CITY OF NEW YORK
DEPARTMENT OF CONSUMER AFFAIRS

MICHAEL ROLLINS,

-and-

DEPARTMENT OF CONSUMER AFFAIRS,

Complainants,

-against-

A-1 AMERICAN ROOFING & CHIMNEY, INC.

-and-

AHMED ELNENAEY,

Respondent..

DECISION AND ORDER

Record Nos.:
9187-2014-ADJC
9188-2014-ADJC

NOH No.:
C0541914

License No.:
1267069-DCA (HIC)[1]
1267070-DCA (HIS)[2]

An inquest was held on October 9, 2014.

Appearances: For the Complainants: Michael Rollins, consumer complainant. Although duly notified of the time and place of the hearings, the respondents failed to appear.

The Notice of Hearing charges respondents with the violating the following:

1. Respondent company with violating New York City Administrative Code ("Admin Code") § 20-700 and Title 6 of the Rules of the City of New York (6 RCNY) § 1-12 by engaging in a deceptive trade practice in the negotiation and performance of a home improvement contract in that the respondent company failed to honor its ten year guarantee on the work;

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;

3. Respondents with violating 6 RCNY § 2-221(a)(1) by failing to include in the contract the contractor's license number and the

[1] The Home Improvement Contractor License was revoked on October 4, 2013.

[2] The Home Improvement Salesperson License was revoked on October 4, 2013.

salesperson's name;

4. Respondents with violating 6 RCNY § 2-221(a)(2) by failing to include in the contract whether or not the parties had determined a definite completion date to be of the essence;

5. 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;

6. Respondents with violating 6 RCNY § 2-221(a)(6) by failing to provide a schedule of progress payments specifically identifying the state of the completion of the work or services to be performed, including any materials to be supplied before each such progress payment is due;

7. 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;

8. 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;

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

10. Respondents with violating 6 RCNY § 1-05 by failing to clearly identify the HIS license number listed on the contract as a New York City Department of Consumer Affairs License Number; and

11. 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.

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

Findings of Fact

The consumer, Michael Rollins, entered into a written contract with respondents, home improvement contractor A-1 American Roofing & Chimney, Inc. and home improvement salesperson Ahmed Elnenaey, on March 20, 2009 to repair and replace modified rubber on the entire roof of his residential property located at 722 Warwick Street in Brooklyn, NY in exchange for $3,500. The contract was performed and the respondents were paid in full. The contract included a ten year warranty on labor and materials. The consumer phoned the respondent home improvement contractor to perform repairs to the roof, which remains under warranty, on August 6, 2013 and the respondent agreed to perform the repairs. The respondent home improvement contractor subsequently never responded to the consumer's calls or performed the repairs. The consumer contracted with Liberty New Roofing to perform the repairs on June 23, 2014 in exchange for $1,200, which was paid in full, and the repairs were completed.

The respondent has no prior violations.

Opinion

The credible evidence establishes that the consumer is entitled to restitution against the respondents in the amount of $1,200.[3]

ORDER

A-1 American Roofing & Chimney, Inc is found **guilty upon default** of the charges set forth in the Notice of Hearing, and is hereby

ORDERED to pay to the Department of Consumer Affairs a TOTAL FINE of $3,850, which is immediately due and owing, as follows:

1)	Admin Code § 20-700	$ 350
2)	Admin Code § 20-393(11)	$ 1,000
3)	6 RCNY § 2-221(a)	$ 1,000
4)	6 RCNY § 2-221(b)	$ 1,000
5)	6 RCNY § 1-05	$ 500

Respondent Ahmed Elnenaey is found **guilty upon default** of the charges set forth in the Notice of Hearing, and is hereby

ORDERED to pay to the Department of Consumer Affairs a TOTAL FINE of $2,500, which is immediately due and owing, as follows:

1)	6 RCNY § 2-221(a)	$ 1000
2)	6 RCNY § 2-221(b)	$ 1000

[3] See consumer's exhibit C.

3) 6 RCNY § 1-05 $ 500

The charges setting forth four additional violations for each respondent for subsections of violation of 6 RCNY § 2-221(a) in the Notice of Hearing fail to provide sufficient information as to give the respondent notice of the particular charge alleged,[4] as is required by Title 6 of the Rules of the City of New York Section 6-21(b).

It does not identify a correct source of law, rule or regulation to charge five additional violations for a single violation 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).[5] 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.[6] Accordingly a failure to contain one, some, or all of the requirements in a contract is a failure to "contain all" requirements and constitutes a single violation[7] of 6 RCNY 2-221(a).

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[4] "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* for a *single 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 a charge of failing to provide the consumer with *a sufficient written contract* for a *single agreement* to perform a home improvement.

[5] See also DCA v. Advanced Solutions Group Inc., ALJ Viruet (June 24, 2013) DCA v. Un Sook Lim D/B/A Enamoo ALJ Simon (April 14, 2014); and DCA v. Bravo Automotive Club, Inc., 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…"

[6] *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.

Subsections 6 RCNY § 2-221(a)(1)-(10) only *enumerates* "<u>all</u> of the" items which *the* written "contract shall contain" pursuant to 6 RCNY § 2-221(a). 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 for 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 <u>*any*</u> 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" will "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[8] and go against the codified legislative intent pursuant to Admin Code § 20-101.[9] For the above mentioned reasons, I depart from prior decisions.[10]

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[7] 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 <u>*each such violation*</u>" (emphasis added).

[8] 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 <u>written</u> 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).

[9] 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.

Accordingly, only one charge of 6 RCNY § 2-221(a) is sustained and the five additional charges for the subsections which enumerate the items required by 6 RCNY § 2-221(a) are **dismissed**.

The Respondents are further **Ordered to pay RESTITUTION to the Consumer in the amount of $1,200, jointly and severally, which is immediately due and owing**.

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").

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).

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[10] "[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*, pg. 416 (2d ed. 1985).

It does not identify a chargeable section of law, rule or regulation.[11]

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.[12] I concur that that Administrative Code § 20-101 has "the force of law" as a statement of legislative intent.[13] I concur with the long standing principles of an administrative agency's ability to evaluate a licensee's character and fitness.[14] 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.[15]

I do not concur that a history of the tribunal upholding a charge supports the assertion that it is correctly charged [16] as declining to follow those decisions is proper if they are inconsistent with the law, regulation or rule's text, result from an error of law or are otherwise not supported by law, rule or regulation.[17] 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

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

[12] *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).

[13] *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).

[14] *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).

[15] *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).

[16] *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."

[17] *Supra* note 10.

a chargeable Section of law.[18] 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 Affairs, 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 permit default decisions.[19] 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

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[18] 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.

[19] 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."

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, and 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 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 <u>*unless*</u> *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.[20]

This constitutes the recommendation of the Administrative Law Judge.

Shanet Viruet
Administrative Law Judge

DECISION AND ORDER

Upon an independent review of the record, the recommendation of the Administrative Law Judge is **modified**. The decision above improperly dismisses charges, applies a charge not found in the Notice of Hearing and fails to fine the respondent, A-1 American Roofing & Chimney, Inc., for violating 6 RCNY Section 1-14 for failing to appear at the hearing.[21]

6 RCNY Section and subdivisions 2-221(a)(1), (a)(2), (a)(5), (a)(6), (a)(9) and (a)(10)

In the above decision, the judge holds that 6 RCNY Section 2-221(a) permits only one charge and dismisses all six of the charges based upon the rule's subdivisions: (a)(1), (a)(2), (a)(5), (a)(6), (a)(9) and (a)(10). Although the determination is purportedly based upon the "plain meaning" of the rule's text, it is, in fact, an interpretation, one that contradicts binding precedent.[22] It is also inconsistent with the structure and purpose of the rule.[23]

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[20] *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).

[21] That respondent was licensed at the time of the events giving rise to the Notice of Hearing, while respondent Ahmed Elnenaey was not.

[22] See, *e.g.*, *Louis Smith,* et al. *v. Vikram Construction, Inc.*, CD500055230 (Appeal Determination, February 24, 2004) ("6 RCNY Section 2-221[a] places the obligation on the respondent . . . to furnish the consumer with a written contract containing the information set forth in subdivisions [1] through [10]. Since the respondent failed to do so, the Judge correctly found the respondent guilty of violating 6 RCNY Sections 2-221[a][1], 2-221[a][2], 2-221[a][7], and 2-221[a][10]"). In addition, the dismissal of these charges in an inquest decision is antithetical to the purpose of defaults, where charges are upheld not because of their merit but because guilt is declared as a matter of law upon a party's failure to appear.

[23] The amendment also raises a consideration of due process because it adds a charge - 6 RCNY Section 2-221(a) - that was not asserted in the Notice of Hearing (6 RCNY Section 2-221(a) contains its own contract requirements, none of which were outlined in the Notice of Hearing). The amendment has been made without notice to the parties, which implicates their rights to object, prepare arguments or be heard on the

The rule's usage of the phrase "a written contract" and the word "all" does not simply relegate 6 RCNY Section 2-221(a) into an all-or-nothing proposition. A single contract must have "all" of the information required by the ten subdivisions of 6 RCNY Section 2-221(a). The word "all" is utilized only to denote that the totality of the information required by the subdivisions must be found in the contract, meaning each subdivision is equally important and equally worthy of inclusion in "a written contract."[24] It thus follows that for each subdivision's mandate not found in the contract, an independent violation has occurred, to which an independent charge may attach.[25]

Unlike the assertion of the above decision, treating each subdivision of 6 RCNY Section 2-221(a) as its own violation leads to no "absurd" result. In fact, judges should not be compelled to treat all contracts the same, regardless of the number of violations, especially with respect to a law that clearly indicates multiple, separated obligations. The punishment should be proportional to the number of those obligations violated.

The above decision also asserts that respondents face high fines if the law is interpreted to allow multiple charges.[26] Such a "hardship to the particular [business, however,] cannot overcome the reasonably presumed

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charge. These concerns, however, will not have to be addressed because the amended charge is not approved and because the penalty will be applied in conjunction with the charges listed in the Notice of Hearing.

[24] This is also why 6 RCNY Section 2-221(a)(1)-(a)(10) is not analogous to Administrative Code Section 20-273(a), as is suggested in footnote 5, *supra*. That section of the Code does not separate the several requirements of second hand dealer books into individualized subdivisions. In addition, *DCA v. Bravo Automotive Club, Inc.*, 05339999, 5801-2014-ADJC (Decision, ALJ Tumelty, N. Tumelty, May 23, 2014), which the above decision cites in footnote 5, itself relied, in part, upon *DCA v. Mangu Auto Body Repair, Inc.*, LL005280451 (Decision, ALJ Zeitler, July 2, 2013), which differentiated between a charge for not have the "book" required by Administrative Code Section 20-273(a) and the charges for not having specific contents of such a book. In the instant matter, there is no charge for not having "a contract" because it is undisputed that the parties did, in fact, enter into a written contract, albeit with missing information. See Notice of Hearing ¶¶ 3-6.

[25] As further evidence that the Department intended each subdivision to represent its own violation, most of the subdivisions carry more than one potential ground for a violation (*e.g.*, 2-221[a][1], which mandates a date, the contractor's name, their office address, their telephone number and their license number, as well as the salespersons' name and license number - yet the Tribunal routinely considers 2-221(a)(1) a single charge).

[26] See footnote 8, *supra*. The fines are not excessive, however, as each violation is treated on its own, at a $1,000 maximum potential fine each. See 20 Administrative Code Section 20-392(a) and (a)(8) ("[t]he commissioner shall have the power to impose a fine not to exceed one thousand dollars upon a licensee . . . for . . . [v]iolation of any provision of this subchapter or any rule or regulation adopted hereunder").

public benefit of an otherwise valid ordinance." *Matter of Simon v. Myers*, 36 N.Y. 2d 300, 303, 367 N.Y.S.2d 755, 327 N.E.2d 801 (1975). Accordingly, the penalties will be imposed consistent with the charges listed in the Notice of Hearing.

Administrative Code Section 20-101

In the Order section of the above decision, the hearing judge finds that Administrative Code Section 20-101 is not a chargeable section of law, while recognizing (and notwithstanding) that the Tribunal's Appeal Determination in *DCA v. Marwan M. Eligawy*[27] ("*Eligawy*") held that it is reversible error to find Administrative Code Section 20-101 is not a chargeable section of law. In effect, the decision of a judge with original jurisdiction has determined that an Appeal Determination does not need to be followed as binding precedent. This cannot be countenanced.

In declining to follow *Eligawy*, the hearing judge relies upon *DCA v. Riverdale Towing & Collision, Inc.*, LL517063 (Appeal Determination, November 24, 2009) ("*Riverdale*"), where it was held that "an agency [must] provide an explanation when it departs from its own precedent." In the *Riverdale* decision, the doctrine of *stare decisis* was applied to an administrative adjudicatory decision, consistent with the holding of *Matter of Charles A. Field Delivery Service, Inc.*, 66 N.Y.2d 516 (1985) ("*Charles A. Field*"), which is cited in *Riverdale*. Upon these decisions, the hearing judge rests a justification for a re-examination of the question decided by *Eligaway* and which parts of that decision need not be adhered to. As with *Riverdale*, the above decision rests upon *stare decisis*, the application of which must be examined further.

Stare decisis permits courts of the same level to carefully and sparingly reconsider prior decisions. Under certain circumstances, old holdings may be overruled. It is also a limited doctrine and gives way when lower courts of original jurisdiction attempt to reconsider the decisions of higher appeals courts:

> IN a legal system which places a premium on consistency, precedent presents itself as the backbone of the judicial process. Adherence to precedent is the rule and not the exception. The substance of this rule is twofold although the dichotomy is not clearly delineated. By *stare decisis* a court is bound to follow its own previous decisions. And by the very nature of the judicial system, 'lower' courts are bound to follow previous rulings of that appellate tribunal which may ultimately approve or reject lower court decisions.

[27] 903-2014-APPL (Appeal Determination, July 30, 2014).

The Attitude of Lower Courts to Changing Precedents, 50 Yale L. J. 1448 (1941). This "dichotomy" can be thought of as horizontal (courts of the same level reconsidering their own precedents, which is authorized by *stare decisis*) and vertical (lower courts reconsidering precedents of higher courts, which is not authorized by *stare decisis*).[28]

Administrative tribunals are bound by *stare decisis* as equally as the courts. In *Charles A. Field*, the Court of Appeals declared that "[s]*tare decisis* is no more an inexorable command for administrative agencies than it is for courts[.]"[29] Moreover, and as with federal[30] and state[31] appellate courts, the Tribunal's Appeals Determinations represent an authority of higher review over the decisions of hearing judges. This is described in the Tribunal's own rules of procedure,[32] as well as in the City Administrative Procedure Act.[33] There is

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[28] This is not to say that lower courts can never depart from prior appellate decisions. They can distinguish when the facts indicate a different application of the law. They can distinguish *dicta* from holdings. They can recognize subsequent changes in the law. What they cannot do is simply disagree or ignore otherwise binding precedents.

[29] Id. at pp. 518-519. The matter came to New York's High Court from the State Unemployment Insurance Appeal Board ("Board"), which the Court recognized as a body of final agency determination. The Court held that the Board's "decision, which, on essentially the same facts as underlaid a prior agency determination, reache[d] a conclusion contrary to the prior determination[,] is arbitrary and capricious." Id. at pg. 518.

[30] "[U]nless and until the Supreme Court should instruct otherwise, inferior federal courts had best adhere to the view that if [that] Court has [addressed] a question . . . lower courts are bound by [that] decision[of the Supreme] Court until such time as the Court informs them that they are not." *Hicks v. Miranda*, 422 U.S. 332, 344-345, 95 S.Ct. 2281, 2289, 45 L.Ed.2d 223 (1975) (internal citations and quotations omitted).

[31] "The doctrine of *stare decisis* requires that courts of original jurisdiction follow the decisions and precedents of the Appellate Division[.]" *Ross Bicycles, Inc. v. Citibank, N.A.*, 149 A.D.2d 330, 331, 539 N.Y.S. 2d 906 (1st Dept. 1989). See also *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664, 476 N.Y.S.2d 918, 919-920 (2d Dept. 1984) ("the doctrine of *stare decisis* requires trial courts in this department to follow precedents set [even] by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule[.]" Id., 102 A.D.2d at 664, 476 N.Y.S.2d at 919-920).

[32] See 6 RCNY Sections 6-39 ("[a]fter conclusion of the hearing, the Hearing Officer shall prepare a decision and order"), 6-40 ("[a]ny party aggrieved by the decision and order . . . may . . . file a written appeal to the Direct of Adjudication *who serves as the designee of the Commissioner*"; emphasis added) and 6-41 ("[a]fter exhaustion of the procedure set forth in §6-40 herein, judicial review of a final decision or order of the Department may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules"). As only Appeal Determinations of the Director of Adjudication serve as final agency determination for purposes of court review (see CPLR Sections 7801 and 7801[1]), then Appeal Determinations must be, *a fortiori*, a higher authority than the hearing-level decisions that give rise to the appeals.

thus no question that administrative tribunals must recognize and respect both the horizontal and vertical nature of precedents and the limited scope of *stare decisis*.

It is thus determined that *stare decisis* cannot be utilized by an administrative law judge to reconsider the holdings of administrative appellate determinations. Accordingly, the judge in the above decision was without authority to "decline to follow" the *Eligawy* Appeal Determination, relegating all of the related analysis moot. Accordingly, and in light of the holding of *Eligawy*, the respondents will be found guilty of violating Administrative Code Section 20-101.[34]

ORDER

The respondent, **A-1 American Roofing & Chimney, Inc.**, is found **guilty upon default** of the charges set forth in the Notice of Hearing, and is hereby

ORDERED to pay to the Department of Consumer Affairs a TOTAL FINE of $9,350, which is immediately due and owing, as follows:

1)	**Administrative Code § 20-700**	**$ 350**
2)	**Administrative Code § 20-393(11)**	**$1,000**
3)	**6 RCNY § 2-221(a)(1)**	**$1,000**
4)	**6 RCNY § 2-221(a)(2)**	**$1,000**
5)	**6 RCNY § 2-221(a)(5)**	**$1,000**
6)	**6 RCNY § 2-221(a)(6)**	**$1,000**
7)	**6 RCNY § 2-221(a)(9)**	**$1,000**
8)	**6 RCNY § 2-221(a)(10)**	**$1,000**
9)	**6 RCNY § 2-221(b)**	**$1,000**
10)	**6 RCNY § 1-05**	**$ 500**
11)	**Administrative Code § 20-101**	**$ 0**[35]
	6 RCNY Section 1-14	**$ 500**

The respondent, **Ahmed Elnenaey**, is found **guilty upon default** of the charges set forth in the Notice of Hearing, and is hereby

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[33] "Agencies shall adopt rules governing agency procedures for *adjudications and appeals*[.]" New York City Charter ("Charter") Section 1046(b). It should also be noted that the Appeals Determinations are signed in the name of the Commissioner of Consumer Affairs (see 6 RCNY Section 6-40), while "hearing officer[s] . . . shall not make any final decision, determination, or order, but shall only recommend such[.]" Charter Section 1046(e).

[34] Although the licenses no longer exist, the charges must still be considered because the respondent was licensed at the time of the contract and because this determination becomes part of the respondents' records on file with the Department.

[35] See footnote 34.

ORDERED to pay to the Department of Consumer Affairs a TOTAL FINE of $7,500, which is immediately due and owing, as follows:

3)	**6 RCNY § 2-221(a)(1)**	**$1,000**
4)	**6 RCNY § 2-221(a)(2)**	**$1,000**
5)	**6 RCNY § 2-221(a)(5)**	**$1,000**
6)	**6 RCNY § 2-221(a)(6)**	**$1,000**
7)	**6 RCNY § 2-221(a)(9)**	**$1,000**
8)	**6 RCNY § 2-221(a)(10)**	**$1,000**
9)	**6 RCNY § 2-221(b)**	**$1,000**
10)	**6 RCNY § 1-05**	**$ 500**
11)	**Administrative Code § 20-101**	**$ 0**[36]

In addition, the dispositions in the above decision regarding restitution and the respondents' fitness to hold future Department licenses, will not be disturbed.

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 Decision and Order of the Department. 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.

Date: November 19, 2014

Richard J. Zeitler, Jr.
Director of Adjudication[37]

[36] See footnote 34.

cc: via email: mroll68@verizon.net

via email: a1american.ny@gmail.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

[37] This decision was assigned for review while the Director was Principal Administrative Law Judge.

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.