

DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS
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DISTRICT OF COLUMBIA
DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS,
Petitioner,

v.

MARIO'S TOWING & STORAGE UNLIMITED,
INC.,
Respondent.

Case No.: 2010-DCRA-00150
NOI No.: S701806

FINAL ORDER

I. Introduction

Petitioner, District of Columbia Department of Consumer and Regulatory Affairs (DCRA), served Notice of Infraction (NOI) No. S701806 on Respondent, Mario's Towing & Storage Unlimited, charging it with two violations of 11 District of Columbia Municipal Regulations (DCMR) 3203 for: (1) failing to obtain a certificate of occupancy (major auto repair; and storage of vehicles); or, in the alternative, (2) use beyond a scope of a certificate of occupancy (major auto repair; and storage of vehicles). DCRA alleged that the violations occurred on December 9, 2009, at 3401 Benning Road, NE, and sought a \$2000 fine for each violation. Respondent answered the NOI timely with a plea of Deny.

An evidentiary hearing was held on June 24, 2010, July 8, 2010, and August 26, 2010. Dwayne Denson, Respondent's owner, and Edgar Denson, Respondent's manager, appeared for

Respondent, who was represented by Charlene Kow, Esquire. David Lang, DCRA Civil Advocate, appeared for DCRA with witnesses Kevin Carter, Supervisory Investigator, Business and Professional Licensing Administration, DCRA; Robert Henry, Permit Center Supervisor, DCRA; and Gustavo Viteri, Chief Information Technology Officer, DCRA. Based upon the testimony of the witnesses, my evaluation of their credibility, and the exhibits admitted into evidence, I make the following findings of fact and conclusions of law; and find as follows.

- DCRA proved that Respondent failed to obtain a certificate of occupancy for automobile storage. Respondent must pay a \$2000 fine for this violation.
- DCRA proved that Respondent failed to obtain a *validly issued* certificate of occupancy for automobile repair. But DCRA did not prove that Respondent *knowingly* obtained an invalid certificate. Therefore, no fine is imposed.
- DCRA did not prove that Respondent exceeded the scope of certificates of occupancy for either auto repair or storage of vehicles. These charges are dismissed with prejudice.

II. Findings of Fact

1. Respondent stored and repaired automobiles at 3401 Benning Road, NE (Property) on December 9, 2009. On that date, DCRA Inspector Anthony Hooks issued NOI No. S701806 after photographing the following evidence of automobile storage and repair.
 - A sign advertising Auto Lube & Detailing Express, oil change, and tire rotation and repair;
 - A sign advertising an on-duty mechanic, Monday through Saturday, from 7 a.m. to 6 p.m.;
 - A sign on a building that read “Mobil 1 Lube Express”;

- Automobile parts in a garage;
- A truck with no license plate, a van, and a disabled towing truck parked on the Property;
- Disassembled automobiles;
- An automobile transmission lying on the ground;
- Two automobiles without front hoods and engines;
- Automobile parts resting on a tire; and
- A truck with a missing wheel.

PXs 103A, 103C - J, 103M - N.

2. Respondent proffered Exhibit 201, which purported to be a copy of a certificate of occupancy for the Property for automobile repair issued to Respondent by DCRA on June 6, 2003. The “certificate” was not issued validly.
3. Respondent proffered Exhibits 200 and 205, which purported to be copies of certificates of occupancy for the Property for automobile repair issued to Respondent by DCRA on February 29, 2008.¹ The “certificates” were not issued validly.
4. Respondent proffered Certificate of Occupancy Permit No. CO10001545, issued by DCRA to Respondent for 3621 Benning Road, NE, as evidence that automobile storage was authorized for the Property. Respondent’s Exhibit (RX) 203. The certificate does not pertain to the Property.

¹ Exhibit 200 was proffered as a copy issued for Respondent’s files and Exhibit 205 as a copy issued for display. The format of the two exhibits differs. Exhibit 205 has a “Department of Consumer and Regulatory Affairs District of Columbia Government” logo in the center. Exhibit 200 does not.

5. DCRA's search of its official databases - ACELA and FileNet - showed no certificate of occupancy issued to Respondent for the Property, nor any application from Respondent for a certificate of occupancy for the Property, between May 1951 and August 25, 2010. PX 104. The search was conducted by address since the databases were indexed by address. No search was conducted by Respondent's name.²

III. Evidence Discussion

A. Certificate of Occupancy Process

Gustavo Viteri, Chief Information Technology Officer, DCRA, and Robert Henry, Permit Center Supervisor, DCRA,³ explained the certificate of occupancy process, credibly, as follows. A person or entity seeking to establish a use at a specific location, or to register a change of ownership or a use change must complete a written application for a certificate of occupancy. Each application to establish or register a change is assigned a unique number, which becomes the certificate of occupancy permit number once the certificate is issued.

Applications for and certificates of occupancy issued by DCRA before July 2008 were scanned and stored electronically in a historical document repository called FileNet; and were indexed for retrieval by address, date, and document number. If a certificate of occupancy issued

² Respondent's counsel suggested that a valid certificate of occupancy *might* be found if DCRA searched its data bases by Respondent's name. But counsel stopped short of arguing that DCRA issued certificates to Respondent that were not part of the record in this case.

³ Mr. Viteri served as DCRA's Chief Information Technology Officer for four years preceding the hearing date and initially was hired to develop and implement an agency-wide database and electronic management information system to support DCRA functions, including the issuance of certificates of occupancy. The information system – ACELA – was implemented in July 2008. Mr. Henry supervised the DCRA Permit Center for three years preceding the hearing date.

before July 2008 is requested, an exact replica or image is printed from FileNet. Images are marked as copies by stamp or computer. All applications for and certificates of occupancy issued by DCRA from July 2008 forward are generated and stored in ACELA – DCRA’s electronic management information system. FileNet is linked to ACELA.

B. The Violation/Storage

Edgar Denson maintained that automobile storage was authorized for the Property under Certificate of Occupancy Permit No. CO10001545, which Respondent obtained for 3621 Benning Road, NE, located a block and a half from the Property. RX 203. His conclusion derived from an account of a meeting that allegedly took place about a year and a half before the hearing, during which DCRA officials told tow truck operators, in essence, that they could obtain a certificate of occupancy for storage at one location and store automobiles at another where there was no certificate for storage, as long as the two locations were not more than three quarters of a mile apart.

Permit No. CO10001545 does authorize “Automobile Towing, Storage and Repair”, but it limits the uses to “7600 Square Feet in Square No. 5021 and Lot No. 51.” RX 203. The square and lot number correspond to the premises located at 3621 Benning Road, NE. There is no indication on the face of the certificate that off-site storage was authorized, regardless of proximity. And, DCRA refuted Edgar Denson’s testimony with that of Kevin Carter, Supervisory Investigator, Business and Professional Licensing Administration (BPLA), DCRA.

BPLA was charged with enforcing DCRA’s towing regulations. Mr. Carter was not aware of any meeting during which DCRA advised tow truck operators that they could store

towed vehicles at a location where there was no certificate of occupancy for storage. Mr. Carter testified credibly that, given his senior position at BPLA at the time the meeting would have taken place, he would have attended or been aware of the meeting. And, Edgar Denson admitted that he did not attend the meeting, he heard about it from a tow operator, and no one from DCRA told him he could store cars off-site.

C. The Violation/Automobile Repair

1. Positions Taken

Edgar Denson testified that he obtained a certificate of occupancy for the Property for auto repair when Respondent started the business in 2008. Respondent, through counsel, proffered two documents, each titled “Certificate of Occupancy”, as evidence that automobile repair was authorized. But, through its explanation of the certificate of occupancy process set forth above, and its proffer of certificates for the Property that were issued and maintained in accordance with the process, DCRA demonstrated that the certificates Respondent proffered were not valid.

3. Certificate of Occupancy/June 6, 2003

Respondent proffered Exhibit 201 as evidence that DCRA issued Respondent a certificate of occupancy for the Property on June 6, 2003. The document is titled “Certificate of Occupancy Permit No. CO56002.” The description of occupancy is listed as “Auto Lubrication, Accessory Sales and Office Space; the use “Automobiles and other Motor Vehicles – F”. Permission pursuant to the certificate purports to be granted to Respondent trading as Lube Tek. The DCRA Director is listed as Linda K. Argo.

To refute Respondent's Exhibit 201, DCRA proffered Petitioner's Exhibit 100, which DCRA issued for the Property on the same date and bears the same permit number as Respondent's Exhibit 201. The certificate was issued to Lube Technologies Inc., trading as Lube Tek, not Respondent. Petitioner's Exhibit (PX) 100. It properly shows David A. Clarke as the DCRA Director at the time of issuance instead of Linda K. Argo, who did not become DCRA Director until five years later in 2008. And, Mr. Viteri testified credibly that DCRA first adopted the format for Respondent's Exhibit 201 in 2008, although it purportedly was issued in 2003.

DCRA also proffered a copy of the application for Petitioner's Exhibit 100 from Lube Technologies, Inc. The copy of the application, dated April 25, 2003, was retrieved from FileNet and bears the handwritten number "56002", which corresponds to the permit number on the certificate issued to Lube Technologies, Inc. PX 100.

Respondent's witnesses distanced themselves from Exhibit 201. When cross examined, Edgar Denson testified that Respondent was not established at 3401 Benning Road, NE, until 2008, so he did not obtain a certificate of occupancy in 2003. And, he was not sure how "trading as Lube Tek" got on the document, because Respondent never operated under that name. Dwayne Denson also testified that Respondent never operated as Lube Tek. Edgar Denson testified further that there were so many papers, he was not sure he gave Exhibit 201 to his counsel to be submitted as evidence in this case.

But, DCRA testified credibly that Respondent showed Inspector Hooks a copy of Exhibit 201 on the date of the violation. And, in October 2009, Dwayne Denson applied to DCRA for a Basic Business License for auto repair and attached a copy of Exhibit 201, as proof that Respondent had a certificate of occupancy for the Property. PX 107. When DCRA asked

Dwayne Denson to identify the Basic Business License application, he testified that the handwriting on the application was his, but he could not remember if he submitted Exhibit 201 with the application.

4. Certificate of Occupancy/February 29, 2008

Respondent proffered Exhibits 200 and 205 as copies of certificates of occupancy issued to Respondent for the Property on February 29, 2008. Edgar Denson testified that he obtained a certificate for the Property in 2008, but lost it; and - months before the hearing date - DCRA gave him the exhibits as replacements. The address for DCRA is listed as “1100 4th Street, SW.”

To refute Respondent’s exhibits, Mr. Viteri testified that he found a copy of Respondent’s Exhibit 200 in ACELA, but the time stamp embedded in ACELA’s data base showed that the document was generated first in ACELA on June 23, 2010. DCRA also proffered Petitioner’s Exhibit 106 - Certificate of Occupancy Permit No. CO 161956, which bears the same permit number and was issued for the Property on the same date as Respondent’s Exhibits 200 and 205. But DCRA issued the certificate to John C. Cheeks trading as “18 & 1 Oil Lube Service”, not Respondent.

Robert Henry and Gustavo Viteri testified credibly that Petitioner’s Exhibit 106 was a FileNet image of a certificate of occupancy validly issued to Mr. Cheeks. The image shows the word “copy” printed multiple times in the background, as a watermark would appear. The address for DCRA is listed as “941 North Capitol Street, NE”, DCRA’s address on February 29, 2008. DCRA did not move to “1100 4th Street, SW” – the address listed on Respondent’s Exhibits 200 and 205 – until March 19, 2010. And, DCRA proffered a copy of Mr. Cheeks’

application, dated February 22, 2008. PX 105. The handwritten number on the face of the application - "161956" - is consistent with the permit number that appears on the certificate issued to Mr. Cheeks.

5. Invalid Documents/Respondent's Role

Respondent testified that it obtained Exhibits 200, 201, and 205 from DCRA. The evidence showed that the exhibits are copies of invalid documents, which were created at and provided by DCRA. DCRA did not argue otherwise. DCRA presented no evidence to establish Respondent's role in the issuance of the documents. In closing, DCRA argued that Respondent presented the exhibits to perpetrate a fraud upon the court, but did not present evidence to establish that Respondent knew the exhibits were fraudulent.

IV. Conclusions of Law

A. Jurisdiction

This case is governed by Subchapter II of the Civil Infractions Act of 1985 (D.C. Official Code §§ 2-1801.01 through 2-1802.05); the District of Columbia Administrative Procedure Act (D.C. Official Code §§ 2-501 *et seq.*); and the Office of Administrative Hearings Establishment Act at D.C. Official Code § 2-1831.03(b)(2), which authorizes OAH to hear and decide this case.

B. Failure to Obtain a Certificate of Occupancy/Violation and Fine

DCRA charged Respondent with violating 11 DCMR 3203 by failing to obtain or, exceeding the scope of, certificates of occupancy for automobile repair and storage of vehicles, on December 9, 2009, at 3401 Benning Road, NE. Governing rules at 11 DCMR 3203 provide,

in pertinent part, that “no no person shall use any structure, land, or part of any structure or land for any purpose until a certificate of occupancy has been issued to that person stating that the use complies with the provisions of this title and the D.C. Construction Code, Title 12 DCMR.” A violation of 11 DCMR 3203 is a Class 1 infraction, punishable by a fine of \$2000.⁴ The evidence clearly shows that Respondent stored and repaired automobiles on the Property on the date of the violation; and that Respondent did not obtain a validly issued certificate of occupancy for the uses.

Respondent testified that it believed a certificate of occupancy for storage obtained for another location authorized it to store automobiles on the Property. The face of the document confers no such authority. And, Respondent’s reliance on a second hand report of guidance allegedly provided by DCRA officials is irresponsible, at best. Respondent is liable for this violation and must pay the \$2000 fine.

DCRA clearly established that the “certificates of occupancy” proffered by Respondent for automobile repair were not valid. There were discrepancies on the face of the documents – a former DCRA Director listed as Director before her appointment date; and a DCRA address that predated DCRA’s move to the location. DCRA credibly described its process for issuing, tracking, storing, and retrieving certificates of occupancy from its official database. In doing so, it showed that a certificate of occupancy number is unique to each person and activity and the same number would not be issued to two different entities on the same date for the same property. DCRA discredited Respondent’s “certificates” by proffering, from its official databases, copies of applications and certificates issued for the Property to others on the same

⁴ 16 DCMR 3312.1(c); 16 DCMR 3300; 16 DCMR 3201.1(a)(1).

dates that Respondent claimed DCRA issued certificates to it. And, DCRA showed that one “certificate” was created in an official database after its purported issuance date.

By showing that Respondent’s “certificates” were invalid, DCRA proved, by a preponderance of evidence, that on December 9, 2009, Respondent repaired automobiles on the Property without obtaining a certificate of occupancy. Respondent is liable for the violation.

Given Respondent’s evidence, including a “certificate” purportedly issued before the business was established and referencing a trade name that was not Respondent’s, one might assume that Respondent knew that it did not have a valid certificate or, at least, should have suspected that something was amiss. And, DCRA elicited testimony and proffered evidence that aroused suspicion. But the evidence fell short of establishing, by a preponderance of evidence, that Respondent knew it did not have a certificate of occupancy for automobile repair. So, no fine is imposed for this violation.

C. Exceeding the Scope of a Certificate of Occupancy/Violation and Fine

DCRA also charged Respondent with exceeding the scope of certificates of occupancy for automobile storage and repair. Since DCRA proved that Respondent had no certificates of occupancy, the charges of exceeding the scope are dismissed with prejudice.

IV. ORDER

Based on the entire record in this matter, it is this ____ day of **June 2011**:

ORDERED, that Respondent is **NOT LIABLE** for violating 11 DCMR 3203 by exceeding the scope of a certificates of occupancy for automobile storage and repair. These charges are **DISMISSED WITH PREJUDICE**; and it is further

ORDERED, that Respondent is **LIABLE** for violating 11 DCMR 3203 by failing to obtain a certificate of occupancy for automobile repair as charged in NOI No. S701806, but no fine is imposed for this violation; and it is further

ORDERED, that Respondent is **LIABLE** for violating 11 DCMR 3203 by failing to obtain a certificate of occupancy for automobile storage, as charged in NOI No. S701806 and shall pay a fine in the amount of **TWO THOUSAND DOLLARS (\$2000)** in accordance with the attached instructions within 20 calendar days of the service date of this order (15 days plus 5 days for service by mail pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, by law, interest shall accrue on the unpaid balance at the rate of 1½% per month or portion thereof, beginning with the date of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified may authorize additional sanctions, including suspending Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), placing liens on Respondent's property pursuant to D.C. Official Code § 2-1802.03(i) and sealing Respondent's business premises or work site pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

ORDERED, that Respondent may file a request for reconsideration within 15 calendar days of the date of mailing listed below. Any such request must be **RECEIVED** by the Clerk of the Office of Administrative Hearings within the deadline. It is further

ORDERED, that the appeal rights of any person aggrieved by this Order are set forth below.

Wanda R. Tucker
Administrative Law Judge

PAYMENTS

If a payment is required by this Order, to be properly credited to your case(s) the payment must be sent to the attention of the Clerk of the Office of Administrative Hearings. Payments are only accepted by check or money order and must be made payable to “D.C. TREASURER.” Enclose full payment and mail the check in an envelope with required postage to:

Clerk
Office of Administrative Hearings
One Judiciary Square
441 Fourth Street, NW
Washington, DC 20001-2714

IMPORTANT: Please do not call the D.C. Court of Appeals with questions about how to make any payments required under this Order. The D.C. Court of Appeals does not accept any payments in cases decided by the Office of Administrative Hearings. **If you have questions, please call the Clerk’s Office at the Office of Administrative Hearings on 202-442-9094.**

APPEAL RIGHTS

Pursuant to D.C. Official Code § 2-1831.16(c)-(e), any party suffering a legal wrong or adversely affected or aggrieved by this Order may seek judicial review by filing a petition for review and six copies with the District of Columbia Court of Appeals at the following address:

Clerk
District of Columbia Court of Appeals
430 E Street, NW, Rm. 115
Washington, DC 20001
202-879-2700

The petition for review (and required copies) may be mailed or delivered in person to the Clerk of the Court of Appeals, and must be received by the Clerk of the Court of Appeals within 30 calendar days of the mailing date of this Order. Information on petitions for review to the Court of Appeals can be found in Title III of the Rules of the District of Columbia Court of Appeals.

IMPORTANT NOTICES:

- 1. By law, the amount of a lawfully imposed fine cannot be modified or reduced on appeal. D.C. Official Code § 2-1831.16(g).**
- 2. Filing of a petition for review does not stay (stop) the requirement to comply with a Final Order, including any requirement to pay a fine, penalty or other monetary sanction imposed by a Final Order. If you wish to request a stay, you must first file a written motion for a stay with the Office of Administrative Hearings. If the presiding Administrative Law Judge denies a stay, you then may seek a stay from the D.C. Court of Appeals.**
- 3. If you are a member of the United States Armed Forces on active duty, you may have certain rights under the Servicemembers Civil Relief Act 50 U.S.C.S. Appx. §501 et seq. If you qualify for these rights and you have LOST this case because you were not present, you MAY be able to have this case reopened. If you think you may qualify under this law, you must notify this court promptly to ensure that your rights are protected.**

Certificate of Service:

By First Class Mail (Postage Paid):

Charlene Kow, Esquire
5335 Wisconsin Avenue, NW, #440
Washington, DC 20015

By Inter-Agency Mail:

Melinda Bolling, Esquire
General Counsel
Office of the General Counsel
Department of Consumer and
Regulatory Affairs
1100 4th Street, SW, Suite 5266
Washington, DC 20024

I hereby certify that on _____,
2011, I caused this order to be served on the parties
named on this page at the addresses listed and by
the means stated.

Clerk/Deputy Clerk