

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

**NOTICE OF ADOPTION OF AMENDMENTS TO CHAPTER 6 (FOOD UNITS)
OF TITLE 24 OF THE RULES OF THE CITY OF NEW YORK**

In compliance with §1043 (b) of the New York City Charter (the “Charter”), and pursuant to the authority granted to the Commissioner of the Department of Health and Mental Hygiene (the “Department”), a Notice of Intention of the proposed amendment of Chapter 6 (Food Units) was published in the City Record on June 13, 2007, and a public hearing was held on July 26, 2007. Four comments were received. No further amendments have been made to the proposed rule change.

Statutory Authority

These amendments are authorized by §§389(b) and 1043 (a) of 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.” These rules are further authorized pursuant to §17-324 of the Administrative Code of the City of New York (the “Administrative Code”) which provides that “the commissioner ... shall make such rules as deemed necessary for the proper implementation and enforcement of this subchapter.”

Statement of Basis and Purpose

The Department of Health and Mental Hygiene is adopting two amendments to Chapter 6 (“Food Units”) of Title 24 of the Rules of the City of New York (“RCNY”). First, the Department clarifies that the removal or transfer of a decal on a mobile food vending unit by persons other than employees of the Department shall constitute an illegal transfer that will result in the revocation of such permit or decal. Second, the Department is codifying the current practice of distinguishing violations received by mobile food vendor licensees. Since 1986, applicants for new and renewal licenses and permits have been required to pay only the fines and penalties accumulated for serious violations classified as “A” violations as a prerequisite before renewing or receiving a new license or permit. Fines and penalties accumulated for other less serious “B” violations must still be paid, but the satisfaction of such fines and penalties was not a prerequisite for the renewal or receipt of a license or permit. This rule classifies all violations by mobile food vendors of any provisions of the New York City Health Code (“Health Code”), the State Sanitary Code [10 NYCRR Chapter 1] (“Sanitary Code”), and Chapter 6 of these rules as “A” violations for which fines and penalties must be paid before renewal or issuance of any mobile vending license or mobile vending unit permit. The rule also codifies certain violations of Title 17 of the Administrative Code issued for improper street placement of mobile food units and unlicensed mobile vending as “A” violations.

Applicable Law

Mobile food vending in New York City is regulated by Subchapter 2 (“Food Vendors”) of Chapter 3 of Title 17 of the Administrative Code; Articles 5, 81 and 89 of the Health Code; Part 14 of the Sanitary Code and Chapters 6 and 20 of 24 RCNY. Pertinent to the rule change are the following provisions of these laws and rules applicable to renewal and issuance of mobile vending licenses and permits:

Administrative Code § 17-317(b) provides that the Commissioner “shall not issue or renew a food vendor license ... if the applicant, licensee, ... failed to pay any fine, penalty or judgment duly imposed pursuant to the provisions of this subchapter or any rules promulgated thereunder.”

Health Code §5.05(f) bars the Commissioner from issuing a license or permit unless “there are no fines, penalties or forfeitures imposed by the Administrative Tribunal established by Article 7 which are due and payable by the applicant or the permittee.”

Notices of violations (“summonses” or “NOV’s”) for which civil penalties are sought are adjudicated at the Environmental Control Board (“ECB”), in accordance with Administrative Code §17-325(d). Criminal summonses are returnable to Criminal Court. ECB’s penalties for Health Code, Administrative Code and Chapter 6 mobile vendor violations are now codified in ECB’s rules. *See*, 15 RCNY §§31-107 (“Food Vendor Administrative Code Penalty Schedule”) and 31-110 (“Health Code and Miscellaneous Food Vendor Violations Penalty Schedule”). These fines and penalties will be unaffected by the rule change.

Basis for rule regarding “A” violations

In 1981 certain mobile food vendor licensees challenged the Administrative Code provision that requires vendors to pay all fines and penalties for violations of the Administrative Code and Health Code prior to receiving or renewing a license or permit. *See, George Iliopoulos v. Koch* (Sup. Ct. NY Co.), Index No. 9342/81. In 1986, the City and plaintiffs settled the action, the City agreeing that it would deny renewal or issuance of mobile vending licenses and permits only for non-payment of fines and penalties imposed for specific serious violations deemed “A” violations. Fines and penalties accumulated for other less-serious “B” violations would still need to be satisfied, but such satisfaction has not been a condition for the renewal or issuance of a mobile vending license or permit. *Iliopoulos* further distinguishes “A” and “B” violations for determining which violations may be predicates for denial, revocation or suspension of mobile vending licenses and permits pursuant to Administrative Code §17-317 (a)(2). This provision authorizes the Commissioner, after due notice and an opportunity to be heard, to refuse to issue, suspend or revoke a mobile vending permit or license if an applicant, licensee, permittee, or their employees “have been found guilty of four or more violations of this subchapter or any rules promulgated pursuant thereto within a two-year period or have been found guilty of a violation of the provisions of part fourteen of the state sanitary code or of the New York city health code, ...”

This rule maintains the original *Iliopoulos* “A” classification of certain Title 17 mobile vending violations, related to street placement of carts, pedestrian public safety and adds to the “A” list vending foods without a license or permit. The New York City Police Department, which is also authorized to enforce these provisions of the Administrative Code, supports continuing these distinctions.

The rule eliminates any classifications for violations of applicable provisions of the Health Code, State Sanitary Code and Department regulations for a number of reasons. The passage of time, the repeal and reenactment of Article 81, and the Department’s experience with mobile vending enforcement have made it clear that categorizing Health Code and Sanitary Code violations as more or less serious serves no public health purpose, since the only purpose in issuing summonses and trying to collect fines and penalties for such violations is to secure compliance with these important public health safeguards. If some Health Code violations are not punishable, and fines and penalties for such violations are not payable, why should any vendor *ever* comply with those Health Code provisions? As noted above, §17-317 (a)(2) of the Administrative Code authorizes the Commissioner to revoke a food vending license if the licensee has been found in violation of *four* violations of the Administrative Code in a two-year period, but only *one* violation of the Health Code or Sanitary Code during the same period, indicating that more weight is to be accorded compliance with the Health Code and Sanitary Code. Finally, when the Board of Health repealed and reenacted Article 81 of the Health Code in 1996, it eliminated, renumbered

and combined many of the Health Code violations previously categorized in the *Iliopoulos* stipulation as “A” violations, and added important new provisions to protect the public health to that Article.

It should also be noted that, while Department rules that codify the Department’s inspection procedures for food service establishments classify violations as critical and general, *all* fines and penalties imposed on fixed location food service establishments for *all* sustained or defaulted violations of the Health Code and Sanitary Code must be paid before any such establishment’s operator may renew its permit. See, 24 RCNY Chapter 23; Health Code §5.05(f). Accordingly, the classification of all mobile vendor Health Code and Sanitary Code violations as “A” violations is consistent with the Department’s rules, as well as with the intent of the Health Code and the Administrative Code.

Although a comment on the proposed change questioned the Commissioner’s authority to make this rule change, the rule is clearly within the Commissioner’s authority under the New York City Charter. Moreover, the Department continues to believe that the best interests of the public will be served by a rule which emphasizes the gravity of violations of Article 81 of the Health Code and the Sanitary Code.

Basis for rule to clarify “transfer” and “assignment” of decals and licenses

The rule further amends Chapter 6 by adding a provision to clarify which mobile vending industry practices will be regarded as prohibited transfers or assignments of vendor licenses, permits, and the decals or insignias that are affixed to mobile vending units. Health Code §5.11 provides that the “purported or attempted transfer of a permit to a person not named therein as permittee ... automatically revokes such permit.” Health Code §5.13 holds permittees accountable for complying with the conditions of the permit and the Health Code and makes them jointly and severally liable for violations committed by their agents or employees. The Department is not proposing to prevent permittees from employing or authorizing other licensed vendors from operating their carts. However, licenses, permits and decals shall be subject to immediate seizure by Department inspectors if, upon inspection, the Department observes evidence of a prohibited transfer of a license, permit or decal. Under this rule, a prohibited transfer of a decal will include the removal, for any reason, of a decal from the vending unit to which the decal was applied by the Department inspector at the time the unit passed inspection, and its reattachment to or use on the same or another vending unit, by anyone but a Department inspector. If a cart is in an accident, otherwise damaged, or requires repairs affecting the part of the cart unit to which the Department attached the decal, removal of the Department decal by anyone other than authorized Department inspectors is explicitly prohibited. Reinspection of the cart and attachment of a new decal by the Department will be required in every such instance. The rule is intended to enable the public, as much as possible, to buy food only from carts that have passed Department inspection. When the Department identifies an improper decal transfers, it will act to revoke both the mobile vending unit permit and the permittee’s mobile vending license. This rule provides further notice to vendors that such practices constitute illegal transfers and are prohibited.

Use by a person other than the licensee of a licensed vendor’s blue paper license or badge is also prohibited and the rule authorizes the immediate seizure of a vendor’s blue paper license or laminate badge when either is found being used unlawfully by a person to whom it was not issued. The Department’s concern is that only a food vendor who has a required food protection course and complied with all other legal duties be authorized to prepare and sell food to the public.

Statement Pursuant to Charter Section 1042 - Regulatory Agenda

Through an oversight this rule change was not included in the Department’s Regulatory Agenda.

THE RULE IS AMENDED AS FOLLOWS:

Note - Matter to be deleted is in [brackets]

Matter underlined is new

Section 1. Subdivision (c) of §6-01 (Mobile Food Units) of Chapter 6 (Food Units) of Title 24 of the Rules of the City of New York, is amended, to be printed to read as follows:

§6-01 Mobile Food Units.

* * *

(c) [*Inspection.*] *Inspections.*

(1) *Pre-permit.* No mobile food unit permit or decal, plate or insignia shall be issued without [prior proof, satisfactory to the department,] a pre-permit inspection of the unit by the Department and its determination that the unit is of sanitary construction and design, equipped with adequate and sufficient facilities to properly handle and store the foods being vended, and that the unit is serviced and stored from a[n approved] depot, commissary or other facility operating with a permit issued pursuant to Article 81 of the Health Code.

(2) *Re-inspections required.* Any mobile food unit that has been damaged as a result of an accident, or that otherwise requires or has undergone any repair or alteration at any time after a pre-permit inspection, shall be re-inspected by the Department, and a new decal, plate or insignia shall be affixed by the Department, if the unit passes such inspection, before such unit may be used to vend food.

(3) *Unauthorized decal removal or transfer voids permit.* Any removal of a decal, plate or insignia from the place on a mobile food unit where an employee of the Department originally affixed the decal, plate or insignia, and the determination by the Department that the decal, plate or insignia has been reattached to another place on the same unit or to any place on any other unit by a person other than an employee of the Department, shall constitute a prohibited transfer of such decal, plate or insignia, voiding such decal, plate or insignia and permit. Such voided decal, plate or insignia and the vendor's mobile food unit permit may be seized by any employee or agent of the Department. Any permittee whose decal, plate or insignia and permit are seized pursuant to this paragraph may request an opportunity to be heard and to show cause why such decal, plate or insignia and permit should not be deemed permanently revoked.

§2. Chapter 6 (“Food Units”) of Title 24 of the Rules of the City of New York, is amended, to add a new §6-05, to be printed to read as follows:

§6-05 Violations.

(a) Health Code and Sanitary Code violations. Every person renewing a mobile food vending license or a mobile food unit permit, or applying for a new mobile food vending license or mobile food unit permit shall pay all fines and penalties for all “A” violations as defined by subdivision (b) of this section that have been adjudicated, or for which the licensee, permittee or applicant for a license or permit has been found in default. Proof of payment of all such fines and penalties shall be submitted prior to issuance of a new or renewal license or permit.

(b) For the purposes of mobile vending permit or license renewal, or issuance of a new license or permit, all violations of the New York city health code, the state sanitary code, these rules and the violations of the administrative code of the city of New York listed in subdivision (d) of this section where the licensee, permittee or applicant is found in violation as a result of a hearing on the merits or by default, shall be deemed “A” violations.

(c) The commissioner may refuse to issue a mobile food vending license or a mobile food unit permit and may, after due notice and an opportunity to be heard, in addition to any other penalties, refuse to renew, suspend or revoke such a license or permit when the applicant, licensee, permittee, its officers, directors, shareholders, members, managers or employees have been found to be in violation of four or more of the provisions of subchapter 2 of chapter 3 of title 17 of the administrative code of the city of New York that are classified as “A” violations in subdivision (d) of this section within a two-year period or have been found to be in violation of the provisions of part fourteen of the state sanitary code or of the New York city health code, or the applicant, licensee, permittee, its officers, directors, shareholders, members, managers or employees have pending any unanswered summonses for a violation of a provision of subchapter 2 of chapter 3 of title 17 of the administrative code of the city of New York that is classified as an “A” violation in subdivision (d) of this section.

(d) Administrative Code violations. For the purposes of revocation or suspension of mobile food permits or licenses, or of determining whether permits or licenses shall be renewed or new licenses and permits issued, violations of the following provisions of subchapter 2 (“Food Vendors”) of chapter 3 (“Licenses and Permits”) of title 17 of the administrative code of the city of New York, or successor provisions, where the licensee, permittee or applicant is found in violation as a result of a hearing on the merits or by default, shall be deemed “A” violations:

Admin. Code

Section

Description

§17-307(a) Unlicensed mobile food vendor

§17-307(b) Unpermitted mobile food unit

§17-307(d) Vending of unapproved items

§17-311 Failure to display mobile food vending license; mobile food unit permit and/or
mobile food unit decal, plate or insignia.

§17-314(a) Failure to permit regular inspections

§17-314(b) Failure to give supplier/depot/commissary information

§17-314(c) Sale of unauthorized foods without written approval

§17-314.1 Sale, loan, lease or transfer of license, permit or decal, plate or insignia

§17-315(a) Vendor on sidewalk allows less than 12 feet as pedestrian path; or cart not at,
or abutting curb

§17-315(e) In bus stop, or less than 10 ft. from drive, subway, crosswalk, etc.

§17-315(j) Failure to move when ordered by police officer after notice of exigent
circumstances given

§17-316 Transfer of food to unlicensed food vendor for resale

Ch 6 adoption.DOC