Consumer and
Worker Protection

THE CITY OF NEW YORK
DEPARTMENT OF CONSUMER AND WORKER PROTECTION

NYC DEPARTMENT OF CONSUMER AND WORKER PROTECTION, *Petitioner*, *-against-* J&O SECURITY SERVICES, INC. and JOSEPH OSAGIE, *Respondents*.	OATH Index No. 2830/18 **Final Agency Decision**

On November 5, 2020, Administrative Law Judge Joycelyn McGeachy-Kuls of the Office of Administrative Trials and Hearings ("OATH") issued a Report and Recommendation in the above-captioned matter. OATH recommended that Respondents be liable for $6,648.24 to employee D. Elutilo and recommended that Respondents be liable for $4,000 in civil penalties to the City of New York.

The Department of Consumer and Worker Protection ("DCWP" or the "Department") now issues this Final Agency Decision pursuant to section 2203(h)(1) of the New York City Charter and section 6-02 of title 6 of the Rules of the City of New York. The Department did not receive any written arguments from the parties to this matter. Following review of the record, the Department adopts OATH's Report and Recommendation subject to the modifications explained below.

DISCUSSION

Petitioner alleged that Respondents J&O Security Services, Inc. and Joseph Osagie violated the Earned Safe and Sick Time Act, section 20-911 *et seq.* of chapter 8 of title 20 of the New York City Administrative Code, and certain related rules. Following Petitioner's presentation at trial, Respondents moved to dismiss four counts brought by Petitioner in its amended petition. The Petitioner argued against dismissal by relying, in part, on a rule that creates an inference against a respondent if the respondent fails to maintain, retain, or produce a required record. *See* 6 R.C.N.Y. 7-111(a) ("[a]n employer's failure to maintain, retain, or produce a record that is required to be maintained under the [office of labor standards] laws and

rules that is relevant to a material fact alleged by the Office in a notice of violation issued . . . creates a reasonable inference that such fact is true . . . .").[1]

On December 4, 2019, OATH granted in part and denied in part Respondents' motion to dismiss. In doing so, OATH refused to apply any inference based on section 7-111(a) for two reasons. First, OATH held that the rule was an invalid use of the Department's rulemaking authority because it attempts to exercise authority over functions delegated to OATH and is an impingement of OATH's independence. Second, OATH held that the rule would not apply here because Petitioner failed to introduce a "notice of hearing" on which the rule relies. OATH Dec. at 3 (Dec. 4, 2019).

Petitioner then moved for reconsideration of the dismissal, arguing, among other things, that OATH's failure to apply the inference created by section 7-111(a) was in error. On April 27, 2020, OATH denied this motion. Regarding the validity of section 7-111(a), OATH held that "this rule is valid" without any further explanation.[2] OATH Dec. at 3 (Apr. 27, 2020).

Regardless, OATH held that Petitioner was not entitled to the inference created by the rule because Petitioner "failed to offer a *notice of hearing* into evidence as referenced in its rule." *Id.* at 3 (emphasis added). Although the Petitioner started its case by filing and serving a petition, and later an amended petition, OATH held that a "notice of hearing" and a "petition" are not equivalent or used interchangeably. *Id.* at 4.

This holding is in error. Section 7-111(a) currently uses "notice of violation." A prior version of this rule in effect when this case was originally filed used "notice of hearing." Both phrases refer to the charging document used by the Department to present factual allegations and legal violations, and to commence a trial or hearing at OATH. Other phrases used to refer to this same document include a "petition," a "summons," and a "complaint."

The plain text of section 7-111(a) is unambiguous as to the meaning of notice of violation. The rule is about failing to maintain, retain or produce a record "that is relevant to a *material fact alleged* by the Office in a notice of violation issued," (emphasis added), making clear that the notice of violation is the charging instrument used by a petitioner to allege facts, regardless of what the document is titled.

Other rules of the Department also make this clear. Section 1-14.1 of title 6, titled "Notices of Hearing," explains that "[n]otices of hearing includes summonses, petitions, and

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[1] Until September 20, 2018, this rule was codified at section 7-13(g) of title 6 and used "notice of hearing" instead of "notice of violation."

[2] This holding seemingly reversed OATH's previous holding that the rule is an invalid use of rulemaking authority. Indeed, the regulatory history shows proper compliance with the rulemaking process. The Department promulgated Section 7-111 of title 6 of the Rules of the City of New York pursuant to the City Administrative Procedure Act following public notice and comment, resulting in a valid Notice of Adoption published in the City Record on August 21, 2018.

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other notices of violation filed by the Department [of Consumer and Worker Protection]." In other words, these terms are all synonyms for the same legal document. *See also* 6 R.C.N.Y. 2-428(a)(5) ("...every summons, complaint, or notice of violation of any law or regulation issued to a pedicab driver..."). In this case, Petitioner started its case at OATH by alleging facts and legal violations in a document titled a petition. The use of "notice of violation" in section 7-111(a) refers to the petition filed by Petitioner.

CONCLUSION

OATH's Report and Recommendation is adopted subject to the modification explained above. Respondents are ordered to pay $6,648.24 to employee D. Elutilo and $4,000 in civil penalties to the City of New York.

Date: 4/30/2021

Lorelei Salas
Commissioner
Department of Consumer and Worker Protection