OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
Appeals Division
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Appeal No. 2600059 DOB v. Suffolk Construction Company March 26, 2026

Appeal Decision

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

Respondent appeals from a recommended decision by Judicial Hearing Officer (JHO) M. Rodriguez, dated December 15, 2025, sustaining a Class 1 violation of § 3301.2 of the Building Code (BC), found in Title 28 of the Administrative Code of the City of New York, for failure to safeguard the public and property from construction operations. Having fully reviewed the record, the Board finds that the JHO's decision is not supported by the law and a preponderance of the evidence.

Summons	Law Charged	Hearing Decision	Appeal Decision	Penalty
39537920X	BC § 3301.2	In Violation	Reversed – Dismissed	$0

In the summons, the issuing officer (IO) affirmed on March 12, 2025, at 301 Park Avenue, Manhattan, as follows:

> A worker fell approximately 40 feet in height[,] had a fatal fall during an operation in the ceiling on 6th floor[;] he step[ped] on the suspended ceiling made up of acoustical board[.] The board broke & he went through the hole & landed on the 3rd floor[.] Inspection reveal[ed] no lighting illumination . . . , no working platform with guardrail . . . [,] no CAZ provide[d.]

The IO indicated that Petitioner, the Department of Buildings (DOB), was seeking the Aggravated II penalty.

In the affirmation of service, the IO indicated that he served the summons at 2:10 p.m. on March 12, 2025, using the "affix and mail" method of service allowed by § 1049-a(d)(2) of the New York City Charter (Charter) and described his reasonable but unsuccessful attempt to personally serve the summons as, "I spoke to safety director who told me he was not on site to accept summon[s] on behalf of the named Respondent[,] that I should post it."

At a telephonic hearing held on December 4, 2025, Respondent's attorney challenged service. The IO initially testified that he spoke with Respondent's safety director, who told the IO that he was not authorized to accept service and directed the IO to post the summons. Petitioner's attorney asked the IO what he inquired after the safety director's response, and the IO testified that the safety director told the IO that he was not on site, so the IO could post the summons

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on the fence, which the IO did. Petitioner's attorney then asked, "So he said that there was no one there authorized to accept service and then that you should post it?" Respondent's attorney objected, asserting that the IO did not testify that the safety director informed the IO that there was no one present at the site authorized to accept service. The JHO asked the IO to repeat his testimony, and the IO stated that he asked the safety director if he was authorized to accept service, and the safety director told him that he was not and that there was no person at the job site authorized to accept service. On cross examination, the IO testified that the site safety manager called the safety director, with whom he spoke on the phone, and "the safety director said he wasn't authorized and right now he wasn't on the site as well, that I should post the summons. That's it."

In rebuttal, Respondent's safety director testified as follows. On March 12, 2025, he got a call from the site safety manager, who put the IO on his phone. The IO stated that he was at the site to issue a summons and asked if the safety director was authorized to accept service on Respondent's behalf. The safety director told the IO that he was authorized to accept service but was in his office, a block away from the site, and could be on site in a few minutes. The IO did not want to wait and said that he was going to post the summons. The IO did not ask him if there was anyone else present at the site authorized to accept service. At the time of service, there were at least three project executives and two general construction superintendents on site authorized to accept service. On redirect, the IO answered in the affirmative when Petitioner's attorney asked if the safety director told the IO that there was no one present at the site authorized to accept service. But the IO also asserted that the safety director should have instructed the IO to give the summons to a specified authorized person on site.

Respondent's attorney argued as follows. The IO provided inconsistent testimony, first testifying that he asked the safety director only if the safety director was authorized to accept service before posting the summons, but after being led by Petitioner's attorney, stating that the safety director told him that there was no one present at the site authorized to accept service. According to the safety director, the IO did not ask him if there was anyone present at the site who was authorized to accept service. Therefore, the IO did not make a reasonable attempt to personally serve the summons.

In the decision, the JHO found that the IO made a reasonable attempt to personally serve the summons because "[the IO] spoke to [the safety director] who told him to post the summons on the door." The JHO credited Petitioner's evidence and found Respondent's other arguments without merit.

On appeal, Respondent's attorney reiterates her hearing arguments on service, adding that the JHO's finding of proper service was based on the IO being directed to post the summons by the

safety director, which does not satisfy the reasonable attempt standard. Respondent's attorney also repeats her other hearing arguments. Petitioner did not answer the appeal.

The Board reverses the JHO's decision. Charter § 1049-a(d)(2) permits service of a summons by affixing it in a conspicuous place to the cited premises after making a reasonable attempt to deliver it to a person at the premises upon whom service may be made as provided by Article 3 of the New York State (NYS) Civil Practice Law and Rules or Article 3 of the NYS Business Corporation Law, followed by specified mailings. Here, the IO initially testified that he spoke with the safety director, who informed the IO that he was not authorized to accept service on Respondent's behalf and directed the IO to post the summons. After Petitioner's attorney asked the IO the leading question, "So he said that there was no one there authorized to accept service and then that you should post it?," the IO amended his testimony to include that the safety director told the IO that there was no person on site authorized to accept service. Respondent's safety director testified that he told the IO that he was authorized to accept service but was not on site. Respondent's safety director further testified that there were several persons on site authorized to accept service, but the IO did not ask him if there were persons at the site authorized to accept service.

While per § 6-12(c) of Title 48 of the Rules of the City of New York, the formal rules of evidence do not apply in OATH hearings, the Board finds that in asking a leading question, Petitioner's attorney in effect coached the IO to testify that the safety director advised him that there was no person on site authorized to accept service, which is inconsistent with the IO's initial testimony and affirmation of service. The Board also finds other inconsistencies and ambiguities in the IO's testimony. Therefore, the Board credits the safety director's testimony and does not credit the IO's amended testimony that he inquired of the safety director if there was anyone present on site authorized to accept service. On this record, the Board finds that the IO failed to make a reasonable attempt to personally serve the summons before resorting to "affix and mail" service. The Board notes that contrary to the JHO's decision, a directive to post the summons is not a substitute for inquiring of the safety director whether there was anyone else present at the site authorized to accept service. As the Board is dismissing the charge for improper service, it need not address Respondent's attorney's other arguments on appeal.

Accordingly, the Board reverses the JHO's decision sustaining a Class 1 violation of BC § 3301.2 and dismisses this charge.

By: OATH Appeals Division