

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, notice of intention to amend Article 7 (Administrative Tribunal) of the New York City Health Code (the “Health Code”) was published in the City Record on June 26, 2009 and a public hearing was held on July 29, 2009. No testimony or comments were received. At its meeting on September 22, 2009, the Board of Health adopted the following resolution.

STATUTORY AUTHORITY

These amendments to the Health Code are promulgated pursuant to §§558 and 1043 of the Charter. Sections 558(b) and (c) of the Charter empower the Board of Health to amend the Health Code and to include in the Health Code all matters to which the authority of the Commissioner and the Department of Health and Mental Hygiene (the Department) extends. Section 1043 grants the Department rule-making authority.

STATEMENT OF BASIS AND PURPOSE

The Board of Health, at its meeting on June 18, 2008, adopted a resolution repealing and reenacting Article 7 of the New York City Health Code (Administrative Tribunal). Thereafter, the Department requested and the Board further amended §7.09 (Appearances) and §7.11 (Hearings and mail adjudications) of this Article. Subdivision (d) of §7.09 provides that a default may be found if the respondent fails to appear at a hearing of a notice of violation. The hearing examiner, after finding the respondent in default, will then review the allegations in the notice of violation, and may issue a default decision, finding the respondent in violation of the specific law or regulations cited. A respondent is notified of the default decision by certified mail. A respondent may then, within 30 days of the mailing of the notice of decision, request that the Tribunal vacate or reopen the default. The Tribunal has reported that respondents or their representatives often come to the Tribunal and ask for a copy of the default decision in order to expedite reopening of the default. This is usually done because they discover that they can’t renew their permits because of an unpaid default penalty, and the Tribunal has been providing copies of default decisions upon request. While §7.09 (d) neither prohibits nor allows this practice, this amendment authorizes and codifies this practice in such instances. The Tribunal has drafted a new Notice of Appearance form and added a box to capture a signature to show personal receipt of the default decision. The amendment further provides that the thirty days for a respondent to request that a default be reopened would start to run from the earlier of the date of certified mailing or the date the copy is provided personally to the respondent or respondent’s representative. The amendment does not require the Department to serve notices of decision on default personally, and does not extend the thirty days allowing a respondent to reopen or vacate a default. Subdivision (h) of §7.11 has also been amended to reflect the change in §7.09 (d), authorizing mailing and personally providing a copy of a default decision to a respondent.

Statement Pursuant to Charter § 1043

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.

The amendment is as follows:

Matter underlined is new

Matter to be deleted is indicated by [] brackets

RESOLVED, that subdivision (d) of §7.09 of Article 47 (Administrative Tribunal) of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, adopted by resolution on the eighteenth of June, two thousand eight, be, and the same hereby is, amended, to be printed together with explanatory notes, to read as follows:

§7.09 Appearances.

* * *

(d) Failure by the respondent to appear in person, by sending an attorney or other authorized representative, or by mail shall constitute a waiver of the right to a hearing and shall authorize the hearing examiner, without further notice to the respondent, to find that the respondent is in default and that the facts are as alleged in the notice of violation, and to render a default decision sustaining the allegations and imposing a penalty pursuant to Article 3 of this Code or as authorized by other applicable law. If, before issuing a default decision, the Tribunal finds 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 and instead adjourn the matter for a new hearing date. A decision that is adverse to a respondent by reason of the respondent’s default shall be issued 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 request in writing that a default decision be reconsidered, if the request to reconsider is postmarked or received by the Tribunal within thirty 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 request to reconsider a 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, shall be reviewed by a hearing examiner who shall determine if it establishes a reasonable excuse for the default and a legally sufficient basis to reconsider a default decision. 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 to vacate a default decision shall not be subject to review by the Review Board.

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Notes: Subdivision (d) of §7.09 was amended by resolution of the Board of Health adopted on September 22, 2009 to authorize the Tribunal to alternatively notify a respondent or representative of a default by certified mailing, or by providing a copy of a default decision to a respondent or respondent's representative who personally appears at the Tribunal and requests such a copy. The amendment does not require personal service of any notices of decision issued on default of the respondent. A respondent still has thirty (30) days to request reconsideration of a default and the time is counted from the earlier of the date of mailing or date on which a copy of the default decision is personally provided.

RESOLVED, that subdivision (h) of §7.11 of Article 47 (Administrative Tribunal) of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, adopted by resolution on the eighteenth of June, two thousand eight, be, and the same hereby is, amended, to be printed together with explanatory notes, to read as follows:

§7.11 Hearings and mail adjudications.

* * *

(h) 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 a violation is sustained, 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: Subdivision (h) of §7.11 was amended by resolution adopted by the Board of Health on September 22, 2009 to be consistent with provisions of subdivision (d) of §7.09 regarding notification of a default decision.