

**City of New York
Office of Administrative Trials and Hearings**

Notice of Promulgation of Rule

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED in the Office of Administrative Trials and Hearings (OATH) in accordance with Sections 1049 and 1043 of the New York City Charter that OATH amends section 6-21 of subchapter E of chapter 6 of title 48 of the Rules of the City of New York, concerning requests for new hearings after default. The proposed rule was published in *The City Record* on August 27, 2018, and a public hearing was held on September 26, 2018.

No one testified at the public hearing concerning this rule. OATH received one written comment about this rule from Jack Jaffa & Associates under the heading “Limited Adjournments/Rescheduling,” stating that the proposed rule mandates that a second default decision is not subject to review or appeal at the Tribunal. Notably, this amendment is merely a clarification of that fact. The amendments to section 6-21(e) do not address the processes by which a respondent may request a reschedule or adjournment. OATH did not make any additional amendments to the rule based on this written comment.

Statement of Basis and Purpose of Final Rule

The Office of Administrative Trials and Hearings (“OATH”) amends section 6-21 of subchapter E of chapter 6 of title 48 of the Rules of the City of New York, concerning requests for new hearings after a failure to appear. OATH replaces references to “motion to vacate a default” with “request for a new hearing after default,” which is easier for the public to understand and is similar to the terminology on OATH’s forms and website. OATH also made amendments to clarify subdivisions (e) and (f) of section 6-21. Subdivision (e) applies to respondents seeking to file a second request for a new hearing, and subdivision (f) applies to respondents filing a first request for a new hearing at least one year after receipt of the default decision.

The first paragraph of subdivision (e) clarifies that respondents who have defaulted twice are not eligible to file another request for a new hearing and that the second default decision is the Tribunal’s final determination, subject to judicial review pursuant to Article 78 of the New York Civil Practice Law and Rules. The second paragraph of subdivision (e) clarifies the exception under which the Chief Administrative Law Judge or his or her designee may consider granting a new hearing after the issuance of a second default decision. These amendments make clear that there are no additional administrative procedures to exhaust after the receipt of a second default decision in order to file a petition pursuant to Article 78.

The amendments to subdivision (f) clarify that the discretion of the Chief Administrative Law Judge or his or her designee to consider a request for a new hearing more than one year from the date of the default decision applies only if it is the first such request made by the respondent.

New material is underlined.

[Deleted material is in brackets.]

Section 1. Section 6-21 of Subchapter E of Chapter 6 of Title 48 of the Rules of the City of New York is amended to read as follows:

(a) Form of [Motion] Request. A [motion to vacate a default] request for a new hearing after default (motion to vacate a default) is a [request] motion by a Respondent for a new hearing after the Respondent did not appear and a default decision was issued. The Respondent must make [this motion] the request by application to the Tribunal on a form approved by the Tribunal. The [motion] request must be dated, contain a current mailing address for the Respondent; explain how and when the Respondent learned of the violation and be certified to under the penalties of perjury. If the [motion] request is made by an attorney or other representative, the [motion] request must explain the relationship between the Respondent and the person making the [motion] request.

(b) A first [motion to vacate a default] request for a new hearing after default by a Respondent that is submitted within sixty (60) days of the mailing or hand delivery date of the default decision will be granted. A [motion to vacate a default] request for a new hearing after default that is submitted by mail must be postmarked within sixty (60) days of the mailing or hand delivery date of the default decision.

(c) A [motion to vacate a default] request for a new hearing after default that is submitted after sixty (60) days of the date of the mailing or hand delivery date of the default decision must be filed within one (1) year of the date of the default decision and be accompanied by a statement setting forth a reasonable excuse for the Respondent's failure to appear and any documents to support the [motion to vacate the default] request. The Hearing Officer will determine whether a new hearing will be granted.

(d) Reasons for Failing to Appear. In determining whether a Respondent has shown a reasonable excuse for failing to appear at a hearing, the Hearing Officer will consider:

- (1) Whether the summons was properly served pursuant to applicable law.
- (2) Whether the Respondent was properly named, including but not limited to:
 - (i) Whether the Respondent was cited generally as "Owner" or "Agent" on all copies of the summons served on the Respondent; or
 - (ii) Whether the Respondent was an improper party when the summons was issued, such as:
 - (A) An individual who was deceased or legally incompetent on the hearing date upon which the Respondent did not appear; or
 - (B) For a premises-related violation, the Respondent was not the owner, agent, lessee, tenant occupant or person in charge of or in control of the place of occurrence on the date of the offense.
- (3) Whether circumstances that could not be reasonably foreseen prevented the Respondent from attending the hearing.
- (4) Whether the Respondent had an emergency or condition requiring immediate medical attention.
- (5) Whether the matter had been previously adjourned by the Respondent.

- (6) Whether the Respondent attempted to attend the hearing with reasonable diligence.
- (7) Whether the Respondent's inability to attend the hearing was due to facts that were beyond the Respondent's control.
- (8) Whether the Respondent's failure to appear at the hearing can be attributed to the Respondent's failure to maintain current contact information on file with the applicable licensing agency.
- (9) Whether the Respondent has previously failed to appear in relation to the same summons.
- (10) Any other fact that the Tribunal considers to be relevant to the motion to vacate.

(e) Defaulting twice on the same summons.

(1) If, after a request for a new hearing has been previously granted, [and a new default decision has been issued, a motion to vacate the second default decision in relation to the same summons will not be granted.] a Respondent defaults on the same summons, the second default shall not be eligible for a request for a new hearing. The second default decision is the Tribunal's final determination and is not subject to review or appeal at the Tribunal. Judicial review of the decision may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.

(2) Notwithstanding the forgoing, upon application, the Chief Administrative Law Judge or his or her designee [will have the discretion, in] may grant a new hearing after default upon a showing of exceptional circumstances and in order to avoid injustice [, to grant a request for a new hearing].

(f) Except as otherwise stated in § 5-03 of [the] this Title, the Chief Administrative Law Judge or his or her designee will have the discretion, in exceptional circumstances and in order to avoid injustice, to consider a [motion to vacate a default filed] Respondent's first request for a new hearing after default made more than one (1) year from the date of the default decision.

(g) If a [motion to vacate a default] request for a new hearing after default is granted, the Tribunal will send a notice to the Respondent at the Respondent's address provided on the motion. If the Respondent is deceased or legally incompetent, a notice will be sent to Respondent's representative at the address provided by the representative on the motion. Notice will also be sent to the Petitioner upon request. If the Respondent is unable to appear on the hearing date scheduled after such motion is granted, the Respondent may request that the hearing be rescheduled one (1) final time.

(h) If a [motion to vacate a default] request for a new hearing after default is granted and the Respondent has already made a full or partial payment, no request of a refund will be considered until after the hearing is completed and a decision issued.

(i) A decision to grant a [motion to vacate a default] request for a new hearing after default is not a final decision on the issues of whether the Respondent was properly served or a proper party on the date of the offense.

[(i)] (j) A denial of a [motion to vacate a default] request for a new hearing after default is the Tribunal's final determination and is not subject to review or appeal at the Tribunal. Judicial review of the denial may be sought pursuant to Article 78 of the New York Civil Practice Law and Rules.