

NOTICE OF PUBLIC HEARING

- Subject:** Opportunity to comment on proposed amendment of §3.12 (Administrative Tribunal) of the New York City Health Code, relating to service of notices of violation returnable to the Environmental Control Board
- Date / Time:** April 18, 2012, from 10 a.m. to 12:00 p.m.
- Location:** New York City Department of Health and Mental Hygiene
2 Gotham Center, 14th Floor, Room 14-45
42-09 28th Street
Long Island City, NY 11101-4132
- Contact:** Rena Bryant
(347) 396-6071

Proposed Rule Amendment

Pursuant to the authority vested in the Board of Health (“Board”) by Section 558(b) and (c) of the New York City Charter (“Charter”), and in accordance with §§556, 558 and 1043 of the Charter, the Department of Health and Mental Hygiene (“Department”) is proposing that the Board of Health amend §3.12 of the Health Code relating to service of notices of violation returnable to the Environmental Control Board. This proposal was not included in the Department’s regulatory agenda because the need for the amendment became known after publication of the regulatory agenda.

Instructions

- Prior to the hearing, you may submit written comments about the proposed amendment by mail to:

New York City Department of Health and Mental Hygiene
Board of Health
Office of the Secretary to the Board
Attention: Rena Bryant
2 Gotham Center, 14th Floor, Room 14-15, Box 31
Long Island City, NY 11101-4132

or electronically through NYC RULES at www.nyc.gov/nycrules or by email to RESOLUTIONCOMMENTS@HEALTH.NYC.GOV or online (without attachments) at <http://www.nyc.gov/html/doh/html/notice/notice.shtml> on or before 5:00 P.M., on April 18, 2012.

- To request a sign language interpreter or other form of reasonable accommodation for a disability at the hearing, please contact Rena Bryant at the phone number shown above by April 4, 2012.
- Copies of written comments and a summary of oral comments received at the hearing will be available within a reasonable time after receipt between the hours of 9:00 A.M. and 5:00 P.M. at:

New York City Department of Health and Mental Hygiene
Board of Health
Office of the Secretary to the Board
Attention: Rena Bryant
2 Gotham Center, 14th Floor, Room 14-05, CN 30
Long Island City, NY 11101-4132

- The Department's general policy is to make written comments available for public viewing on the internet. The comments it receives, including any personal information provided with the comment, will be posted without change to <http://www.nyc.gov/html/comment/comment.shtml>.

Statement of Basis and Purpose

Statutory Authority

These amendments to the New York City Health Code (the "Health Code") are issued according to §§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 authority to regulate all matters affecting 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 over which the Department has authority. Section 1043 of the Charter gives the Department rulemaking powers.

These amendments are related to revisions to the Charter approved by the voters in 2010, authorizing the Mayor by Executive Order to consolidate certain administrative tribunals by transferring their adjudicatory functions to the Office of Administrative Trials and Hearings ("OATH").

Background of Rule Amendments

On November 2, 2010, New York City voters approved Charter revisions including an amendment authorizing the Mayor, by Executive Order, to consolidate certain administrative tribunals into OATH. In addition, the Charter amendment required the establishment of a committee whose mandate was to recommend which tribunals or types of cases should be transferred to OATH. The Mayor's Committee on Consolidation of Administrative Tribunals ("Mayor's Committee") issued its "Report and Recommendations," dated June 7, 2011, containing an Appendix with recommended modifications to rules of the various tribunals ("Report" and "Appendix").

By Executive Order No. 148 (June 8, 2011) (the "Executive Order"), the Mayor ordered the "transfer of the administrative tribunals [*sic*] established by the Board of Health pursuant to Section 558 of the Charter" to OATH, effective July 3, 2011. According to the Executive Order, certain provisions of the Health Code and other Rules of the City of New York pertaining to the Department's Administrative Tribunal, as well as some additional interim procedures, would be deemed interim rules of OATH in accordance with the Mayor's Committee's Report and Appendix. These provisions, rules, and procedures, were designated interim rules until OATH itself completed official rulemaking in accordance with the Charter.

At its meeting on December 13, 2011, the Board adopted a Resolution repealing Article 7 (“Administrative Tribunal”) of the Health Code, and amending other provisions of the Health Code that refer to Article 7 and/or the Administrative Tribunal. Certain provisions of Article 7 survived the transfer to OATH and were added to Article 3 (“General Provisions”) of the Health Code. According to the Resolution, the amendments (including the repeal of Article 7) would not be effective until OATH’s rules for the Health Tribunal at OATH became effective. Section 3.12 will become effective at the same time as the new OATH rules.

A new §3.12 (“Administrative Tribunal”) was adopted by the Board, incorporating surviving provisions of the repealed Article 7. Subdivision (b) of this section confers jurisdiction on the Health Tribunal at OATH and the Environmental Control Board (“ECB”) to hear all violations of the Health Code or any other State or local law or regulation enforced by the Department seeking monetary penalties. The same subdivision also provides that these proceedings will be adjudicated in accordance with the applicable procedures of the Health Tribunal or the ECB. However, the new section inadvertently omitted a provision for service of notices of violation (“NOVs”) to be brought before the ECB.

This rule therefore addresses service of Department NOVs to be heard by ECB; NOVs can be served either personally or by mail or other delivery. The proposed amendments to §3.12 (b) allow any of these methods of service. Currently, the Charter prescribes that when NOVs to be heard by ECB are served personally, the resulting decisions, whether rendered after a hearing or after a default by the respondent, may be docketed, or entered, as judgments in a court, without additional court proceedings, but does not prescribe procedures for other than personal service. The Charter does allow automatic docketing of decisions on NOVs not served personally by several other City agencies, but not those issued by the Health Department.

Proposed Rule Amendments

Adding this provision to § 3.12 is necessary because ECB’s rules provide that NOVs returnable to ECB that are not served personally may be brought before ECB. and may be served “alternatively as provided by the statute, rule or other provision of law governing the violation alleged. Lawful service in a manner other than that provided for in §1049-a(d)(2) shall give the tribunal jurisdiction to hold a hearing or render a decision and order whether after hearing or in default thereof, but such decision and order shall not be entered in Civil Court or any other place provided for entry of civil judgments without court proceedings.” 48 RCNY §3-31 (c).

Thus, the Department is proposing that the Board further amend §3.12 (b) to add provisions for service of NOVs returnable to the ECB.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

The resolution is as follows:

Deleted material is in [brackets]; new text is underlined.

RESOLVED, that §3.12 of Article 3 (General Provisions) 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 as follows:

§3.12 Administrative Tribunal and Environmental Control Board proceedings.

(a) Administrative Tribunal. The Administrative Tribunal established by the Board of Health pursuant to §558 of the Charter is hereby continued. It shall be operated by and within the City's Office of Administrative Trials and Hearings and known as the Health Tribunal at OATH.

(b) Proceedings at the Health Tribunal at OATH and the Environmental Control Board. Where the Department seeks a fine or monetary penalty for a violation of this Code or any other State or local law or regulation enforced by the Department, it shall bring a proceeding at either the Health Tribunal at OATH or at the Environmental Control Board, and such proceedings shall be governed by the procedures of such Tribunal or Board, as the case may be.

~~[(1)]~~ (c) Service of notices of violations returnable to the Environmental Control Board.

(1) Personal service. Notices of violation returnable to the Environmental Control Board may be served in person upon (i) the person alleged to have committed the violation, (ii) the permittee or registrant, (iii) the person who was required to hold the permit or to register, (iv) a member of the partnership or other group concerned, (v) an officer of the corporation, (vi) a member of a limited liability company, (vii) a management or general agent, or (viii) any other person of suitable age and discretion as may be appropriate, depending on the organization or character of the person, business, or institution charged.

(2) Service by mail. Notices of violation returnable to the Environmental Control Board may be served by certified or registered mail through the U.S. Postal Service, or by any type of mail utilizing any other mailing service that provides proof of mailing and receipt, to any such person at the address of the premises that is the subject of the NOV or, as may be appropriate, at the residence or business address of (i) the alleged violator, (ii) the individual who is listed as the permittee or applicant in the permit issued by the Board or the Commissioner or in the application for a permit, or (iii) the registrant listed in the registration form. In the case of service by mail, documentation of delivery or receipt provided by the delivery or mailing service is proof of service of the notice of violation.

~~[(2)]~~ (d) Decisions. The decisions of the Environmental Control Board shall be final; the decisions of the Health Tribunal at Oath shall be final, except in the case of any appeal from an adjudication of a violation of Article 13-E of the Public Health Law.

~~[c]~~ (e) Appeals pursuant to Article 13-E of the Public Health Law. Where there is an appeal from an adjudication of a violation of Article 13-E of the Public Health Law, the Health Tribunal at

OATH shall, pursuant to the applicable provision of the rules of OATH governing such Tribunal, issue a recommended decision to the Commissioner for him or her to review. Within thirty (30) days of the issuance of the recommendation, the respondent may submit to the Department a written argument why the decision should or should not be followed by mailing by certified or registered mail, emailing or delivering by hand a copy of the argument to the General Counsel of the Department. After the Department has received the respondent's argument or after forty-five (45) days have passed from when the Tribunal issued its recommended decision, whichever time is shorter, the Commissioner shall issue a written decision affirming, reversing or modifying the recommended decision, or remanding the appeal back to the Health Tribunal at OATH for further proceedings. The Commissioner's decision shall be served on the respondent by certified or registered mail. Where appropriate, the Commissioner's decision shall order the Tribunal to repay the respondent any penalty that has been paid. Except when the Commissioner remands an appeal to the Health Tribunal at OATH for future proceedings, the Commissioner's decision shall constitute a final agency determination.

Notes: Section 3.12, added by resolution adopted December 13, 2011, reflecting the transfer of the former Department Administrative Tribunal to OATH, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011), was further amended by resolution adopted XX, adding a new subdivision (c) providing for service of notices of violations returnable to the Environmental Control Board; and making conforming technical changes to the section. This section is effective on the effective date of the rules for the Health Tribunal at OATH.

**NEW YORK CITY LAW DEPARTMENT
DIVISION OF LEGAL COUNSEL
100 CHURCH STREET
NEW YORK, NY 10007
212-788-1087**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Service of NOV's Returnable to ECB

REFERENCE NUMBER: 2012 RG 010

RULEMAKING AGENCY: Dept. of Health & Mental Hygiene

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: March 5, 2012

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

**RULE TITLE: Proposed Amendment of Section 3.12 of the NYC Health Code
(Services of Notices of Violation Returnable to the Environmental
Control Board)**

REFERENCE NUMBER: DOHMH-12

RULEMAKING AGENCY: Department of Health and Mental Hygiene

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period because it does not establish a violation, modification of a violation, or modification of the penalties associated with a violation.

/s/ Rachel Squire
Mayor's Office of Operations

March 6, 2012
Date