

DEPARTMENT OF HEALTH AND MENTAL HYGIENE

BOARD OF HEALTH

NOTICE OF ADOPTION
OF AMENDMENTS TO ARTICLE 3
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 intention to amend Article 3 of the New York City Health Code (the “Health Code”) was published in the City Record on March 16, 2012 and a public hearing was held on April 18, 2012. No persons testified, no written comments were received, and no changes have been made to the proposed resolution. At its meeting on June 12, 2012, the Board of Health adopted the following resolution.

Statement of Basis and Purpose

Statutory Authority

These amendments to the New York City Health Code (the “Health Code”) are issued in accordance with §§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 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 a "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 dated 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 completes 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 Board resolution, the amendments (including the repeal of Article 7 and the amended §3.12) would not be effective until OATH’s rules for the Health Tribunal at OATH became effective.

The new §3.12 (“Administrative Tribunal”) incorporates 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 §3.12 inadvertently omitted a provision for service of notices of violation (“NOVs”) to be brought before the ECB.

This resolution amends §3.12 to add, in a new subdivision (c), provisions for service of NOVs returnable to the ECB, and provides that NOVs can be served either personally or by mail or other delivery. 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. The Charter provision does not prescribe procedures for other than personal service, and although it authorizes automatic docketing of decisions on NOVs not served personally by several other City agencies, NOVs not personally served by the Health Department do not result in decisions that are automatically docketed or entered as judgments.

Adding this provision to § 3.12 is necessary because ECB’s rules provide that NOVs returnable to ECB that are not personally served 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).

“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 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 to OATH of the former Department Administrative Tribunal, in accordance with the Mayor's Executive Order No. 148 (June 8, 2011), was further amended by resolution adopted June 12, 2012, 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 shall be effective on the effective date of the rules for the Health Tribunal at OATH.