" itemization by Dundee Plumbing and, accordingly, should be deemed inadmissible.[8] The respondents

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inadvertent error that the specific documents offered for evidence, provided to the tribunal and the respondent, and discussed at length during the hearing were not "*formally* re-marked and moved…into evidence. "

[6] Likewise, the respondents did not change their defenses or objections, or was the consumers otherwise denied an opportunity to cross examine the sole witness; Mr. Paliuras.

[7] See consumers' exhibit M subpart 1.

[8] See consumers' exhibit M, Dundee Plumbing and Heating Inc. estimate, in which the respondent is not charged work included in the estimate not charged (work added on 3/13/2013) by Dundee. See also consumer's exhibit M subpart 1 (itemized) in which the respondent is likewise not charged by Dundee for work included in the invoice. Dundee's decision to not charge the respondent for some work performed does not establish that the itemization is not a "proper" itemization by Dundee Plumbing and, accordingly, should be deemed inadmissible.

declined to make an application for an additional hearing on the itemized paid invoice issued by Dundee, or subpoena any witnesses in support of its claim that it is not a proper itemization, though given an opportunity to do so.

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

Findings of Fact

On March 23, 2012, Stephen Ponterio and Elaine Ponterio (hereinafter "consumers") entered into a written contract with Spirodon Paliuras, the home improvement salesperson and president of CSPN Paliuras Construction Corp., and the home improvement company CSPN Paliuras Construction Corp. The contract provided for substantial various home improvements to be performed on the consumers' residential property located at 69-11 182nd Street, Fresh Meadows, NY in exchange for $387,000.00. The home improvements to be performed included excavation, foundation and framing work; installation of windows, the roof, brick on the exterior, rough plumbing, an HVAC system, sheetrock, tiling, painting, trims including crown molding throughout first and second floor, hardwood floors, stairs and rails; electrical work; spackling and painting throughout the home, as specified in the contract and plans. The contract provided the various home improvements were to be completed 12 months from the start date. The actual start date and completion date were not indicated on the contract. The respondent contractor commenced work pursuant to the contract on March 23, 2012.

The contract, which was drafted by the respondent salesperson, contained substantial typographical errors. In the section of the contract on page 3 titled "Trims" which reads "install all trims in white paintable 3" ceasing 6" base 5" *gown* in the first floor and the second floor" the word gown is a typographical error which should read crown. In the section on page 3 entitled "HVAC" which reads "install *3tone* for the first floor and 4 for the second, Contractor will do load analysis and new Blue print for the HVAC," the phrase "3tone" is a typographical error which should read "3 ton."

On August 8, 2012, the parties entered into a second written contract for the installation of a French drain system (the "Second Contract"), for which consumers paid the respondent company an additional $14,000 for the deposit and to begin installing the pipe. The respondent company did not complete this work.

On January 16, 2013, the parties entered into a written agreement as to the outstanding work whereby they agreed that the balance then currently owed under the first contract was $24,300. The consumers agreed to place this amount in escrow with their attorney, Dennis Marc Reisman, Esq. The parties

further agreed that: $5,000 would be released from escrow upon completion of all electric, plumbing (except toilets), roofing and part of miscellaneous work, and the surveyor completed his work; an additional $5,000 would be released upon completion of miscellaneous work, floor work and varnishing; another $5,000 would be released when the painting was completed; another $5,000 would be released when miscellaneous and other outstanding project work was completed; and the final balance would be paid when the certificate of occupancy was issued, and waiver of lien and contractor warranties are provided to the consumers. The consumers paid the respondent $5,000 and an outstanding balance of $19,300 remained unpaid on the agreement.

On or about February 14, 2013, the consumers changed the locks preventing the respondent contractor from re-entering and performing any additional work at the consumers' residence.

Each of the first and second contracts did not include: the license number of the home improvement contractor; the name or license number of the home improvement salesperson as on record with the Department; a statement of any contingencies that would materially change the approximate or estimated completion date; a statement as to whether the parties had determined that a definite completion date to be of the essence; a notice to the owner that the contractor or subcontractor who performs on the contract and is not paid may have a claim against the owner which may be enforced against the property in accordance with applicable lien laws; a notice to the owner that the home improvement contractor is legally required to deposit all payments received prior to completion in accordance with subdivision four of § 71-a of the New York State Lien Law and that, in lieu of such deposit, the home improvement contractor may post a bond or contract of indemnity with the owner guaranteeing the return or proper application of such payments to the purposes of the contract; a clause wherein the contractor agrees to procure all permits required by law; and a notice to the buyer, in immediate proximity to the space reserved for the signature of the buyer and in bold face type of a minimum size of 10 points, that the buyer has a three day right to cancel the transaction at any time prior to midnight of the third business day after the date of the transaction. The respondents also did not provide the consumers with a separate Notice of Cancellation form regarding the consumer's three day right to cancel the contract.

The contract included a clause wherein the contractor agrees to furnish the buyer with a certificate of workers' compensation insurance prior to commencement of work pursuant to the contract.

The respondent company failed to perform the following work under the home improvement contract in a skillful and competent manner in the following respects: the polyurethane on the hardwood floors contained bubbles

and sanded in sections rather than completely restriped and refinished to correct the bubbles; the painted walls doors and railings had cracks, holes, gashes, leak marks and/or exposed plastering; the basement toilet bowl was not installed according to manufacturer specifications; the door jam was cracked during installation; the dryer in the basement was installed over one foot from the wall; and the HVAC was not installed pursuant to the contract terms or in a skillful and competent manner in that a load analysis was not performed, nor and new blueprint for HVAC produced, pursuant to a load analysis before installation to determine the correct size of the unit necessary for the proper cooling and heating of the residence.

The respondent company also disregarded the plans or specifications of terms and conditions agreed to under a home improvement contract in the following respects, in that the respondent contractor failed to: install crown molding on the second floor; install a three foot tall boiler room crawlspace; install a third outside hose; install vinyl windows and instead installed wood windows; install 65 high-hat lighting fixtures and instead installed only 56; remove debris from construction left on the consumers' property; perform a load analysis or produce and new blueprint pursuant thereto for HVAC before installation to determine the correct size of the unit necessary for the proper cooling and heating of the residence; and install a 3 ton HVAC unit for the first floor and 4 ton HVAC unit for the second floor.

The respondents have no prior violations.

Opinion

Charges 1 and 2 (Administrative Code sections 20-393(1) and 20-393(11))

The consumers established that the respondent company did not perform the following work pursuant to the contract in a skillful and competent manner and that they paid a total of $16,860 to correct and finish the work.

The consumers established, through credible testimony supported by documentary evidence, that the flooring was improperly and unprofessionally finished.[9] The consumers credibly established, and the respondent conceded, that some of the hardwood floors installed and finished on first and second floors and on the stairs by the respondent's subcontractor had bubbles in the polyurethane, was stripped in sections rather than completely restriped and refinished to correct the bubbles in the polyurethane, and was never refinished properly.[10] The respondent's claim that he offered the respondent money in exchange for the work not properly completed or otherwise offered to continuously attempt to correct the faulty work does not establish a defense to

[9] See consumers' exhibit L.
[10] See consumers' exhibit L.

failing to perform the work in a skillful and competent manner. The consumers credibly established that the paid a separate contractor, Flynn Custom Flooring $2,400, to correctly finish the floors.[11]

The consumers established, through credible testimony supported by photographic evidence, that the residence was improperly and unprofessionally painted and that it cost them $7,400 to correct and complete the work.[12] The consumers credibly established through photographic evidence and documents prepared by another contractor that the painted areas were not taped properly and that painted walls doors and railings were left with cracks, holes, gashes, leak marks and/or exposed plastering. The respondent's unsupported claim that he did not leave the residence in the condition depicted in the dated photographs is not supported by a preponderance of the credible evidence.

The consumers established through credible testimony and documentary evidence that they paid another contractor, Dundee Plumbing, to partially complete the work not completed by the respondent, indicated in the contract and punch list, in order for them to obtain sign offs and a certificate of occupancy.[13] They established that it cost them $3,500 to correct and complete this portion of the work.[14] The consumers also established that they paid an additional $3,560 to Malta Electric for various repairs performed in order for the residence to comply with New York City Department of Buildings code and pass inspection. The consumers established that on May 15, 2013 after correction and completion of work was performed by Dundee Plumbing & Malta, they obtained a certificate of occupancy.[15]

The consumers also established that the respondent company did not perform the following work pursuant to the contract in a skillful and competent manner and provided sufficient estimates of future repairs needed to correct and finish the work.

The consumers established through detailed testimony and documentary evidence that the respondent failed to install the dryer in the basement in a skillful and competent manner, in that it was installed over one foot from the wall.[16] The consumers also established that the dryer will have to be reinstalled with cylinder block supports to correct the work, and that it will cost them $1,100 to complete this work.[17] The respondent's unsupported claim that it

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[11] See Consumers' exhibit L.
[12] See Consumers' exhibits Y, AA, and ZZ.
[13] See consumers' exhibit A, M and post hearing submission referred to as "exhibit A," which is an itemized version of the paid invoice and marked and moved into evidence as M sub 2.
[14] See Consumers' exhibit M.
[15] See Consumers' exhibits P and Q.
[16] See consumers' exhibit I.
[17] See consumers' exhibits I and PP.

should cost less to reinstall the dryer with the cylinder blocks does not sufficiently rebut the consumers' testimony and documentary evidence.[18]

The consumers established that the plans called for three outside hoses, and the respondent admitted that he only installed two.[19] The consumers also established that it will cost an additional $1,200 to install the additional plumbing needed for the third hose. [20] The consumers established that the respondent installed a door pursuant to the contract,[21] and that the jam which was cracked during the construction,[22] will cost $350 to remove and replace.[23] The respondent also established that the contract provided for crown molding on the first and second floors as specified in the contract and that the respondent failed to install crown molding on the second floor.[24] The respondent's claim that it is impractical or improper to install crown molding on the type of ceilings contained in the residence where not installed is not supported by a preponderance of the credible evidence. Furthermore, the respondent's claims that it is impractical or improper does not establish a meritorious defense to failing to comply with the specific terms of the contract, which specifically provides for base board and crown to be installed throughout the first and second floors. The consumers' established that it will cost $9,500 to install the missing crown molding.[25]

The consumers established that the basement toilet bowl was not installed a skillful and competent manner. The consumers established through credible testimony and supporting documentation that the toilet, which was not defective, was installed three and one quarter inches from the wall when the manufacturer's specifications for that toilet provide it should be installed at a distance of one-half an inch from the wall.[26] Mr. Paliuras' unsupported assertion that the toilet bowl was defective and that is why it was installed three and one quarter inches from the wall is not credible. Mr. Ponterio credibly testified that he contacted the manufacturer regarding the toilet bowls and verified that the toilets were not defective and were not installed according to the specifications for the toilet. The consumers established that it will cost $3,500 to correct and complete the proper installation of the toilet.[27] The consumers did not establish that it will cost them an additional $200 for tiles

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[18] See consumers' exhibit H.
[19] See consumers' exhibits G and photos submitted into evidence.
[20] See consumers' exhibits A and PP.
[21] See consumers' exhibit A, page 3, section entitled "Doors" which provides "install all doors…," and PP.
[22] See consumers' exhibit I.
[23] See consumer's exhibit PP.
[24] See consumers' exhibit A, page 3, section entitled "Trims," I, and PP.
[25] See consumers' exhibit PP.
[26] See consumers' exhibits C and K.
[27] See consumers' exhibit PP.

for the bathroom, as they did not provide any evidence to substantiate the amount. Accordingly restitution for bathroom tiles of $200 will not be awarded.

The consumers established that the contract and plans called for the installation of two double hung vinyl windows in the bathroom.[28] The respondent admitted that he failed to install vinyl windows and instead installed wood windows. The respondent's claim that there was a contract modification to the terms of the contract requiring the installation of vinyl windows is not supported by a preponderance of the credible evidence. The respondent's claim that, because Ms. Ponterio initialed the same brand windows in wood rather than vinyl on a several page long product list, the contract terms and plans were modified—absent any other evidence of an agreement between the parties to modify the contract—does not establish a contract modification. In addition his unsubstantiated claim that the brand windows do not come in vinyl to match the exterior of the house does not establish a meritorious defense to failing to substantially comply with the contract and plans. The consumers rebutted the respondent's claim and established that Anderson windows come in the color requested in a vinyl type material; fibrex.[29] The consumers' also established that it will cost $1,500 to correct and complete this work.[30]

The consumers credibly testified supported by the contract and photographic evidence that the contract required the respondent to install 65 high-hats and that the respondent only installed 56.[31] The consumers also established through credible testimony supported by documentary evidence that it will cost $1469.81 to correct and complete this work.[32]

The consumers did not present any evidence to support its assertion that the respondent failed to perform various electrical work listed in Malta Electric Incorporated estimates #1075 and #1076 pursuant to the contract with the respondent. The consumers did not submit evidence to establish that this work was part of the contract or required items for the residence to receive signoffs, a certificate of occupancy or be in compliance with any codes or rules. Accordingly the consumer's request for an additional $675 in restitution is denied.

The consumers established supported by documentary evidence, that the HVAC was not installed pursuant to the contract terms or in a skillful and competent manner. It is established by preponderance of the credible evidence that the phrase "3tone" is a typographical error which should read "3 ton." The

[28] See consumers' exhibit A, page 2, under the section entitled "windows," and G.
[29] See consumers' exhibit SS
[30] See consumers' exhibit PP.
[31] See consumer's exhibit A.
[32] See consumers' exhibit UU. The respondent's objections to the admissibility of this exhibit were overruled.

contract provides that the respondent "install central heating and air conditioning for the house as per plan…Install 3tone for the first floor and 4 for the second, Contractor will do load analysis and new blue print for the HVAC." The respondent, who drafted the contract and is a home improvement professional, best situated to provide an alternative explanation, was unable to provide any rational alternative explanation of what the language 3tone means, if not 3 ton. He was also unable to provide a rational explanation of why a 2 and 2 ½ ton units were installed, rather than 3 and 4 ton units as provided for in the contract, or why he was unable to produce "a load analysis and new blue print for the HVAC" *dated before* the 2 and 2 ½ ton units were installed, as provided for in the contract. The respondent also did not produce any documentary evidence to support a modification of the contract terms "install 3tone for the first floor and 4 for the second, Contractor will do load analysis and new Blue print for the HVAC" (correction added).

The respondent's claim that he had a third party perform a load analysis *after* the contract was breached which indicate the smaller units are an adequate size to cool the residence[33] fails to establish a meritorious defense to failing to comply with the contract. The respondent failed to install a 3 ton unit on the first floor and 4 ton unit on the second or to perform a load analysis and new blue print for the HVAC system as required by the contract. The consumers established that it will cost $9,000 to correct and complete the work and install a 3 and 4 ton unit.[34]

Additionally, the contract unambiguously provides "install two thermostats" for the house and the consumers did not establish any monetary damages for their unsupported assertion that the respondent failed to install a third thermostat or zone.[35]

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[33] Mr. Paliuras' unsupported claim that subcontractor "Angelo" for "Diversified" told him that the 2 and 2 ½ ton HVAC units were sufficient but did not provide him with any documentation of a Manual J calculation that Mr. Paliuras has no personal knowledge was actually performed lacks credibility and is not a defense to breach of contract. In addition, the subsequent Manual J calculation performed by Home Energy Solutions lacks credibility.[33] Additionally, the fact that the contract provided for the installation of 3 and 4 ton units to be installed and that no load analysis was done before the installation of 2 and 2 ½ ton unit supports the consumers' claim that the 2 and 2 ½ ton HVAC units installed are not large enough to adequately cool or heat the residence. The consumers' established that they had to install base board heating to adequately heat the entire residence.

[34] The consumers presented documentary and testimonial evidence of three estimates for correction and completion of the work; one for $7,000 by With Pride, one for $9,000 by Sears, and one for $29,000 by JM Mechanical. Although ordinarily the average of estimates will be considered, the consumer specifically notified the respondent in the Notice of Hearing and at Hearing via documentary evidence that it specifically requests only $9,000 based on the Sears estimate. Accordingly, that figure will be used to calculate damages rather than a substantially higher average of the three estimates. See NOH CD;DD500134514 and exhibits FF and QQ.

[35] See consumers' exhibit M and M subpart 1, Dundee did not charge the respondent for some work hand written on the estimate and some work invoiced; which included the installation of a third zone, or thermostat, in the basement.

The consumers established through detailed and consistent testimony supported by photographic evidence and an invoice from Peter & Vinny Landscaping Gardening Co Inc., that debris was left by the respondent at the residence which required removal at a cost of $900.[36] The respondent's unsupported claim that he did not leave debris at the location does not sufficiently rebut the consumers more credible evidence.

As the consumers established that the contractor failed to perform work under a home improvement contract in a skillful and competent manner, charge 1 shall be sustained.

The consumer also established through credible testimony supported by photographic evidence and the plans that the respondent failed to complete stucco work. The contract provides for various stucco work, indicated in the plans, including exterior bricks down to the grade.[37] The respondent's claim, supported by a letter drafted by the architect, Frank Petruso,[38] that the "*intent* of the drawings is to install bricks on top of the existing brick shelf and leave parts of the original foundation…exposed" does not provide a meritorious defense to materially deviating from or disregarding the *actual* plans, which provides for exterior bricks down to the grade (emphasis added). The respondent also established that it paid Pasqual concrete $4,300 to correct and complete this work.[39]

The consumers established through credible and consistent testimony, supported by photographic and documentary evidence that the respondent failed to install an accessible boiler room crawl space and that it will cost them $2,500 to correct and complete the work.[40] The respondent's assertion, supported by the architect's affidavit, that although the plans provide for a three foot high boiler room crawl space, the space between the existing concrete slab and the floor joists, it is not useable space and is only to provide a wood floor structure that matches the existing wood floor structure" does not provide a meritorious defense for materially deviating from or disregarding the plans which specifically provides for a three foot high crawl space.

As the consumers established that the contractor materially deviated from or disregarded the plans or specifications, charge 2 shall be sustained.

The consumers' claim that it incurred consequential damages in the amount of $11,062.05 as a result of the delay in construction caused by the

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[36] The respondent did not sufficiently rebut the consumer's testimony and documentary evidence, though given an opportunity to do so.
[37] See consumers' exhibit G, which includes exterior bricks down to the grade.
[38] See respondents' exhibit 7.
[39] See consumers' exhibit XX.
[40] See consumers' exhibits G and J.

respondent is not supported by the preponderance of the credible evidence. Although the respondent credibly claims that the respondent failed to perform work in a skillful and competent manner, the respondent did not allow the respondent to complete the work under the time provided for in the original contract. The consumers admitted that they changed the locks to prevent the respondent from re-entering the property on or about February 14, 2013, before the completion date indicated in the original contract. The completion date indicated in the contract is twelve months after the start date,[41] which was on or about March 23, 2012. The consumers' unsupported claim that it had orally agreed to an earlier date than indicated in the written contract, which Mr. Ponterio admits he reviewed, does not establish a modification to the date in the written contract. Additionally, the consumers' claim that they wanted the work to be completed at an earlier date indicated on the punch list, prepared by their attorney, provided to and signed by the respondent who was not represented by counsel, does not rebut the respondent's claim that the contract was not modified for consideration by the punch list. Finally the consumers' claim that they had an interested unnamed buyer which they lost due to the delay in the completion of work caused by the respondent is unsubstantiated by any additional evidence. Accordingly, restitution for consequential damages as a result of the delay in the amount of $11,062.05 will not be awarded.

The consumers established through testimony and photographic evidence that the respondent did not install the French drain and left holes and pipes on their property. The consumers credibly testified that they had to cover the holes left on their property caused by respondent. It is determined that the consumers received no benefit from the contract under which they paid the respondent company an additional $14,000. Accordingly the consumers are entitled to restitution in the amount of $14,000.

Charge 3 (6 RCNY § 2-223(a) (2 counts)

It is not established by a preponderance of the credible evidence that the respondent failed to obtain a certificate of occupancy or the proper permits to install the French drain system, necessary to the proper completion of the contract in accordance with applicable state or local building laws. The consumers admitted that they prevented the respondent from returning to work before the date the contract was to be completed, which would need to be completed before a certificate of occupancy could be obtained.

Additionally, although the respondent admitted that he began work on and never obtained a permit for the French drain, he asserted that no permit was needed to install a French drain and the complainants failed to offer any evidence of permits required by applicable state or local building laws to do so.

[41] See consumers' exhibit A.

As there was no evidence offered on the record as to what other laws outside of the jurisdiction of this tribunal are being violated, the charge will be dismissed.

Charges 4 through 11 (6 RCNY sections 2-221(a)(1), 2-221(a)(2), 2-221(a)(4), 2-221(a)(5), 2-221(a)(8), 2-221(a)(9), 2-221(a)(10) (14 counts per respondent) and 2-221(b) (2 counts per respondent)

With regard to 6 RCNY section 2-221(a), the record establishes that the respondents failed to furnish a contract to the consumer a contract which contains *all* of the following: (1) the home improvement contractor's license number and the salespersons license number (2) a statement of any contingencies that would materially change the approximate or estimated completion date and a statement of whether or not the parties had determined a definite completion date to be of the essence…(4) a notice to the owner that the contractor or subcontractor who performs on the contract and is not paid may have a claim against the owner which may be enforced against the property in accordance with the applicable lien laws (5) a notice to the owner that the home improvement contractor is legally required to deposit all payments received prior to completion in accordance with subdivision four of § 71-a of the New York State Lien Law and that, in lieu of such deposit, the home improvement contractor may post a bond or contract of indemnity with the owner guaranteeing the return or proper application of such payments to the purposes of the contract…(9) a clause wherein the contractor agrees to procure all permits required by law and (10) a statement, in immediate proximity to the space reserved for the signature of the buyer and in bold face type of a minimum size of 10 points, that the buyer has the right to cancel the transaction at any time prior to midnight of the third business day after the date of the transaction. As the record establishes that there were two contracts which failed to include all of the required items, two counts of 6 RCNY § 2-221(a), rather than fourteen counts, will be sustained against each respondent. The respondents' correction is noted.[42]

I decline to follow this tribunal's recent decisions which limits the tribunal's ability to depart from prior decisions and provide an explanation therefore. See *DCA v. A-1 American Roofing & Chimney Inc.*, (hereinafter "*A-1*") 9187-2014-ADJC, 9188-2014-ADJC; C0541914, ALJ Viruet (November 19, 2014), modified decision, citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985). See also *DCA v. Plantagenet Holding Inc. d/b/a Allstate Renovations*, (hereinafter "*Plantagenet*") CD; DD500135297-ADJC, ALJ Viruet (December 2, 2014), modified decision, citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985).

[42] See respondents' exhibit 8.

I decline to follow *A-1* insofar as it holds *Field* imposes a "stare decisis" constraint imposed on common law courts on administrative tribunals; requiring an administrative tribunal to follow or distinguish prior decisions. *A-1 American Roofing and Chimney, Inc. Id.* Stare decisis duties imposed on common law courts require courts to follow or distinguish precedent.[43] In contrast, as held in *Field*, "Administrative stare decisis" only requires an *explanation* when an agency, acting in a quasi-judicial capacity, fails to adhere to previous tribunal determinations.[44] The Court specifically provides "[t]he *Field* decision…addressed actions of an *administrative agency acting in a quasi-judicial capacity*.... Our decision imposes a *stare decisis constraint on administrative agencies requiring them to explain inconsistent decisions.*" *Ins. Premium Fin. Ass'n of New York State v. New York State Dep't of Ins.,* 88 N.Y.2d 337, 345, 668 N.E.2d 399, 403 (1996) (*cf., Matter of Richardson v. Commissioner of N.Y. City Dept. of Social Servs.,* 88 N.Y.2d 35, 643 N.Y.S.2d 19, 665 N.E.2d 1059) (hereinafter "*Ins. Premium*") (emphasis added).[45] An interpretation of the term "stare decisis" in *Field's* dicta imposing stare decisis constraints imposed on common law courts on administrative agencies acting in quasi-judicial capacities, rather than "administrative stare decisis," contradicts the Court's own explanation of *Field* and "administrative stare decisis" constraints it imposes on administrative agencies pursuant thereto.

Accordingly I decline to follow *A-1* and *Plantagenet* which would preclude me from departing from prior decisions and provide explanations therefore. I do so as follows. Instead, I rely on *DCA v. Riverdale Towing & Collision, Inc.* in which this tribunal holds, "[*Field*] requires an agency to provide an *explanation* when it departs from its own precedent." LL5170636, Appeal Determination (November 24, 2009), citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985), which requires "an agency to provide an explanation when

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[43] Common Law Courts, which are required to follow or distinguish decisions, issue final decisions and orders. Administrative law judges recommended decisions shall be provided to the parties and the commissioner, or his or her designee, has the authority to adopt, modify or reject the recommended findings or decisions by administrative law judges. See 6 RCNY § 6-61 and the City Administrative Procedure Act ("CAPA") § 1046(e) and (f). *See also Infra* note 9.

[44] "[P]ast agency practice is not binding precedent." *New York Pub. Interest Research Grp., Inc. v. Johnson*, 427 F.3d 172, 182 (2d Cir. 2005). *See DCA v. Riverdale Towing & Collision, Inc.* in which *this tribunal holds*, "although [the cited] case *does not require an agency to follow its own precedent*…[it] requires an agency to provide an *explanation* when it departs from its own precedent." LL5170636, Appeal Determination (November 24, 2009), citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985), which requires "an agency to provide an explanation when it departs from its own precedent" (emphasis added).

[45] *See also Matter Of Long V. Perales* in which the Court provides the "commissioner violated the principles of administrative stare decisis when he failed adhere to his previous determinations, which admittedly are in conflict with his present decision, *and failed to provide an explanation therefor.* It was proper to remit the matter to the state commissioner *for an explanation*" (emphasis added). *Long v. Perales* 172 A.D.2d 667,*citing Matter of Field Delivery Serv.,* 66 N.Y.2d 516, 498 N.Y.S.2d 111, 488 N.E.2d 1223; *see also, Matter of Martin,* 70 N.Y.2d 679, 518 N.Y.S.2d 789, 512 N.E.2d 310.

it departs from its own precedent" (emphasis added). I also rely on *Field, Ins. Premium,* and other cases which provide the same. I depart from prior decisions and provide explanations therefore as follows.

The charges setting forth twelve additional violations for each respondent for subsections of violation of 6 RCNY § 2-221(a) in the Notice of Hearing fails to provide sufficient information as to give the respondent notice of the particular charges alleged,[46] as is required by 6 RCNY § 6-21(b).

These charges do not identify a correct source of law, rule or regulation to charge twelve additional violations for two violations of 6 RCNY § 2-221(a).

6 RCNY § 2-221(a) provides "*Every* agreement to perform a home improvement *shall be evidenced by a written contract*…and each home improvement contractor or sales person shall furnish to the buyer…*a* contract…*The* contract *shall contain all of the following*: (1)…" The definition of the word "all" is "the *whole amount, quantity,* or extent of" (www.meriam-webster.com, November 1, 2014).[47] See also *Black's Law Dictionary*, citing *State v. Hallenberg-Wagner Motor Co.,* 341 Mo. 771, 108 S.W.2d 398, 401, which provides "'[a]ll' refers rather to the aggregate under which the individuals are subsumed than to the individuals themselves" *Black's Law Dictionary* 68 (5th ed. 1979) (emphasis added). Accordingly, the plain meaning of 6 RCNY 2-221(a) clearly and unambiguously provides *if all* of the enumerated items are not included in the contract, 6 RCNY § 2-221(a) is violated.[48] Accordingly a failure to contain one, some, or all of the requirements in a contract is a failure

[46] "The notice of violation or copy thereof when filled in and served shall constitute notice of the violation charged, and, if sworn to or affirmed, shall be prima facie evidence of the facts contained therein." See New York City Charter Section 2203(h)(2). The notice of violation constitutes notice of a charge of failing to provide the consumer with *a sufficient* written contract by "failing to include in *the* contract for *the* agreement to perform a home improvement" pursuant to 6 RCNY § 2-221(a). The facts alleged in the notice of hearing are sufficient to support the charge.

[47] See also DCA v. Advanced Solutions Group Inc., LL005315801 ALJ Viruet (June 24, 2013) DCA v. Un Sook Lim d/b/a Enamoo, 2180-2014-ADJC; 5338254, ALJ Simon (April 14, 2014); and DCA v. Bravo Automotive Club, Inc., 5801-2014-ADJC; 05339999, ALJ Tumelty, (May 23, 2014) which dismiss any additional counts of Admin Code § 20-273 charged for failing to keep "*a book in which* shall legibly be written…"

[48] *See Flores v. The Lower East Side Center, Inc. v. Procida Realty and Construction Corp.*, which provides"…the starting point in any case of interpretation must always be the language itself, giving effect to the *plain meaning* thereof." 4 N.Y.3d 363, 795 N.Y.S.2d 491, 828 N.E.2d 593 (2005) (citing *Majewski v. Broadalbin-Perth Cent. School Dist.,* 91 N.Y.2d 577, 583, 573 N.Y.S.2d 966, 696 N.E.2d 978 (1998). *See also Patrolmen's Benevolent Assoc. v. City of New York,* which provides "It is well settled that where statutory language is *clear and unambiguous*, the statute must be given *literal effect*" (emphasis added) 41 N.Y.2d 205, 391 N.Y.S.2d 544, 359 N.E.2d 1338.

to "contain all" requirements and constitutes a single violation[49] of 6 RCNY 2-221(a).

Subsections 6 RCNY § 2-221(a)(1)-(10) only *enumerates* "*all* of the" items which *the* written "contract shall contain" pursuant to 6 RCNY § 2-221(a); "the aggregate under which the individuals are subsumed." *Id.* It does not convert the charge of failing to provide a *single sufficient written contract* for a single agreement to perform home improvement pursuant to 6 RCNY § 2-221(a) into ten separate charges, against a home improvement contractor or salesperson, or twenty charges collectively. Accordingly, such an interpretation would subject a home improvement contractor or salesperson who fails to provide *any* written contract for a single oral agreement to perform home improvement, as required by 6 RCNY § 2-221(a), to ten separate charges, or twenty charges collectively, for failing to provide each enumerated section of required language not "included" in the single written contract never actually provided. Such an interpretation is not supported by the language of the rule, which requires "a written contract" containing "all of the following" be provided, and would yield the absurd result of charging a person ten violations for failing to include language in a non-existent contract. In addition such an interpretation as charged would exceed statutory permissible maximum penalties[50] and go against the codified legislative intent pursuant to Admin Code § 20-101.[51] For

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[49] Admin Code §20-401(b) provides "*any person* who violates any provisions of this subchapter shall be liable for a penalty of *not more than* one thousand dollars for *each such violation*" (emphasis added).

[50] The Department charges the respondent home improvement contractor with six charges of 6 RCNY 2-221(a) and home improvement salesperson with six charges of 6 RCNY 2-221(a), for a single deficient contract. The Department construes each of the ten subsection of 6 RCNY § 2-221(a) as separate charges for a single deficient contract. The Department also "demands an order…imposing maximum fines on Respondent's for each and every charge set forth herein including $1,000.00 per count for each and every charge set forth herein pursuant to [Admin Code] § 20-401(1)(b)" (see Notice of Hearing C0541914). This construction of 6 RCNY § 2-221(a), and Admin Code § 20-401(1)(b), would subject a home improvement contractor or salesperson to maximum fines of $10,000 each—or total maximum fines of $20,000 collectively—for failing to provide *a single written contract*. As failing to provide a single sufficient written contract would subject a respondent to maximum fines of $10,000—and both home improvement contractor and salesperson to $20,000—this construction of 6 RCNY § 2-221(a) would result in maximum fines in excess of the permissible statutory maximum fine of $1,000 per violation of Subchapter 22 in Admin Code § 20-401(1)(b).

[51] Admin Code § 20-103 provide "the provisions of [chapter 1] and chapter 2 of this title shall be liberally construed in accordance with the legislative declaration of the city council set forth in section 20-101." Admin Code § 20-101, "Legislative intent," provides "consumer affairs… requires…sanctions which are *equitable*, *flexible*, and efficient" (emphasis added). A construction of Admin Code § 20-401(1)(b) and 6 RCNY § 2-221(a) collectively that would subject a home improvement contractor or salesperson to maximum fines of $10,000—or total maximum fines of $20,000—for failing to provide a single written contract, or for providing a single deficient contract, is not equitable or flexible and accordingly contrary to the requirements of Admin Code § 20-101 and 20-103.

the above mentioned reasons, I depart from prior decisions,[52] only two charges of 6 RCNY § 2-221(a) is sustained, one per deficient contract, and the twelve additional charges per respondent for the subsections which enumerate the items required by 6 RCNY § 2-221(a) are **dismissed**.[53]

The charge setting forth a violation of Admin Code § 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.[54]

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[52] "[The court] *must* reject administrative constructions of a statute…that are inconsistent with the statutory language." *FEC v. Democratic senatorial Campaign Committee*, 454 U.S. 27, 32 (1981) (emphasis added). It is a "settled principle that when the administration of a statute has been confined to a regulatory agency *and a statutory term is reasonably capable of the interpretation* the agency has given, [the] court will sustain this even though it might have reached a different conclusion"… See *SEC v. Talley Industries*, 399 F. 2d 396, 403(2d Cir. 1968). See also *DCA v. Riverdale Towing & Collision, Inc.* which provides, "although [the cited] case *does not require an agency to follow its own precedent*…[it] requires an agency to provide an *explanation* when it departs from its own precedent." LL5170636, Appeal Determination (November 24, 2009), citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985), which requires "an agency to provide an explanation when it departs from its own precedent" (emphasis added). See also *Administrative Law and Regulatory Policy* which provides "common law courts challenge the law by 'distinguishing' precedents or by explicitly overruling. Agencies…have even greater latitude to depart from prior decisions…if *agencies* do *depart from prior decisions*, *courts* should require them to *explain and justify* such departures…[and] courts have indeed imposed such a requirement. Stephen G. Breyer and Richard B. Stewart, *Administrative Law and Regulatory Policy* 416 (2d ed. 1985).

[53] I am not "amending the notice of hearing" or "adding a charge of 6 RCNY § 2-221(a)" to the notice of hearing. (*See DCA v. A-1 Roofing and Chimney Inc.* which provides "the amendment also raises a consideration of due process because it adds a charge-6 RCNY Section 2-221(a)…") Subsections 6 RCNY § 2-221(a)(1)-(10) are included parts of 6 RCNY § 2-221(a), not stand alone charges; complete articulations, or sentences, proscribing conduct. For example 6 RCNY § 2-221(a)(1) alone reads "(1) the date of the transaction, the contractor's name, office address, telephone number and license number; and the salesperson's name and license number." Only 2-221(a) completes the sentence and proscribes conduct. It provides "§ 2-221(a)…the contract shall contain all of the following: (1) the date of the transaction…" Likewise, only 2-221(a) and all of its subsections provide what is necessary to fully comply with subsection 2-221(a) which provides "[t]he contract shall contain all of the following: (1)….(2)….(3)…." Accordingly, I sustain one charge on default of 2-221(a) which subsumes all of the charged subsections thereof, 6 RCNY § 2-221(a)(1)-(10), and dismiss additional charges for subsections of 6 RCNY § 2-221(a). The issuance of a default does not obviate requirements that the notice of hearing identify a correct source of law, rule or regulation for each and every violation contained therein and the matters to be adjudicated as required by CAPA § 1046 (a)(2), § 1046(a)(3) and § 6-21(b).

[54]Admin Code § 20-101 is a legislative intent section, not a chargeable section of law. The correct source of law which prohibits unfair, deceptive or unconscionable trade practices is Admin Code § 20-700 entitled "Unfair Trade Practices Prohibited" and provides "No person shall engage in any deceptive or unconscionable trade practice in the sale, lease, rental, or loan

This tribunal held that a determination that the Department failed to establish a violation of Admin Code § 20-101 because it is not a chargeable section of law constitutes reversible error (*See DCA v. Marwan M. Eligawy*, 903-2014-APPL (July 30, 2014). I decline to follow *DCA v. Marwan M. Eligawy* for the following reasons.[55] I concur that that Administrative Code § 20-101 has "the force of law" as a statement of legislative intent.[56] I concur with the long standing principles of an administrative agency's ability to evaluate a licensee's character and fitness.[57] I concur that courts have recognized the Department's broad powers in imposing fines, revoking licenses and ordering restitution. I only determine that Admin Code § 20-101 is not a chargeable section of law.[58]

I do not concur that a history of the tribunal upholding a charge supports the assertion that it is correctly charged[59] as declining to follow those decisions is proper if they are inconsistent with a law's, rule's or regulation's plain meaning, result from an error of law, or are otherwise not supported by law, rule or regulation.[60] I also do not concur that any court on appeal cited in *DCA v. Marwan M. Eligawy* has ruled on the issue of whether Admin Code § 20-101 is a chargeable Section of law.[61] It is also precluded by the New York City Charter ("NYC Charter"). (New York City Charter § 2203(h)(3)).

*Laureiro v. NYC Dept. of Consumer Affair*s, cited in *DCA v. Marwan M. Eligawy,* does not address whether Admin Code § 20-101 is a chargeable section of law (*See DCA v. Marwan M. Eligawy,* 903-2014-APPL (July 30, 2014), citing *Laureiro v. NYC Dept. of Consumer Affairs*, 41 A.D.3d 717 (2nd Dept. 2007). The only two questions before the court in *Laureiro* were a challenge to DCA's jurisdiction and a facial due process challenge to the DCA rules which

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or in the offering for sale, lease, rental, or loan of any consumer goods or services, or in the collection of consumer debts."

[55] *See DCA v. Riverdale Towing & Collision, Inc.*, LL5170636, Appeal Determination (November 24, 2009), citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985).

[56] *See DCA v. Marwan M. Eligawy*, which notes "the Department correctly argues that Administrative Code § 20-101 has the force of law, 903-2014-APPL (July 30, 2014).

[57] *See DCA v. Marwan M. Eligawy*, which notes that courts recognize the "long standing principles of an administrative agency's ability to evaluate a licensee's character and fitness" 903-2014-APPL (July 30, 2014).

[58] *See DCA v. Marwan M. Eligawy*, which notes courts have "recognized the Department's broad powers in imposing fines, revoking licenses and ordering restitution" 903-2014-APPL (July 30, 2014).

[59] *See DCA v. Marwan M. Eligawy*, which provides that "by dismissing Administrative Code § 20-101, [the Judge] ignored decades of tribunal decisions which found violations of Administrative Code § 20-101 for lack of fitness and ordered license revocation."

[60] *Supra* note 17.

[61] In *DCA v. Marwan M. Eligawy*, this tribunal correctly asserts that courts have upheld decisions in which a Judge found a violation of Administrative Code § 20-101 for lack of fitness and ordered license revocation." However none of the decisions cited address the issue on appeal of whether Admin Code § 20-101 is a chargeable section of law.

permit default decisions.[62] Other cases cited in *DCA v. Marwan M. Eligawy* similarly do not address the issue of whether Admin Code § 20-101 is a chargeable section of law and are therefore also distinguishable.

Admin Code § 20-101 is not a chargeable section of law and does not contain sufficient information as to give the respondent notice of the particular charges alleged. Admin Code § 20-101 is not chargeable because it is a legislative intent section. The correct charge, which prohibits unfair, deceptive or unconscionable trade practices, is Admin Code § 20-700 entitled "Unfair Trade Practices Prohibited." This determination is supported by the legislation itself. Admin Code § 20-101 is entitled "legislative intent" (See Admin Code § 20-101). Legislative intent is a "declaration of the city council" which delineates how the "chapter and chapter two of title 20 shall be… construed" (See Admin Code § 20-103). Admin Code § 20-101 provides:

> "Legislative intent. The council finds that for the protection and relief of the public from deceptive, unfair and unconscionable practices, for the maintenance of standards of integrity, honesty and fair dealing among persons and organizations engaging in licensed activities, for the protection of the health and safety of the people of New York city and for other purposes requisite to promoting the general welfare, licensing by the department of consumer affairs is a necessary and proper mode of regulation with respect to certain trades, businesses and industries. The council finds further that, in order to secure the above-mentioned purposes, and generally to carry out responsibilities for supervising and regulating licensed activities, trades, businesses and industries, the commissioner of consumer affairs requires powers, remedies and sanctions which are equitable, flexible and efficient. Finally, the council finds that sanctions and penalties applied by the commissioner and by the courts for the violation of laws and regulations by individuals and organizations engaging in various licensed activities, trades, businesses and industries, must be sufficient to achieve these above-mentioned purposes of licensing."

Accordingly, the text of Admin Code § 20-101 confers duties, powers, and remedies related to licensing *on the "Department" and the "Commissioner."* It imposes the duty on *the Department,* through licensing, with protecting the public, the maintenance of standards among persons and organizations of integrity, honesty and fair dealing, protection of the health safety and welfare of the people… and *other purposes requisite to promoting the general welfare*". It does not charge "the public…persons and organizations…or the people of New York city" to conform their conduct to <u>*any*</u> act or practice described with

[62] The Court held that the Department has "jurisdiction to hold [a] hearing into [a licensees] continued fitness to hold a DCA license and to issue [a] determination upon a petitioner's default."

reasonable particularity. The charge alleged by the Department that "respondents violated Admin Code § 20-101 of the Code by failing to maintain standards of integrity, honesty and fair dealing" does not constitute a description of an act or practice with reasonable particularity. Admin Code § 20-101 is only "the legislative declaration of the city council," that "licensing by the department…is a necessary and proper mode of regulation" for these "and…other purposes requisite to promoting the general welfare" (See Admin Code § 20-103 and § 20-101).

In addition, NYC Charter § 2203(h)(3) entitled "Powers of the commissioner" specifically provides "no *act or practice* shall be deemed a deceptive trade practice *unless it has been declared a deceptive trade practice* and *described with reasonable particularity in a local law or in a rule or regulation* promulgated by the commissioner" (emphasis added). Accordingly, a *charge* that the "respondent [has] *violated Administrative Code § 20-101* of the Code by failing to *maintain the standards* of *integrity, honesty* and *fair dealing* required of licensees" does not describe with any particularity what specific acts or practices would constitute a "failure to maintain" this "standard," and is accordingly an impermissible charge under the NYC Charter. As *unfair* trade practices, including *deceptive* and *unconscionable* trade practices, are prohibited by Admin Code § 20-700 *and* described with particularity in Admin Code § 20-701, deceptive trade practices are correctly chargeable under that section of law, not Admin Code § 20-101. As NYC Charter § 2203(h)(3) specifically precludes the commissioner from declaring an act, such as the general assertion that a respondent "failed to maintain standards of integrity honesty and fair dealing," without describing the act with reasonable particularity, I decline to follow the determination finding respondents guilty of violating Admin Code § 20-101, and the charge is dismissed.

In the alternative, if it is deemed a chargeable section of law, there is insufficient evidence in the Notice of Hearing to **DECLARE** that Respondents are deemed unfit to hold any license issued by the Department in the future.[63]

With regard to 6 RCNY section 2-221(b) the preponderance of the credible evidence establishes that the respondents failed provide a separate notice of cancellation to the consumers for each of the two contracts. Accordingly the charges will be sustained.

ORDER

Respondent CSPN Paliuras Construction Corp. is found **guilty** of the following charges set forth in the Notice of Hearing, and is hereby

[63] *See Mark LaFlamme and DCA v. Guru Nanak Construction Inc and Kamaljit Singh*, 8243-2014-ADJC and 8249-2014ADJC, C0472014, ALJ Simon (October 3, 2014).

ORDERED to pay to the Department of Consumer Affairs a

TOTAL FINE of $2,000[64] which is immediately due and owing, as follows:

1)	Administrative Code § 20-393(1)	$ 500
2)	Administrative Code § 20-393(11)	$ 500
3)	6 RCNY § 2-221(a)($250 per count for 2 counts)	$ 500
4)	6 RCNY § 2-221(b)($250 per count for 2 counts)	$ 500

Respondent CSPN Paliuras Construction Corp. is found **not guilty** of the charges of 6 RCNY § 2-223(a) which is hereby dismissed.

Respondent Spirodon Paliuras, is found **guilty** of the charges set forth in the Notice of Hearing, and is hereby

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[64] The fine imposed reflects this tribunals historical norms in fines for first time violations in and before 2010 and the respondents admission and correction of contract deficiencies. *See DCA v. Karlos Barahona,* DD500106703, ALJ Nisonoff (November 16, 2009), *DCA v. Chelsea Fine Kitchens Inc.*, CD500117361, ALJ Kassapian (December 21, 2009), and *DCA v. RT Windows and Glass Installations Inc. and Vincent Brini*, CDDD500119683, ALJ Paul (July 2, 2010). I decline to follow prior decisions which hold that *judicial discretion* <u>*is not*</u> *allowed where explicitly delineated by the cited section or other law*, if "the Tribunal has previously held that maximum penalties are appropriate…" and that "administrative proceedings like judicial proceedings require consistent results given essentially similar facts. 1025-2014-APPL, LL005342205 (October 3, 2014) (emphasis added). *See DCA v. Riverdale Towing & Collision, Inc.* ("*Riverdale*") in which *this tribunal holds*, "although [the cited] case <u>*does not*</u> *require an agency to follow its own precedent…*[it] requires an agency to provide an <u>*explanation*</u> when it departs from its own precedent." LL5170636, Appeal Determination (November 24, 2009), citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985), which requires "an agency to provide an explanation when it departs from its own precedent" (emphasis added). *See also DCA v. Finest Deli Corp.* which reverses fines imposed within the statutory range and imposes maximum penalties pursuant to the Department's appeal. In *Finest Deli*, the tribunal holds "although the respondent's attorney claims that the Tribunal <u>*should not*</u> *interfere with the Judge's discretion*, as the Department correctly argues in its appeal, the Tribunal has previously held that maximum penalties are appropriate…" and that "administrative proceedings like judicial proceedings require consistent results given essentially similar facts. 1025-2014-APPL, LL005342205 (October 3, 2014) (emphasis added). Although this tribunal consistently imposed maximum penalties prior to July 2014, this appeal decision, *Finest Deli,* incorrectly states the requirements of *Field*. Additionally it fails to consider multiple decisions by this tribunal, not published as of the end of July to January 13, 2015, in which the tribunal <u>did not</u> impose maximum penalties given essentially similar facts as the case cited in the appeal. For these reasons, I decline to follow *Finest Deli* and instead follow *Field.* LL5170636, Appeal Determination (November 24, 2009), citing *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985).

ORDERED to pay to the Department of Consumer Affairs a

TOTAL FINE of $1,000,[65] which is immediately due and owing, as follows:

1) 6 RCNY § 2-221(a)($250 per count for 2 counts) $ 500
2) 6 RCNY § 2-221(b)($250 per count for 2 counts) $ 500

The Respondents are further **Ordered to pay RESTITUTION to the Consumer in the amount of $46,679.81, jointly and severally, which is immediately due and owing** as follows:

$66,179.81	**For correction and completion**
-$19,500	**Owed on the contract to the respondent**
$46,679.81	**Total restitution owed to the consumer**

The Respondents are further **Ordered** to provide to the Department proof of payment of restitution to the Consumer 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, New York 10004" or by emailing such proof to: collections@dca.nyc.gov. The failure to pay restitution or to provide to the Department proof of payment within thirty (30) days of the date of this decision will result in the revocation of any license of the respondents', without further notice to the respondents.

If the respondent operates while the license is revoked, the respondents will be subject to criminal prosecution and/or civil penalties of at least $100 per day for each day of unlicensed activity, as well as the closing of the respondents' 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. Failure to comply with this order within thirty (30) days (including payment of the fine) may result in the suspension of any other Department of Consumer Affairs licenses held by the Respondent. 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.

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[65] *Supra* note 64.

Shanet Viruet
Administrative Law Judge

DECISION AND ORDER

Upon an independent review of the record, the recommendation of the Administrative Law Judge is **modified.** See below; see also, modified decision, *DCA v Plantagenent Holding Inc. d/b/a Allstate Renovations and Frank J. Sessa* CDDD500135297 (November 26, 2014).

The respondent company, **CSPN PALIURAS CONSTRUCTION CORP.** is found **guilty** with respect to the following charges, as set forth in the Notice of Hearing and

Ordered to pay to the Department a TOTAL FINE of $17,000., which is immediately due and owing, as follows:

Administrative Code § 20-393(1)	**$ 500**
Administrative Code § 20-393(11)	**$ 500**
6 RCNY § 2-221(a)(1)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(2)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(4)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(5)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(8)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(9)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(10)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(b)	**$2,000**
($1,000 per count for 2 counts)	

Administrative Code Section 20-101 **Revocation**

The respondent, **SPIRODON PALIURAS** is found **guilty** with respect to the following charges, as set forth in the Notice of Hearing and

Ordered to pay to the Department a TOTAL FINE of $16,000., which is immediately due and owing, as follows:

6 RCNY § 2-221(a)(1)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(2)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(4)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(5)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(8)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(9)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(a)(10)	**$2,000**
($1,000 per count for 2 counts)	
6 RCNY § 2-221(b)	**$2,000**
($1,000 per count for 2 counts)	

Administrative Code Section 20-101 **Revocation**

In addition, **the Home Improvement Contractor License 1215331 ("HIC") is REVOKED, EFFECTIVE IMMEDIATELY.** The respondent is directed to surrender all license documents to the Licensing Division immediately. Continued operation with revoked licenses subjects the respondent to CRIMINAL PROSECUTION and/or civil penalties of $100 per day for each day of unlicensed activity, as well as the closing of the unlicensed business and/or the removal of items sold, offered for sale, or utilized in the

operation of the unlicensed business, pursuant to the Administrative Code of the City of New York Sections 20-105 and 20-106 (the "Padlock Law").

In addition, **the Home Improvement Salesperson's License 1215329 ("HIS") is REVOKED, EFFECTIVE IMMEDIATELY.** The respondent is directed to surrender all license documents to the Licensing Division immediately. Continued operation with revoked licenses subjects the respondent to CRIMINAL PROSECUTION and/or civil penalties of $100 per day for each day of unlicensed activity, as well as the closing of the unlicensed business and/or the removal of items sold, offered for sale, or utilized in the operation of the unlicensed business, pursuant to the Administrative Code of the City of New York Sections 20-105 and 20-106 (the "Padlock Law").

The Respondents are further **Ordered** to provide to the Department proof of payment of restitution to the Consumer 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, New York 10004" or by emailing such proof to: collections@dca.nyc.gov. The failure to pay restitution or to provide to the Department proof of payment within thirty (30) days of the date of this decision will result in the revocation of any license of the respondents', without further notice to the respondents.

If respondents operate while the license is revoked, the respondents will be subject to criminal prosecution and/or civil penalties of at least $100 per day for each day of unlicensed activity, as well as the closing of the respondents' 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").

In addition, the dispositions in the above decision regarding restitution, dismissal of 6 RCNY Section 2-223(a) and the respondents' fitness to hold future licenses, will not be disturbed.

This constitutes the Decision and Order of the Department.

Date: **February 13, 2015**

Eryn DeFontes
Associate Director of Adjudication

cc: via email: dennisreisman@aol.com
via email: spiros@cspnconstruction.com
via email: jasselta@forchellilaw.com
Jordan Cohen, Esq., Assistant Director, DCA Legal Division

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

APPEALS

RESPONDENT(S): You may file a **MOTION TO VACATE** this decision **within 15 days** from the date you knew or should have known of this decision. Your motion **must** include: 1) the reason you did not appear at the hearing; AND 2) a sworn statement outlining a meritorious defense to the charge(s) in the Notice of Hearing. You must include with your motion a check or money order for $25 payable to DCA; and *a check or money order* payable to DCA for the entire restitution amount you were ordered to pay in the decision. You may file your Motion to Vacate either by email or regular mail, as follows:

BY EMAIL: Send your motion to **myappeal@dca.nyc.gov** and, at the same time, mail the $25 appeal fee and the restitution 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: Send your motion, along with the $25 fee and the restitution, to: Director of Adjudication, Department of Consumer Affairs, 66 John Street, 11th Floor, New York, NY 10038. **Make sure to include in your motion** some indication or proof that you have sent copies of the motion **TO THE CONSUMER** at the consumer's address, **AND to DCA'S LEGAL DIVISION,** 42 Broadway, 9th Floor, New York, NY 10004.

CONSUMER: You may file an **APPEAL** of this decision **within 30 days from the date of the decision.** You may file your Appeal either by email or regular mail, as follows: **BY EMAIL:** Send your appeal to **myappeal@dca.nyc.gov**. 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: Send your appeal to: Director of Adjudication, Department of Consumer Affairs, 66 John Street, 11th Floor, New York, NY 10038. **Make sure to send a copy of your appeal to each of the respondents.**

IMPORTANT NOTICE TO BOTH PARTIES

YOUR MOTION OR APPEAL MAY BE DENIED IF YOU DO NOT INCLUDE SOME INDICATION THAT YOU HAVE SENT A COPY OF IT TO EACH OF THE OPPOSING PARTIES LISTED IN THE NOTICE OF HEARING.