

**DEPARTMENT OF HEALTH AND MENTAL HYGIENE
COMMISSIONER OF HEALTH AND MENTAL HYGIENE**

NOTICE OF PUBLIC HEARING

**NOTICE OF INTENTION TO AMEND
TITLE 24 OF THE RULES OF THE CITY OF NEW YORK TO ADD A NEW
CHAPTER 24 (“FINES FOR FOOD SERVICE ESTABLISHMENT VIOLATIONS”)**

IN COMPLIANCE WITH SECTION 1043(a) OF THE NEW YORK CITY CHARTER NOTICE IS HEREBY GIVEN OF THE PROPOSED AMENDMENT OF TITLE 24 OF THE RULES OF THE CITY OF NEW YORK TO ADD A NEW CHAPTER 24 (“FINES FOR FOOD SERVICE ESTABLISHMENT VIOLATIONS”).

THE PUBLIC HEARING REGARDING THIS PROPOSAL THAT WAS ORIGINALLY SCHEDULED FOR DECEMBER 17, 2004, HAS BEEN CANCELLED AND RE-SCHEDULED. NOTICE IS HEREBY GIVEN THAT THE DEPARTMENT WILL HOLD A PUBLIC HEARING ON THE PROPOSAL FROM 10:00 A.M. TO 12:00 P.M. ON THURSDAY, JANUARY 13, 2005 IN THE SECOND FLOOR AUDITORIUM AT 125 WORTH STREET, IN LOWER MANHATTAN.

PERSONS INTERESTED IN PRE-REGISTERING TO SPEAK AT THE HEARING SHOULD NOTIFY RENA BRYANT, SECRETARY TO THE DEPARTMENT, IN WRITING, BY MAIL TO 125 WORTH STREET, CN-31, NEW YORK, NEW YORK 10013, OR BY FAX TO (212) 788-4315 BY 5:00 P.M. ON JANUARY 12, 2005. PLEASE INCLUDE A TELEPHONE NUMBER WHERE, IF NECESSARY, YOU MAY BE REACHED DURING NORMAL BUSINESS HOURS. SPEAKERS WILL BE LIMITED TO FIVE (5) MINUTES.

REGISTRATION OF PERSONS WHO WISH TO SPEAK AT THE HEARING WILL BE ACCEPTED AT THE DOOR ON THE DATE OF HEARING. HOWEVER, PREFERENCE WILL BE GIVEN TO THOSE WHO REGISTER BEFORE THE HEARING DATE.

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 DEPARTMENT, 125 WORTH STREET, CN-31, NEW YORK, NEW YORK 10013, (212) 788-5242, BY JANUARY 6, 2005.

WRITTEN COMMENTS REGARDING THE PROPOSAL MUST BE SUBMITTED ON OR BEFORE CLOSE OF BUSINESS JANUARY 13, 2005 TO RENA BRYANT, SECRETARY TO THE DEPARTMENT, BY MAIL TO 125 WORTH STREET, CN-31, NEW YORK, NEW YORK 10013, OR FAX TO (212) 788-4315 OR E-MAIL TO PUBLICCOMMENTS@HEALTH.NYC.GOV.

WRITTEN COMMENTS RECEIVED BY THE SECRETARY 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.

Statutory Authority

Amendment of Title 24 of the Rules of the City of New York is authorized by §§389(b) and 1043 (a) of the New York City Charter (the “Charter”). Charter §389(b) provides that “heads of mayoral agencies shall have the power to adopt rules to carry out the powers and duties delegated to the agency head or the agency by or pursuant to federal, state or local law.” Charter §1043(a) authorizes each agency to “adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law.”

Statement of Basis and Purpose

These rules amend Title 24 by adding a new Chapter 24 codifying the fine schedule to be assessed at the Administrative Tribunal of the New York City Department of Health and Mental Hygiene (“DOHMH” or the “Department”) for violations of the New York City Health Code and New York State Sanitary Code issued by the Bureau of Food Safety and Community Sanitation (“BFSCS”) in conducting food service establishment (“FSE”) inspections.

These fines were previously recommended, and allowed discretion to hearing examiners to adjust them based on mitigating or aggravating factors. Chapter 24 eliminates such discretion. If the hearing examiner sustains a violation cited at the condition level of severity or magnitude in the Notice of Violation, the hearing examiner shall assess a fine in accordance with the fine schedule. The hearing examiner will, however, continue to determine whether the condition level indicated in the Notice of Violation accurately reflects the factual conditions, based on all the evidence presented at a hearing.

Fines within Health Code Range

The amounts of the fines are within the range (\$200 to \$2,000) authorized by §3.12 of the New York City Health Code for violations of the Health Code. Section 3.12 was amended, (effective February 13, 2003), by resolution adopted by the Board of Health after publication of the proposed changes and a public hearing. Section 3.12 currently requires that a minimum fine of \$200 be imposed by a hearing examiner sustaining any Health Code violation. Moreover, if a respondent fails to appear at a hearing, and the hearing examiner finds a default, the fine must be doubled.

Critical violations continue to occur in large numbers in New York City, although the data show that things are improving. Between April, 2003 (when the scoring system was initiated) and October, 2004, among the most commonly cited critical violations associated with risk factors for food borne illness was cross-contamination of food and food equipment, a violation which was cited on a significant percentage of food services establishment inspections. Other risk factors, such as improper personal hygiene practices of food workers, and improper handwashing and bare hand contact with ready-to-eat foods, were also common violations cited during this period. However, the Department’s data show that in the year following implementation of the scoring system, the average number of all critical violations decreased significantly.

Analysis of Department data for the pre-scoring period showed that general violations for which no fine was imposed were more likely to remain uncorrected than critical violations for which the highest fines are imposed. The Department would be most satisfied if restaurants were all compliant with the Health Code and no fines at all were levied. However, years of experience has shown that only application of sufficient fines is effective in reliably improving Health Code

adherence among restaurant operators. Chapter 24's fine schedule is intended to deter the occurrence of the most serious violations which have the greatest risk of causing human illness by providing the highest fines for such violations, and to further deter repeat violations by increasing the fines for the same violations found on subsequent compliance inspections.

Conditions

Evaluating the severity of a violation and considering critical and individual general violations as part of the overall score enable offer a clearer picture of the sanitary condition of the establishment. The *Condition Levels* described in Chapter 23 of these rules have been incorporated in the Chapter 24 fine schedule to be used by hearing examiners at the DOHMH Administrative Tribunal in assessing fines for sustained violations, after Notices of Violations have been adjudicated. The greater the *Condition* level, the higher the fine that may be assessed, and the fine schedule in Chapter 24 reflects the severity of conditions set forth in Chapter 23 of Title 24 of these rules.

Statement pursuant to Charter §1042 – Regulatory Agenda

The proposed rule was not included in the Department's FY 2005 Regulatory Agenda because the need for such rules was not known at that time.

THE PROPOSAL IS AS FOLLOWS:

Note - Matter to be deleted is in [brackets]
Matter underlined is new

Section 1. Title 24 of the Rules of the City of New York is amended by adding a new Chapter 24, entitled "Fine Schedule for Food Service Establishment Violations."

CHAPTER 24

FINE SCHEDULE FOR FOOD SERVICE ESTABLISHMENT VIOLATIONS

§24-01. Introduction and scope

§24-02. Definitions and construction of words and terms

§24-03. Imposition of fines

§24-04. Repeat violations

§24-05 Defaults

§24-06 Effect of other laws and construction

§24-01. Introduction and scope. The schedule of fines in Table 1 of this Chapter shall be imposed for notices of violations issued to food service establishments and non-retail food processing establishments operating pursuant to, or subject to, a permit issued by the Commissioner of Health and Mental Hygiene, returnable to the Administrative Tribunal of the Department of Health and Mental Hygiene. The schedule of fines in Table 1 of this Chapter

shall not, however, apply to adjudications of notices of violations issued to mobile food vending units or mobile food unit operators, and shall not include additional penalties for late payment of fines owing to the Administrative Tribunal.

§24-02. Definitions and construction of words and terms.

Administrative Tribunal shall mean the Administrative Tribunal of the Department established in Article 7 of the Health Code.

Administrative violations are critical violations of the Health Code or other applicable law which are listed under “Administration” in Appendix 23-A to Chapter 23 of these rules.

Condition or condition level. Value (I, II, III, IV or V) based on the number, magnitude or pervasiveness of occurrences, or the seriousness of risk presented by a violation as indicated in Appendix 23-A and Appendix 23-B to Chapter 23 of these rules.

Critical violations are violations of the Health Code or other applicable law listed under the classification “critical violations” in Appendix 23-A to Chapter 23 of these rules and are relatively more likely than “general violations” to contribute to food contamination, illness, or environmental degradation and may represent a substantial risk to the public health.

First reinspection for the purpose of imposition of the fine schedule in this Chapter shall mean a second, or compliance, inspection conducted after an initial inspection.

Food protection certificate holder is a person required to hold a food protection certificate in accordance with Health Code §81.15.

General violations. All violations of the Health Code or other applicable law listed under the classification “general violations” in Appendix 23-A to Chapter 23 of these rules.

Initial inspection. A full sanitary inspection conducted by the Department, which may be the first of a possible series of inspections, to determine if an establishment is operating in compliance with applicable law.

Repeat violation shall mean a further violation of the same provision of the Health Code or other applicable law that was previously cited in a Notice of violation issued to a food service establishment within the previous 12 months, which was upheld and sustained at an Administrative Tribunal hearing.

Second or subsequent reinspection for the purpose of imposition of the fine schedule in this Chapter, shall mean a third or subsequent compliance inspection conducted after a first reinspection.

Violation type shall mean that a violation cited on a notice of violation and for which a fine is being imposed in accordance with Table 1 of this Chapter, has been categorized as a public health hazard, a critical, administrative or general violation, or a failure to comply with Health Code

food protection certificate holder requirements, as such terms are defined in this Chapter and Chapter 23 of these rules.

§24-03. Imposition of fines. The fines in the schedule in Table 1 of this Chapter shall be imposed by Administrative Tribunal hearing examiners, for individual violations cited on notices of violation of the New York City Health Code or other applicable law, and which are sustained after a hearing.

§24-04. Repeat violations. Fines shall be imposed for individual repeat violations and for new violations found on reinspections in accordance with the schedule in Table 1 of this Chapter.

§24-05 Defaults. Whenever there is a finding of a default following failure of a respondent to appear at an Administrative Tribunal hearing, the fines in Table 1 shall be doubled in accordance with §3.12 of the Health Code.

§24-06 Effect of other laws and construction.

(a) These rules shall be read and enforced in accordance with all applicable provisions of law, including, but not limited to, the State Public Health Law and Sanitary Code, the New York City Health Code, and Title 17 of the Administrative Code of the City of New York.

(b) No provision herein shall limit the authority of the Department to conduct such other inspections or take any other action it deems necessary, to enforce any provision of law within the jurisdiction of the Department.

(c) If any provision of this Chapter is adjudged invalid by any court of competent jurisdiction, such judgment shall not affect or impair the validity of the remainder of this Chapter.

Table 1. FINES FOR FOOD SERVICE ESTABLISHMENT VIOLATIONS

<u>TYPE OF VIOLATION</u>	<u>CONDITION</u>				
<u>INITIAL INSPECTION</u>					
<u>Critical Violations:</u>	<u>Condition I</u>	<u>Condition II</u>	<u>Condition III</u>	<u>Condition IV</u>	<u>Condition V</u>
<u>Public Health Hazards (*) (PHH*)</u>	\$400	\$450	\$500	\$600	\$800
<u>Administrative</u>	=	=	=	=	\$1,000
<u>Other Critical</u>	\$300	\$350	\$400	\$500	\$800
<u>General Violations</u>	\$200	\$225	\$250	\$350	
<u>Food Protection Certificate (FPC) Holder</u>	=	=	=	=	\$500
<u>FIRST REINSPECTION</u>					
<u>Critical Violations:</u>	<u>Condition I</u>	<u>Condition II</u>	<u>Condition III</u>	<u>Condition IV</u>	<u>Condition V</u>
<u>New PHH (*)</u>	\$450	\$500	\$550	\$650	\$800
<u>Repeat PHH (*)</u>	\$500	\$550	\$600	\$700	\$900
<u>Administrative</u>	=	=	=	=	\$1,000
<u>New or Repeat</u>					
<u>New Other Critical</u>	\$350	\$400	\$450	\$550	\$700
<u>Repeat Other Critical</u>	\$500	\$550	\$600	\$700	\$900
<u>New General Violations</u>	\$225	\$250	\$300	\$350	
<u>Repeat General Violations</u>	\$275	\$300	\$350	\$400	
<u>New FPC Holder</u>	=	=	=	=	\$700
<u>Repeat FPC Holder</u>	=	=	=	=	\$900
<u>SECOND OR SUBSEQUENT REINSPECTION</u>					
<u>Critical Violations:</u>	<u>Condition I</u>	<u>Condition II</u>	<u>Condition III</u>	<u>Condition IV</u>	<u>Condition V</u>
<u>New PHH (*)</u>	\$600	\$650	\$700	\$800	\$1,000
<u>Repeat PHH(*)</u>	\$700	\$750	\$800	\$900	\$1,000
<u>Administrative</u>	=	=	=	=	\$1,000
<u>New or Repeat</u>					
<u>New Other Critical</u>	\$500	\$550	\$600	\$700	\$1,000
<u>Repeat Other Critical</u>	\$700	\$750	\$800	\$900	\$1,000
<u>New General Violations</u>	\$250	\$300	\$350	\$400	
<u>Repeat General Violations</u>	\$450	\$500	\$550	\$600	
<u>New FPC Holder</u>	=	=	=	=	\$800
<u>Repeat FPC Holder</u>	=	=	=	=	\$1,000