

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BOARD OF HEALTH

NOTICE OF INTENTION
TO AMEND ARTICLE 7 OF THE NEW YORK CITY HEALTH CODE

NOTICE OF PUBLIC HEARING

In compliance with §1043(b) of the New York City Charter (the “Charter”) and pursuant to the authority granted to the Board of Health by §558 of said Charter, notice is hereby given of the proposed amendment of Article 7 (Administrative Tribunal) of the New York City Health Code (the “Health Code”).

NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE WILL HOLD A PUBLIC HEARING ON THE PROPOSAL FROM 10 A.M. to 12 P.M. ON FRIDAY, JANUARY 21, 2011 IN THE THIRD FLOOR BOARD ROOM (ROOM 330) AT 125 WORTH STREET, NEW YORK, NEW YORK 10013.

PERSONS INTERESTED IN PRE-REGISTERING TO SPEAK SHOULD NOTIFY, IN WRITING, RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET CN-31, NEW YORK, NEW YORK; (212) 788-5010 BY 5:00 P.M. THURSDAY, JANUARY 20, 2011. PLEASE INCLUDE A TELEPHONE NUMBER WHERE, IF NECESSARY, YOU MAY BE REACHED DURING NORMAL BUSINESS HOURS. SPEAKERS WILL BE LIMITED TO FIVE (5) MINUTES.

PERSONS WHO REQUEST THAT A SIGN LANGUAGE INTERPRETER OR OTHER FORM OF REASONABLE ACCOMMODATION FOR A DISABILITY BE PROVIDED AT THE HEARING ARE ASKED TO NOTIFY RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013; (212) 788-5010 BY JANUARY 14, 2011. REGISTRATION WILL BE ACCEPTED AT THE DOOR UNTIL 12:00 P.M. HOWEVER, PREFERENCE WILL BE GIVEN TO THOSE WHO PREREGISTER.

WRITTEN COMMENTS REGARDING THE PROPOSAL ADDRESSED TO THE ATTENTION OF THE BOARD OF HEALTH MUST BE SUBMITTED TO RENA BRYANT, SECRETARY TO THE BOARD OF HEALTH, BY MAIL TO 125 WORTH STREET CN-31, NEW YORK, NEW YORK 10013, BY FAX TO (212) 788-4315, BY E-MAIL TO RESOLUTIONCOMMENTS@HEALTH.NYC.GOV OR ONLINE (WITHOUT ATTACHMENTS) AT <http://www.nyc.gov/html/doh/html/notice/notice.shtml> OR www.nyc.gov/nycrules ON OR BEFORE 5:00 P.M., FRIDAY, JANUARY 21, 2011. ATTACHMENTS TO ONLINE COMMENTS MUST BE MAILED OR FAXED. COMMENTS RECEIVED AFTER JANUARY 21, 2011 WILL BE CONSIDERED TO THE EXTENT POSSIBLE.

WRITTEN COMMENTS RECEIVED BY THE SECRETARY TO THE BOARD OF HEALTH AND A TRANSCRIPT OF THE PUBLIC HEARING WILL BE AVAILABLE FOR PUBLIC INSPECTION WITHIN A REASONABLE TIME AFTER RECEIPT, BETWEEN THE HOURS OF 9:00 A.M. AND 5:00 P.M. AT THE OFFICE OF THE SECRETARY. THE DEPARTMENT’S GENERAL POLICY IS TO MAKE WRITTEN COMMENTS AVAILABLE FOR PUBLIC VIEWING ON THE INTERNET. ALL COMMENTS RECEIVED,

INCLUDING ANY PERSONAL INFORMATION PROVIDED, WILL BE POSTED WITHOUT CHANGE TO <http://www.nyc.gov/html/doh/html/comment/comment.shtml>.

STATUTORY AUTHORITY

These amendments to the New York City Health Code (the “Health Code”) are promulgated pursuant to Sections 556, 558 and 1043 of the New York City Charter (the “Charter”). Section 556 of the Charter provides the Department of Health and Mental Hygiene (the “Department”) with jurisdiction to regulate all matters affecting the health in the city of New York. Section 558(b) and (c) of the Charter empower the Board of Health (the “Board”) to amend the Health Code and to include in the Health Code all matters to which the Department’s authority extends. Section 1043 of the Charter grants the Department rulemaking powers.

STATEMENT OF BASIS AND PURPOSE

As part of a comprehensive review of the Health Code, the Board of Health repealed and recodified Article 7 by resolution adopted June 18, 2008. The recodified Article went into effect July 26, 2008. The Department is requesting that the Board further amend §7.09 (Appearances) and §7.11 (Hearings and mail adjudication) of this Article to authorize telephone or electronic adjudications and to facilitate settlements.

The Department believes that allowing hearings to take place by means of telephone and other electronic media would make access to the Administrative Tribunal proceedings much less burdensome to respondents. Currently, respondents are required to travel from all parts of the City to the single Tribunal hearing location at 66 John Street in downtown Manhattan. Travel and waiting times can significantly reduce the time respondents spend attending to their immediate business operations. Authorizing respondents the opportunity to participate in telephone hearings when offered by the Department could relieve that burden. No respondent would be required to participate in a telephone hearing; they would be conducted only in cases where the Department and the respondent were willing to engage in them. While a respondent would waive the right to participate in a public hearing and to cross examine Department witnesses for the benefit of not having to appear in person at the Tribunal, telephonic hearings could be adjourned to and continued at the Tribunal if the respondent changes his or her mind. The rules of several New York State government agencies currently authorize telephone hearings. Subdivision (a) of §7.09 would be amended, and a new subdivision (h) of §7.11 would be added to authorize such hearings. In addition, the Department requests that subdivision (a) be further amended to reference appearances by representatives in §7.21, that the language describing defaults in §7.09 (d) be clarified, and that subdivision (d) be further amended to extend the time for reopening a default as of right from thirty days to sixty days.

Extending the time for reopening a default would benefit respondents, who inadvertently miss the current deadline of thirty days after mailing or receipt of a notice of default decision. It would also be expected to facilitate operations at the Administrative Tribunal, reducing the time spent by hearing examiners on reviewing second requests to reopen defaults and enable hearing examiners to devote more of their time to adjudications of notices of violations on the merits.

Recodified Article 7 authorizes the Department to make offers to settle notices of violation. Currently §7.09 (e) requires that settlement offers be made by certified mail, an excessively burdensome procedure for the Department and for respondents. The Department also requests that the Board authorize the Department to make settlement offers in a more efficient manner, including online.

STATEMENT PURSUANT TO CHARTER §1043.

This resolution was not included in the Department's Regulatory Agenda for 2009-2010 because the need for the amendment was not known until after the Regulatory Agenda was promulgated.

The resolution is as follows.

Matter deleted is in brackets [].

New matter is underlined.

RESOLVED, that subdivisions (a), (d) and (e) of §7.09 of Article 7 of the New York City Health Code, found in Title 24 of the Rules of the City of New York, be, and the same hereby is amended, to be printed together with explanatory notes to read as follows:

§7.09 Appearances.

(a) A respondent may appear for a hearing by:

(1) appearing in person [on the date and] at the place and on the date scheduled for the hearing[.];

(2) sending an authorized representative [specified herein] to appear on behalf of such person [on the date and] at the place and on the date scheduled for the hearing [is scheduled] who is:

(i) an attorney admitted to practice law in New York State,

(ii) a representative registered to appear before the Tribunal pursuant to §7.21, or

(iii) any other person, subject to the provisions of §7.21;

(3) making a written request [before the scheduled hearing] for an adjudication by mail, provided that the request is received by the Tribunal or bears a postmark indicating that it was mailed before the scheduled date of a hearing; or

(4) participating in a hearing conducted by telephone or other electronic media when the opportunity to do so is offered by the Department. The respondent, by agreeing to participate in such a hearing rather than appearing in person at the Tribunal, shall waive his or her rights to a public hearing and to cross-examine the Department's inspectors, except that a telephonic or electronic hearing may be adjourned to the Tribunal for a live hearing if the hearing officer determines that the testimony of a Department witness is necessary or if the respondent makes a request for such an adjournment.

* * *

(d) [Failure by the respondent to appear in person, by sending an attorney or other authorized representative, or by mail] A respondent who fails to appear or to make a timely request for an adjournment shall [constitute a waiver of the right] not be entitled to a hearing. [and shall authorize the hearing examiner, without] Without further notice to the respondent, [to] a hearing examiner may find that the respondent is in default if the respondent has failed to appear and [that the facts are as alleged in the notice of violation, and to] render a [default] decision sustaining the [allegations] violations cited in the notice of violation, subject to findings the hearing examiner must make with respect to the service of the notice of violation and the sufficiency of the factual allegations contained therein, and imposing a penalty pursuant to Article 3 of this Code or as authorized by other applicable law. If, before [issuing] a default decision is issued, [the Tribunal finds] it is determined that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, [the Tribunal may choose to not issue] a default decision may not be issued and [instead adjourn] the matter may be adjourned [for] to a new hearing date. A decision that is adverse to a respondent [by reason of the respondent's default] shall be issued on default only after the hearing examiner has determined that the notice of violation was served as required by applicable law, and that the notice of violation alleges sufficient facts to support the violations charged. The Tribunal shall notify a defaulting respondent of the issuance of a default decision by mailing a copy of the decision by certified mail or by providing a copy to a respondent or respondent's representative who appears personally at the Tribunal and requests a copy. A respondent may request in writing that a default decision be reconsidered, if the request to reconsider is postmarked or received by the Tribunal within [thirty] sixty days of the date of mailing of the default decision to the respondent or the date a copy was provided to the respondent or the respondent's representative at the Tribunal, whichever date is earlier. One such request shall be granted administratively as of right provided that the Tribunal's records show that there have been no other failures to appear in relation to the particular notice of violation. [In all other cases a] A request to reconsider a default decision that is received more than sixty days after mailing or personal receipt of the default decision shall be accompanied by a statement setting forth good cause for the respondent's failure to appear, [and either a meritorious defense to any violation found in the decision or a jurisdictional defect in the notice of violation.] Such statement, and any [supporting documentary evidence deemed necessary by a hearing examiner] documents to support the request for reconsideration of the default, shall be reviewed by a hearing examiner who shall determine if it establishes a reasonable excuse for the default. [However, under no circumstances shall more than two requests to reconsider default decisions be

entertained in relation to a particular notice of violation.] Denial of a request to vacate a default decision shall not be subject to review by the Review Board.

(e) [Where the notice of violation or an accompanying document, or a related document served on the respondent by certified mail, sets forth a monetary amount that may be paid in full satisfaction of the notice of violation, a respondent may, in lieu of attending a scheduled hearing, pay said amount by mail in the manner and time provided for in such notice.] The Department may extend an offer to settle any notice of violation by setting forth a monetary amount that a respondent may pay in full satisfaction of the violations cited in the notice of violation. A respondent may, in lieu of attending a hearing, pay the department the monetary amount. Such payment shall constitute an admission of liability for the violations charged and no further hearing or appeal shall be allowed.

Notes:

Subdivisions (a) and (d) of §7.09 were amended by resolution on XXX to authorize the Administrative Tribunal to conduct hearings by telephone conference call and other electronic media, and subdivision (e) was amended to facilitate making settlement offers. Subdivision (d) was amended to extend the time for respondents to request reconsideration of an initial default from thirty to sixty days after mailing or receipt of a notice of default decision.

RESOLVED, that subdivision (c) of §7.11 of Article 7 of the New York City Health Code be amended, that subdivision (h) of such section be amended and relettered as subdivision (i), and that a new subdivision (h) be added, to be printed together with explanatory notes to read as follows:

§7.11 Hearings and mail adjudications.

* * *

(c) Each party to a proceeding shall have the right to be represented by counsel or other authorized representative as set forth in [§7.09(a) hereof,] §§7.09 (a) and 7.21 of this Article, to present evidence, to examine and cross-examine witnesses and to have other rights essential for due process and a fair and impartial hearing.

* * *

(h) With the consent of all parties, a hearing examiner may conduct a hearing by telephone or other electronic media. Subject to the provisions of § 7.09(a)(4), a respondent who participates in such a hearing shall waive the right to appear personally at the hearing and to cross-examine the Department inspector who issued the notice of violation.

[(h)] (i) A written decision sustaining or dismissing each charge in the notice of violation shall be promptly rendered by the hearing examiner who presided over the hearing, or who conducted the adjudication by mail, or who rendered a default decision. Each decision, other than a default decision, shall contain findings of fact and conclusions of law [and,] [where] Where a violation is sustained, the hearing examiner shall impose a penalty. A copy of the decision, other than a default decision mailed or otherwise provided in accordance with §7.09(d) hereof, shall be served forthwith on the respondent or on the respondent's counsel, registered representative or other authorized representative, either personally or by certified mail. Any fines imposed shall be paid within thirty days of service of the decision. If full payment of fines is not made within thirty days, an additional penalty may be imposed per NOV in an amount of fifty dollars, if paid between thirty-one and sixty days after service of the decision, and one hundred dollars if paid more than sixty days after service of the decision.

Notes:

A new subdivision (h) was added, and former subdivision (h) was relettered as subdivision (i), §7.11 on XXX to authorize the conduct of hearings by means of telephone or other electronic media, and subdivision (c) was amended to add a reference to representatives in §7.21.