

Petitioner, the Department of Buildings (DOB), appeals from a recommended master decision dismissing two Class 1 violations of Section 28-401.19(6) of the Administrative Code of New York City (Code) against Respondent, a licensed master plumber, for displaying negligence, incompetence, lack of knowledge, and a disregard of the Code and related laws and rules. In the summonses, dated November 14, 2016, the issuing officer (IO) affirmed that:

**Law charged
(Summons)**

Code Section 28-401.19(6),
Class 1

*(Plumbing sign-off request
summons)*

**Violating conditions as described by the IO on the
summonses**

Master Plumber displayed negligence, incompetence, lack of knowledge, and a disregard of the Code and related laws and rules: On or about November 14, 2016, the Department generated a report and learned that between April 1, 2016 and October 31, 2016, Respondent submitted 213 inspection requests to sign-off plumbing work. During this 7 month period, approx. 99 of these requests were denied which accounts for 46.48% of all plumbing sign-off requests submitted by Respondent. This high rate of failure constitutes negligence, incompetence, lack of knowledge, and/or a disregard of the Code and related laws and rules.

Code Section 28-401.19(6),
Class 1

*(Gas authorization request
summons)*

Master Plumber displayed negligence, incompetence, lack of knowledge, and a disregard of the Code and related laws and rules: On or about November 14, 2016, the Department generated a report and learned that between April 1, 2016 and October 31, 2016, Respondent submitted 273 inspection requests to authorize gas. During this 7 month period, approx. 159 of these requests were denied which accounts for 58.24% of all gas authorization requests submitted by Respondent. This high rate of failure constitutes negligence, incompetence, lack of knowledge, and/or a disregard of the Code and related laws and rules.

The hearing

As a preliminary matter, Respondent's attorney moved to dismiss the charged violations, asserting that the OATH Hearings Division was not the proper tribunal to hear the summonses. She asserted as follows. The summonses must be heard before the OATH Trials Division—not the OATH Hearings Division—because under the charged section of law Petitioner may suspend or revoke Respondent's master plumber's license. In support, she submitted copies of Code Section 28-401.19 and 28-401.19.1, and Sections 104-07 and 105-05 of Title 1 of the Rules of the City of New York (RCNY).

Petitioner's attorney countered that the OATH Hearings Division had jurisdiction to hear the instant summonses because it was not seeking to revoke Respondent's license, but rather was only seeking to impose civil penalties, as expressly provided by Code Section 28-401.19, under

which DOB may seek not only to “suspend or revoke a license or certificate of competence,” but also to “impose a fine not to exceed twenty-five thousand dollars for each finding of violation”

On the substance of the charges, the attorney for Petitioner stated that it conducted a survey of all plumbing requests for sign-off and gas authorization requests made by licensed master plumbers in New York City, covering the time frame from 4/1/16 through 10/31/16. She maintained that the two instant summonses were issued to Respondent because he was one of ten licensed master plumbers in the City of New York who had the highest denial rates for plumbing sign-off requests and gas authorization requests. She maintained that Respondent’s high rate of denials indicates “negligence, incompetence, lack of knowledge, and a disregard of the Code and related laws and rules.” She offered in support of the two summonses DOB reports showing: (i) that he submitted 213 inspection requests to sign-off plumbing work that were rejected; and (ii) that he submitted 159 requests for gas authorization that were denied.

Following a continuance to allow his appearance, DOB’s Assistant Chief Inspector, Elias Katsihitis, testified as follows. He is responsible for reviewing requests for plumbing sign-offs and gas authorizations, and generated the two DOB reports. As the licensed master plumber on the job, Respondent had the duty to review the work thoroughly and ensure that other people working on the job also completed necessary work and conducted necessary inspections before submitting a request. DOB operates with the expectation that every submission made by a licensed master plumber is accurate, complete, and truthful. Even where documents submitted along with a request are prepared by other licensed professionals, such as an architect or engineer, the licensed master plumber makes the request under his own professional seal. Therefore, it remained Respondent’s obligation to ensure that all necessary steps had been completed and documented before making a request.

Respondent’s attorney responded that the reports were insufficient to make out a case under Code Section 28-401.19(6) since they did not describe with any specificity what was done by Respondent that rose to the level of negligence, incompetence, lack of knowledge, and a disregard of the Code and related laws and rules. She further asserted that the charges were improperly designated Class 1 violations because, as the plumbing sign-off requests and gas authorization requests were never approved, there was no immediately hazardous condition.

In her recommended master decision, the hearing officer found that: (1) the OATH Hearings Division is a proper venue with jurisdiction to hear the instant summonses because Petitioner was only seeking civil penalties under Code Section 28-401.19(6); (2) Petitioner’s evidence was sufficiently lacking in clarity to support the allegations that all denials listed on the reports resulted from Respondent’s failure to provide sufficient information and/or documentation; (3) Petitioner failed to show that either a 46% sign-off-request-denial rate or a 58% gas-authorization-denial rate was unreasonably high for these often complex procedures, as nothing in the record indicates what the average rate of denial is for such requests; and (4) Petitioner did not establish that the violating conditions charged were properly designated as Class 1, immediately hazardous.

Issues on appeal

The issues on appeal are: (1) whether the OATH Hearings Division has proper jurisdiction over summonses charging Respondent with Code Section 28-401.19(6) for negligence, incompetence, lack of knowledge, and a disregard of the Code and related laws and rules; and, if so, (2) whether Petitioner established such deficiencies so as to make out the violations; (3) whether Petitioner established the charged violations were properly designated Class 1, immediately hazardous; and (4) if so, whether Respondent refuted or established a defense to the charged violations.

Applicable law

Code Section 28-401.19, provides, in pertinent part:

The commissioner shall have the power to suspend or revoke a license or certificate of competence and/or to impose a fine not to exceed twenty-five thousand dollars for each finding of violation, and/or to order any holder thereof to repair damage resulting from any act or omission as set forth in this chapter or in rules, for any of the following:

* * *

6. Negligence, incompetence, lack of knowledge, or disregard of this code and related laws and rules.

OATH Hearings Division – Rules of Practice, found in Chapter 6 of 48 RCNY sets forth, as follows.

Section 6-02 provides, in pertinent part:

(a) Jurisdiction. Pursuant to Charter Section 1048, the Tribunal has jurisdiction to hear and determine summonses issued by a City agency or, when permitted by law, an individual, consistent with the following applicable laws, rules and regulations:

* * *

2. The Tribunal has jurisdiction to hear and determine summonses returnable to the Board pursuant to §1049-a of the New York City Charter and provisions of the New York City Administrative Code, any rules and regulations made thereunder, or provisions of New York State law, and to conduct special hearings and enforcement proceedings before the Board pursuant to Title 24 of the New York City Administrative Code.

Section 6-12 provides, in pertinent part:

(a) Admissibility of Evidence. Relevant and reliable evidence may be admitted without regard to technical or formal rules or laws of evidence applicable in the courts of the State of New York. Irrelevant, immaterial, unreliable or unduly repetitious evidence will be excluded. Immaterial or irrelevant parts of an admissible document must be segregated and excluded to the extent practicable.

Charter Section 1049-a(c) provides, in relevant part:

* * *

- c. (1) The [] [B]oard shall enforce the provisions of the charter and the administrative code, and any rules and regulations made thereunder, which relate to
 - * * *
 - (g) the construction, alteration, maintenance, use, occupancy, safety, sanitary condition, mechanical equipment and inspection of buildings or structures . . . which are within the jurisdiction of the department of buildings . . . ;
 - * * *
- d. (1) (a) The [] [B]oard shall conduct proceedings for the adjudication of violations of the laws, rules and regulations enforced by it pursuant to the provisions of subdivision c of this section or of any other law providing for enforcement by the [] [B]oard in accordance with this paragraph (1) and with rules and regulations promulgated by the [B]oard, and shall have the power to render decisions and orders and to impose the civil penalties provided under law for such violations.

Section 102-01(b) of 1 RCNY provides in relevant part:

- (1) **IMMEDIATELY HAZARDOUS VIOLATION.** Immediately hazardous violations are those . . . where the violating condition poses a threat that severely affects life, health, safety, property, the public interest, or a significant number of persons so as to warrant immediate corrective action . . . Immediately hazardous violations shall be denominated as Class 1 violations.

The appeal

On appeal, Petitioner’s attorney reasserts her arguments from the hearing as follows. (1) The hearing officer failed to appreciate that each of Respondent’s denials alone poses a grave hazard to the people of the city of New York. (2) While Petitioner acknowledges that mistakes are possible when submitting plumbing sign-off requests and gas authorization requests, the fact that any of the requests made by Respondent could result in possible injuries or fatalities renders such a significant number of denials beyond the pale of any standard of reasonableness. (3) Despite the hearing officer’s conclusion to the contrary, Petitioner established sufficient facts to warrant the summonses being designated Class 1, immediately hazardous, violations.

In Respondent’s answer, his attorney reasserts her arguments from the hearing as follows. (1) OATH Hearings Division is not the proper tribunal and has no jurisdiction to adjudicate these summonses. The proper tribunal is the OATH Trials Division, where, prior to the issuance of the instant violations, these cases have always been heard. The charged section of law clearly contemplates and is intended for the specific purpose of suspension or revocation of Respondent’s license. (2) As Petitioner’s entire case was based on a report that was hearsay and a witness’s testimony that was double hearsay, there is no credibility to the charges against Respondent. Petitioner failed to produce any person with firsthand knowledge to testify as to the facts of the case. (3) Petitioner failed to make out a prima facie case where it presented no standard of negligence, incompetence, lack of knowledge, or disregard of the Code and related laws and rules to support its allegations. (4) The summonses do not rise to the level of Class 1, immediately hazardous violations, since the cited requests were all rejected and therefore they posed no immediate danger severely affecting life, health or safety on the date of offense.

The Board's determination

Having fully reviewed the record, the Board finds that the hearing officer's recommended master decision is not supported by the law and the record and a preponderance of the evidence and grants Petitioner's appeal.

Violation properly before OATH Hearings Division

On these facts, the Board finds that the OATH Hearings Division – Rules of Practice provides the jurisdiction to hear summonses charging violations under Code Section 28-401.19. Respondent's attorney argues that Code Section 28-401.19 should be read in conjunction with Code Section 28-401.19.1 (Notice of Hearing), and 1 RCNY Sections 104-07 (Suspension or Revocation) and 105-05 (Adjudications). However, the Board finds none of the provisions relating to licensure deprive the Hearings Division of jurisdiction. In pertinent part, 48 RCNY Section 6-02(a)(2) grants the Hearings Division power to determine summonses returnable to the Board under Charter Section 1049-a, which, in turn, grants the Board power to enforce provisions of the Code which relate to the construction, alteration, maintenance, use, occupancy, safety and inspection of buildings which are within the jurisdiction of the DOB. *See* Charter Section 1049-a (c)(1)(g). The Charter further provides that the Board shall conduct proceedings for the adjudication of violations of the laws, rules and regulations enforced by it, and shall have the power to render decisions to impose the civil penalties provided under law for such violations. *See* Charter Section 1049-a (d)(1)(a). From these provisions, the Board concludes that OATH Hearings Division has jurisdiction over the charged violations.

Hearsay testimony may be admitted and accorded due weight

Under the OATH Hearings Division – Rules of Practice, relevant and reliable evidence may be admitted without regard to technical or formal rules or laws of evidence. *See* 48 RCNY Section 1-12(c). Hearing officers may thus properly admit hearsay evidence and exercise discretion to accord it the weight they deem appropriate. *See NYC v. Grossman* (Appeal No. 1000316, August 19, 2010). Here, the Petitioner offered two reports showing the denials of Respondent's sign-off and gas authorization requests, as well as the testimony of Mr. Katsihitis, the person responsible for reviewing Respondent's requests, who generated the reports. The Board finds that the hearing officer properly found the reports and Mr. Katsihitis's testimony were admissible and could be accorded due weight.

Petitioner established violations of Code Section 28-401.19(6)

The Board finds that Petitioner's evidence established that Respondent displayed negligence, incompetence, lack of knowledge, and a disregard of the Code and related laws and rules, in violation of Code Section 28-401.19(6). In dismissing the summonses, the hearing officer found Petitioner's "evidence was sufficiently lacking in clarity to support the allegations that *all* denials are based upon [R]espondent's failure to provide sufficient information and/or documentation" (emphasis added).

Nevertheless, Code Section 28-401.19 penalizes "[n]egligence, incompetence, lack of knowledge, or disregard of [the Code] and related laws and rules," without specifying how many instances of such inadequacies must be established. Code Section 28-401.19 furthermore may require repair of damage resulting from "*any* act or omission as set forth in this chapter or in

rules” (emphasis added). The Board therefore finds that the hearing officer erred in requiring Petitioner to show that the reason for all its denials of Respondent’s requests was a failure to provide sufficient information and/or documentation. Petitioner need only demonstrate that in one or more instances Respondent showed negligence, incompetence, lack of knowledge, or disregard of the Code and related laws and rules in order to establish a violation.

Petitioner did so with respect to multiple requests on each of the two reports.

- Most significantly, the reports establish that Respondent repeatedly requested gas authorization and plumbing sign-off requests without providing documentation of inspections, authorizations and/or required tests, evidencing negligence or incompetence if not disregard for the legal requirement. See DOB Gas Authorization Report, requests: #2, #5, #18, #13, #14, #16, #17, #23, #26, #238, #29, #34, #40, #41, #44, #46, #48, #50, #52, #56, #63, #65, #66, #69, #70, #71, #75, #78, #87, #92, #97, #99, #102, #104, #107, #111, #116, #119, #131, #140, #146, #147, #155, #157, #158 and #159; DOB Plumbing Sign-Off Report, requests #2, #5, #6, #7, #10, #16, #18, #22, #23, #28, #29, #31, #32, #35, #36, #40, #41, #42, #44, #46, #47, #52, #55, #56 #60, #63, #65, #67, #68, #69, #70, #75, #80, #81, #83, #87, #90, #91, #92, #93, #94, #95 #96, #97, #98 and #99.
- The reports also establish that Respondent made recurrent requests for gas authorization and plumbing sign-offs that were repeatedly denied for the same reasons as the initial denial, either out of disregard of the legal requirement in the hope that DOB would not catch the mistake or negligence because Respondent failed to properly scrutinize the requests he was submitting. See DOB Gas Authorization Report, requests #4, #27, #43, #60 (3rd rejection) and #63; DOB Plumbing Sign-Off Report, requests #9, #53, #100, and #132.

The Board finds this evidence, unrefuted by Respondent, sufficient to make out the violations.

The Board furthermore rejects Respondent’s attorney assertion, on appeal as at the hearing, that Petitioner failed to establish the violations because a large number of Respondent’s denials were based simply on paperwork. On the contrary, deficiencies such as omitted documentation of inspections and tests of gas piping are significant failures in complying with procedures that ensure the public’s health and safety.

Class 1 violation established

Finally, the Board finds that Petitioner properly designated the violations Class 1. A Class 1 violation is defined as “a violating condition [that] *poses a threat* that severely affects life, health, safety, property, the public interest, or a significant number of persons so as to warrant immediate corrective action” (emphasis added). Here, a substantial number of Respondent’s requests are with respect to work involving gas. Because deficiencies in such work have the potential for serious injuries or fatalities from a gas leak or explosion, they are properly designated as Class 1.

In rebuttal, Respondent’s attorney has argued that, because Respondent’s requests were never approved, the violations were not immediately hazardous. Nevertheless, it does not negate the severity of a violating condition that the threat posed is not allowed to come to fruition.

Furthermore, it was because Respondent's omissions required "immediate corrective action" that Respondent could not continue with the subject work without addressing Petitioner's rejections. *See NYC v. Shia Waldman* (Appeal No. 1600820, September 22, 2016).

Accordingly, the Board reverses the hearing decision, sustains two violations of Code Section 28-401.19(6) and imposes a civil penalty of \$3,200 (\$1,600 x 2).

Additional information from OATH records (not in original decision)

Master NOV #

Name of Respondent's counsel or other authorized representative (if any)

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