

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BOARD OF HEALTH

NOTICE OF ADOPTION
OF AMENDMENTS TO ARTICLE 7 OF THE NEW YORK CITY HEALTH CODE

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, a notice of public hearing and notice of proposed amendment of Article 7 (Administrative Tribunal) of the New York City Health Code (the “Health Code”) was published in the City Record on December 17, 2010 and a public hearing was held on January 21, 2011. No persons testified, and one written comment was received. In response to this comment and a comment from Department staff, several changes were made to the proposal. At a meeting on March 15, 2011, the Board of Health adopted the following resolution.

STATUTORY AUTHORITY

These amendments to the New York City Health Code (the “Health Code”) are promulgated pursuant 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 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As part of a comprehensive review of the Health Code, the Board of Health repealed and recodified Article 7 by resolution adopted June 18, 2008.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 Board of Health is further amending §7.09 (Appearances) and §7.11 (Hearings and mail adjudication) of this Article to authorize telephone or electronic adjudications and to facilitate settlements.

Support for the amendments was received in a comment from the Director of Operations of the New York State Restaurant Association Greater New York City Chapters. The comment requested that the following additional changes be made: allowing respondents to cross-examine inspectors during telephone or electronic hearings; vacating defaults when respondents request adjudications by mail postmarked the day before a scheduled hearing and the request is received after the date of hearing; extending the proposed deadline for vacating a default from 60 days to 120 days; and imposition of penalties for food service establishment violations in accordance with the recommended penalty schedule of the Department’s Bureau of Food Safety and Community Sanitation (BFSCS). The Department agrees that the resolution should be amended to allow cross-examination of witnesses during telephone or other electronic hearings and to permit defaults to be vacated when written requests for mail adjudication with timely postmarks are received after the date of the hearing. In addition, in response to a request from Department staff, the term “reconsider” or “reconsideration” has been amended in §7.09 and §7.17 (c) with respect to reopening defaults.

Allowing hearings to take place by means of telephone and other electronic media will make the Administrative Tribunal more accessible to respondents. Currently, respondents are

required to travel from all parts of the City to the Tribunal's single hearing location at 66 John Street in downtown Manhattan. The travel and waiting times associated with appearing in person at the Tribunal can significantly increase the time that respondents are able to devote to their businesses. Allowing the Department to offer telephone hearings could relieve that burden. Telephone and electronic hearings would be optional. They would be conducted only in cases where the Department and the respondent were willing to engage in them, and anyone wishing to appear in person at the Tribunal could still do so. The rules of several New York State government agencies currently authorize telephone hearings. Accordingly, subdivision (a) of §7.09 is being amended, and a new subdivision (h) of §7.11 has been added to authorize such hearings. The Department originally proposed that telephone and electronic hearings only be authorized in cases where no witnesses other than the respondent would testify. However, in response to a comment received from the New York State Restaurant Association, the Department has deleted this restriction. Respondents can still knowingly waive the right to cross examine Department witnesses in person, and a hearing examiner can, in a particular case, require the parties to appear in person if he or she determines that it is necessary to see a witness in order to assess credibility. The Department agrees that there is no reason to categorically exclude cases in which other witnesses are going to testify. In addition, paragraph (4) of §7.09 (a) has been further amended to allow all parties, not only respondent to request an adjournment. Subdivision (a) of §7.09 has also been amended to reference appearances by representatives in §7.21.

Subdivision (d) of §7.09 has been amended to extend the time for reopening a default as of right from thirty days to sixty days. In response to a comment from Department staff, the term "reconsider a default" has been amended throughout Article 7 by substituting the term "motion to vacate a default" since the latter term more accurately describes Tribunal procedures. Extending the time for reopening a default will benefit respondents who inadvertently miss the current deadline of thirty days after mailing or receipt of a notice of default decision. It should also facilitate operations at the Administrative Tribunal, reducing the time spent by hearing examiners in reviewing second requests to reopen defaults and enable hearing examiners to devote more of their time to adjudication of notices of violations on the merits. The New York State Restaurant Association suggested in its comment that the sixty days proposed be extended even longer, to 120 days. The Department, however, believes that sixty days is sufficiently long and that it is in the interest of public health that respondents correct cited violations as promptly as possible. Prolonging the time for notices of violations to be adjudicated would not serve this interest.

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. Accordingly, this provision has been amended, authorizing 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 before the scheduled date of the hearing or bears a postmark indicating that it was mailed to the Tribunal before the scheduled date of a hearing. If the request bearing such a postmark is received by the Tribunal after a decision on default has been issued, such default shall be vacated automatically; or

(4) participating in a hearing conducted by telephone or other electronic media when the opportunity to do so is offered by the Department, provided, however, that a telephone or electronic hearing may be adjourned for a live hearing if the hearing officer determines that such an adjournment is necessary, or if any party requests 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 make a motion in writing requesting [request in writing] that a default [decision be reconsidered,] be vacated, if the [request to reconsider] motion to vacate 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] motion to vacate 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] motion to vacate 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] motion 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 March 15, 2011 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 make a motion to vacate 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.

[(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 March 15, 2011 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.

RESOLVED, that subdivision (c) of §7.17 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 as follows:

§7.17 Review Board

* * *

(c) A respondent may seek to review, in whole or in part, any final decision of a hearing examiner, other than a decision rendered on default by the respondent. However, neither a denial [to reconsider] of a motion to vacate a default decision nor a plea admitting the violations charged shall be subject to review by the Review Board. Within thirty days of the Tribunal delivering or mailing the decision to the respondent or authorized representative, such respondent may file a notice of appeal on a form prescribed by the department, accompanied by a brief statement setting forth the specific reasons why the decision should be reversed, remanded or modified. Filing a notice of appeal shall not stay the collection of any fine or other the penalty imposed by the decision. No appeal shall be permitted unless the fine or penalty imposed has been paid prior to or at the time of the filing of the notice of appeal, or the respondent may post a cash or recognized surety company bond in the full amount imposed by the decision and order appealed from. Appeals decisions shall be made upon the entire record of the hearing and the evidence before the hearing examiner. Appeals may be decided without the appearance of the respondent, but the respondent may make a request to appear before the Review Board at the time of filing the notice of appeal.

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Notes: Subdivision (c) of §7.17 was amended by Board of Health resolution adopted March 15, 2011 to substitute the term “motion to vacate” for “to reconsider” in the provision that neither a denial *to reconsider* a default decision nor a plea admitting the violations charged shall be subject to review by the Review Board.