

NEW YORK CITY
OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS
ENVIRONMENTAL CONTROL BOARD

BOARD MEETING

Training Room 143, 12th Floor
100 Church Street, New York, New York

March 31, 2016

9:24 A.M. - 11:51 A.M.

March 31, 2016

MEMBERS PRESENT:

Lt. Dan Albano, Esq. - Police Department
Fidel F. Del Valle, Esq. - Chair, OATH
Ernest J. Cavallo - Citizen Member
Shamonda Graham - Department of Buildings
Joseph Gregory, Esq. - Fire Department
Elizabeth Knauer, Esq. - Citizen Member
Madelynn Liguori, Esq. - Department of Sanitation
Jorge Martinez, Esq. - Department of Health and Mental
Hygiene
Russell Pecunies, Esq. - Department of Environmental
Protection
Douglas Swann - Citizen Member

ALSO PRESENT:

Simone Salloum - Counsel to the Board, OATH/ECB
Frances Shine - Secretary to the Board, OATH/ECB

Rachel Amar - Special Assistant to the Commissioner, OATH
Helaine Balsam, Esq. - Deputy General Counsel, OATH
Denis Brogan - Assistant General Counsel, OATH
John Burns - First Deputy Commissioner, OATH
John Castelli - Assistant Commissioner For Legislative
Affairs, OATH
Vanessa Caughman - Computer Service Technician, OATH
Kelly Corso, Esq. - Assistant Director of Adjudications,
ECB
Fana Garrick - Public Affairs Assistant, OAT
David Goldin, Esq. - Administrative Justice Coordinator,
Mayor's Office

Vivienne Kahng - Staff Attorney, Appeals, OATH/ECB
Nancy Lin - Office of Management & Budget
Susan Kassapian - Acting Deputy Commissioner, OATH/TVH &
Health Hearings
Tynia Richards - Deputy Commissioner, General Counsel
Doris Stewart - Department of Transportation
Peter Schulman, Esq. - Deputy Supervising Attorney,
Appeals, OATH/ECB
Thomas Southwick, Esq. - Supervising Attorney, Appeals,
OATH/ECB

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2 (The board meeting commenced at 9:24
3 A.M.)

4 MR. FIDEL DEL VALLE: Good morning,
5 everyone.

6 UNIDENTIFIED MALE 1: Good morning.

7 MR. DEL VALLE: We have a quorum. Is
8 there a motion to adopt the minutes from the last
9 meeting? And let's see. I'll ask our deputy
10 general counsel to give us an outline of proposed
11 model rules.

12 MS. HELAINE BALSAM: Good morning.
13 Helaine Balsam, Deputy General Counsel for OATH.
14 You have before you proposed procedural rules.
15 As you may remember, on September 25th, the Board
16 approved a set of proposed rules to move most of
17 the procedural rules for ECB out of Chapter 3 of
18 Title 48 and into Chapter 6 of Title 48 so that
19 we could have a more uniform standard across all
20 of the tribunals that OATH services. At that
21 meeting, the Board made a couple of very specific
22 requests to changes in those rules that they
23 wanted to see. One was to keep panels and the
24 other was to keep the superseding appeal. So I

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2 call your attention to page 28. If you look at
3 page 28, you will see that both those rules are
4 still there. It's now Section 3-15, panel of
5 board review of appeals. So (a) deals with the
6 panels and it's actually stronger than the old
7 rule. The old rule said the Board may from time
8 to time call panels. This one actually says the
9 Board will establish panels. And (b), 3-15(b) is
10 the superseding appeal decision. Other than
11 that, most of the changes between us and the law
12 department and, actually, we had several issuing
13 agencies that weighed in because they had gotten
14 advance copies of this also, were fairly minor
15 tweaks. So any questions?

16 MR. DEL VALLE: I'll just say something
17 for the benefit of somebody watching on YouTube
18 that by "panels," we mean appeals panels composed
19 of subcommittees of the Board. And a superseding
20 appeal is really a motion to reargue an appeal.
21 To reargue, it's rearguing a pre-existing appeal.
22 So it makes to somebody hearing, but when I first
23 read it, it didn't make any sense to me. Thank
24 you. Are there any questions?

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2 MS. BALSAM: Yes.

3 MS. MADELYNN LIGUORI: Hi. Madelynn
4 Liguori, Sanitation. Just two questions for you.
5 On the electronic filing of the summonses, you
6 said these were an exemption, I just had, from
7 the Agency perspective obviously, Sanitation does
8 issue many of its tickets electronically, but
9 it's going to take us a while to go fully
10 electronic. We just want to make sure that those
11 exemptions will be granted to the agencies until
12 such time that the whole agency is electronic, as
13 well as the other agencies are.

14 MS. BALSAM: Yes.

15 MS. LIGUORI: Okay. So there won't be
16 any issue where we're not issued an exemption?

17 MS. BALSAM: No.

18 MS. LIGUORI: Okay.

19 MR. DEL VALLE: No. And Sanitation
20 isn't the only one in that boat. I mean, there
21 are some agencies that have yet to find out what
22 a computer is.

23 MS. LIGUORI: Well, we're actually
24 sharing our technology with Parks next week.

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2 MS. BALSAM: Oh, great.

3 MS. LIGUORI: And then the other
4 question I had, it deals with pre-hearing
5 requests to reschedule. And it makes a
6 petitioner provide notice to a respondent three
7 days in advance.

8 MS. BALSAM: Mm-hmm.

9 MS. LIGUORI: But there's no requirement
10 that a respondent has to notify the petitioner or
11 anyone has to notify the petitioner. Is--

12 MS. BALSAM: So the, the rationale
13 behind that is that the petitioner chooses the
14 return date so the petitioner actually knows what
15 the return date is. Whereas, the res-, right?
16 So when your agents are out there, they're
17 choosing the date. Right? So with--

18 MS. LIGUORI: Okay.

19 MS. BALSAM: --knowledge, they can say,
20 okay, well, I could go to court on that day and
21 know they're available. Whereas, the
22 respondents, they're just given the summons and
23 the date's the date. So if they want to change
24 it, they'll change it. They can ask to change it

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2 without having to notify the petitioner.

3 Obviously, you're still entitled to notice if
4 it's the kind of hearing where you want to
5 appear. So--

6 MR. DEL VALLE: When the, they don't,
7 they won't pick the date. The date will be,
8 they'll be told what the date is and they'll be
9 told what the date is based on availability of
10 the petitioner.

11 MS. BALSAM: And there will be notice
12 to both sides.

13 MS. LIGUORI: Okay. That was my, yeah.

14 MS. BALSAM: Yeah.

15 MR. DEL VALLE: It, it won't be a notice
16 in the sense that you'll be notified of the new
17 date because you'll be asked what you want the
18 new date to be.

19 MS. LIGUORI: Okay. Okay. Thank you.

20 MS. BALSAM: I think --

21 MS. LIGUORI: No, no, no. That's okay.

22 MS. SHAMONDA GRAHAM: Shamonda Graham,
23 Department of Buildings. So back when this rule
24 was originally drafted, my agency did make

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2 comments as well.

3 MS. BALSAM: Mm-hmm.

4 MS. GRAHAM: And some of the comments
5 were that we were looking for language in the
6 definition of summons that included that the
7 summons had a Commissioner's order. We see that
8 it's, it's defined as summons for notice of
9 violation, but we don't see any language that
10 speaks to the Commissioner's order which all DOB
11 violations contain.

12 MS. BALSAM: So most summonses don't
13 have Commissioner's orders--

14 MS. GRAHAM: Yes.

15 MS. BALSAM: --and we can't define it
16 that way.

17 MR. DEL VALLE: But it can be included
18 in the, in the narrative part of the summons.

19 MS. BALSAM: I mean, it's your
20 Commissioner's order. Right?

21 MS. GRAHAM: Yes.

22 MS. BALSAM: Whereas, the summons is
23 the summons to come to court so.

24 MS. GRAHAM: Okay. But I believe the

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2 heading actually says, Commissioner's Order. So
3 would that be considered--

4 MS. BALSAM: Well, you asked for that.

5 MS. GRAHAM: Yeah. Would that be
6 considered in the details of violation?

7 MS. BALSAM: It says, summons.

8 MS. GRAHAM: Mm-hmm.

9 MS. BALSAM: Right? So--

10 MS. GRAHAM: On the top and then, and
11 then the Commissioner's Order is included in the
12 narrative. Is that correct?

13 MR. DEL VALLE: You can add it in the
14 narrative.

15 MS. GRAHAM: Okay.

16 MR. DEL VALLE: In effect, in the
17 narrative, you can, you can include a thing that
18 says there is a Commissioner's Order blah, blah,
19 blah, blah.

20 MS. GRAHAM: Okay. So--

21 MR. DEL VALLE: So long as the
22 respondent's on notice of its existence, that's
23 the concept.

24 MS. GRAHAM: That a Commissioner's Order

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2 exists and it's included in the summons. Okay.
3 So the other thing that we did have some concern
4 about was the appearances of our representatives.

5 MS. BALSAM: Mm-hmm.

6 MS. GRAHAM: And we ask that if a
7 representative is in another hearing, that they
8 not be considered not present and we were looking
9 for language here that stated that and I don't
10 see anything here that says that.

11 MS. BALSAM: You know, I think that
12 happens on both sides, not petitioners and
13 respondents--

14 MS. GRAHAM: Okay. So as long as
15 we're--

16 MS. BALSAM: You know, there are some
17 things that don't need to be rules. Right?
18 There are other th-, you know, there are
19 protocols.

20 MS. GRAHAM: Mm-hmm.

21 MS. BALSAM: It's a reasonableness
22 standard.

23 MS. GRAHAM: Okay.

24 MS. BALSAM: So that's, I, I just think

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2 that's something that we don't have to codify.

3 MS. GRAHAM: Okay. But provided that
4 we're in the Tribunal, then we would be
5 considered present. That's the concern. And as
6 long as that's the case, then--

7 MS. AMY SLIFKA: For the most part, they
8 are, you are considered present.

9 MS. GRAHAM: Mm-hmm.

10 MS. SLIFKA: And it works both sides so,
11 I mean, I don't want to get into--

12 MS. BALSAM: But just, let's just --
13 Amy Slifka for the--

14 MS. SLIFKA: Oh, I'm sorry. Amy
15 Slifka--

16 MS. BALSAM: recorder.

17 MS. SLIFKA: I'm not going to get into
18 the details. Most of the petitioning agencies
19 know how it works. And the same way, if a
20 respondent sends one representative and they have
21 over 100 cases, they are present, but they might
22 not be present for all 100.

23 MS. GRAHAM: Okay. Available.

24 MS. SLIFKA: Same thing on your side.

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2 If you don't send enough representative, the fact
3 that you're here, doesn't necessarily mean you're
4 here. And as all the agencies know, we work with
5 both the agencies and the respondents to get
6 through the cases.

7 MS. GRAHAM: Okay.

8 MR. DEL VALLE: And then, and, and just
9 so people are aware, I don't think it's happening
10 right now, but it has happened in the past where
11 some agencies have been rather abusive of the
12 fact that they want somebody at every hearing and
13 they scheduled a ton of hearings on the same day
14 at the same time and don't sent adequate
15 representation and the result is we have somebody
16 who shows up at 8:30 in the morning because the
17 summons says 8:30 in the morning and they're
18 still there at 2:00 in the afternoon. If that
19 kind of abuse is perceived, we will be dismissing
20 summons all over the landscape because we're not
21 going to torture people because they want to
22 contest a summons.

23 MS. GRAHAM: I think a lot, just, just
24 to comment on that many of the agencies are just

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2 stretched with resources and providing, like you
3 said, having enough people to do all the cases.
4 There's no way to have enough representation for
5 every single summons if they all decided to show
6 up in one day, but I do understand your point.
7 So I have one other thing and it's--

8 MR. DEL VALLE: If, if an agency has a
9 problem with that--

10 MS. GRAHAM: Well, we can sort them out.

11 MR. DEL VALLE: --please let me, also
12 let me know because we can go and beat up OMB.
13 My, one of my--

14 MS. GRAHAM: And you can get me some
15 more staff. I like that.

16 MR. DEL VALLE: Yeah. Yeah. It's one
17 of my favorite pastimes.

18 MS. GRAHAM: So one of the other issues,
19 I had a few issues with this, let me just say
20 that. And again, just to put out there, my
21 agency supports the reorg and everything that
22 you're doing here, but I needed clarity and so
23 did my Commissioner.

24 MS. BALSAM: Sure.

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2 MS. GRAHAM: So regarding the remote
3 appearances, we, we have, we have MOUs for that.
4 Basically where the agency has agreed upon
5 certain codes and things of that sort. So one of
6 the things we're concerned about is if, the way
7 it's worded is that if ECB, or rather OATH -- I'm
8 so sorry -- if you have it available then the
9 respondent can have a remote, a remote hearing.
10 Now, is that limited to when the agency is
11 present in your tribunal? For us, it appears
12 that you will have the ability to allow this
13 hearing and we need to make sure, one, that we're
14 there, and then, and then, two, that it's, you
15 know, on the right day and all of those things.
16 And what does that mean for the MOUs that we
17 already have in place?

18 MS. BALSAM: So the MOUs control when
19 remote adjudication is available because that's
20 an agreement between the--

21 MS. GRAHAM: Okay. But, but the way
22 it's worded here--

23 MS. BALSAM: --the tribunal and the
24 agency.

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2 MS. GRAHAM: --it appears that OATH
3 basically has the ability to say, okay, well,
4 we'd like to allow this. So the MOUs will still
5 be the under lying, as long as that's the case,
6 then we're okay.

7 MR. DEL VALLE: And, and there, and
8 there are remote hearings where the agency is not
9 present there.

10 MS. GRAHAM: Yes.

11 MR. DEL VALLE: Like the Port Authority
12 Police will be doing it from JFK.

13 MS. BALSAM: You might want to
14 consider--

15 MR. DEL VALLE: The hearing takes place
16 at Long Island City, but Port Authority police
17 officers testify from JFK by video link and
18 potentially the respondent is testifying by video
19 link too. It's Captain Kirk, eat your heart out,
20 time.

21 MS. GRAHAM: We can't wait to get there.
22 But again, it was just the concern that it would
23 be on the day that we're, we are actually there
24 or able to be there.

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2 MS. BALSAM: Right.

3 MS. GRAHAM: And controlled, underlying
4 control by the MOU.

5 MS. BALSAM: Right.

6 MS. GRAHAM: So the agency agrees to it.

7 MS. BALSAM: Right.

8 MS. GRAHAM: Okay.

9 MR. DEL VALLE: We're already doing that
10 with the Port Authority Police, by the way.

11 MS. GRAHAM: Okay.

12 MS. BALSAM: I think Elizabeth is next.

13 MS. ELIZABETH KNAUER: I had a few
14 questions. One is Section, in Chapter 3--

15 MS. BALSAM: Mm-hmm.

16 MS. KNAUER: Section 3-14, claims of
17 prior adjudication?

18 MS. BALSAM: Mm-hmm.

19 MS. KNAUER: Is that page 20, well,
20 really, the sub--

21 MS. BALSAM: Starts on 27.

22 MS. KNAUER: Page 28. Is that the same
23 as it has been?

24 MS. BALSAM: Yes.

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2 MS. KNAUER: Okay. Alright. I just
3 wanted to make sure.

4 MS. BALSAM: Yes. Exactly. With,
5 except for the cross-reference, yes.

6 MS. KNAUER: Okay.

7 MS. BALSAM: Exactly the same.

8 MS. KNAUER: On page 43, Section 6-12,
9 the evidence.

10 MS. BALSAM: Okay.

11 MS. KNAUER: This is kind of -- I'm just
12 wondering if this was a sort of, because of the
13 reorganization something got lost here. Under
14 admissibility of the summons, (b), the last
15 sentence says, when such report is served with
16 summons, such report, I just, I didn't see where
17 the referenced report was.

18 MS. BALSAM: It's in the sentence
19 before. The summons may include the report of
20 the inspector.

21 MS. KNAUER: Okay. sorry. That was
22 just my--

23 MS. BALSAM: Yeah.

24 MS. KNAUER: And then the other question

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2 I had on this section in, in Sections (e) and
3 (f), they reference a party making a timely
4 motion, opportunity to prove such noticed fact
5 will be granted to any party making a timely
6 motion and objections to evidence must be timely.
7 And I'm just wondering how, that doesn't seem to
8 be defined here--

9 MS. BALSAM: Well, it's really during
10 the hearing.

11 MS. KNAUER: --what is considered
12 timely. But shouldn't it, shouldn't that be
13 specified that it's during a hearing. I just,
14 it's just not clear to me what's considered
15 timely. If it had to be before the hearing or if
16 it, but you're saying it's during the hearing is
17 considered timely.

18 MS. BALSAM: Yeah. I mean, basically,
19 if somebody -- let's assume a respondent says to
20 the hearing officer, I'd like to take official
21 notice of the fact that 100 Church Street is
22 between Broadway and Park Place.

23 MS. KNAUER: Right, right.

24 MS. BALSAM: Right? And the hearing

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2 officer, says, okay, I take official notice. The
3 hearing goes on, blah, blah, blah, blah. You
4 know, 45 minutes later, somebody says, wait a
5 minute, but 100 Church isn't. So that, you know,
6 may be problematic so, by timely, what we mean is
7 there should be a discussion as to when that is
8 going on. If you think it should be more
9 specific, we can think about how to rephrase it.
10 But in the meantime, can we go ahead and publish
11 these? We can still change it in the final rule-
12 -

13 MS. KNAUER: Oh, yeah, yeah. I just,
14 since I thought of the question, I--

15 MS. BALSAM: Yeah. No, no, that's
16 great.

17 MS. KNAUER: I don't think this is a
18 major stumbling block. I just, I would suggest
19 making it a little bit more specific.

20 MS. BALSAM: Okay.

21 MS. KNAUER: And on the following page,
22 Section 6-14, request for adjournment, I've seen
23 a few appeals concerning the language, a hearing
24 officer may, and not it would be adjourn a

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2 hearing, for testimony of the inspector, where it
3 seems like that language has been interpreted as
4 more of a direction than a discretionary thing,
5 offering the hearing officer complete discretion.

6 MS. BALSAM: The hearing officer
7 doesn't have complete discretion. The whole
8 point of this is that there are certain times
9 where a hearing officer is not allowed to
10 adjourn.

11 MS. KNAUER: I, I'm sorry.

12 MS. BALSAM: Solely within the presence
13 of the issuing officer.

14 MS. KNAUER: Complete discretion to not
15 adjourn.

16 MS. BALSAM: Oh.

17 MS. KNAUER: So I, I just, I've seen a
18 few appeals where the finding is that the hearing
19 officer improperly did not grant the adjournment.
20 So I'm just, and it seemed li-, it seemed like
21 the language is almost being interpreted as a
22 direction that they should grant an adjournment
23 under these circumstances. So I'm just wondering
24 if that is the--

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2 MS. BALSAM: No. This says when a
3 hear-, this rule says when a hearing officer
4 can't adjourn.

5 MS. KNAUER: Can't. I understand--

6 MS. BALSAM: So that aside, there are
7 certain instances where they probably should have
8 and didn't and somebody appeals on that basis.
9 For example, it's the first time on, there's a
10 factual issue, a petitioner representative is
11 there and says, we'd like to adjourn for our
12 inspector.

13 MS. KNAUER: Right.

14 MS. BALSAM: And the hearing officer
15 says, no.

16 MS. KNAUER: Right. So the way this is
17 written--

18 MS. BALSAM: So--

19 MS. KNAUER: --plain language suggests
20 that the hearing officer has discretion to just
21 deny that request. There are certain
22 circumstances where they can't grant the request,
23 but the way this is written suggests that if, you
24 know, you know, except, I guess, according to an

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2 arbitrary and capricious standard that there's no
3 direction that under these circumstances they
4 should grant the request, but that does not seem
5 to be the way that the rule is always being
6 interpreted. I'm just wondering if we should
7 clarify the rule to actually make it, offer less
8 discretion to a hearing officer to deny a request
9 if we, if we believe that, in fact, the hearing
10 officer should grant such requests under these
11 circumstances.

12 MS. SLIFKA: Can I say something?

13 MS. BALSAM: Yeah.

14 MS. SLIFKA: Yeah, I'm not sure that
15 would make a difference because those hearing
16 officers that are improperly denying, it's a
17 learning process. So this is giving them the
18 reasons why, but to say that he should have, he
19 should have granted the adjournment because --
20 it, it's, you can't, you can't lay everything out
21 for a hearing officer. All you can do is
22 instruct the hearing officer, teach the hearing
23 officer. You can't, you know--

24 MR. DEL VALLE: Let, let me add a little

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2 piece of caution because I've been dealing with
3 rules for almost 40 years and there's always a
4 temptation to be very specific with rules. And
5 then what you find out is that as time evolves,
6 things come up, circumstances come up that are
7 not that specific and you wind up applying very
8 specific rules where you get ridiculous results.

9 MS. KNAUER: I don't, yeah--

10 MR. DEL VALLE: You have to, you have to
11 have some amount of slack and discretion in it.

12 MS. KNAUER: I think that maybe, maybe
13 I'm not being clear on what I was suggesting. I
14 was just asking whether, in fact, we should
15 change that may into a should or a must. That is
16 actually what the intent of the rule is. That
17 where the hearing officer concludes that the,
18 that the, you know, where one of these
19 circumstances applies, or both of these
20 circumstances apply, one and two, not, not
21 changing the language of those, but in fact, is
22 the intent of the rule that the hearing officer
23 should grant the adjournment under those
24 circumstances. That is the way it's been

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2 interpreted by the appeals staff.

3 MS. BALSAM: That is not the intent of
4 the rule. The intent of the rule is to control
5 when a hearing officer may not adjourn. That's
6 the intent of the rule.

7 MS. KNAUER: And they, but they can
8 choose not to adjourn even where--

9 MS. BALSAM: A petitioner
10 representative is present and has asked for the
11 inspector.

12 MS. KNAUER: And, but--

13 MS. BALSAM: They are allowed to do
14 that. Sometimes there just isn't a factual
15 dispute. There may not be a factual dispute.

16 MS. KNAUER: Right. But do they have
17 this, even, but what if there is a factual
18 dispute and they still decide not to adjourn--

19 MR. DEL VALLE: That's why we have
20 hearing officers in there. We hope they're
21 intelligent enough to figure that out. And if
22 they're not, we have an appeals process.

23 MS. KNAUER: But should, but I guess,
24 but it's the point of, my point is when the

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2 appea-, okay. So the circumstances that I've
3 seen this come up is there is a, there's a
4 hearing date that the petitioner's
5 representatives says, I want the inspector here
6 because there is a factual dispute.

7 MS. BALSAM: Mm-hmm.

8 MS. KNAUER: And the respondent doesn't
9 want to adjourn it. The respondent is a busy
10 person, doesn't want to have to come back. And
11 the hearing officer says, you know, I'd, I'm, in
12 fairness, I'm not going to adjourn it. You had
13 your chance to have your inspector here. I
14 don't, I don't want to make this person come
15 back. But there is a factual dispute. And then
16 the, and then the petitioner appeals--

17 MS. BALSAM: Mm-hmm.

18 MS. KNAUER: --and says, we should have
19 been granted the adjournment to present the
20 inspector. The way this is--

21 MR. DEL VALLE: It should have been
22 denied then.

23 MS. KNAUER: --written suggests the
24 hearing officer had the, had the discretion to

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2 make that call even if there was a factual
3 dispute. But I'm just wondering if, in fact,
4 that's not the intent. That the intent is where
5 there is a factual dispute and the petitioner has
6 a representative there, the hearing officer, in
7 fact, should adjourn it at the request of the
8 petitioner.

9 MS. BALSAM: Yeah. I don't, yeah, I
10 don't think--

11 MR. DEL VALLE: I, I--

12 MS. BALSAM: --you can't--

13 MR. DEL VALLE: I disagree because that
14 opens it up to abuse by petitioners who want to
15 jerk around the respondent.

16 MS. KNAUER: I, I tend to agree with the
17 way it's written here, but it's not necessarily
18 the way that, on appeals, it's been interpreted
19 because there, I think there have been appeals
20 granted to petitioners on the basis of the
21 hearing officer denying the adjournment because,
22 because there was an actual dispute and a finding
23 that there should have been an adjournment. Even
24 though the way that this is written suggests

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2 ultimate discretion in the hearing officer for
3 any reason--

4 MS. BALSAM: This, this rule controls
5 when a hearing officer can adjourn, basically,
6 when a petitioner isn't there. Okay? Right?
7 Because they can only adjourn for the complaining
8 witness if the respondent consents--

9 MS. KNAUER: Right.

10 MS. BALSAM: --or somebody from the
11 petitioner is there to ask. That's what this
12 rule says. Right? So basically what the ill-,
13 the, the problem that it was trying to address at
14 the time, and this goes back to when the charter
15 was amended in the 2008 Charter Amendment, was
16 that respondents were upset because Petitioner
17 could check a box on the summons that said
18 petitioner to appear and the respondent would
19 come in--

20 MS. KNAUER: Right.

21 MS. BALSAM: --on the hearing date, at
22 the date and time set for the hearing and we
23 would adjourn because the petitioner had checked
24 the box petitioner to appear. So this particular

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2 rule was designed to prohibit that from
3 happening. Basically what it says is if the
4 respondent is told to come in at a certain time,
5 the hearing's going to go forward unless there's
6 somebody there from the petitioner to ask for the
7 officer.

8 MR. DEL VALLE: Yeah.

9 MS. KNAUER: Right.

10 MS. BALSAM: And this is, again, only
11 with issuing officers. There can be other
12 reasons to adjourn--

13 MS. KNAUER: Right.

14 MS. BALSAM: --that don't -- alright?

15 MS. KNAUER: Right. No, I understand.

16 MS. BALSAM: So unless the petitioners,
17 someone from the petitioner is there to ask for
18 the officer or the respondent says it's okay. So
19 that's the ill that it was designed to address.
20 And I think it does that. Right?

21 MS. KNAUER: I agree that it does that.

22 MS. BALSAM: Okay. It's not supposed
23 to do anything else. What you're suggesting is
24 that we should have a rule that says, hearing

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2 officers must adjourn? I don't know that I want
3 to do that. I--

4 MS. KNAUER: I am not, I am actually not
5 suggesting that. I like the way it's written
6 now.

7 MS. BALSAM: Okay.

8 MS. KNAUER: 'Cause I think it, it gives
9 the hearing officer discretion to not grant an
10 adjournment even if the petitioner, even if
11 there's a petitioner's attorney who wants, who
12 asks for the adjournment and even if they say
13 there's a disputed fact to the, that the issuing
14 officer could shed light on.

15 MS. BALSAM: Right.

16 MS. KNAUER: But the hearing officer, I
17 believe, under this, the way it's written, has
18 discretion to say, no, I don't want to have to
19 bring this person back for, you know, \$150
20 ticket.

21 MS. BALSAM: I would say that this
22 doesn't prohibit them from, from--

23 MS. KNAUER: You would say that--

24 MS. BALSAM: --not adjourning.

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2 MS. KNAUER: --but petitioners have
3 appealed and I believe the appeals have been
4 granted--

5 MS. BALSAM: Mm-hmm.

6 MS. KNAUER: --on the basis that they
7 should--

8 MS. BALSAM: 'Cause sometimes the
9 hearing will--

10 MS. KNAUER: --have granted the
11 adjournment, even though this--

12 MS. BALSAM: But that's not this rule.
13 Right?

14 MS. KNAUER: Right. They could use this
15 rule. They've used this rule.

16 MS. TYNIA RICHARDS: Can I, can I just
17 add something?

18 MS. BALSAM: This is Tynia Richards,
19 general counsel, just for the--

20 MS. RICHARDS: Tynia Richards, general
21 counsel. Just to give you a little bit of
22 perspective. For example, in the trials
23 division, the rule on adjournments says that an
24 adjournment will be granted for cause. Period,

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2 full stop. So what happens is that sometimes
3 they are granted and sometimes they are not.
4 That would be reviewed at some point. Right? If
5 somebody had an objection to whether or not it
6 was granted, it was denied improvidently. Here,
7 at, so I guess what I'm trying to say is that
8 there are a couple of reasons, a couple of ways
9 to fix due process. One is by rulemaking to,
10 here, Helaine is explaining, is that this is to
11 prevent some situations that we've seen. But the
12 other piece of it is that the appeals fix the
13 other side when they've been improvidently
14 denied. So due process, the full process that's
15 provided here is taking what you're saying into
16 account. It was fixed because the appeals caught
17 the ones where they should have been granted.

18 MS. KNAUER: But the--

19 MS. RICHARDS: You cannot legislate by
20 rule, by every situation. So I think that we're
21 just trying to tell you that the hearing officers
22 deserve the discretion and then when they fall
23 short, we have a way to fix it.

24 MS. KNAUER: I agree with that. What

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2 I'm raising is that in reviewing appeals
3 decisions, I believe there's precedent and maybe
4 Tom, maybe you can correct me. I believe that
5 there is precedent interpreting this, using this
6 rule to grant appeals for improper denial of
7 adjournments.

8 MS. SLIFKA: But that again depends on
9 the facts of the appeal. So for example, if a
10 case was adjourned five times for the inspector
11 to appear and then finally they said, the hearing
12 officer said, I'm not adjourning again, you would
13 not have reversed that on appeal and say
14 petitioner had the right to have the inspector
15 there. So it's very, it's, it's fact-based.

16 MS. KNAUER: But I'm hearing two
17 different things then.

18 MS. BALSAM: But there's also another--

19 MS. KNAUER: I'm hearing Helaine say
20 that this does not, this does not provide a basis
21 for granting an appeal for denial of an
22 adjournment, but you seem to be saying that it
23 does.

24 MS. BALSAM: There's ano-, there are

1 March 31, 2016

2 other, there are currently other sections that
3 the Board--

4 MS. KNAUER: But I, this is the rule
5 that I have seen brought up on appeal and, okay.

6 MS. BALSAM: I don't know what to tell
7 you.

8 MS. KNAUER: Okay. No, I feel like
9 you've given me some clarity about what the
10 proper interpretation is. I just don't know that
11 that's what's been used at the, in every appeal
12 decision.

13 MS. BALSAM: Without actually looking
14 at appeals, I can't say more.

15 MS. KNAUER: Yeah, right.

16 MS. BALSAM: Okay.

17 LT. DAN ALBANO: Right.

18 MS. BALSAM: So I think Joe was next.
19 Then I'll get to you, dear.

20 LT. ALBANO: I'm sorry.

21 MS. BALSAM: Just, yeah.

22 MR. JOSEPH GREGORY: Joseph Gregory,
23 Fire Department. With respect to page 45, where
24 it says the inspector fails to timely appear.

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2 Just concerns as far as I know in the past we've
3 given the inspectors, actually both parties, the
4 respondent and the inspector, a two-hour window.

5 MR. DEL VALLE: That's a rule.

6 MR. GREGORY: So is that still going to
7 hold true or has that been [unintelligible]
8 [00:26:39]. 'Cause we just, we don't want it to
9 be where they come in an hour later--

10 MS. BALSAM: Right.

11 MR. GREGORY: --and then it's like, oh,
12 well, you weren't here at that particular time,
13 inspector, so we just dismissed it. So that's
14 what, the concern that we would.

15 MS. SLIFKA: The original rule had the
16 one-hour.

17 MS. BALSAM: Yeah, the original rule,
18 the original rule had a whole diff-, a whole
19 bunch of time standards. And to be perfectly
20 honest, it was very difficult to interpret. So
21 what we tried to do was pare this down to the
22 bare bones of what was required under the
23 Charter. So the intent is to provide a
24 reasonableness standard. So is two hours

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2 reasonable? I think it is, but I'm not going to
3 be--

4 MR. DEL VALLE: I think so.

5 MS. BALSAM: --the person that's
6 standing there. I'm not going to make that call
7 so--

8 MR. DEL VALLE: Right. Okay.

9 LT. ALBANO: Dan Albano from the Police
10 Department. The two-hour window is something
11 we've created by rule? I thought that was,
12 that's law. Right?

13 MS. BALSAM: No. Well, no. There, we
14 had, the former adjournment rule defined what's a
15 timely appearance by the inspector so there is--

16 MS. SLIFKA: One hour.

17 MS. BALSAM: --one hour from when a
18 case was ready to be called or something else.

19 MS. SLIFKA: Or two hours--

20 MS. BALSAM: Two hours from the time--

21 MS. SLIFKA: --from the time scheduled.

22 MS. BALSAM: Right. From the scheduled
23 time or an hour from when the case is ready to be
24 called. So it, it kind of expanded and gave

1 March 31, 2016

2 petitioners more time to get their people there
3 because if somebody clocked in and the two-hour
4 mark was approaching and the hearing officer then
5 called the case, petitioner then had another
6 hour. Right? 'Cause that's when the case was
7 ready to be called. So we got rid of that.

8 LT. ALBANO: So we could offer them what
9 time?

10 MS. BALSAM: It wasn't required by the
11 Charter so we got rid of that.

12 LT. ALBANO: Okay.

13 MS. BALSAM: So you know, and we left
14 it open-ended in terms of what's going to be
15 timely and, again, as far as I'm concerned, it's
16 a reasonableness standard. What's reasonable
17 under the circumstances?

18 MR. DEL VALLE: Right, right now those
19 timeframes are not going to change.

20 LT. ALBANO: It's kind of tight.

21 MR. DEL VALLE: But I, I have to, I have
22 to say that the goal is to eventually every
23 summons will be called within 30 minutes of the
24 time that's on the summons. And if both sides

1 March 31, 2016

2 are not ready to go, one side is going to lose.

3 LT. ALBANO: There's a two-hour window
4 start, the clock starts when the summons is
5 called.

6 MR. DEL VALLE: It starts to run--

7 MS. BALSAM: No.

8 MR. DEL VALLE: --from the time--

9 LT. ALBANO: No?

10 MR. DEL VALLE: --from the time that
11 the, the, that the summons is scheduled.

12 MS. BALSAM: Right.

13 MS. KAHNG: Right.

14 LT. ALBANO: Scheduled. And it doesn't
15 get extended once it's called.

16 MS. BALSAM: So this rule doesn't--

17 LT. ALBANO: That's part of the, running
18 the clock.

19 MS. BALSAM: This rule, this rule
20 doesn't prohibit an extension. Right?

21 Previously, there were all kinds of time limits.
22 This rule is more flexible.

23 LT. ALBANO: Two hours is kind of tight.

24 MS. BALSAM: I don't know what to tell

1 March 31, 2016

2 you.

3 MR. DEL VALLE: Not if you're a
4 respondent and you're sitting there all day on a
5 summons.

6 LT. ALBANO: Understood.

7 MS. GRAHAM: Shamonda Graham, Department
8 of Buildings. But, you know, you realize there
9 is also the vice versa situation where the
10 issuing officer is present at the time--

11 LT. ALBANO: We do.

12 MS. GRAHAM: --of the scheduled hearing
13 and the respondent does not appear.

14 MS. BALSAM: Yeah.

15 MS. GRAHAM: For one, I can say from my
16 agency's perspective, a large concern is having
17 the issuing officer present from the time the
18 hearing is scheduled, the respondent shows up,
19 even if they show up at the two-hour mark, now
20 you have your inspector or some of them don't
21 show up for a while, now you have your inspector
22 in court waiting for this respondent to appear.
23 And so, to me, there should be a, you know, it
24 needs to be on both sides where the respondent

1 March 31, 2016

2 has, and I didn't even look to compare, but where
3 the respondent has the same responsibility to
4 appear--

5 MR. DEL VALLE: Absolutely.

6 MS. GRAHAM: --when scheduled 'cause
7 this would be an adjournment. Correct?

8 MS. BALSAM: Absolutely.

9 MR. DEL VALLE: Absolutely.

10 MS. GRAHAM: The issue -- okay.

11 MR. DEL VALLE: The, the model is
12 basically this. If, if I'm told I have to be in
13 front of Judge Daniels in the Eastern, in the
14 Southern District at 11:00 and I'm not there at
15 11:00, I'm in deep, deep trouble unless I can, I
16 send an ambulance report saying I just got hit by
17 a fire truck or something.

18 LT. ALBANO: But you're a lawyer.
19 That's different.

20 MR. DEL VALLE: I'm, I'm a lawyer, but
21 the, the petitioners are the professional side,
22 they are the professional scorers, were issuing
23 the summonses. They stand in effect as that.
24 There's more of an excuse for a non-professional

1 March 31, 2016

2 respondent as opposed to a rep--

3 LT. ALBANO: I understand.

4 MR. DEL VALLE: --or somebody who sends
5 a lawyer. There's no excuse for them not being
6 on time and, and, and I'm not going to name
7 particular folks, but there are people who
8 actually have Esq. behind their names and, and
9 try to abuse the system in some of our tribunals
10 by showing up like at 5:00 in the afternoon when
11 the summonses were like at 9:00 in the morning
12 and, and going through a song and dance routine.
13 And I'm not going to cut them any slack because
14 they're, they're playing. I know the game that
15 they're playing. And, you know, to, to quote a
16 great philosopher, Homie don't play that way.

17 MS. GRAHAM: I can say that much.

18 LT. ALBANO: Alright.

19 MS. GRAHAM: I agree with that.

20 However, like I said, I think there should be
21 some thought given to when the inspector is
22 present and the respondent is not.

23 MS. SLIFKA: But there is some. There
24 is some given. There is thought given to when

1 March 31, 2016

2 the inspector is present and the respondent is
3 not. And--

4 MS. GRAHAM: So what happens?

5 MS. SLIFKA: --respondent does have to
6 appear timely and if the respondent doesn't
7 appear, because usually in those instances, the
8 case has been adjourned [unintelligible]
9 [00:32:18].

10 MS. GRAHAM: That's my point.

11 MS. SLIFKA: So if the respondent does
12 not appear timely, then their case gets
13 defaulted.

14 MS. GRAHAM: And timely would be--

15 MS. SLIFKA: Timely is within two-,
16 well, right now, we don't know, it's a
17 reasonableness, but there's--

18 MS. GRAHAM: Well, that's why I'm
19 raising--

20 MS. BALSAM: Certainly at the end of
21 the, certainly at the end of the day, it would be
22 defaulted, but then--

23 MR. DEL VALLE: The goal is two years
24 from now it will be 30 minutes for everybody.

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2 MS. SLIFKA: Right. Okay. So that's,
3 right. So that would be determined--

4 MR. DEL VALLE: That's the goal. But a
5 lot of people are, are, are gnashing teeth,
6 rendering garments and having otherwise epileptic
7 seizures over that concept.

8 MS. BALSAM: Well, me just see if Joe's
9 done.

10 MR. GREGORY: I was going to say, in a
11 perfect world, I mean, everybody should show up
12 on time and everything--

13 MS. BALSAM: Right.

14 MR. GREGORY: --but we all know that in
15 a perfect world, on both sides, it's not
16 realistic. People are late for airports. People
17 are late for -- you go to DMV, you're not going
18 to walk in and say, well, I have a six, you know,
19 a 3:00 appointment I'm going to -- so my concern
20 is--

21 MR. DEL VALLE: I don't want to use DMV
22 as our model.

23 LT. ALBANO: No.

24 MR. GREGORY: I mean, it's the real

1 March 31, 2016

2 world. You know, I mean, we can't use--

3 MS. BALSAM: Right.

4 MR. GREGORY: You know, but point being
5 is that the way the language is now, it leaves so
6 much open for interpretation, it's like, well,
7 what's -- it doesn't even say I mean, I
8 understand you're saying it's reasonable, but as
9 far as a reasonable time, but even the language
10 in here doesn't say reasonable, it just says
11 timely and it doesn't--

12 MS. BALSAM: 'Cause the Charter says
13 timely.

14 MR. GREGORY: Okay. So--

15 MS. BALSAM: Right? I mean we kept, we
16 kept as close to the Charter -- again, the idea
17 was to make it as simple as possible because I
18 have to tell you, we've had CLE classes on the
19 ECB adjournment rule. Okay? A one-credit CLE
20 class on the ECB adjournment rule. So the idea
21 was to pare it down and make it as simple as
22 possible within the confines of what the Charter
23 says because that's the law. So that's why it's
24 phrased this way. If you compare this to the

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2 Charter, you'll see they're very, very close.

3 MR. DEL VALLE: And you have to have
4 flexibility to account for realities like, you
5 alluded to such as transit, the disruptions,
6 blackouts, blizzards, weather, Sandy--

7 MS. GRAHAM: Or respondents who show up
8 late in--

9 MS. BALSAM: Or respondents who are
10 chronically late.

11 MS. GRAHAM: --the day and the inspector
12 has left because--

13 MS. BALSAM: Right.

14 MS. GRAHAM: --the two-hour window's up.

15 LT. ALBANO: Right.

16 MS. BALSAM: Right.

17 MR. DEL VALLE: Family member dies.

18 MS. GRAHAM: Now we have to call them
19 back into court.

20 MS. BALSAM: Right.

21 MR. DEL VALLE: [Unintelligible]

22 [00:34:26] could happen.

23 MS. GRAHAM: So I just want to make sure
24 that, from a policy perspective, that this does

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2 leave room for that.

3 MS. BALSAM: Right.

4 MS. GRAHAM: That that will be addressed
5 because to wait for an entire day for a
6 respondent, for our inspectors is not feasible.
7 And we may have to come back to the court--

8 MR. DEL VALLE: Exactly.

9 MS. GRAHAM: --when that respondent is
10 available or ready or decides to appear. So as
11 long as from a policy perspective that would
12 then--

13 MR. DEL VALLE: I would say not only is
14 it not feasible, it's totally inappropriate.

15 MS. GRAHAM: Yeah. But it happens.

16 MS. BALSAM: I think Ernie was next.

17 MR. ERNEST CAVALLO: I just was going to
18 say, I mean, this isn't, we're not reinventing
19 the wheel here, the court system has gone through
20 this debate about default times and things like
21 that and they left it up to each individual
22 judge. For the most part, the judges were
23 responsible. But there were some shirkers that
24 made timely mean, you know, like 15 minutes,

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2 because that way they just dismissed all their
3 cases where people didn't come.

4 MR. DEL VALLE: You mean Judge Lowe?

5 MR. CAVALLO: Pardon?

6 MR. DEL VALLE: You mean Judge Lowe?

7 MR. CAVALLO: I know no names. No names,
8 right, will be told. So there is, there are
9 pitfalls to not having it defined. And it
10 generally--

11 MS. BALSAM: Look, I mean--

12 MR. CAVALLO: --hurts, you know, it
13 generally hurts people who are trying to get
14 there, but have some problem, such as transit,
15 such as childcare, such as all the other, can't
16 find the right room, whatever. Right.

17 MS. BALSAM: So what I can say is that
18 it, having the definitions in there didn't work
19 very well.

20 MR. CAVALLO: Okay.

21 MS. BALSAM: So we've taken them out.
22 We can certainly revisit it if we find that
23 it's--

24 MR. DEL VALLE: Not working.

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2 MS. BALSAM: --still not working. So--

3 MR. CAVALLO: I will also say I applaud
4 the idea of the 30-minute. In the court system,
5 if you have a 9:00, you know, if your case is on
6 for 9:30, it's understood you will be there until
7 the lunch break. You may be there to the lunch
8 break.

9 MS. BALSAM: Right.

10 MR. CAVALLO: Nobody ever questions it.
11 The pro se or, or the lawyers. So that's a
12 really admirable goal. We tried breaking it up
13 into three time periods, 9:30, 11:00 and noon.
14 But it didn't work. No, it didn't work at all.
15 It was a mess as a matter of fact.

16 MR. DEL VALLE: A lot of it is driven by
17 volume.

18 LT. ALBANO: Understood. Sure.

19 MS. BALSAM: Jorge, you--

20 MR. JORGE MARTINEZ: Yeah. My question
21 is something else entirely, but just going
22 through all these issues. On page 46, decisions,
23 decisions. I know throughout these rules, we've
24 been changing shall to must.

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2 MS. BALSAM: Yeah. That's the plain
3 language stuff.

4 MR. MARTINEZ: Right. This is, it says
5 here on 6-17, each decision will contain findings
6 of fact and conclusions of law. I'm told that
7 this does not always happen so I'm wondering if
8 we can change will to must.

9 MR. DEL VALLE: Hmm?

10 MS. BALSAM: We can consider that. Can
11 we publish it with the will right now because
12 this is what's been approved and we can consider
13 changing it when the final rule comes around?
14 Because otherwise I've got to go back to the --
15 you going to make me go back to the Law
16 Department?

17 MR. MARTINEZ: You mean it would be
18 considered--

19 MS. BALSAM: We started in September,
20 Jorge.

21 MR. MARTINEZ: Do I have to submit
22 something in writing saying please consider this
23 change? You know what I mean? Do I have to?

24 MS. BALSAM: I mean, I'm taking notes.

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2 If you want to, if you feel it would, if you
3 would feel more comfortable submitting something
4 in writing, I'm fine with that.

5 MR. MARTINEZ: Okay.

6 MS. BALSAM: But I'm taking notes.

7 MR. MARTINEZ: Okay.

8 MS. BALSAM: Yeah.

9 MS. LIGUORI: Madelynn Liguori,
10 Sanitation. Just on Jorge's point, this was an
11 existing provision so this hasn't changed.

12 MS. BALSAM: No.

13 MS. LIGUORI: Each decision will contain
14 findings of fact and conclusions of law.

15 MS. BALSAM: Right.

16 MS. LIGUORI: So it's been in effect
17 for--

18 MR. MARTINEZ: Also, but if we're
19 changing it now, why don't we make things more
20 concrete since--

21 MS. BALSAM: I actually, I'm in favor
22 of that.

23 MS. LIGUORI: Okay.

24 MS. BALSAM: But, but then what's the

1 March 31, 2016

2 ramification if they do?

3 MR. MARTINEZ: I feel we, everyone
4 should know the conclusions of law and finding of
5 fact.

6 MS. BALSAM: Yeah.

7 MR. MARTINEZ: I mean, I think it's,
8 it's, it's a basic thing that, you know, should
9 be attached to every decision.

10 MR. DEL VALLE: Well, that's the only
11 thing you can appeal from.

12 MS. BALSAM: Yeah, we do try it. We do
13 try it. We do try it.

14 LT. ALBANO: Helaine, could I?

15 MS. BALSAM: Dan.

16 LT. ALBANO: Yeah. Dan Albano, Dan
17 Albano from the Police Department. I, I just
18 want to go back to the adjournment thing again
19 'cause we're now, we now have somebody back into,
20 at ECB, a representative that's going to be
21 there. It had stopped for a while. We're back
22 again.

23 MS. SLIFKA: On Wednesdays.

24 LT. ALBANO: And if our representative

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2 asked for an adjournment if there's a, an issue
3 of fact and the hearing officer agrees there's a
4 issue of fact--

5 MS. BALSAM: Right.

6 LT. ALBANO: Will we get an adjournment
7 or is it still up to the hearing officer's
8 discretion?

9 MS. BALSAM: It's still up to the
10 hearing officer's discretion to make that call as
11 to whether or not there's an actual issue of
12 fact.

13 LT. ALBANO: Okay.

14 MR. DEL VALLE: And there's also,
15 there's also--

16 LT. ALBANO: But if he agrees that
17 there's an issue of fact, he will adjourn.

18 MR. DEL VALLE: There's also, there's
19 also the question--

20 MS. BALSAM: They should, yes.

21 LT. ALBANO: Okay.

22 MR. DEL VALLE: --of whether or not the
23 petitioner in advance--

24 MS. BALSAM: And whether or not it's

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2 the first time it's being adjourned.

3 MR. DEL VALLE: --knew that there was
4 going to be an issue of fact. If they knew in
5 advance that there was going to an issue of fact,
6 they should have come prepared.

7 LT. ALBANO: No. But the rep's not, the
8 rep's not going to know.

9 MS. BALSAM: The reps don't know.

10 LT. ALBANO: The rep's not going to know
11 that. And the other issue is there are some
12 things that we can amend on the NOV.

13 MS. BALSAM: Right.

14 LT. ALBANO: Can, can we adjourn to have
15 the issuing officer come and make the amendment?

16 MS. SLIFKA: You could make the
17 amendment.

18 LT. ALBANO: Would the, the--

19 MS. BALSAM: But why would you want to
20 do that? If you have a rep there, and why would
21 you want to have your officer come to make the,
22 to ask for the hearing?

23 LT. ALBANO: Okay. So then the rep can
24 make the amendment to an NOV that he didn't

1 March 31, 2016

2 issue?

3 MS. SLIFKA: To a section of law?

4 MS. BALSAM: Okay. So, so let me,
5 wait, wait, wait. Reps don't make amendments.
6 Right? Reps ask for amendments to be made.
7 Right? They make motions to amend. So, yes,
8 reps on both sides could theoretically move to
9 amend. Right? Although it's usually only
10 petitioners. And yes, it routinely happens at
11 other agencies where it's the rep--

12 LT. ALBANO: Alright. Good. Okay.

13 MS. BALSAM: --and not the inspector.

14 LT. ALBANO: Okay.

15 MR. DEL VALLE: It depends what the
16 amendment is, I mean--

17 LT. ALBANO: Right. And I understand.
18 You can't amend for everything.

19 MR. DEL VALLE: --if it's fixing--

20 MS. BALSAM: Right.

21 MR. DEL VALLE: --a, a decimal point,
22 it's one thing. If it's changing the allegation
23 completely--

24 MS. BALSAM: Right. The facts.

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2 MR. DEL VALLE: --that's a whole
3 different animal.

4 LT. ALBANO: No, no. Understood,
5 understood.

6 MS. BALSAM: Elizabeth, you had another
7 point?

8 MS. KNAUER: Yes. Also on page 45,
9 still in the request for an adjournment section.

10 MS. BALSAM: Yep.

11 MS. KNAUER: (C), a hearing officer may
12 not adjourn a hearing on more than one two
13 occasions because of the unavailability of the
14 inspector.

15 MS. BALSAM: Mm-hmm.

16 MS. KNAUER: I think that's quite fair
17 when the petitioner is requesting the
18 adjournment.

19 LT. ALBANO: We can work with that.

20 MS. KNAUER: I'm just wondering about a
21 respondent who's coming back and they want to
22 cross examine that inspector and they, they show
23 up once, the inspector's not there. They want
24 the inspector there, there's an adjournment. The

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2 next time they come -- they have no control over
3 whether the inspector comes. The inspector's not
4 there. If they want, they want to cross examine
5 that inspector, why can't the hearing officer
6 grant another adjournment?

7 MR. DEL VALLE: But that's a request by,
8 by the respondent, not the petitioner.

9 MS. KNAUER: This just says a hearing
10 officer may not adjourn. It doesn't say, at the
11 request of a petitioner. It says, may not
12 adjourn for, on more than two occasions.

13 MS. BALSAM: Because at some point a
14 hearing has to go forward and if it's already
15 been adjourned twice, it should go forward on the
16 third day, regardless of whether or not the
17 officer appeared or not and, and the scenario
18 that this addresses is the rep who comes in and
19 keeps adjourning for the inspector. The
20 respondent rep who keeps adjourning for the
21 inspector or for another reason or whatever
22 because they don't want to pay or their clients
23 don't want to pay. So that's where that came
24 from. Right? So, well, yeah, but I really need

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2 the inspector for this reason. Well, you know,
3 you've had two shots.

4 MS. KNAUER: But I think then the
5 hearing officer can just say, I'm not going to
6 adjourn it because there's no issue of fact
7 there. That just goes back to the original--

8 MR. DEL VALLE: Right. That's a--

9 MS. KNAUER: --rule we were discussing.
10 I don't know why there is a blanket rule that
11 they can't adjourn it another time if there is an
12 issue of fact and the respondent wants to cross
13 examine that inspector and they have no control
14 over whether that person's there or not. So
15 it's, I'm, so I think there is a situation where
16 the, an adjournment could properly be granted
17 because for the respondent to be able to cross
18 examine somebody, they, they say, they dispute
19 what, you know, the, the summons is being offered
20 as the case of, as all of the evidence. In the
21 case.

22 MR. DEL VALLE: You bring up a good
23 point.

24 MS. BALSAM: Right.

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2 MS. KNAUER: And the person says, that's
3 not true.

4 MS. BALSAM: And the petitioners, and
5 the petitioners already had two shots at bringing
6 in the inspector and the inspector hasn't showed
7 up.

8 MS. KNAUER: The petitioner did.

9 MS. BALSAM: Right?

10 MS. KNAUER: Right. But the respondent
11 is the person saying that did not happen and--

12 MS. BALSAM: Okay.

13 MS. KNAUER: --I, I want to cross
14 examine that person because you're going to
15 accept what they say its face value as sworn, as
16 sworn testimony, I want to have the opportunity
17 to cross examine them. And the, and the
18 petitioner is not bringing the inspector.

19 MS. BALSAM: Right.

20 MS. KNAUER: So how, but then this is
21 saying the hearing, even under that circumstance,
22 the hearing officer can't continue to adjourn the
23 hearing and make the inspector come.

24 MS. BALSAM: No. The hearing officer

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2 can never make the inspector come. See, that's
3 where you're wrong.

4 MS. KNAUER: Well, though, I guess,
5 well--

6 MS. BALSAM: But it's not like in court
7 where they'll show up because the court ordered
8 them? We don't have that kind of authority. We,
9 we say we're adjourning for it, but if they don't
10 send the inspector, they're not, if the
11 petitioner doesn't send the inspector, the
12 inspector's just not coming. So how many times
13 are you going to make the respondent come back--

14 MS. KNAUER: Okay.

15 MS. BALSAM: --where the petitioner
16 just isn't sending the inspector and maybe the
17 inspector's left, maybe, you know, I mean,
18 petitioners will make those determinations.
19 They're saying it's not worth our while to take
20 our inspector off the street so we're just not
21 sending that person. We want to rest on our
22 paper. We have a right to rest on our papers.
23 How many times are you going to make the
24 respondent come back in that situation?

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2 MS. KNAUER: So, but, you're basically
3 saying the respondent does not have the right to
4 cross examine the person whose, whose sworn
5 testimony--

6 MS. BALSAM: No, I'm saying that--

7 MS. KNAUER: --you're saying--

8 MS. BALSAM: --the respondent has a
9 right to ask for it and if, in fact, the
10 petitioner doesn't send the inspector, the
11 hearing officer will rule--

12 MR. DEL VALLE: If, if--

13 [END ECB MARCH 2016 BOARD MEETING PART
14 1.WMA]

15 [START YOUTUBE @ 44:20]

16 MR. DEL VALLE: --the hearing officer
17 wants to submit papers which I consider to be
18 high risk because of its, it can be very easy to
19 refute what's on paper without anybody there to
20 defend it. If I'm the hearing officer and the
21 paper says, alleges A and the respondent says, A
22 just didn't happen, then it's a matter of
23 credibility.

24 MS. KNAUER: Right.

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2 MR. DEL VALLE: Whether there's, there's
3 a, even if the inspector were there and said it
4 is A and the respondent says, no, it was B, it's
5 still a matter of credibility. The difference is
6 I can judge the, the body that's sitting in front
7 of me's credibility a lot better than, than the
8 person who's not there, and the person who's not
9 there is at risk that I'm not going to find them
10 credible because they're not there.

11 MS. KNAUER: I, I agree that that's how
12 it should play out to practice. I think
13 oftentimes because the inspector is not there,
14 their sworn statement is viewed as credible.
15 But, but--

16 MS. BALSAM: Let me just say that the
17 training for the hearing officers, we actually
18 address that in our training.

19 MS. KNAUER: And say they should weigh
20 the--

21 MS. BALSAM: Yes. And we have this
22 discussion.

23 MS. KNAUER: Okay. And, and if, in
24 fact, the petitioner, and if in fact the hearing

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2 officer, I mean, sorry, the inspector doesn't
3 have to show up, if the petitioner doesn't ask
4 them to then this rule can't address that.

5 MR. DEL VALLE: Mr. Gregory?

6 MS. BALSAM: No, Russ had his hand up.
7 Russell hasn't spoken yet.

8 MR. GREGORY: No, go ahead.

9 MS. BALSAM: I'll get back to you.

10 MR. RUSSELL PECUNIES: Just, to just,
11 that scenario that we were just discussing. If
12 it's adjourned twice for the officer, and on the
13 third date the respondent says, I want a third
14 adjournment for the officer to come in, the judge
15 would not be allowed to grant that--

16 MS. BALSAM: That's correct.

17 MR. PENUNIES: --even if it's at the
18 respondent's request.

19 MS. BALSAM: That's correct.

20 MS. KNAUER: That was the issue that I
21 was raising.

22 MS. BALSAM: That's correct.

23 MS. KNAUER: But it doesn't matter. If
24 the petitioner is not going to put forward the

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2 inspector anyway, you're right, there's no point
3 in adjourning it further.

4 MS. BALSAM: And that happens. I can
5 tell you from my experience as a hearing officer.
6 I've got to Joe Gregory--

7 MR. GREGORY: Actually, it's--

8 MR. DEL VALLE: You lose the floor.

9 MR. CAVALLO: Ernie Cavallo, Citizen
10 Member. When you do the training, do you tell or
11 suggest that they take an inference from the lack
12 of appearance after two, after two times?

13 MS. BALSAM: We talk about the concept
14 and that they can do that. I, I'm not, I'm not
15 in a position to tell them what to do. They're
16 supposed to be independent. So I can't stand
17 there and say, you should take a negative
18 inference. I'm not going to do that. Right?

19 MR. CAVALLO: I understand that. I just
20 want to know what the parameters are because I
21 think the incentive would be not to send the
22 officers now because, especially if respondent
23 want, wants it. The respondents may be crazy to
24 want them because, you know, the officer will

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2 come in and say, this is what I saw; this is what
3 wrote; blah blah blah. They have some other
4 idea. But they have a sense they have not gotten
5 justice if they have not had their request
6 fulfilled. And if they're willing to come back,
7 the purpose of this is that so respondent doesn't
8 have to come back more than two times and
9 somebody wants to come back, why shouldn't they
10 be allowed to come back?

11 MS. KNAUER: Because it's futile.

12 MS. SLIFKA: Because the petitioner is
13 not producing their inspector.

14 MR. CAVALLO: At some point--

15 MS. SLIFKA: It's based on time and we
16 have to resolve these issues. Some of these are
17 serious issues and there's a delay tactic that
18 the high volume representatives use all the time.

19 MR. CAVALLO: I guess so.

20 MS. SLIFKA: And what Helaine said
21 initially, that's what this, you know, this
22 adjournment--

23 MR. DEL VALLE: And, and the high volume
24 representatives are not in the position of Mrs.

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2 Smith, who's a 87-year old homeowner in Queens,
3 who is responding to a sanitation; we're talking
4 about people who are making millions of dollars a
5 year representing businesses throughout the City
6 and they play a lot of games.

7 MR. CAVALLO: Well, I'm worried about
8 Mrs. Smith because I'm a citizen representative,
9 let's put it that way. And--

10 MS. SLIFKA: Mrs. Smith--

11 MR. CAVALLO: I know--

12 MS. SLIFKA: Mrs. Smith doesn't usually
13 want to come back.

14 MR. CAVALLO: But I know many many
15 appeals where the rep doesn't show up, somebody
16 shows up. They do their whole case and they get
17 found not to be credible and the piece of paper
18 is more credible and they wanted the person
19 there.

20 MS. BALSAM: But that could be, Ernie.
21 I mean, that could absolutely be. You could have
22 a respondent that is totally not credible. I've
23 been there. I'm sure you've been there too

24 MR. CAVALLO: I've been there.

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2 MS. BALSAM: You know, we're, where the
3 piece of paper really is more credible and you
4 could have sit-, you could have the reverse
5 situation also where the respondent is
6 unbelievably credible, but that's really funny.
7 The respondent is very, very credible.

8 MR. DEL VALLE: Okay. This is an aside.
9 I get to see all of the 311, either online or
10 phone call inquiries and complaints that, that
11 relate to the tribunals. It is not at all
12 uncommon for me to get a complaint saying,
13 hearing officer's corrupt or, or the, or the
14 inspector's corrupt or the world is corrupt
15 because I got a summons for, let's say, a dirty
16 sidewalk and, and I was found guilty because the
17 sidewalk was dirty and I wasn't the person who
18 dirtied the sidewalk. Well, yeah, you are guilty
19 because that's what the law is but they will
20 absolutely sincerely believe to the core of their
21 soul that they weren't guilty, and, and you see
22 that time and time again. What they're actually
23 disputing is the existence of the law in the
24 first place. But that's not what our business is

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2 about. I mean, we interpret the existing law.
3 You have a problem with what the law says, go
4 talk to your councilman and get it changed.
5 You're going to, you're going to have a lot of
6 that and you're going to have people who are not,
7 I hate to say it, but they're not sophisticated
8 as, as to the reality of the world or their own
9 legal responsibilities. There's a lot of folks,
10 for example, that get into businesses who are, to
11 say the least, naïve as to what their legal
12 responsibilities are. They understand that they
13 have to get, they might have to get an
14 accountant, but they won't get a lawyer to do a
15 closing and are, totally are oblivious to the
16 fact that they open up a business and, and they
17 have particular responsibilities that have to do
18 with the Buildings Department, the Health
19 Department, DOT, Fire and all these other codes
20 that relate to public safety and public health
21 that have evolved over the last few hundred years
22 in the City and they, they wind up shocked when
23 they find out, oh, I have to have the fish
24 sitting on ice? That doesn't make any sense to

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2 me, that's not fair. Why should I have to do
3 that? You know, a bunch of people died once upon
4 a time because they got food poisoning, that's
5 why. You, you, you run into this constantly. I,
6 I get to share some of the, what I would call
7 crazy e-mails I get sometimes about that kind of
8 stuff. And, and we have to, we respond to all of
9 them basically saying, you know, that's the law
10 or, or whatever and things like that. Not
11 everybody's going to walk away happy. As a judge
12 once said, if at least 50, if everybody walks out
13 of my court happy, that means I did my job.

14 MR. GREGORY: I just had a quick
15 comment/question.

16 MS. BALSAM: Yeah.

17 MR. DEL VALLE: I don't want to cut
18 anybody off so if anybody's got any questions or
19 issues.

20 MR. GREGORY: Joseph Gregory, Fire
21 Department. Page 52, this is more of a question
22 than a comment. The question is that, is that
23 provision actively enforced because what happens
24 quite often--

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2 MS. BALSAM: Are you talking about
3 registered representatives or prehearing
4 notification?

5 MR. GREGORY: Prehear-, I'm sorry,
6 prehearing notification. So what happens very
7 often is the high volume reps, they'll come in
8 with 30 cases and they'll have their own personal
9 fire rep for the entire time at the exclusion,
10 you know, of the individuals that are coming in.
11 So that can be, you know, problematic as far as
12 that goes. So that, you know, I just wanted to
13 comment to know if that's actively enforced, that
14 provision, that's fine, but also the--

15 MS. BALSAM: Well, remember, that this
16 provision just says that they can't appear on
17 more than 15 unless they fax us a list.

18 MR. GREGORY: Right.

19 MS. BALSAM: It doesn't say that they
20 can't appear on 30. It just says if they're
21 going to appear on more than 15, let us know in
22 advance so we can try and schedule accordingly.

23 MR. GREGORY: Well, yeah, 'cause it says
24 that in cases, in the next paragraph, it says at

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2 the discretion of the hearing officer. So they
3 can add as many more as they want at the
4 discretion of the hearing officer in charge. So
5 I'm just saying--

6 MR. DEL VALLE: They can try.

7 MR. GREGORY: Well--

8 MS. BALSAM: You know, what, what we're
9 trying to address here is that we don't want them
10 picking up cases in the waiting room and then
11 adding them. They're not supposed to do it -- it
12 happens. So we're trying to get them to do as
13 much in advance as possible.

14 MS. SLIFKA: Right. And from a
15 practical standpoint right now, they submit their
16 list. They're required to submit the list and
17 they're really not adding cases. It's an
18 exceptional circumstance where maybe they,
19 something fell off the list. No, because we have
20 to calendar the day and you have your reps and we
21 have our hearing officers and they're not adding
22 20, 30 cases at all.

23 MR. DEL VALLE: This is meant to, to
24 stop champerty going on in the playroom.

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2 MS. KNAUER: Can I ask just--

3 MS. BALSAM: Yeah.

4 MS. KNAUER: --a question about this?

5 So, about how it works. So if, if there is a
6 high volume rep who submitted their list, are all
7 of their cases heard at once so other people are
8 waiting or are they spaced out throughout the day
9 so that person has to stay there all day if they
10 need to.

11 MS. SLIFKA: The managers are instructed
12 to space them throughout. Especially if there
13 are pro se respondents sitting there waiting and
14 we know they have to get back to work or someone
15 has childcare issues.

16 MS. KNAUER: Right.

17 MS. SLIFKA: Right.

18 MS. BALSAM: Dan.

19 LT. ALBANO: If a rep doesn't show up
20 twice, that's what we've given them--

21 MS. BALSAM: An inspector.

22 LT. ALBANO: An inspector. We get two
23 bites at the apple. Doesn't make it two times
24 after, he's been notified and you have access to

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2 the computer system. Right? Computer
3 notification. Is there any ramification? Are
4 you going to let the Agency know, I mean, that's
5 twice he didn't show up.

6 MS. SLIFKA: You conduct the hearing. I
7 mean--

8 LT. ALBANO: Are there are consequences
9 or notification back to the Agency, you know, we
10 asked for your inspector twice and he hasn't
11 shown up.

12 MS. SLIFKA: No.

13 MR. DEL VALLE: We, we can do that if
14 the Agency wants to do that.

15 LT. ALBANO: Yeah, yes. He's given two
16 chances to show up. He hasn't shown up.

17 MR. DEL VALLE: Yeah, that's an, that's
18 an integrity control issue.

19 MS. SLIFKA: But, right, the other issue
20 is which Tynia was just saying, if the rep is
21 there and they know the inspector don't show up.
22 In your case, you don't have a rep so you're just
23 adjourning for the--

24 LT. ALBANO: Right.

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2 MS. SLIFKA: But your rep is there
3 originally adjourning for the inspector, unless
4 the respondent requests the inspector and your
5 rep is there the next day, you now have a rep
6 coming and that's when the case is--

7 LT. ALBANO: On Wednesdays, in
8 Manhattan.

9 MS. SLIFKA: So the rep should be on
10 notice. That's the only time it's going to be
11 adjourned unless the respondent requests it.
12 There has to be a petitioner present to make the
13 request for an adjournment so.

14 LT. ALBANO: The respondent, there are
15 cases where the respondent's going to ask for,
16 for an adjournment and they, we, we don't show
17 up.

18 MS. SLIFKA: Right.

19 LT. ALBANO: And we want to know about
20 it.

21 MS. SLIFKA: Okay.

22 MR. DEL VALLE: I understand, I
23 understand Lieutenant Albano's concern. I know
24 exactly what he's talking about.

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2 LT. ALBANO: Especially now where it
3 looks like we're going to be using ECB more and
4 more for other issues.

5 MS. SLIFKA: And we can, we can
6 definitely-- That's an easy fix.

7 MR. DEL VALLE: It's only 300,000 cases.
8 That's all.

9 MS. GRAHAM: Shamonda Graham, Department
10 of Buildings. I'm asking a question on and I
11 need clarify on the definitions found on page 33
12 and 34.

13 MS. BALSAM: Let me get there.

14 MS. GRAHAM: Yeah. Take your time. At
15 running the risk of, I'm not sure about this.

16 MS. BALSAM: Okay.

17 MS. GRAHAM: Board is defined as the
18 Environmental Control Board, right, the
19 Environmental Control Board of the City of New
20 York.

21 MS. BALSAM: Mm-hmm.

22 MS. GRAHAM: And the tribunal is defined
23 to include the Environmental Control Board?

24 MS. BALSAM: Right. Because--

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2 MS. GRAHAM: So--

3 MR. DEL VALLE: To include the
4 Environmental Control Board Tribunal--

5 MS. GRAHAM: That's what, very much so.

6 MR. DEL VALLE: Not us, not this group.

7 MS. GRAHAM: So I guess what I'm asking
8 is which one is this group, and I would imagine
9 that it's Board.

10 MR. DEL VALLE: Right.

11 MS. GRAHAM: So when--

12 MR. DEL VALLE: Unless you want to hear
13 700,000 cases.

14 MS. KNAUER: But if you look at the
15 definition it does say--

16 MS. GRAHAM: It's almost circular for me,
17 but I get what, how you're explaining it. So
18 then on page 49, I'll let you get there, and
19 throughout.

20 MR. DEL VALLE: We had that discussion
21 before and, and it's, it's a discussion that I've
22 been having with folks for about the last 35
23 years because we had the same problem when I, it
24 still exists, at the Taxi and Limousine

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2 Commission. There are tons of provisions in the

3 rules, laws or whatever that speak of the TLC

4 shall do this, that or the other thing. Well, if

5 you read it literally, you're talking about the

6 nine commissioners of the TLC actually signing

7 off on everybody's driver's license when they

8 say, you know, the Taxi and Limousine Commission

9 shall issue a license, which, of course, is

10 absurd. It's not the idea. What we do is draw

11 the distinction between administrative functions

12 which staff do, such as license processing and

13 that kind of thing, and policy decisions, which

14 are what the Board does, what the commission

15 itself does. The TLC is composed of nine

16 commissioners and a chair. They don't, you know,

17 do the actual mailings, whatever. I mean, it's

18 like almost 200,000 licensees. It's kind of like

19 when ECB was originally conceived of, actually in

20 the 1960s. It came into existence in '71, but it

21 was conceived in the 1960s. They imagined that we

22 would be listening directly to every, every case,

23 you know. And they figured that it might be like

24 24 cases a year. Well, gee whiz, we like making

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2 laws in this country. And now there's 700,000
3 summons issued and pretty soon we're going to be
4 getting a whole bunch more by this time next
5 year. If you think this is complicated, you
6 ain't seen nothing yet. Well, so we wound up
7 creating a tribunal, delegating authority to
8 actually do the hearings to the tribunal, and
9 delegating authority for ministerial functions
10 and so forth and like that. And, and it then
11 gets more complicated when parts of the
12 Environmental Control Board that were created in
13 1971 were removed. We no longer control the
14 Sanitation Department. We no longer control DEP.
15 We no longer control the Health Department. We
16 don't, we no longer control DOT. This was a
17 super agency; it was conceived as a super
18 enforcement agency. It isn't that anymore. And
19 unfortunately, we're stuck with a lot of legacy
20 nonsense that when they pulled out DEP, for
21 example, they made very clear in the DEP section
22 what is DEP, but that didn't go to the ECB part
23 of the charter to make clear what, what is and
24 isn't anymore. It was just left out there, you

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2 know, orbiting Jupiter or something. And, and a
3 lot of that stuff needs to be cleaned up, which
4 leads to a lot of weird inconsistencies and
5 contradictions we encounter. And going back to
6 what your original point is, when, when they talk
7 about the Board's function, you know, some of its
8 ministerial, which obviously the Board is not
9 involved in, doesn't care about. And some of
10 that is policy stuff, which is the real purpose
11 of any board is to set policy and dealing with
12 policies. So we have to, we have to read it that
13 way. And it's awkward because I tried to change
14 that when I was with the TLC to make it explicit
15 and it just, it just couldn't make it work. Hm?

16 MS. GRAHAM: You find that language
17 everywhere.

18 MR. DEL VALLE: Yeah.

19 MS. GRAHAM: You have the charter. You
20 have to go to each Agency's section of the
21 charter to, to fix it. My question is on page
22 49, where it talks about appeals decisions,
23 subsection 3, it says summonses returnable to the
24 Board pursuant to 1049(a), which I would

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2 understand to be the tribunal. But then it says,
3 the appeals unit makes recommended decisions to
4 the Board. So I think, even through out, and
5 that would be this Board.

6 MR. DEL VALLE: Right.

7 MS. GRAHAM: Even throughout the
8 document itself, the entire, close attention
9 should be paid to where you use the language
10 tribunal versus where you use the language Board.
11 And I think there should be some clarity here on
12 whether or not the Environmental Control Board,
13 the one where we sit, is included in the
14 definition of Tribunal. And maybe there should
15 be some way to distinguish the two.

16 MR. DEL VALLE: At least for the purpose
17 of the rules.

18 MS. GRAHAM: Yeah. Well, that's what I
19 meant.

20 MR. DEL VALLE: Yeah.

21 MS. GRAHAM: For the purpose of the
22 rules, even here, if you, you know, we understand
23 that you mean the Tribunal and then the Board,
24 but anybody else reading it would say, why would

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2 they refer a decision to themselves? Why would
3 they recommend a decision to themselves?

4 MS. BALSAM: So the, I would love to say
5 for summonses returnable to the tribunal pursuant
6 to 1049(a). The Law Department has a different
7 perspective. And they view the Board as the one
8 that has the, the entity that has the power when
9 it comes to the laws. Right? The laws that say
10 that the summonses are returnable to the
11 Environmental Control Board. Knowing that the
12 Board is empowered to have an executive director
13 who is our commissioner and Chief ALJ, right, and
14 hearing officers, but they wanted Board here and
15 there's only so much back and forth you can have.

16 MS. GRAHAM: No, I understand. I guess
17 for me, because you have that follow-up language
18 that says that pursuant to 1049(a), it makes
19 clear exactly what you mean, but then if you look
20 at it as it relates to the definition, that are
21 put up front--

22 MS. BALSAM: Right.

23 MS. GRAHAM: It makes one wonder why are
24 we saying Board here? And I really, really--

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2 MR. DEL VALLE: The short answer is
3 that's what the Law Department is insisting upon.

4 MS. GRAHAM: And also, and also there
5 are other places where the term Board is used.
6 To me, it seems like it's used interchangeably
7 with Board--

8 MS. BALSAM: We tried very hard to make
9 it clear and we're cognizant of the issue of
10 Tribunal versus Board and we made it tribunal
11 wherever we thought it was appropriate, but there
12 were places where had to change it back to Board.

13 MS. GRAHAM: Okay. And then--

14 MS. BALSAM: If you want, if you want to
15 send me a list, I'll be more than happy to look
16 at it again.

17 MS. GRAHAM: Well that and I'm positive
18 that my agency does have very small minor that
19 are not even necessary to bring up here, issues
20 that they would like to definitely send you
21 regarding this.

22 MS. BALSAM: But we can publish this,
23 right?

24 MS. GRAHAM: I, my agency has some

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2 reservations.

3 MR. DEL VALLE: Okay.

4 MS. GRAHAM: And then we can publish it.

5 MR. DEL VALLE: No, we're going to
6 publish it. We're going to publish it and we're
7 going to get comments from the agencies and the
8 public because we've been jerking around with
9 this for too long. And, and a lot of it has to
10 do with having to persuade the Law Department.
11 Which, by the way, we cannot publish unless the
12 Law Department certifies that it's not ultra-
13 vires and the, and the Mayor's Office certifies
14 that it is in English. I'm not kidding.

15 MR. MARTINEZ: Yes, Jorge Martinez,
16 Department of Health. I have a question about
17 consolidation of cases on page 38, subsection
18 (b). It says here, "in the interest of ... blah
19 blah blah ... determination of cases on the same or
20 similar issues or the same parties." I wonder
21 whether the "or" should be changed to an "and."

22 MS. BALSAM: Not necessarily.

23 MR. MARTINEZ: No?

24 MS. BALSAM: No. Let's say you have

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2 violations that are issued to contractors and
3 building owners. You might want to have the
4 hearings together.

5 MR. MARTINEZ: Or "and/or"?

6 MR. DEL VALLE: Well, or, or means
7 and/or. I, I took grammar when I was in grammar
8 school. The conjunction and disjunction are
9 not necessarily mutually exclusive when it's an
10 "or." Just like although it's politically
11 correct to say him or her, when I, when I learned
12 grammar, we knew that in the context of the
13 document that if it says him, it means him or
14 her. But politically being correct, it says him
15 or her everywhere. Somebody whose learning
16 English as the second language it sounds
17 ridiculous because it's obvious, but, but that's
18 where that's at.

19 MR. MARTINEZ: Right. I'm sorry, I
20 mean, I don't want to be labor this, but the way
21 I read it is if a respondent comes in with
22 different, a case could be consolidated if it's
23 the same respondent but doesn't matter what
24 issues but if it's the same parties, it doesn't

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2 matter the issue, the case could be consolidated.

3 No?

4 MS. BALSAM: It could be. But they ask,
5 I mean, you know, I don't think that we're in the
6 business of consolidating things ad hoc. There
7 has to be a valid reason do it so.

8 MR. MARTINEZ: I'm just saying, clarity,
9 trying to get clear so I don't want to push it,
10 but this raised a flag for me.

11 MR. DEL VALLE: Anything else? Anybody
12 want a break? So what, what is proposed is that
13 we'll publish for comments from the public this
14 draft, and it is a draft, and conduct a hearing
15 and accept comments from the public and anyone
16 else for that matter as to any items in here.
17 The process, and I'm doing this for the benefit
18 mostly for the benefit of the video, the process
19 involves, at the conclu-, during the process or
20 at the conclusion of the process in response to
21 any of the comments that are submitted, if there
22 are any changes made that are non-substantive,
23 then there's a final version of the rules that
24 the Board will vote on and either up or down.

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2 If, at the, as a result of, of the vetting

3 process, the common process, it's believed that

4 there should be substantive changes, then we

5 start all over again. The rules are published

6 again as though they're new. There's a new

7 comment period and new hearing and then there is,

8 any changes or non-changes and the Board votes.

9 That theoretically can go on in perpetuity, but

10 in reality it doesn't go on in perpetuity. Given

11 that, I'm, I'm moving that we publish the draft

12 and continue the process of accepting comments

13 from whomever is interested in making comments

14 and we then evaluate them. And then have a

15 hearing, a public hearing where people who do not

16 want to submit their comments in writing can come

17 in person and, and, and yell and rant and

18 whatever they'd like to do at a public hearings

19 and we get a report on it. Anybody here, of

20 course, is welcome to sit in at the public

21 hearing and, and listen to the testimony or

22 question the witnesses when we have a date. And

23 I would like to move for a vote to publish for

24 comment. All in favor? All opposed? Two

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2 opposed, the rest in favor. The motion carries.

3 [END YOUTUBE @ 1:12:46]

4 [START ECB MARCH 2016 BOARD MEETING PART
5 2.MP3]

6 MR. DEL VALLE: We're up to three. Time
7 flies when you're having fun.

8 MS. BALSAM: Okay. So next we have
9 another proposed rule.

10 MR. DEL VALLE: Yay.

11 MS. BALSAM: You may remember back in
12 October there was a question about moving penalty
13 schedules out of ECB's rules and into Agency
14 rules. At the time, the presenting agency was
15 the Parks Department and the Board had agreed to
16 go forward. The Law Department had some issues,
17 which we have worked through and at this moment
18 in time, Parks is not moving forward, but DEP
19 most definitely is because they have a May 6th
20 deadline for the Air Code. So the Law Department
21 suggested that ECB pass a rule and we actually
22 already had one so we just had to amend one,
23 telling the hearing officers, directing the
24 hearing officers to look to the penalty schedules

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2 in the agency rules instead of in subchapter G of
3 Chapter 3 of Title 48. So we are amending
4 Section 3-100 to say that if there is no penalty
5 schedule under 3-100, look to the agency rules
6 and the agency rules will have the penalty
7 schedules and we are repealing the Air Code
8 effective, the Air Code Penalty Schedule
9 effective May 6th because that's the date that
10 the new Air Code goes into effect. And if we
11 don't do that, we'll have two penalty schedules
12 and that would be bad. Questions?

13 MR. DEL VALLE: Motion? I believe it's
14 unanimous.

15 MS. BALSAM: Okay. And we would ask
16 that the Board pass a resolution to have other
17 agencies move forward as well. The agencies are
18 aware of it and actually we have been working
19 with them. Yeah.

20 MR. RUSSELL PECUNIES: Just one, one
21 question. Russ Pecunies, DEP. Will you guys
22 have to get a 30-day waiver for this--

23 MS. BALSAM: Yes.

24 MR. PECUNIES: --to take effect?

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2 MS. BALSAM: Yes.

3 MR. PECUNIES: Yes? Okay.

4 MS. BALSAM: And everybody's aware of
5 that.

6 MR. DEL VALLE: And they, they've asked,
7 it's a package from here and from the agency
8 together to City Hall for signature.

9 MR. PECUNIES: We actually, our penalty
10 schedule without the waiver will take effect on
11 May 8th, two days late. We've spoken, Amy and I
12 have spoken and just any tickets that are issued
13 on June, on May 6th or May 7th, will not be
14 subject to a penalty schedule. The judge will
15 have the discretion to impose any penalty within
16 the minimum and the maximum just for tickets
17 issued on those two days. So I don't think we're
18 going to need the 30-day waiver.

19 MR. DEL VALLE: Okay.

20 MS. BALSAM: It's the next one. We're
21 both doing it together.

22 MR. DEL VALLE: Alright. ECB's final
23 rule regarding an amendment to the DOB schedule.

24 MR. DENIS BROGAN: Good morning,

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everyone. My name is Denis Brogan, assistant general counsel here at OATH. Today we have the final rule. It's an amendment of the Building's Penalty schedule, construction safety violations. You may recall from the last meeting the Department of Buildings' penalty schedule. It's in Section 3-103 of Subchapter G of Chapter 3 of Title 48 of the Rules of City of New York. It contains penalties for notices of violation issued by New York City's Department of Buildings. The proposed rule was published in the City Record on February 29, 2016 and we held the public hearing yesterday on March 30, 2016. I want thank Shamonda for your gracious presence yesterday at John Street for a public hearing. As you can see from your packet, the proposed modifications to the penalty schedule, they add two new infractions and amend three existing infractions. There's two charts in you packet.

The first one for the new entries, I just want to cite sections of law, it's 28-201.1 Class I and II. Those are for failure to comply with the law, rule or commissioner's order

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2 involving construction and/or equipment safety
3 operations. Those are all new penalties. And
4 your second chart in the packet, these are
5 increases in the penalties in Administrative Code
6 Section BC 3301.2, Class I, and 3316.2 Class II.
7 There's Class I and II for 3301.2. This is for
8 inadequate safety measures operation of crane,
9 derrick, hoisting equipment in unsafe manner and
10 respectively, the Class I and II for 3301.2 is
11 failure to safeguard all persons and property
12 affected by construction operations. And you can
13 see those are the increased penalties that are
14 underlined. So at this time, I'd like to ask for
15 a vote on the final rule.

16 MR. DEL VALLE: And before we take the
17 vote, anything--

18 MR. BROGAN: Any questions?

19 MR. DEL VALLE: --and are there any
20 questions? I'd like to add that if, mostly for
21 the benefit of somebody writing their Ph.D.
22 dissertation reviewing this 150 years from now or
23 40 years from now who see some sort of
24 inconsistency in how we're proceeding with this

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2 item as opposed to the previous item, it's
3 because this particular item has to do with life
4 and death issues that were brought to light from
5 a, a recent tragic crane accident. And for
6 reasons of expediency in, in processing the rule
7 changes and penalty changes, we are, we are
8 moving in, in this, this framework right now.
9 That may be modified or altered as we progress,
10 but right now we need this like right now and
11 we're, we're waiving the, the Mayor has, has been
12 asked to, will be certifying that today and
13 sending it over to the Mayor's office to waive
14 the, the 30-day period for the rule to take into
15 effect. That, that has to be based on a
16 certification by the Buildings Department and by
17 me and endorsed by the Mayor. And I'll be going
18 to City Hall probably this afternoon. So that's
19 why we're doing it the way we're doing it.

20 Is there a motion to adopt the rule?

21 And it is--

22 MS. BALSAM: One abstention.

23 MR. DEL VALLE: --unanimous with one
24 abstention.

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2 MR. BROGAN: Thank you.

3 MR. DEL VALLE: I still guess you're
4 probably in favor. I don't know why. Just a
5 wild guess. Now for the hard stuff. Cease and
6 desist orders requested by DEP.

7 MR. PECUNIES: Good morning. Russell
8 Pecunies, DEP Legal. This month DEP is making
9 one request for a cease and desist order under
10 the sewer code. This is for 186 Gourmet Deli on
11 Hillside Avenue in Jamaica. This location has
12 been issued a series of violations and
13 commissioners' orders directing them to install
14 and maintain an appropriate grease interceptor
15 for their sink. They have defaulted on all of
16 the violations that have been issued and they are
17 still not in compliance. Due to their continuing
18 disregard for the commissioner's orders that have
19 been issued and their failure to appear in
20 response to the violations that have been issued,
21 DEP is asking the Board to approve an order to
22 cease and desist.

23 MR. DEL VALLE: Any questions? Is there
24 a motion? It's unanimous with one abstention.

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2 MR. PECUNIES: Okay. The next one is
3 under the Air Code. This is for Arzu Restaurant
4 at 10105 Queens Boulevard in Forest Hills. This
5 location has been cited on three occasions for
6 the emission of smoke the kitchen exhaust. They
7 have stipulated to all three of the violations,
8 but have not corrected the condition. And due to
9 the continuing failure to comply with the Air
10 Code by eliminating the emission of smoke from
11 the kitchen exhaust, DEP is asking the Board to
12 approve an order to cease and desist.

13 MR. DEL VALLE: Any questions?

14 MS. KNAUER: I do have a question about
15 this one. I notice -- Elizabeth Knauer, citizen
16 member -- I, I notice that in looking at the, the
17 summonses now called notices of violation, that
18 the, the second most recent ones, the one from
19 October of 2014. Rather than referring to the
20 kitchen exhaust, it refers to an indoor barbecue
21 grill situated in the kitchen as being the
22 equipment in violation.

23 MR. PECUNIES: Yeah. Apparently--

24 MS. KNAUER: Is that just a difference

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2 in descriptive--

3 MR. PECUNIES: Apparently what they do
4 is they have a barbecue grill that they move
5 between inside and outside depending on the
6 weather. And when it's inside, it's going up the
7 kitchen exhaust.

8 MS. KNAUER: So this was just a, it was
9 just a difference in the way that the inspector
10 described it.

11 MR. PECUNIES: Yeah. Mm-hmm.

12 MS. KNAUER: The actual stuff was--

13 MR. PECUNIES: It's, it's what's coming
14 out of the kitchen.

15 MS. KNAUER: Okay.

16 MR. PECUNIES: When the barbecue grill
17 is kept indoors, it's being exhausted through the
18 kitchen exhaust.

19 MS. KNAUER: Okay. So in terms of what
20 would be sealed if it came to that--

21 MR. PECUNIES: It would be the kitchen
22 exhaust, not the grill. 'Cause the grill
23 apparently they wheel it inside and outside
24 depending on the weather. Yeah. I had asked

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2 them about that specifically because the middle
3 ticket equipment was described differently.

4 MS. KNAUER: And the, the, the measures
5 that they would take to address this situation
6 would be improving the filtration of their
7 kitchen exhaust or by not using the barbeque
8 grill.

9 MR. PECUNIES: This could be corrected
10 by, and I'm not sure of all of the ways that they
11 cook in this restaurant. If the, if the smoke is
12 being caused specifically from the grill, they
13 could stop using the grill. Or they could
14 install something on the kitchen exhaust to, to
15 abate the smoke.

16 MR. DEL VALLE: How old is the, the
17 oldest citation?

18 MR. PECUNIES: What's that?

19 MR. DEL VALLE: How old is the oldest--

20 MR. PECUNIES: The tickets go back to--

21 MR. DEL VALLE: --ticket?

22 MR. PECUNIES: --one ticket goes back to
23 '14. And then, actually two of the tickets are
24 from '14 then there were no violations detected

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2 in '15. A violation was issued again in January.
3 I asked them if there were continuing complaints
4 and I was told that this one had come from City
5 Hall, that there was a complaint that was, that
6 we were contacted through the Mayor's office to--

7 MR. DEL VALLE: So somebody sent their
8 complaint to City Hall.

9 MR. PECUNIES: --act on this one. So.

10 MR. DEL VALLE: Is there a motion? It's
11 unanimous with one exemption. Does this mean
12 though that the, that the summonses for the
13 emissions, am I correct? The violation is for
14 the emissions of the--

15 MR. PECUNIES: The violation is for the
16 emission of smoke from the stack.

17 MR. DEL VALLE: Right. So they move the
18 grill to the sidewalk and they're doing the same
19 thing, but it's not coming out the stack. It's
20 not illegal?

21 MR. PECUNIES: The, the Code is
22 equipment based so it's the kitchen exhaust, it's
23 the fan that's blowing the smoke out through the
24 stack. That's the equipment that's causing the

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2 violation. But we apparently have not, we could
3 issue a violation from smoke or odors from the
4 grill when it was outside, but we have not done
5 so.

6 MR. DEL VALLE: Well, it might, it might
7 also be a, either, depending on where on the
8 sidewalk a DOT or other viola--

9 MR. PECUNIES: It, it may be that--

10 MR. DEL VALLE: --DEP violation.

11 MR. PECUNIES: It may be that when the
12 smoke is out, when the grill is outside, the
13 smoke it not affecting anybody. But when it's
14 coming out the stack on top of the building, it's
15 going right into--

16 MR. DEL VALLE: outside your window,
17 yeah.

18 MR. PECUNIES: --somebody's window.

19 MR. DEL VALLE: Okay. Just curious.

20 MR. PECUNIES: The next one is a vio-, a
21 request under the Noise Code. This is for
22 Chelsea 9th Pizza Corp. at 204 Ninth Avenue. At
23 this location, the kitchen exhaust is being cited
24 for noise, not for smoke. They've been cited

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2 three times since this past July. They have
3 defaulted on all three of the violations and
4 based on the continuing failure to come into
5 compliance, the Department is asking that the
6 Board issue an order to cease and desist.

7 MR. DEL VALLE: Questions? Motion?
8 It's unanimous with one abstention.

9 MR. PECUNIES: And then finally, there
10 are 28 requests for cease and desist orders
11 relating to failure to comply with commissioner's
12 orders directing the installation of backflow
13 prevention devices. In each of these cases, a
14 summons has been issued and adjudicated finding
15 the respondent in violation and there is a
16 continuing failure to comply by installing the
17 required device. And therefore, the Department
18 is asking the Board to issue cease and desist
19 orders.

20 MR. DEL VALLE: Questions? Motion?
21 It's unanimous with one abstention again.

22 MR. PECUNIES: Thank you.

23 MR. DEL VALLE: Do you know if boilers,
24 skin boilers, human boilers are supposed to have

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2 backflow preventives?

3 MR. PECUNIES: The building, one of the
4 reasons a building would have to install a
5 backflow prevention device is if it had a boiler
6 over 350,000 BTUs. That's considered a large
7 boiler and that would require the building to
8 have a backflow device.

9 MR. DEL VALLE: Okay.

10 LT. ALBANO: That's a big boiler.

11 MR. DEL VALLE: 'Cause I have one and
12 it's nowhere near that.

13 MR. PECUNIES: If you look at the reason
14 on, on the requests, the reason why they need the
15 device is given on the affidavit and many of them
16 say, large boiler.

17 MR. DEL VALLE: Okay. Thank you.
18 Kelly.

19 MS. KELLY CORSO: Good morning. I'm
20 Kelly Corso, Assistant Director for Adjudications
21 for OATH ECB hearings. We have 21 pre-sealing
22 reports for today's Board. We have, 17 of those
23 pertain to backflow violations. In all those
24 cases, the hearing officers recommended no

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2 sealing or other action based on the respondent's

3 evidence of compliance at the hearings. The

4 remaining cases we have, one Air Code violation

5 and in this case the hearing officer recommended

6 that there be no sealing or other action given

7 the respondent's evidence of compliance at the

8 hearing and presented a valid operating

9 certificate. One of the remaining cases pertains

10 to a Noise Code violation and in this case, the

11 respondent, the respondent presented proof of

12 work done on the air conditioner to bring it to

13 compliance with the Air Code. I'm sorry, the

14 Noise Code. And based on that, the hearing

15 officer recommended that the equipment remain

16 unsealed provided that DEP's initial reinspection

17 and further reinspections for a period of 180

18 days thereafter show no violation. And the final

19 case, the final two cases are Sewer Code cases.

20 And in both of those cases, the hearing officers

21 recommended that the C&D proceedings be

22 discontinued. In one of the cases, the hearing

23 officer's recommendation is based on DEP's

24 finding that the respondent has complied with the

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2 commissioner's order. And in the other case, the
3 recommendation is based on DEP's finding that the
4 respondent no longer owns the cited premises.

5 Any questions?

6 MR. DEL VALLE: Motions? It's unanimous
7 with one exemption, abstention. Is there a
8 motion to adjourn to Executive Session to review?
9 It's unanimous.

10 [END ECB MARCH 31, 2016 BOARD MEETING
11 PART 2.MP3]

12 [START ECB MARCH 31, 2016 BOARD MEETING
13 PART 3.MP3]

14 MR. DEL VALLE: Alright. After that
15 commercial break, we're back. All those in favor
16 of affirming the appeals decisions from March 10,
17 2016 and March 24, 2016, appeal panels as
18 presented in Executive Session? Please signify
19 by saying, aye.

20 LT. ALBANO: The one, does that include
21 what we just voted on?

22 MR. DEL VALLE: No, no. This is a
23 whole--

24 MS. BALSAM: No.

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2 LT. ALBANO: No, no, no. I understand
3 it's different, but does that, that, what we're
4 voting on now, include this particular case that
5 we just--

6 MR. DEL VALLE: No.

7 LT. ALBANO: No. Okay. Alright.

8 MR. DEL VALLE: Those two are separate.

9 MR. CAVALLO: All the others.

10 LT. ALBANO: I got you. Okay. I'm
11 sorry.

12 MR. DEL VALLE: Was that unanimous?

13 MS. BALSAM: Yes.

14 MR. DEL VALLE: Now, regarding the, the,
15 the two that went through more detailed
16 discussion. With regards to NYC v. JIAN, Inc.,
17 that's the vacant gas station.

18 MR. CAVALLO: It's Gian isn't it?

19 MS. BALSAM: Jian.

20 MR. CAVALLO: Oh, Jian.

21 MR. DEL VALLE: Jian. J-I-A-N, Inc.

22 I'm not sure how to pronounce that. I'm going to
23 phrase this a little bit differently than the way
24 it's articulated here because it's not that clear

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2 to me. Those in favor of sustaining the, the
3 violation that is, that the premises being a
4 closed gas station would be considered a vacant
5 lot, say, aye.

6 MULTIPLE: Aye.

7 MR. DEL VALLE: That's one, two, three,
8 four, five, six, seven. Those opposed? Two.
9 The motion carries.

10 MS. LIGUORI: And one abstention.

11 MR. DEL VALLE: And one abstention.
12 Sanitation is abstained. The other case is NYC
13 v. Jersey Boring and Drilling Company.

14 LT. ALBANO: They certainly weren't
15 boring. I couldn't help myself. I'm sorry.

16 MR. DEL VALLE: I understand that. Those
17 in favor of sustaining the violation finding no
18 defense to the non-compliance charge and holding
19 that respondent was responsible for reviewing its
20 permit and obtaining an amendment to correct any
21 errors. Those in favor, say, aye. That's one,
22 two, three, four, five. Those opposed? Three.
23 Abstain? One. The motion carries.

24 MS. KNAUER: Can I just say something on

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2 the record?

3 MR. DEL VALLE: Absolutely.

4 MS. KNAUER: Concerning this case
5 though? While, while I voted for sustaining the
6 violation because indeed the respondent had
7 violated their permit, I, I think that it was a
8 hard decision for, for those of us voting that
9 way to reach because clearly there was a mistake,
10 or it appears clear that there was a mistake made
11 by DOT to the respondent's detriment that they
12 should have remedied. However, I, I do think it
13 would have been more appropriate in this case,
14 and if it's possible to actually, you know, for
15 this to happen now, it would have been
16 appropriate and still would be for DOT to
17 actually withdraw this violation. But I don't
18 think that's within our purview as the Board.

19 MR. DEL VALLE: I'm inclined to agree.

20 LT. ALBANO: Well, then let's, let's
21 pursue that.

22 MR. PECUNIES: Well, but I, I think I
23 will, will tell our people about this and
24 presumably they will speak to DOT and, first of

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2 all, make sure this doesn't happen again and
3 because this ongoing work, this was not just work
4 that was just that's--

5 LT. ALBANO: Right.

6 MR. PECUNIES: --going on at one site.
7 And, you know, I, I don't know what the
8 technicalities are in terms of whether it's still
9 possible or whether DOT would want to. But we'll
10 certainly contact DOT about this.

11 MR. DEL VALLE: Does that, does that
12 make you--

13 MS. KNAUER: Yes. I just wanted to put
14 that on the record and I think there's always a
15 possibility of settling with the, with the City
16 ultimately settling this out with the entity,
17 however that happens so, you know. But--

18 LT. ALBANO: Alright. I don't want to
19 change my vote, but I think that's something that
20 should be pursued.

21 MR. DEL VALLE: Yes. Clearly. Is there
22 a motion to break for lunch and then come back?
23 Or?

24 LT. ALBANO: It's the longest one.

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MR. DEL VALLE: Or to adjourn? I think
it's to adjourn and it's unanimous.

(The board meeting concluded at 11:51
A.M.)

Environmental Control Board, March 31, 2016

CERTIFICATE OF ACCURACY

I, Julia Zappi, certify that the foregoing transcript of Environmental Control Board - Board Meeting on March 31, 2016 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Certified By



Handwritten signature of Julia Zappi in cursive script, positioned above a horizontal line.

Date: April 8, 2016

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