



OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
Appeals Unit

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Appeal No. 2101440

DOB v. Preferred GC Group Inc.

December 16, 2021

APPEAL DECISION

The appeal of Respondent, general contractor, is **denied**.

Respondent appeals from a recommended decision by Hearing Officer C. Charles (Brooklyn), dated June 30, 2021, sustaining a Class 2 violation of § 28-201.1 of the Administrative Code of the City of New York (Code) for failure to comply with a law, rule or Commissioner's order involving construction and/or equipment safety operations. Having fully reviewed the record, the Board finds that the hearing officer's decision is supported by the law and a preponderance of the evidence. Therefore, the Board finds as follows:

| Summons | Law Charged | Hearing Determination | Appeal Determination | Penalty |
|-----------|-----------------|-----------------------|-------------------------|---------|
| 35497202M | Code § 28-201.1 | In Violation | Affirmed – In Violation | \$5,000 |

BACKGROUND

In the summons, the issuing officer (IO) affirmed observing on July 21, 2020, at 552 Prospect Place, Brooklyn:

[O]ngoing construction activities contrary to Mayor's executive orders, incorporating requirements of Governor's Executive Order 202.34 and subsequent orders and guidance published by the New York State Department of Health to same. At time of inspection, the COVID-19 safety plan was incomplete/missing information.

At the telephone hearing held on June 28, 2021, the attorney for Petitioner, Department of Buildings (DOB), moved to adjourn the hearing for the IO's testimony to explain how Respondent's COVID-19 safety plan was deficient. Respondent's attorney opposed Petitioner's motion, stating he did not dispute that information was missing from the safety plan, although he lacked firsthand knowledge. He moved to dismiss the summons, arguing as follows. The conclusory allegations in the summons that the safety plan was incomplete or missing information failed to comply with § 6-08(c)(2) of Title 48 of the Rules of the City of New York (RCNY) by providing inadequate notice of the facts alleged to constitute the violation charged. It was Petitioner's burden to state in the summons what was wrong with the safety plan and how to fix it, without Respondent having to check the document and "go back and forth." The testimony of the IO could not supplement a summons that was deficient on its face.¹

Petitioner's attorney opposed dismissal, arguing as follows. In order to operate during the Phase 1 reopening period, Respondent had to affirm it would maintain a COVID-19 safety plan on site pursuant to the Governor's orders. By alleging that the safety plan was incomplete/missing information, the summons complied with 48 RCNY § 6-08(c)(2), as Respondent could have looked at the plan it prepared to determine in what respect it was deficient. None of the required information was de minimis, and if any of it was missing or incomplete, it violated the Governor's order. In support, he submitted the template for the COVID-19 safety plan.

¹ In support, Respondent's attorney cited *DOB v. Steven Katz*, Appeal No. 2000607 (July 16, 2020).

In his decision sustaining the violation, the hearing officer denied Petitioner's motion to adjourn the hearing for the IO's testimony, finding there were no disputed factual issues, the summons provided Respondent with adequate notice of the violation, and Respondent could have ascertained whether information was missing or incomplete by reviewing the "relatively short safety plan."

On appeal, Respondent's attorney reiterates his hearing argument that dismissal is warranted because the summons failed to make clear what was missing from Respondent's COVID-19 safety plan, a seven-page document, and notes that the summons was not supplemented at the hearing.

Petitioner did not answer the appeal.

ISSUE ON APPEAL

The issue on appeal is whether the summons complied with 48 RCNY § 6-08(c)(2) by providing Respondent with adequate notice of the facts alleged to constitute the violation charged.

APPLICABLE LAW

48 RCNY § 6-08(c)(2), *Contents of Summons*, provides that a summons must contain, "A clear and concise statement sufficient to inform the Respondent with reasonable certainty and clarity of the essential facts alleged to constitute the violation or violations charged, including the date, time where applicable, and place when and where such facts were observed"

Code § 28-201.1 provides, "It shall be unlawful to fail to comply with an order of the commissioner or to violate any order of the commissioner issued pursuant to this code, the 1968 building code, the zoning resolution or any law or rule enforced by the department."

The Governor's Executive Order No. 202.34, dated May 28, 2020, provides that "[b]usinesses or entities open pursuant to New York State Department of Health guidance must be operated subject to the guidance promulgated by the New York State Department of Health [NYSDOH]."²

The NYSDOH Interim Guidance For Construction Activities During the COVID-19 Public Health Emergency, dated June 26, 2020, was created "to provide owner/operators of construction projects and their employees and contractors with precautions to help protect against the spread of COVID-19" as construction sites reopen. The guidelines provide "minimum requirements only," and set forth the safety measures employers must take for construction activities. Under "Employer Plans," the guidelines provide:

Completed safety plans must be conspicuously posted on site. The State has made available a business reopening safety plan template to guide business owners and operators in developing plans to protect against the spread of COVID-19.

² The Mayor's Emergency Executive Order No. 120, dated June 3, 2020, contains the same provision.

ANALYSIS

For the following reasons, the Board affirms the hearing officer's decision.

On this record, the Board finds that the summons complied with 48 RCNY § 6-08(c)(2) by providing Respondent with adequate notice of the Code § 28-201.1 charge. The Governor's Executive Order No. 202.34 required that businesses reopening during the pandemic operate subject to guidance promulgated by NYSDOH, which, in turn, required such businesses to complete and post a safety plan on site containing the items enumerated in the guidance and incorporated in the State's reopening safety plan template. The IO's affirmed observation that Respondent's COVID-19 safety plan was "incomplete/missing information" required by Executive Order 202.34 and the NYSDOH guidance provided a clear and concise statement of the basis for the charge, and established Petitioner's prima facie case. *See* 48 RCNY § 6-12(b) ("If the summons is sworn to under oath or affirmed under penalty of perjury, the summons will be admitted as prima facie evidence of the facts stated therein.").³

The burden then shifted to Respondent to either refute the charge or establish a defense, *see* 48 RCNY § 6-12(a), which it failed to do. Respondent's attorney did not dispute that information was missing from the safety plan. Instead, he raised a procedural challenge to the facial sufficiency of the summons. In doing so, he failed to articulate any basis for his argument that 48 RCNY § 6-08(c)(2) required Petitioner to identify the specific information omitted from the safety plan so that Respondent did not have to "check the document" and "go back and forth." Nor did he claim any confusion as to the basis for the charge. *See TLC v. Shaikh Ali*, Appeal No. 10105610C (April 5, 2019) (respondent claiming inadequate notice in summons has burden of proving information provided was ambiguous or prejudicial). Respondent had no discretion to omit any of the items the NYSDOH required. As the hearing officer noted, Respondent could have easily ascertained whether its safety plan was incomplete or missing information, as alleged in the summons, by simply reviewing the plan it had prepared and was required to maintain. *See DOB v. Steven Hutchinson*, Appeal No. 1800464 (August 23, 2018) *citing Block v. Ambach*, 73 N.Y.2d 323, 333 (1989) ("in the administrative forum, the charges need only be reasonably specific in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges"). Here, where the summons was sufficiently specific to satisfy the requirements of 48 RCNY § 6-08(c)(2), Respondent was not hindered in its ability to refute the charge or assert a defense on the merits, which it failed to do.

Accordingly, the Board affirms the hearing officer's decision sustaining a Class 2 violation of Code § 28-201.1 and imposing a civil penalty of \$5,000.

By: OATH Hearings Division Appeals Unit

³ Although Respondent's attorney points out on appeal that the summons was not supplemented at the hearing, he opposed Petitioner's request to adjourn the hearing for the IO's testimony, arguing that he was not disputing the merits, and such testimony could not cure a defective summons. The Board notes that because the summons was not facially defective, Petitioner could have supplemented it with the IO's testimony. *See DOB v. JR 180 Scholes LLC*, Appeal No. 1900230 (May 2, 2019).