NOTICE OF ADOPTION

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Office of Administrative Trials and Hearings ("OATH") by §§ 1043 and 1049 of the New York City Charter ("the Charter") and § 1(c) of Mayoral Executive Order No. 148 (June 8, 2011) ("E.O. 148"), and in accordance with the requirements of § 1043 of the New York City Charter, OATH promulgates and adopts an amendment to Title 48 of the Rules of the City of New York ("RCNY") by adding a new Chapter 6, "Rules of Practice Applicable to Cases Before the Health Tribunal at OATH." The amendment was published in *The City Record* on April 26, 2012, and a public hearing was held on May 29, 2012. One comment was received, and is addressed below in connection with the description of § 6-05(g).

Statement of Basis and Purpose of Rule

Background of Rule Amendments

On November 2, 2010, New York City voters approved a number of Charter revisions including an amendment authorizing the Mayor, by executive order, to consolidate City administrative tribunals into the Office of Administrative Trials and Hearings ("OATH"). In addition, they required the establishment of a committee whose mandate was to recommend which tribunals or types of cases should be transferred to OATH. The Mayor's Committee on Consolidation of Administrative Tribunals issued its "Report and Recommendations," dated June 7, 2011, containing an Appendix with recommended modifications to rules of the various tribunals ("Report" and "Appendix"). The set of rules contained in the Appendix that were designated as OATH rules, referred to below as "interim rules," would be continued until OATH conducted rulemaking governing the procedures of the tribunals to be under its jurisdiction.

As further authorized by the Charter amendments, on June 8, 2011, the Mayor issued E.O. 148, which, among other things, transferred to OATH the administrative tribunals then located within the Department of Health and Mental Hygiene ("DOHMH") and the Taxi and Limousine Commission, effective July 3, 2011.

With respect to the Health Tribunal, E.O. 148, by approving the Report and adopting its Appendix, provided that the rules and procedures governing adjudication at the DOHMH Administrative Tribunal would generally be continued with some modifications as interim rules of OATH applicable to the Health Tribunal within OATH. These rules and procedures were contained in Article 7 of the Health Code. This set of interim rules would be continued until such time as OATH completed rulemaking in accordance with the Charter. See E.O. 148, § 1(b) and (c).

As further background, two sets of rules containing provisions that are being amended by this rule are included as an endnote to this publication: (1) the interim rules applicable to the Health Tribunal that were contained in the Appendix to the Report, and (2) Article 7 (Administrative Tribunal) of the Health Code as it existed prior to the promulgation of E.O. 148.

Moreover, the Board of Health has proposed repealing the remaining provisions of Article 7 of the Health Code within its jurisdiction and making certain other conforming changes to the Health Code, including adding a new § 3.12 concerning the operations of the Health

Tribunal at OATH. The rulemaking actions of DOHMH, the Board of Health, and OATH are being coordinated so that the amendments enacted by each entity will take effect on the same date.

Health Code provisions, as described in this proposal, are set forth in a separate portion of Title 24 of the Rules of the City of New York. Unless otherwise specified, references to the Health Code that are included here refer to provisions modified in accordance with E.O. 148.

Summary of Rule Amendments

OATH will codify these interim rules by incorporating them, with some further modifications reflecting OATH practice, into a new Chapter 6 in Title 48 of Rules of the City of New York. The interim rules will now be renumbered and further modified, and they cover the following areas:

- Replacing all references to the existence and jurisdiction of the DOHMH Tribunal with references to OATH;
- Modifying various hearing procedures relating to adjournments, notifications, defaults, appeals, and other matters in order to reduce the burden on OATH and respondents, as well as to improve record-keeping;
- Providing language assistance services to respondents when needed; and
- Where appropriate, making these procedural rules consistent with OATH's practices generally and with respect to other tribunals.

Specific Amendments to be Enacted

Section 6-01("Definitions Specific to this Chapter") sets forth the meanings of terms specifically applicable to the Health Tribunal.

Section 6-02 ("Jurisdiction, powers and duties of the Health Tribunal") closely tracks the interim rule (Health Code § 7.03) that transferred the jurisdiction from DOHMH to OATH.

Health Code § 7.05 ("Director/Chief Administrative Law Judge") is repealed and not re-enacted because the position "Director of the Administrative Tribunal" would no longer exist and therefore there would no longer be references to such position in the OATH rules.

Section 6-03 ("Proceedings before the Health Tribunal") continues, with technical changes, interim rule Health Code § 7.07, which retained the existing DOHMH rule while reflecting the transfer to OATH. The new rule reflects the transfer by specifying that the reference to the "Department" refers to the Health Tribunal at OATH.

Section 6-04 ("Appearances") continues, with several changes, interim rule Health Code § 7.09, which retained the former DOHMH rule (except for subdivision (e) governing DOHMH's settlement authority, which will remain with DOHMH with the added requirement that DOHMH notify OATH of all notices of violation that are withdrawn once DOHMH

receives payment from respondents). The new rule makes several substantive changes to the interim rule, described below:

- It moves the provision in subdivision (a) for adjourning telephone or electronic hearings for live hearings to Section 6-05 (h). This section addresses procedures for hearings by phone or other electronic media. It also provides that DOHMH, in addition to the respondent and respondent's authorized representative, may request an adjournment of a scheduled hearing.

- It removes requirements from former § 7.09(e) for certain findings by the hearing examiner before a default judgment is issued, to make them consistent with procedures currently in place at the Environmental Control Board.

- It replaces the requirement for notice of default judgments by certified mail with notice by regular mail. OATH has found that requiring default decisions to be sent by certified mail is an administrative and financial burden on the Tribunal and, in addition, has downsides for respondents, who often do not follow the extra procedures necessary to claim certified mail. The new rule is consistent with procedures currently in place at the Environmental Control Board.

- Finally, it changes the requirement for when motions for vacating default judgments must be received. The original rule requires receipt within 60 days of the *Tribunal's mailing of the judgment* to the respondent; the new rule requires receipt within 60 days of the *date of the decision*, resulting in improved record keeping at the Tribunal.

Section 6-05 ("Hearings and Adjudications by mail, telephone or other electronic media") continues, with several changes, interim rule Health Code § 7.11, which retained the existing DOHMH rule as a rule of OATH. The new subdivision (f) provides that if a motion is made at a hearing for the presence of the inspector who issued the violation in question, the hearing examiner must only grant the motion if he or she determines that the inspector's presence would contribute to a full and fair hearing. This change will result in more efficient hearings and reduce unnecessary delay. The new rule is consistent with procedures currently in place at the Environmental Control Board.

As a result of a comment received in connection with the published proposal, subdivision (g) has been revised to correct an inadvertent omission relating to the right of any party (not only the respondent) to request the record of a hearing.

Subdivision (j) of § 6-05 provides that OATH will provide appropriate language assistance services to respondents when needed. This subdivision describes how the hearing examiner may make such a determination. The new rule is consistent with procedures currently in place at the Environmental Control Board.

Section 6-06 ("Subpoenas") continues, with changes, interim rule Health Code § 7.13, which retained the existing DOHMH rule. To be consistent with OATH authority, the new rule broadens subpoena power by removing the limitation which restricts the issuance of subpoenas to records and witnesses solely within the control of DOHMH.

Section 6-07 ("Disqualification of hearing examiners") continues, with changes, interim rule Health Code § 7.15, which retained the existing DOHMH rule as a rule of OATH. The new rule makes several substantive changes to the interim rule, described below:

- It modifies the procedure for making a motion for disqualification by eliminating the need to submit supporting affidavits.
- It shortens the time frame for the hearing examiner's reply to the motion.
- It allows for a brief adjournment for the purpose of prompt appeal to the Chief Administrative Law Judge or his/her designee in the event that a hearing officer denies the motion for disqualification.
- It provides that a party may raise a denial of a motion for disqualification on appeal.
- The new rule is consistent with procedures currently in place at the Environmental Control Board.

Section 6-08 ("Appeals") continues, with changes, interim rule Health Code § 7.17, which superseded the DOHMH provisions for appeals by a "Review Board" and established an Appeals Unit within the Health Tribunal. Having appeals decided by an Appeals Unit within the Health Tribunal rather than the DOHMH Review Board promotes more independent decisionmaking. Additionally, interim rule Health Code § 7.17 granted DOHMH the right to appeal adverse decisions. In addition to those changes, the new rule now does the following:

- It re-orders some of provisions and adjusts some of the technical requirements for notice and filing in subdivision (c).
- It provides that all appeals be decided on written submissions and the record of the hearing.
- It no longer contains a provision of the prior rule that had allowed parties to make requests to appear before the Appeals Unit (in order to be consistent with the changes above).
- In subdivision (d) of the new rule, it states that a respondent may apply for a waiver of prepayment of fines prior to appealing a decision, thereby making the appeals process more accessible to all respondents regardless of their ability to pay the fines.
- Consistent with its experience with appeals at the ECB Tribunal, OATH anticipates that these changes will increase efficiency and mitigate scheduling difficulties and backlogs without an impact on due process.

Former Health Code §7.19 ("Disqualification of member of Review Board") was superseded in the interim rule and is no longer in effect.

Section 6-09 ("Registration and disqualification of certain authorized representatives") continues and makes technical conforming changes to interim rule Health Code § 7.21, which

retained the DOHMH rule as a rule of OATH. The prior changes are contained in Article 7 of the Health Code and Chapter 7 of Title 24 of the Rules of the City of New York.

Section 6-10 ("Computation of time") continues, with modification, interim rule Health Code § 7.23, which retained the existing DOHMH rule as a rule of OATH. Under the interim rule and the former DOHMH rule, when a party had the right or requirement to do an act within a period of time from the date of service of a document, and if service of the document was by mail, *five* days were added to the period of time. In the new Chapter 6 in Title 48 of RCNY, all such time periods, with the exception of a non-appealing party's time to respond to an appeal, start from the date of a Tribunal decision instead of the date of service of the document. Accordingly, subdivision (b) of this section is modified to provide that if a Tribunal decision is mailed to a party, *seven* days will be added to period of time within which the party has the right or requirement to act. This change is made to account for the extra time it is expected to take the Health Tribunal to process and mail the decision.

Deleted text is in [brackets]; new text is underlined.

"Shall" and "must" denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Chapter 6 of Title 48

Rules of Practice Applicable to Cases Before the Health Tribunal at OATH

§ 6-01 Definitions Specific to this Chapter.
§ 6-02. Jurisdiction, powers and duties of the Health Tribunal.
§ 6-03. Proceedings before the Health Tribunal.
§ 6-04. Appearances.
§ 6-05. Hearings and adjudications in person, by mail, or by telephone.
§ 6-06. Subpoenas.
§ 6-07. Disqualification of hearing examiners.
§ 6-08. Appeals.
§ 6-09. Registration and disqualification of certain authorized representatives.
§ 6-10. Computation of time.

§ 6-01 **Definitions Specific to this Chapter.**

As used in this chapter:

Board of Health means the board established by section 553 of the New York City Charter, authorized to add, amend or repeal provisions of the Health Code.

Charter means the New York City Charter.

Chief Administrative Law Judge means the director of OATH appointed by the Mayor pursuant to New York City Charter section 1048.

Department means the New York City Department of Health and Mental Hygiene ("DOHMH").

Health Code means the New York City Health Code, codified separately within Title 24 of the Rules of the City of New York.

Hearing Examiner means a person designated by the Chief Administrative Law Judge of OATH, or his/her designee, to carry out the adjudicatory powers, duties and responsibilities of the Health Tribunal at OATH.

Notice of Violation or "NOV" means the document issued by the petitioner to a respondent which specifies the charges forming the basis of an adjudicatory proceeding before the Tribunal.

Party means the petitioner or the person named as respondent, or intervening as of right, in a proceeding before the Tribunal.

Person means any individual, partnership, unincorporated association, corporation or governmental agency.

Petitioner means the New York City Department of Health and Mental Hygiene.

Respondent means the person against whom the charges alleged in a notice of violation have been filed.

Tribunal means the hearing examiners and staff of the Health Tribunal at OATH, who under the direction of the Chief Administrative Law Judge of OATH, or his/her designee, are charged with holding hearings on notices of violation.

§ [7.03] 6-02 **Jurisdiction, powers and duties of the [Administrative] Health Tribunal.**

(a) *Jurisdiction*. In accordance with [the executive order] Mayoral Executive Order No. 148, dated June 8, 2011, and pursuant to Charter section 1048 and consistent with the delegations of the Commissioner of Health and Mental Hygiene and the Board of Health, the Health Tribunal at OATH shall have jurisdiction to hear and determine notices of violation alleging non-compliance with the provisions of the [New York City] Health Code, the New York State Sanitary Code, those sections of the New York City Administrative Code relating to or affecting health within the City, and any other laws or regulations that the Department has the duty or authority to enforce.

(b) *General powers*. The [Administrative] Tribunal or the hearing examiners assigned thereto shall have the following powers:

(1) To impose fines and pecuniary penalties in accordance with Article 3 of [this] the Health Code or other applicable law; and

(2) To compile and maintain complete and accurate records relating to its proceedings, including copies of all notices of violation served, responses, [notices of appeal] appeals and briefs filed and decisions rendered by the hearing examiners [and the Review Board;].

[(3) To adopt, through the Department's rulemaking process, such other rules and regulations as may be necessary or appropriate to effectuate the purposes and provisions of this Article;]

(c) *Hearing Examiners.* Hearing examiners may:

(1) Hold conferences for the settlement or simplification of the issues[,];

(2) Administer oaths and affirmations, examine witnesses, rule upon offers of proof or other motions and requests, admit or exclude evidence, grant adjournments and continuances, and oversee and regulate other matters relating to the conduct of a hearing[,];

(3) Upon the request of any party, or upon the hearing examiner's own volition, and when the hearing examiner determines that necessary and material evidence will result, issue subpoenas or adjourn a hearing for the appearance of individuals, or the production of documents or other types of information, that are in the possession or control of [the Department] a party and in accordance with §[7.13] 6-06 of this [article] chapter[.];

(4) Bar from participation in a hearing any person, including a party, representative or attorney, witness or observer who engages in disorderly, disruptive or obstructionist conduct that disrupts or interrupts the proceedings of the Tribunal; and

(5) [take] Take any other action authorized by applicable law, rule or regulation, or that is delegated by the [Director] Chief Administrative Law Judge or otherwise authorized by applicable law, rule or regulation.

[§7.05 **Director/Chief Administrative Law Judge.**

All references in the Health Code to the Director of the Administrative Tribunal shall be deemed to refer to the Chief Administrative Law Judge of OATH or his/her designee.”]

§ [7.07] 6-03 **Proceedings before the [Administrative] Health Tribunal.**

(a) *Notice of Violation***.** All proceedings before the [Administrative] Tribunal shall be commenced by the issuance and service of a notice of violation ("NOV") upon the respondent and by the [transmittal] filing thereof [to] with the [Administrative] Tribunal. Each NOV shall be prima facie evidence of the facts alleged therein. The notice of violation may include the report of the public health sanitarian, inspector or other person who conducted the inspection or investigation that culminated in the notice of violation. When such report is served in accordance with this section, such report shall also be prima facie evidence of the factual allegations contained therein.

(b) *Service of the Notice of Violation.* The [notice of violation] NOV may be served in person upon the person alleged to have committed the violation, the permittee or registrant, upon the person who was required to hold the permit or to register, upon a member of the partnership or other group concerned, upon an officer of the corporation, upon a member of a limited liability company, upon a management or general agent or upon any other person of suitable age and discretion as may be appropriate, depending on the organization or character of the person, business, or institution charged. Service may also be made by certified or registered mail through the U.S. Postal Service, or by any type of mail utilizing any other mailing service that provides proof of mailing and receipt, to any such person at the address of the premises that is the subject of the NOV or, as may be appropriate, at the residence or business address of (1) the alleged violator, (2) the individual who is listed as the permittee or applicant in the permit issued by the Board of Health or the Commissioner of DOHMH or in the application for a permit, [or] (3) the registrant listed in the registration form, or (4) the person filing a notification of an entity's existence with DOHMH where no permit or registration is required. In the case of service by mail, documentation of delivery or receipt provided by the delivery or mailing service shall be proof of service of the notice of violation.

(c) *Contents of notice of violation***.** The [notice of violation] NOV shall contain:

> (1) A clear and concise statement sufficient to inform the respondent with reasonable definiteness and clarity of the essential facts alleged to constitute the violation or the violations charged, including the date, time where applicable and place when and where such facts were observed;
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> (2) Information adequate to provide specific notification of the section or sections of the Health Code or other law, rule, or regulation alleged to have been violated;
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> (3) Information adequate for the respondent to calculate the maximum penalty authorized to be imposed if the facts constituting the violation are found to be as alleged;
>
> (4) Notification of the date and place when and where a hearing will be held by the [Department] Tribunal, such date to be at least fifteen calendar days after receipt of the [notice of violation] NOV, unless another date is required by applicable law;
>
> (5) Notification that failure to appear on the date and at the place designated for the hearing shall be deemed a waiver of the right to a hearing, thereby authorizing the rendering of a default decision; and

(6) Information adequate to inform the respondent of his or her rights under §[7.09] 6-04 of this [Article] chapter.

(d) *Amendment***.** The hearing examiner may allow an amendment to [a notice of violation] an NOV at any time if the subject of the amendment is reasonably within the scope of the original [notice of violation] NOV; provided, however, that such amendment does not allege any [violation] additional violations based on an act not specified in the original notice, alleged to have occurred subsequent to the service of such notice, and does not prejudice the rights of the respondent to adequate notice of the allegations made against the respondent.

§ [7.09] 6-04 **Appearances.**

(a) *Types of appearances.* A respondent may appear for a hearing by:

(1) appearing in person at the place and on the date scheduled for the hearing;

(2) sending an authorized representative to appear on behalf of such person at the place and on the date scheduled for the hearing who is:

(i) an attorney admitted to practice law in New York State, or

(ii) a representative registered to appear before the Tribunal pursuant to §[7.21] 6-09, or

(iii) any other person, subject to the provisions of §[7.21] 6-09; or

(3) making a written request for an adjudication by [mail] U.S. postal service or other mailing service, provided that the request is received by the Tribunal before the scheduled date of the hearing or bears a postmark or other proof of mailing indicating that it was mailed to the Tribunal before the scheduled date of a hearing. If the request bearing such a postmark or proof of mailing is received by the Tribunal after a decision on default has been issued, such default shall be vacated automatically; or

(4) participating in a hearing conducted by telephone or other electronic media when the opportunity to do so is offered by the [Department, provided, however, that a telephone or electronic hearing may be adjourned for a live hearing if the hearing officer determines that such an adjournment is necessary, or if any party requests an adjournment] Tribunal.

(b) *Appearance by mail.* If the respondent chooses to appear by mail, the written request for mail adjudication shall contain any denials, admissions and explanations pertaining to the individual violations charged, and documents, exhibits or statements to be considered as evidence in support of respondent's defense, or in the determination of penalties. If, after a review of the record, the hearing examiner is of the opinion that it is necessary for the respondent to submit additional evidence, the hearing examiner may require the submission of additional documentary evidence or deny a request for adjudication by mail and adjourn the matter for a

hearing. Violations that are not denied or explained shall be deemed to have been admitted; defenses not specifically raised shall be deemed to have been waived.

(c) [A] *Pre-hearing adjournment requests.* The petitioner, respondent, or authorized representative may request that a scheduled hearing be adjourned to a later date. Such a request may be made in writing to the Tribunal, provided that it is received by the Tribunal no later than three business days prior to the date of the scheduled hearing, or the request may be made in person on the date of the scheduled hearing at any time prior to the hearing. A maximum of three requests for adjournments prior to the hearing by the respondent, and a maximum of three requests for adjournments prior to the hearing by the petitioner [or by the Tribunal,] will be granted administratively as of right. [Thereafter, all]

(d) *Other requests for adjournment*. All requests for adjournments that are not provided for as of right in accordance with subdivision (c) of this section must be made in person to a hearing examiner [or the Director of the Tribunal] at the time of the scheduled hearing, and may be granted only upon a showing of good cause as determined by the hearing examiner [or the Director] in his or her discretion. A denial of an adjournment request shall not be subject to separate or interlocutory review [by the Review Board] or appeal.

[(d)] (e) *Failure to appear*.

(1) A respondent who fails to appear or to make a timely request for an adjournment shall not be entitled to a hearing. [Without further notice to the respondent,] If the respondent fails to appear, a hearing examiner may, without further notice to the respondent, find that the respondent is in default [if the respondent has failed to appear and]. The hearing examiner will then render a default decision sustaining the violations cited in the notice of violation[, subject to findings the hearing examiner must make with respect to the service of the notice of violation and the sufficiency of the factual allegations contained therein], and imposing [a penalty] penalties pursuant to Article 3 of [this] the Health Code or as authorized by other applicable law. [If, before a default decision is issued, it is determined that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, a default decision may not be issued and the matter may be adjourned to a new hearing date. A decision that is adverse to a respondent shall be issued on default only after the hearing examiner has determined that the notice of violation was served as required by applicable law, and that the notice of violation alleges sufficient facts to support the violations charged.]

(2) The Tribunal shall notify [a defaulting] the respondent of the issuance of a default decision by mailing a copy of the decision [by certified mail] or by providing a copy to [a] the respondent or respondent's representative who appears personally at the Tribunal and requests a copy.

(3) [A] The respondent may make a motion in writing requesting that a default be vacated[, if the]. A motion to vacate [is] postmarked [or received by the Tribunal] within sixty days of the date of [mailing of] the default decision [to the respondent or the date a copy was provided to the respondent or the respondent's representative at the Tribunal, whichever date is earlier. One such request] shall be granted administratively as of right, provided that the

Tribunal's records show that there have been no other failures to appear in relation to the particular notice of violation. A motion to vacate a default that is [received] postmarked more than sixty days after [mailing or personal receipt of] the date of the default decision [shall] must be filed within one year of the date of the default decision and be accompanied by a statement setting forth good cause for the respondent's failure to appear. Such statement, and any documents to support the motion to vacate the default, shall be reviewed by a hearing examiner who shall determine if it establishes a reasonable excuse for the default. Denial of a motion to vacate a default decision shall not be subject to review [by the Review Board] or appeal.

§ [7.11] 6-05 **Hearings and [mail] adjudications in person, by mail, or by telephone**.

(a) A notice of violation may be adjudicated at a hearing, by telephone, or by [mail] U.S. postal service or other mailing service.

(b) The hearings shall be open to the public, shall be presided over by a hearing examiner, shall proceed with reasonable expedition and order, and, insofar as practicable, shall not be postponed or adjourned.

(c) Each party to a proceeding shall have the right to be represented by counsel or other authorized representative as set forth in §§[7.09] 6-04 (a) and [7.21] 6-09 of this [Article] chapter, to present evidence, to examine and cross-examine witnesses and to have other rights essential for due process and a fair and impartial hearing.

(d) The Department shall have the burden of proving the factual allegations contained in the [notice of violation] NOV by a preponderance of the evidence. A respondent shall have the burden of proving an affirmative defense, if any, by a preponderance of the evidence.

(e) In addition to evidence submitted, the hearing examiner may request further evidence to be submitted by the petitioner or respondent or may adjudicate the matter based on the record before him or her.

(f)[(1)] Appearances of inspectors

(1) A public health sanitarian, inspector or other person who issued an NOV (the "inspector") may be required to appear at a hearing under the following circumstances:

(a) A respondent may request the presence at the hearing of the [public health sanitarian, inspector or other person who issued the NOV (the "inspector")] inspector, provided that the request is made in writing and is received by the Tribunal no later than seven business days prior to the scheduled hearing. [In such event] Upon such request, the hearing shall be rescheduled to allow for the appearance of the inspector, and the respondent need not appear at the originally scheduled hearing.

(b) A respondent may [also], at the time of the hearing, request the presence of the inspector[; in which case the hearing shall be adjourned]. Upon such request, the hearing examiner shall determine whether the presence of the inspector would afford the respondent a reasonable opportunity to present relevant, non-cumulative testimony or evidence that would contribute to a

full and fair hearing of each party's side of the dispute. Upon such finding, the hearing examiner shall adjourn the hearing to allow for the appearance of the inspector if the inspector is unavailable at the time of the hearing.

(c) [In addition, if]If at a hearing a respondent denies the factual allegations contained in the NOV, the hearing examiner may require the presence of the inspector without a request by the respondent, and, if needed, adjourn the hearing.

(2) In the event that the inspector does not appear, the hearing examiner may adjourn the hearing, or may take testimony, and sustain or dismiss all or part of the [notice of violation] NOV, as the hearing examiner may deem appropriate. In determining the appropriate action, the hearing examiner may consider any relevant facts, including the availability of the inspector, the reason for the failure to appear, the need for and relevance of the requested testimony, and the potential prejudice to either party if the hearing is adjourned or proceeds without the inspector. In no event shall a hearing be adjourned on more than three occasions by the hearing examiner because of the unavailability of an inspector. If the respondent requests that the hearing proceed in the absence of the inspector, the respondent shall be deemed to have waived the appearance of such inspector.

(g) A record shall be made of all [notices of violation] NOV's filed, proceedings held, written evidence admitted and decisions rendered, and such record shall be kept in the regular course of business for a reasonable period of time in accordance with applicable law. Hearings shall be mechanically, electronically or otherwise recorded by the [Administrative] Tribunal under the supervision of the hearing examiner, and the original recording shall be part of the record and shall constitute the sole official record of the hearing. A copy of [a tape] the hearing recording [of a hearing] shall be made available within five business days of receiving a request, upon payment of a reasonable fee in accordance with applicable law, to any [respondent] party requesting a copy, to enable such [respondent] party to appeal a notice of decision [to the Review Board] or for other legal proceedings.

(h) With the consent of all parties, a hearing examiner may conduct a hearing by telephone or other electronic media. At any time during such proceeding, the hearing examiner may adjourn the matter for an in-person hearing if he or she determines it is necessary.

(i) A written decision sustaining or dismissing each charge in the notice of violation shall be promptly rendered by the hearing examiner who presided over the hearing, or who conducted the adjudication by mail, or who rendered a default decision. Each decision, other than a default decision, shall contain findings of fact and conclusions of law. Where a violation is sustained, the hearing examiner shall impose a penalty. A copy of the decision, other than a default decision mailed or otherwise provided in accordance with §[7.09] 6-04(e) hereof, shall be served forthwith on the respondent or on the respondent's counsel, registered representative or other authorized representative, either personally or by [certified] mail. Any fines imposed shall be paid within thirty days of [service of] the date of the decision. If full payment of fines is not made within thirty days, an additional penalty in an amount of fifty dollars may be imposed per NOV [in an amount of fifty dollars,] if paid between thirty-one and sixty days after [service of] the date of the decision, and one hundred dollars if paid more than sixty days after [service of] the date of the decision.

(j) *Language assistance services.*

(1) Appropriate language assistance services shall be afforded to respondents whose primary language is not English to assist such respondents in communicating meaningfully at the hearing. Such language assistance services shall include interpretation of hearings and of pre-hearing conferences conducted by hearing examiners, where interpretation is necessary to assist the respondent in communicating meaningfully with the hearing examiner and others at the hearing.

(2) At the beginning of any hearing or pre-hearing conference, the hearing examiner shall advise the respondent of the availability of interpretation. In determining whether interpretation is necessary to assist the respondent in communicating meaningfully with the hearing examiner and others at the hearing, the hearing examiner shall consider all relevant factors, including but not limited to the following: (i) information from Tribunal administrative personnel identifying a respondent as requiring language assistance services to communicate meaningfully with a hearing examiner; (ii) a request by the respondent for interpretation; (iii) even if interpretation was not requested by the respondent, the hearing examiner's own assessment whether interpretation is necessary to enable meaningful communication with the respondent. If the respondent requests an interpreter and the hearing examiner determines that an interpreter is not needed, that determination and the basis for the determination shall be made on the record.

(3) When required by paragraph (1) of this subdivision, interpretation services shall be provided at hearings and at pre-hearing conferences by a professional interpretation service that is made available by the Tribunal, unless the respondent requests the use of another interpreter, in which case the hearing examiner in his/her discretion may use the respondent's requested interpreter. In exercising that discretion, the hearing examiner shall take into account all relevant factors, including but not limited to the following: (i) the respondent's preference, if any, for his or her own interpreter; (ii) the apparent skills of the respondent's requested interpreter; (iii) whether the respondent's requested interpreter is a child under the age of eighteen; (iv) minimization of delay in the hearing process; (v) maintenance of a clear and usable hearing record; (vi) whether the respondent's requested interpreter is a potential witness who may testify at the hearing. The hearing examiner's determination and the basis for this determination shall be made on the record.

§ [7.13] 6-06 **Subpoenas.**

(a) At any time after a hearing has commenced, a subpoena may be issued by the hearing examiner, upon a form approved by the Tribunal, to compel the timely production of any record or document for examination or introduction into evidence, or to compel the appearance of persons to give testimony, when the hearing examiner finds that such record, document or testimony is reasonably related, relevant and necessary to the adjudication. [Such subpoenas shall be issued only for production of records maintained within the Department, or the appearance of a person who is employed by the Department at the time such appearance is demanded.] Such subpoena may be issued on the hearing examiner's own motion or on the

motion of a party. If made by a party, a motion for a subpoena may be made on an ex parte basis. Upon the issuance of a subpoena the hearing examiner may proceed with the hearing [and] or adjourn such hearing until the subpoenaed documents or witnesses are produced[, or immediately adjourn the hearing until such time].

(b) Subpoenaed documents must be produced and made returnable on a date certain prior to the adjourned date [for the continued hearing]. Witnesses subpoenaed to testify must appear on the adjourned date.

(c) [A hearing examiner who has issued a subpoena, upon]Upon receipt of a motion timely made [by the Department] before the return date of the subpoena, or on the hearing examiner's own motion, a hearing examiner who has already issued a subpoena may [deny,] quash or modify [a] such subpoena if it is shown to be unreasonable, insufficiently relevant to the adjudication or has [been shown to be] wrongfully been issued.

(d) If the hearing examiner determines that a subpoena has not been complied with, and that there is no good cause for such failure to comply, the hearing examiner may proceed with the hearing upon finding that the record, document or testimony subpoenaed is not necessary to the proof or defense of a violation or a fair adjudication of the merits, or [the hearing examiner] may preclude evidence offered by the non-complying party that is related to the subpoena, or may dismiss the particular violation the proof of which appears to the hearing examiner to be reasonably dependent on the material or person subpoenaed, but not produced.

§ [7.15] 6-07 **Disqualification of hearing examiners.**

(a) Grounds for disqualification. A hearing examiner shall not preside over a hearing [in accordance with the provisions of] under the circumstances set forth in subdivisions (D) and (E) of §103 of Appendix A of [Title 48 of the Rules of the City of New York] this title. A hearing examiner who determines his or her disqualification shall [withdraw] disqualify himself or herself from the proceeding by notice on the record and shall notify the [Director] Chief Administrative Law Judge or his/her designee of such [withdrawal] disqualification.

(b) Motion to disqualify. [Whenever a party asserts for any reason that a hearing examiner must be disqualified from presiding over a particular proceeding, such party may file with the Director a motion to disqualify and remove the hearing examiner. Such a motion must be supported by affidavits setting forth the alleged grounds for disqualification. The Director shall furnish a copy of the motion to the hearing examiner whose removal is sought, and the hearing examiner shall have seven days to reply. Unless the hearing examiner disqualifies himself or herself within seven days of the receipt of the motion, the Director shall promptly determine the validity of the alleged grounds, either directly or on the report of another hearing examiner appointed to conduct a hearing for that purpose.] A party may, for good cause shown, request that the hearing examiner disqualify himself or herself. The hearing examiner in the proceeding will rule on such motion. If the hearing examiner denies the motion, the party may obtain a brief adjournment in order to promptly apply for review by the Chief Administrative Law Judge or his/her designee. If the Chief Administrative Law Judge or his/her designee determines that the hearing examiner should be disqualified, the Chief Administrative Law Judge or his/her designee will appoint

another hearing examiner to continue the case. If a hearing examiner's refusal to disqualify is upheld by the Chief Administrative Law Judge or his/her designee, the party may raise the issue again on appeal.

§ [7.17] 6-08 **Appeals.**

(a) There shall be an Appeals Unit within the Health Tribunal at OATH.

(b) (1) The Appeals Unit shall have jurisdiction to review all final decisions, other than default decisions, of [the] hearing [examiner] examiners to determine whether the facts found therein are supported by substantial evidence in the record, and whether the findings and determinations of the hearing [examiner] examiners, as well as the [penalty] penalties imposed, are supported by law. In addition, the Appeals Unit may determine whether a monetary penalty, even if it is lawful, should be increased or decreased.

(2) Appeals decisions are made upon the entire record of the hearing and the evidence before the hearing examiner. The NOV, the recording of the hearing, and all briefs filed and exhibits received in evidence, together with the hearing examiner's decision, constitute the hearing record. The Appeals Unit shall not consider any evidence that was not presented to the hearing examiner. The Appeals Unit shall have the power to affirm, reverse, [to] remand or [to] modify the decision appealed from [or] and to increase or reduce the amount of the penalty imposed within the limits established by the Health Code or other applicable law.

(c) (1) A party may seek [to] review, in whole or in part, of any final decision of a hearing examiner, other than a decision rendered on default by the respondent. However, neither a denial of a motion to vacate a default decision nor a plea admitting the violations charged shall be subject to review by the Appeals Unit.

(2) Within 30 days of the date of [Health Tribunal at OATH delivering or mailing] the hearing [officer's] examiner's decision [to a party or the party's authorized representative], [the] a party [may] seeking review of the decision must file [two copies of a notice of appeal] an Appeal Application on a form prescribed by the [tribunal] Tribunal[, accompanied by two copies of a brief statement setting forth the specific reasons why the decision should be reversed, remanded or modified. Upon receipt of a notice of appeal, the tribunal shall promptly deliver or mail a copy of it, together with a copy of any accompanying statement, to the adverse party.] At the time the Appeal Application is filed, the party seeking review must also serve the Appeal Application on the non-appealing party and file proof of such service with the Tribunal.

(3) Within 30 days of [the tribunal delivering or mailing to a party a notice of appeal filed with the tribunal, the party may file two copies of a response to the appeal with the tribunal, and the tribunal shall promptly deliver or mail a copy of the response to the appealing party.] service of the Appeal Application, or 35 days if service of the Appeal Application is made by mail, the non-appealing party may file a Response to Appeal on a form prescribed by the Tribunal. At the time that the Response to Appeal is filed, the party responding to the appeal must also serve the Response to Appeal on the appealing party and file proof of such service with the Tribunal.

(4) Further filings by either party are not permitted.

(d) Filing [a notice of appeal] an Appeal Application shall not stay the collection of any fine or other penalty imposed by the decision. No appeal by or on behalf of a respondent shall be permitted unless the fine or penalty imposed has been paid [before] prior to or at the time of the filing of the [notice of appeal] Appeal Application, or the respondent may post a cash or recognized surety company bond in the full amount imposed by the decision and order appealed from. [Appeals decisions shall be made upon the entire record of the hearing and the evidence before the hearing examiner. Appeals may be decided without the appearance of the appealing party, but the appealing party may make a request to appear before the Appeals Unit at the time of the filing of the notice of appeal. If the appealing party makes such a request, the tribunal shall provide notice to the parties whether the request is granted and, if so, the date of argument on the appeal, at which either party may appear before the Appeals Unit.] Any application for a waiver of prior payment of the civil penalty must be made prior to or at the time of the filing of the Appeal Application and must be supported by evidence of financial hardship. Waivers of prepayment may be granted in the discretion of the Chief Administrative Law Judge or his/her designee.

[(d)(i)] (e) The Appeals Unit shall promptly issue a written decision affirming, reversing, remanding or modifying the decision appealed from, a copy of which shall be delivered to [DOHMH] the Department and served on the respondent by [certified or registered] mail, stating the grounds upon which the decision is based. Where appropriate, the decision shall order the repayment to the respondent of any penalty that has been paid. The decision of the Appeals Unit shall be the final determination of [DOHMH] the Department, except in the case of a violation arising under Article 13-E of the New York State Public Health Law, entitled "Regulation of Smoking in Certain Public Areas[.],” in accordance with § 3.12 of the Health Code.

§[7.21] 6-09 **Registration and disqualification of certain authorized representatives.**

(a) Any person who represents two or more respondents before the Tribunal within a calendar year shall, as a condition precedent to such representation, register with the Tribunal as a representative. Any person who appears on behalf of a respondent before the Tribunal shall be prohibited from appearing before the Tribunal on behalf of any other respondent within the same calendar year without having completed such registration. A representative shall register by completing and submitting a form provided by the [Department] Tribunal, and such form shall be accompanied by proof acceptable to the [Department] Tribunal identifying the representative, and shall include such other information as the [Department] Tribunal may require. Registered representatives shall notify the Tribunal within ten business days of any change in the information required to be stated on the registration form. The [Department] Tribunal may charge a reasonable fee in accordance with applicable law to cover the cost of processing and maintaining registrations and may issue each representative a registration card and identification number. Attorneys admitted to practice in New York State shall not be required to [so] register.

(b) Attorneys, registered representatives or other authorized representatives may be permanently or temporarily barred by the [Commissioner] Chief Administrative Law Judge or his/her designee from representing any respondents before the Tribunal, and in the case of registered

representatives their registration revoked or suspended, upon a finding by the Office of Administrative Trials and Hearings, or successor agency, issued after an opportunity to be heard [has been afforded], that they have engaged in improper conduct, including but not limited to one or more of the following:

(1) Disorderly, disruptive or obstructive conduct, as set forth in §[7.03] 6-02(c)(4) of this [Article] chapter, on more than one occasion, regardless of whether the representative was barred from participating in a specific hearing by a hearing examiner in accordance with [said] such §[7.03] 6-02(c)(4);

(2) Submitting any false or forged document either as evidence in a matter being adjudicated at the Tribunal, or as proof of representation of a respondent;

(3) Any violation of §3.15 or §3.19 of [this] the Health Code; or

(4) Any criminal conviction of a type that does not fall within the protections afforded under Article 23-A of the New York State Correction Law.

§[7.23] 6-10 **Computation of time.**

(a) In computing any period of time prescribed or allowed by this [Article] chapter, the day of the act or default from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which case the period shall be extended to the next day which is not a Saturday, Sunday or legal holiday. [Whenever a party has the right or is required to do some act within a prescribed period of time after the service of a document and the document is served by mail, five days must be added to the prescribed period of time.]

(b) Whenever a party has the right or is required to do some act within a prescribed period of time after the date of a Tribunal decision, seven days shall be added to such prescribed period of time if the decision is mailed to the party.

Endnotes

Interim rules applicable to the Health Tribunal contained in the Appendix to the Report

§7.03 **Jurisdiction, powers and duties of the Administrative Tribunal.**

(a) Jurisdiction. In accordance with the executive order of the Mayor pursuant to Charter section 1048 and consistent with the delegations of the Commissioner of Health and Mental Hygiene and the Board of Health, the Health Tribunal at OATH shall have jurisdiction to hear and determine notices of violation alleging non-compliance with the provisions of the New York City Health Code, the New York State Sanitary Code, those sections of the New York City Administrative Code relating to or affecting health within the City, and any other laws or regulations that the Department has the duty or authority to enforce.

(b) General powers. The Administrative Tribunal or the hearing examiners assigned thereto shall have the following powers:

(1) To impose fines and pecuniary penalties in accordance with Article 3 of this Code or other applicable law;
(2) To compile and maintain complete and accurate records relating to its proceedings, including copies of all notices of violation served, responses, notices of appeal and briefs filed and decisions rendered by the hearing examiners and the Review Board;
(3) To adopt, through the Department's rulemaking process, such other rules and regulations as may be necessary or appropriate to effectuate the purposes and provisions of this Article;

(c) Hearing Examiners. Hearing examiners may:

(1) Hold conferences for the settlement or simplification of the issues,
(2) Administer oaths and affirmations, examine witnesses, rule upon offers of proof or other motions and requests, admit or exclude evidence, grant adjournments and continuances, and oversee and regulate other matters relating to the conduct of a hearing,
(3) Upon the request of any party, or upon the hearing examiner's own volition, and when the hearing examiner determines that necessary and material evidence will result, issue subpoenas or adjourn a hearing for the appearance of individuals, or the production of documents or other types of information, that are in the possession or control of the Department and in accordance with §7.13 of this article.
(4) Bar from participation in a hearing any person including a party, representative or attorney, witness or observer who engages in disorderly, disruptive or obstructionist conduct that disrupts or interrupts the proceedings of the Tribunal; and
(5) take any other action authorized by applicable law, rule or regulation, or that is delegated by the Director.

§7.05 **Director/Chief Administrative Law Judge.**

All references in the Health Code to the Director of the Administrative Tribunal shall be deemed to refer to the Chief Administrative Law Judge of OATH or his/her designee."

§7.07 **Proceedings before the Administrative Tribunal.**

(a) Notice of Violation**.** All proceedings before the Administrative Tribunal shall be commenced by the issuance and service of a notice of violation ("NOV") upon the respondent and by the transmittal thereof to the Administrative Tribunal. Each NOV shall be prima facie evidence of the facts alleged therein. The notice of violation may include the report of the public health sanitarian, inspector or other person who conducted the inspection or investigation that culminated in the notice of violation. When such report is served in accordance with this section, such report shall also be prima facie evidence of the factual allegations contained therein.

(b) Service of the Notice of Violation. The notice of violation may be served in person upon the person alleged to have committed the violation, the permittee or registrant, upon the person who was required to hold the permit or to register, upon a member of the partnership or other group concerned, upon an officer of the corporation, upon a member of a limited liability company, upon a management or general agent or upon any other person of suitable age and discretion as may be appropriate, depending on the organization or character of the person, business, or institution charged. Service may also be made by certified or registered mail through the U.S. Postal Service, or by any type of mail utilizing any other mailing service that provides proof of mailing and receipt, to any such person at the address of the premises that is the subject of the NOV or, as may be appropriate, at the residence or business address of (1) the alleged violator, (2) the individual who is listed as the permittee or applicant in the permit issued by the Board or the Commissioner or in the application for a permit, or (3) the registrant listed in the registration form. In the case of service by mail, documentation of delivery or receipt provided by the delivery or mailing service shall be proof of service of the notice of violation.

(c) Contents of notice of violation. The notice of violation shall contain:

(1) A clear and concise statement sufficient to inform the respondent with reasonable definiteness and clarity of the essential facts alleged to constitute the violation or the violations charged, including the date, time where applicable and place when and where such facts were observed;

(2) Information adequate to provide specific notification of the section or sections of the Code or other law, rule, or regulation alleged to have been violated;

(3) Information adequate for the respondent to calculate the maximum penalty authorized to be imposed if the facts constituting the violation are found to be as alleged;

(4) Notification of the date and place when and where a hearing will be held by the Department, such date to be at least fifteen calendar days after receipt of the notice of violation, unless another date is required by applicable law;

(5) Notification that failure to appear on the date and at the place designated for the hearing shall be deemed a waiver of the right to a hearing, thereby authorizing the rendering of a default decision; and

(6) Information adequate to inform the respondent of his or her rights under §7.09 of this Article.

(d) Amendment. The hearing examiner may allow an amendment to a notice of violation at any time if the subject of the amendment is reasonably within the scope of the original notice of violation; provided, however, that such amendment does not allege any violation not specified in

the original notice, alleged to have occurred subsequent to the service of such notice, and does not prejudice the rights of the respondent to adequate notice of the allegations made against the respondent.

§7.09 **Appearances.**

(a) A respondent may appear for a hearing by:

(1) appearing in person at the place and on the date scheduled for the hearing;

(2) sending an authorized representative to appear on behalf of such person at the place and on the date scheduled for the hearing who is:

(i) an attorney admitted to practice law in New York State,

(ii) a representative registered to appear before the Tribunal pursuant to §7.21, or

(iii) any other person, subject to the provisions of §7.21; or

(3) making a written request for an adjudication by mail, provided that the request is received by the Tribunal before the scheduled date of the hearing or bears a postmark indicating that it was mailed to the Tribunal before the scheduled date of a hearing. If the request bearing such a postmark is received by the Tribunal after a decision on default has been issued, such default shall be vacated automatically; or

(4) participating in a hearing conducted by telephone or other electronic media when the opportunity to do so is offered by the Department, provided, however, that a telephone or electronic hearing may be adjourned for a live hearing if the hearing officer determines that such an adjournment is necessary, or if any party requests an adjournment.

(b) If the respondent chooses to appear by mail, the written request for mail adjudication may contain denials, admissions and explanations pertaining to the individual violations charged, and documents, exhibits or statements to be considered as evidence in support of respondent's defense, or in the determination of penalties. If, after a review of the record, the hearing examiner is of the opinion that it is necessary for the respondent to submit additional evidence, the hearing examiner may require the submission of additional documentary evidence or deny a request for adjudication by mail and adjourn the matter for a hearing. Violations that are not denied or explained shall be deemed to have been admitted; defenses not specifically raised shall be deemed to have been waived.

(c) A respondent or authorized representative may request that a scheduled hearing be adjourned to a later date. Such a request may be made in writing to the Tribunal, provided that it is received by the Tribunal no later than three business days prior to the date of the scheduled hearing, or the request may be made in person on the date of the scheduled hearing at any time prior to the hearing. A maximum of three requests for adjournments by the respondent, and a maximum of three requests for adjournments by the petitioner or by the Tribunal, shall be granted administratively as of right. Thereafter, all requests for adjournments must be made in person to a hearing examiner or the Director of the Tribunal at the time of the scheduled hearing, and may be granted only upon a showing of good cause as determined by the hearing examiner or the Director in his or her discretion. A denial of an adjournment request shall not be subject to separate or interlocutory review by the Review Board.

(d) A respondent who fails to appear or to make a timely request for an adjournment shall not be entitled to a hearing. Without further notice to the respondent, a hearing examiner may find that the respondent is in default if the respondent has failed to appear and render a default decision sustaining the violations cited in the notice of violation, subject to findings the hearing examiner must make with respect to the service of the notice of violation and the sufficiency of the factual allegations contained therein, and imposing a penalty pursuant to Article 3 of this Code or as authorized by other applicable law. If, before a default decision is issued, it is determined that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, a default decision may not be issued and the matter may be adjourned to a new hearing date. A decision that is adverse to a respondent shall be issued on default only after the hearing examiner has determined that the notice of violation was served as required by applicable law, and that the notice of violation alleges sufficient facts to support the violations charged. The Tribunal shall notify a defaulting respondent of the issuance of a default decision by mailing a copy of the decision by certified mail or by providing a copy to a respondent or respondent's representative who appears personally at the Tribunal and requests a copy. A respondent may make a motion in writing requesting that a default be vacated, if the motion to vacate is postmarked or received by the Tribunal within sixty days of the date of mailing of the default decision to the respondent or the date a copy was provided to the respondent or the respondent's representative at the Tribunal, whichever date is earlier. One such request shall be granted administratively as of right provided that the Tribunal's records show that there have been no other failures to appear in relation to the particular notice of violation. A motion to vacate a default that is received more than sixty days after mailing or personal receipt of the default decision shall be accompanied by a statement setting forth good cause for the respondent's failure to appear. Such statement, and any documents to support the motion to vacate the default, shall be reviewed by a hearing examiner who shall determine if it establishes a reasonable excuse for the default. Denial of a motion to vacate a default decision shall not be subject to review by the Review Board.

(e) Where the notice of violation or an accompanying document, or a related document served on the respondent by certified mail, sets forth a monetary amount that may be paid in full satisfaction of the notice of violation, a respondent may, in lieu of attending a scheduled hearing, pay said amount by mail in the manner and time provided for in such notice. Such payment shall constitute an admission of liability for the violations charged and no further hearing or appeal shall be allowed. If an adjudication is open or completed before the Health Tribunal at OATH, DOHMH shall promptly notify the tribunal that it has received payment in full satisfaction of the notice of violation. If DOHMH withdraws a notice of violation, even if it has been adjudicated, that is open or has been completed before the Health Tribunal at OATH, DOHMH shall promptly notify the tribunal.

§7.11 **Hearings and mail adjudications.**

(a) A notice of violation may be adjudicated at a hearing or by mail.

(b) The hearings shall be open to the public, shall be presided over by a hearing examiner, shall proceed with reasonable expedition and order, and, insofar as practicable, shall not be postponed or adjourned.

(c) Each party to a proceeding shall have the right to be represented by counsel or other authorized representative as set forth in §§7.09 (a) and 7.21 of this Article, to present evidence, to examine and cross-examine witnesses and to have other rights essential for due process and a fair and impartial hearing.

(d) The Department shall have the burden of proving the factual allegations contained in the notice of violation by a preponderance of the evidence. A respondent shall have the burden of proving an affirmative defense, if any, by a preponderance of the evidence.

(e) In addition to evidence submitted, the hearing examiner may request further evidence to be submitted by the respondent or may adjudicate the matter based on the record before him or her.

(f)(1) A respondent may request the presence at the hearing of the public health sanitarian, inspector or other person who issued the NOV (the "inspector"), provided that the request is made in writing and is received by the Tribunal no later than seven business days prior to the scheduled hearing. In such event, the hearing shall be rescheduled, and the respondent need not appear at the originally scheduled hearing. A respondent may also, at the time of the hearing, request the presence of the inspector; in which case the hearing shall be adjourned. In addition, if a respondent denies the factual allegations contained in the NOV, the hearing examiner may require the presence of the inspector and adjourn the hearing.
(2) In the event that the inspector does not appear, the hearing examiner may adjourn the hearing, or may take testimony, and sustain or dismiss all or part of the notice of violation, as the hearing examiner may deem appropriate. In determining the appropriate action, the hearing examiner may consider any relevant facts, including the availability of the inspector, the reason for the failure to appear, the need for and relevance of the requested testimony, and the potential prejudice to either party if the hearing is adjourned or proceeds without the inspector. In no event shall a hearing be adjourned on more than three occasions by the hearing examiner because of the unavailability of an inspector. If the respondent requests that the hearing proceed in the absence of the inspector, the respondent shall be deemed to have waived the appearance of such inspector.

(g) A record shall be made of all notices of violation filed, proceedings held, written evidence admitted and decisions rendered, and such record shall be kept in the regular course of business for a reasonable period of time in accordance with applicable law. Hearings shall be mechanically, electronically or otherwise recorded by the Administrative Tribunal under the supervision of the hearing examiner, and the original recording shall be part of the record and shall constitute the sole official record of the hearing. A copy of a tape recording of a hearing shall be made available within five business days of receiving a request, upon payment of a reasonable fee in accordance with applicable law, to any respondent requesting a copy, to enable such respondent to appeal a notice of decision to the Review Board or for other legal proceedings.

(h) With the consent of all parties, a hearing examiner may conduct a hearing by telephone or other electronic media.

(i) A written decision sustaining or dismissing each charge in the notice of violation shall be promptly rendered by the hearing examiner who presided over the hearing, or who conducted the adjudication by mail, or who rendered a default decision. Each decision, other than a default decision, shall contain findings of fact and conclusions of law. Where a violation is sustained, the hearing examiner shall impose a penalty. A copy of the decision, other than a default decision mailed or otherwise provided in accordance with §7.09(d) hereof, shall be served forthwith on the respondent or on the respondent's counsel, registered representative or other authorized representative, either personally or by certified mail. Any fines imposed shall be paid within thirty days of service of the decision. If full payment of fines is not made within thirty days, an additional penalty may be imposed per NOV in an amount of fifty dollars, if paid between thirty-one and sixty days after service of the decision, and one hundred dollars if paid more than sixty days after service of the decision.

§7.13 **Subpoenas.**

(a) At any time after a hearing has commenced a subpoena may be issued by the hearing examiner to compel the timely production of any record or document for examination or introduction into evidence, or to compel the appearance of persons to give testimony, when the hearing examiner finds that such record, document or testimony is reasonably related, relevant and necessary to the adjudication. Such subpoenas shall be issued only for production of records maintained within the Department, or the appearance of a person who is employed by the Department at the time such appearance is demanded. Upon the issuance of a subpoena the hearing examiner may proceed with the hearing and adjourn such hearing until the subpoenaed documents or witnesses are produced, or immediately adjourn the hearing until such time.

(b) Subpoenaed documents shall be produced and made returnable on a date certain prior to the adjourned date for the continued hearing. Witnesses subpoenaed to testify shall appear on the adjourned date.

(c) A hearing examiner who has issued a subpoena, upon receipt of a motion timely made by the Department before the return date of the subpoena, or on the hearing examiner's own motion, may deny, quash or modify a subpoena if it is unreasonable, insufficiently relevant to the adjudication or has been shown to be wrongfully issued.

(d) If the hearing examiner determines that a subpoena has not been complied with, and that there is no good cause for such failure to comply, the hearing examiner may proceed with the hearing upon finding that the record, document or testimony subpoenaed is not necessary to the proof or defense of a violation or a fair adjudication of the merits, or the hearing examiner may preclude evidence offered by the non-complying party that is related to the subpoena, or may dismiss the particular violation the proof of which appears to the hearing examiner to be reasonably dependent on the material or person subpoenaed, but not produced.

§7.15 **Disqualification of hearing examiners.**

(a) Grounds for disqualification. A hearing examiner shall not preside over a hearing in accordance with the provisions of subdivisions (D) and (E) of §103 of Appendix A of Title 48 of

the Rules of the City of New York. A hearing examiner who determines his or her disqualification shall withdraw from the proceeding by notice on the record and shall notify the Director of such withdrawal.

(b) Motion to disqualify. Whenever a party asserts for any reason that a hearing examiner must be disqualified from presiding over a particular proceeding, such party may file with the Director a motion to disqualify and remove the hearing examiner. Such a motion must be supported by affidavits setting forth the alleged grounds for disqualification. The Director shall furnish a copy of the motion to the hearing examiner whose removal is sought, and the hearing examiner shall have seven days to reply. Unless the hearing examiner disqualifies himself or herself within seven days of the receipt of the motion, the Director shall promptly determine the validity of the alleged grounds, either directly or on the report of another hearing examiner appointed to conduct a hearing for that purpose.

§7.17 **Appeals.**

(a) There shall be an Appeals Unit within the Health Tribunal at OATH.

(b) The Appeals Unit shall have jurisdiction to review all final decisions, other than default decisions, of the hearing examiner to determine whether the facts found therein are supported by substantial evidence in the record, and whether the findings and determinations of the hearing examiner, as well as the penalty imposed, are supported by law. In addition, the Appeals Unit may determine whether a monetary penalty, even if it is lawful, should be increased or decreased. The Appeals Unit shall not consider any evidence that was not presented to the hearing examiner. The Appeals Unit shall have the power to reverse, to remand or to modify the decision appealed from or to increase or reduce the amount of the penalty imposed within the limits established by the Health Code or other applicable law.

(c) A party may seek to review, in whole or in part, any final decision of a hearing examiner, other than a decision rendered on default by the respondent. However, neither a denial of a motion to vacate a default decision nor a plea admitting the violations charged shall be subject to review by the Appeals Unit. Within 30 days of the Health Tribunal at OATH delivering or mailing the hearing officer's decision to a party or the party's authorized representative, the party may file two copies of a notice of appeal on a form prescribed by the tribunal, accompanied by two copies of a brief statement setting forth the specific reasons why the decision should be reversed, remanded or modified. Upon receipt of a notice of appeal, the tribunal shall promptly deliver or mail a copy of it, together with a copy of any accompanying statement, to the adverse party. Within 30 days of the tribunal delivering or mailing to a party a notice of appeal filed with the tribunal, the party may file two copies of a response to the appeal with the tribunal, and the tribunal shall promptly deliver or mail a copy of the response to the appealing party. Filing a notice of appeal shall not stay the collection of any fine or other penalty imposed by the decision. No appeal by or on behalf of a respondent shall be permitted unless the fine or penalty imposed has been paid before or at the time of the filing of the notice of appeal, or the respondent may post a cash or recognized surety company bond in the full amount imposed by the decision and order appealed from. Appeals decisions shall be made upon the entire record of the hearing and the evidence before the hearing examiner. Appeals may be decided without the appearance of

the appealing party, but the appealing party may make a request to appear before the Appeals Unit at the time of the filing of the notice of appeal. If the appealing party makes such a request, the tribunal shall provide notice to the parties whether the request is granted and, if so, the date of argument on the appeal, at which either party may appear before the Appeals Unit.

(d) (i) The Appeals Unit shall promptly issue a written decision affirming, reversing, remanding or modifying the decision appealed from, a copy of which shall be delivered to DOHMH and served on the respondent by certified or registered mail, stating the grounds upon which the decision is based. Where appropriate, the decision shall order the repayment to the respondent of any penalty that has been paid. The decision of the Appeals Unit shall be the final determination of DOHMH, except in the case of a violation arising under Article 13-E of the New York State Public Health Law, entitled "Regulation of Smoking in Certain Public Areas."

§7.21 **Registration and disqualification of certain authorized representatives.**

(a) Any person who represents two or more respondents before the Tribunal within a calendar year shall, as a condition precedent to such representation, register with the Tribunal as a representative. Any person who appears on behalf of a respondent before the Tribunal shall be prohibited from appearing before the Tribunal on behalf of any other respondent within the same calendar year without having completed such registration. A representative shall register by completing and submitting a form provided by the Department, and such form shall be accompanied by proof acceptable to the Department identifying the representative, and shall include such other information as the Department may require. Registered representatives shall notify the Tribunal within ten business days of any change in the information required to be stated on the registration form. The Department may charge a reasonable fee in accordance with applicable law to cover the cost of processing and maintaining registrations and may issue each representative a registration card and identification number. Attorneys admitted to practice in New York State shall not be required to so register.

(b) Attorneys, registered representatives or other authorized representatives may be permanently or temporarily barred by the Commissioner from representing any respondents before the Tribunal, and in the case of registered representatives their registration revoked or suspended, upon a finding by the Office of Administrative Trials and Hearings, or successor agency, issued after an opportunity to be heard has been afforded, that they have engaged in improper conduct, including but not limited to one or more of the following:

(1) Disorderly, disruptive or obstructive conduct, as set forth in §7.03(c)(4) of this Article, on more than one occasion, regardless of whether the representative was barred from participating in a specific hearing by a hearing examiner in accordance with said §7.03(c)(4);

(2) Submitting any false or forged document either as evidence in a matter being adjudicated at the Tribunal, or as proof of representation of a respondent;

(3) Any violation of §3.15 or §3.19 of this Code; or

(4) Any criminal conviction of a type that does not fall within the protections afforded under Article 23A of the New York State Correction Law.

§7.23 **Computation of time.**

In computing any period of time prescribed or allowed by this Article, the day of the act or default from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which case the period shall be extended to the next day which is not a Saturday, Sunday or legal holiday. Whenever a party has the right or is required to do some act within a prescribed period of time after the service of a document and the document is served by mail, five days shall be added to the prescribed period of time.

Article 7 (Administrative Tribunal) of the Health Code as it existed prior to the promulgation of E.O. 148.

§7.01 **Administrative Tribunal.**

The Administrative Tribunal (the "Tribunal") established by the Board of Health pursuant to §558 of the Charter is hereby continued.

§7.03 **Jurisdiction, powers and duties of the Administrative Tribunal.**

(a) Jurisdiction. The Administrative Tribunal shall have jurisdiction to hear and determine, in accordance with §1046 of the New York City Charter, notices of violation alleging non-compliance with the provisions of this Code, the New York State Sanitary Code, those sections of the New York City Administrative Code relating to or affecting health within the City, and any other laws and regulations that the Department has the duty or authority to enforce.

(b) General powers. The Administrative Tribunal or the hearing examiners assigned thereto shall have the following powers:

(1) To impose fines and pecuniary penalties in accordance with Article 3 of this Code or other applicable law;
(2) To compile and maintain complete and accurate records relating to its proceedings, including copies of all notices of violation served, responses, notices of appeal and briefs filed and decisions rendered by the hearing examiners and the Review Board;
(3) To adopt, through the Department's rulemaking process, such other rules and regulations as may be necessary or appropriate to effectuate the purposes and provisions of this Article;

(c) Hearing Examiners. Hearing examiners may:

(1) Hold conferences for the settlement or simplification of the issues,
(2) Administer oaths and affirmations, examine witnesses, rule upon offers of proof or other motions and requests, admit or exclude evidence, grant adjournments and continuances, and oversee and regulate other matters relating to the conduct of a hearing,
(3) Upon the request of any party, or upon the hearing examiner's own volition, and when the hearing examiner determines that necessary and material evidence will result, issue subpoenas or adjourn a hearing for the appearance of individuals, or the production of documents or other types of information, that are in the possession or control of the Department and in accordance with §7.13 of this article.
(4) Bar from participation in a hearing any person including a party, representative or attorney, witness or observer who engages in disorderly, disruptive or obstructionist conduct that disrupts or interrupts the proceedings of the Tribunal; and
(5) take any other action authorized by applicable law, rule or regulation, or that is delegated by the Director.

§7.05 **Organization of the Administrative Tribunal; Director.**

(a) The head of Adjudications at the Administrative Tribunal shall be its Director, who shall be appointed by the Board and who, in addition to having all of the powers of a hearing examiner, shall be responsible for the conduct of hearings and for all administrative matters of law and professional practice related to adjudications, including the management and supervision of hearing examiners; provided that the Director shall neither hold nor delegate any of the powers and duties of the Review Board under §7.17. The Director shall be subject to re-appointment by the Board every three years, but if the Director is not re-appointed he or she may continue to serve until a successor is appointed and ready to assume the powers of office. The Board may at any time remove the Director for cause following an opportunity to be heard. The Director shall devote full time to the Administrative Tribunal and shall not perform any other services for the Department.

(b) The Director shall appoint a sufficient number of hearing examiners to carry out the adjudicatory powers, duties and responsibilities of the Administrative Tribunal. Hearing examiners shall exercise such powers, duties and responsibilities as the Director may assign. The Director may delegate any or all of the powers and duties vested in him or her, The hearing examiners, who shall be attorneys admitted to practice in the State of New York, may be appointed by the Director to serve on a full time, part time or per diem basis, but no hearing examiner shall perform any other services for the Department. Hearing examiners shall be subject to the provisions of the rules of conduct promulgated pursuant to §1049(2)(b) of the New York City Charter.

§7.07 **Proceedings before the Administrative Tribunal.**

(a) Notice of Violation**.** All proceedings before the Administrative Tribunal shall be commenced by the issuance and service of a notice of violation ("NOV") upon the respondent and by the transmittal thereof to the Administrative Tribunal. Each NOV shall be prima facie evidence of the facts alleged therein. The notice of violation may include the report of the public health sanitarian, inspector or other person who conducted the inspection or investigation that culminated in the notice of violation. When such report is served in accordance with this section, such report shall also be prima facie evidence of the factual allegations contained therein.

(b) Service of the Notice of Violation. The notice of violation may be served in person upon the person alleged to have committed the violation, the permittee or registrant, upon the person who was required to hold the permit or to register, upon a member of the partnership or other group concerned, upon an officer of the corporation, upon a member of a limited liability company, upon a management or general agent or upon any other person of suitable age and discretion as may be appropriate, depending on the organization or character of the person, business, or institution charged. Service may also be made by certified or registered mail through the U.S. Postal Service, or by any type of mail utilizing any other mailing service that provides proof of mailing and receipt, to any such person at the address of the premises that is the subject of the NOV or, as may be appropriate, at the residence or business address of (1) the alleged violator, (2) the individual who is listed as the permittee or applicant in the permit issued by the Board or the Commissioner or in the application for a permit, or (3) the registrant listed in the registration form. In the case of service by mail, documentation of delivery or receipt provided by the delivery or mailing service shall be proof of service of the notice of violation.

(c) Contents of notice of violation. The notice of violation shall contain:

(1) A clear and concise statement sufficient to inform the respondent with reasonable definiteness and clarity of the essential facts alleged to constitute the violation or the violations charged, including the date, time where applicable and place when and where such facts were observed;

(2) Information adequate to provide specific notification of the section or sections of the Code or other law, rule, or regulation alleged to have been violated;

(3) Information adequate for the respondent to calculate the maximum penalty authorized to be imposed if the facts constituting the violation are found to be as alleged;

(4) Notification of the date and place when and where a hearing will be held by the Department, such date to be at least fifteen calendar days after receipt of the notice of violation, unless another date is required by applicable law;

(5) Notification that failure to appear on the date and at the place designated for the hearing shall be deemed a waiver of the right to a hearing, thereby authorizing the rendering of a default decision; and

(6) Information adequate to inform the respondent of his or her rights under §7.09 of this Article.

(d) Amendment. The hearing examiner may allow an amendment to a notice of violation at any time if the subject of the amendment is reasonably within the scope of the original notice of violation; provided, however, that such amendment does not allege any violation not specified in the original notice, alleged to have occurred subsequent to the service of such notice, and does not prejudice the rights of the respondent to adequate notice of the allegations made against the respondent.

§7.09 **Appearances.**

(a) A respondent may appear for a hearing by:

(1) appearing in person at the place and on the date scheduled for the hearing;

(2) sending an authorized representative to appear on behalf of such person at the place and on the date scheduled for the hearing who is:

(i) an attorney admitted to practice law in New York State,

(ii) a representative registered to appear before the Tribunal pursuant to §7.21, or

(iii) any other person, subject to the provisions of §7.21; or

(3) making a written request for an adjudication by mail, provided that the request is received by the Tribunal before the scheduled date of the hearing or bears a postmark indicating that it was mailed to the Tribunal before the scheduled date of a hearing. If the request bearing such a postmark is received by the Tribunal after a decision on default has been issued, such default shall be vacated automatically; or

(4) participating in a hearing conducted by telephone or other electronic media when the opportunity to do so is offered by the Department, provided, however, that a telephone or electronic hearing may be adjourned for a live hearing if the hearing officer determines that such an adjournment is necessary, or if any party requests an adjournment.

(b) If the respondent chooses to appear by mail, the written request for mail adjudication may contain denials, admissions and explanations pertaining to the individual violations charged, and documents, exhibits or statements to be considered as evidence in support of respondent's defense, or in the determination of penalties. If, after a review of the record, the hearing examiner is of the opinion that it is necessary for the respondent to submit additional evidence, the hearing examiner may require the submission of additional documentary evidence or deny a request for adjudication by mail and adjourn the matter for a hearing. Violations that are not denied or explained shall be deemed to have been admitted; defenses not specifically raised shall be deemed to have been waived.

(c) A respondent or authorized representative may request that a scheduled hearing be adjourned to a later date. Such a request may be made in writing to the Tribunal, provided that it is received by the Tribunal no later than three business days prior to the date of the scheduled hearing, or the request may be made in person on the date of the scheduled hearing at any time prior to the hearing. A maximum of three requests for adjournments by the respondent, and a maximum of three requests for adjournments by the petitioner or by the Tribunal, shall be granted administratively as of right. Thereafter, all requests for adjournments must be made in person to a hearing examiner or the Director of the Tribunal at the time of the scheduled hearing, and may be granted only upon a showing of good cause as determined by the hearing examiner or the Director in his or her discretion. A denial of an adjournment request shall not be subject to separate or interlocutory review by the Review Board.

(d) A respondent who fails to appear or to make a timely request for an adjournment shall not be entitled to a hearing. Without further notice to the respondent, a hearing examiner may find that the respondent is in default if the respondent has failed to appear and render a default decision sustaining the violations cited in the notice of violation, subject to findings the hearing examiner must make with respect to the service of the notice of violation and the sufficiency of the factual allegations contained therein, and imposing a penalty pursuant to Article 3 of this Code or as authorized by other applicable law. If, before a default decision is issued, it is determined that the failure of the party to appear was caused by circumstances beyond the party's reasonable control, a default decision may not be issued and the matter may be adjourned to a new hearing date. A decision that is adverse to a respondent shall be issued on default only after the hearing examiner has determined that the notice of violation was served as required by applicable law, and that the notice of violation alleges sufficient facts to support the violations charged. The Tribunal shall notify a defaulting respondent of the issuance of a default decision by mailing a copy of the decision by certified mail or by providing a copy to a respondent or respondent's representative who appears personally at the Tribunal and requests a copy. A respondent may make a motion in writing requesting that a default be vacated, if the motion to vacate is postmarked or received by the Tribunal within sixty days of the date of mailing of the default decision to the respondent or the date a copy was provided to the respondent or the respondent's representative at the Tribunal, whichever date is earlier. One such request shall be granted administratively as of right provided that the Tribunal's records show that there have been no other failures to appear in relation to the particular notice of violation. A motion to vacate a default that is received more than sixty days after mailing or personal receipt of the default decision shall be accompanied by a statement setting forth good cause for the respondent's failure to appear. Such statement, and any documents to support the motion to vacate the default, shall be reviewed by a hearing examiner

who shall determine if it establishes a reasonable excuse for the default. Denial of a motion to vacate a default decision shall not be subject to review by the Review Board.

(e) The Department may extend an offer to settle any notice of violation by setting forth a monetary amount that a respondent may pay in full satisfaction of the violations cited in the notice of violation. A respondent may, in lieu of attending a hearing, pay the department the monetary amount. Such payment shall constitute an admission of liability for the violations charged and no further hearing or appeal shall be allowed.

§7.11 **Hearings and mail adjudications.**

(a) A notice of violation may be adjudicated at a hearing or by mail.

(b) The hearings shall be open to the public, shall be presided over by a hearing examiner, shall proceed with reasonable expedition and order, and, insofar as practicable, shall not be postponed or adjourned.

(c) Each party to a proceeding shall have the right to be represented by counsel or other authorized representative as set forth in §§7.09 (a) and 7.21 of this Article, to present evidence, to examine and cross-examine witnesses and to have other rights essential for due process and a fair and impartial hearing.

(d) The Department shall have the burden of proving the factual allegations contained in the notice of violation by a preponderance of the evidence. A respondent shall have the burden of proving an affirmative defense, if any, by a preponderance of the evidence.

(e) In addition to evidence submitted, the hearing examiner may request further evidence to be submitted by the respondent or may adjudicate the matter based on the record before him or her.

(f)(1) A respondent may request the presence at the hearing of the public health sanitarian, inspector or other person who issued the NOV (the "inspector"), provided that the request is made in writing and is received by the Tribunal no later than seven business days prior to the scheduled hearing. In such event, the hearing shall be rescheduled, and the respondent need not appear at the originally scheduled hearing. A respondent may also, at the time of the hearing, request the presence of the inspector; in which case the hearing shall be adjourned. In addition, if a respondent denies the factual allegations contained in the NOV, the hearing examiner may require the presence of the inspector and adjourn the hearing.
(2) In the event that the inspector does not appear, the hearing examiner may adjourn the hearing, or may take testimony, and sustain or dismiss all or part of the notice of violation, as the hearing examiner may deem appropriate. In determining the appropriate action, the hearing examiner may consider any relevant facts, including the availability of the inspector, the reason for the failure to appear, the need for and relevance of the requested testimony, and the potential prejudice to either party if the hearing is adjourned or proceeds without the inspector. In no event shall a hearing be adjourned on more than three occasions by the hearing examiner because of the unavailability of an inspector. If the respondent requests that the hearing proceed in the

absence of the inspector, the respondent shall be deemed to have waived the appearance of such inspector.

(g) A record shall be made of all notices of violation filed, proceedings held, written evidence admitted and decisions rendered, and such record shall be kept in the regular course of business for a reasonable period of time in accordance with applicable law. Hearings shall be mechanically, electronically or otherwise recorded by the Administrative Tribunal under the supervision of the hearing examiner, and the original recording shall be part of the record and shall constitute the sole official record of the hearing. A copy of a tape recording of a hearing shall be made available within five business days of receiving a request, upon payment of a reasonable fee in accordance with applicable law, to any respondent requesting a copy, to enable such respondent to appeal a notice of decision to the Review Board or for other legal proceedings.

(h) With the consent of all parties, a hearing examiner may conduct a hearing by telephone or other electronic media.

(i) A written decision sustaining or dismissing each charge in the notice of violation shall be promptly rendered by the hearing examiner who presided over the hearing, or who conducted the adjudication by mail, or who rendered a default decision. Each decision, other than a default decision, shall contain findings of fact and conclusions of law. Where a violation is sustained, the hearing examiner shall impose a penalty. A copy of the decision, other than a default decision mailed or otherwise provided in accordance with §7.09(d) hereof, shall be served forthwith on the respondent or on the respondent's counsel, registered representative or other authorized representative, either personally or by certified mail. Any fines imposed shall be paid within thirty days of service of the decision. If full payment of fines is not made within thirty days, an additional penalty may be imposed per NOV in an amount of fifty dollars, if paid between thirty-one and sixty days after service of the decision, and one hundred dollars if paid more than sixty days after service of the decision.

§7.13 **Subpoenas.**

(a) At any time after a hearing has commenced a subpoena may be issued by the hearing examiner to compel the timely production of any record or document for examination or introduction into evidence, or to compel the appearance of persons to give testimony, when the hearing examiner finds that such record, document or testimony is reasonably related, relevant and necessary to the adjudication. Such subpoenas shall be issued only for production of records maintained within the Department, or the appearance of a person who is employed by the Department at the time such appearance is demanded. Upon the issuance of a subpoena the hearing examiner may proceed with the hearing and adjourn such hearing until the subpoenaed documents or witnesses are produced, or immediately adjourn the hearing until such time.

(b) Subpoenaed documents shall be produced and made returnable on a date certain prior to the adjourned date for the continued hearing. Witnesses subpoenaed to testify shall appear on the adjourned date.

(c) A hearing examiner who has issued a subpoena, upon receipt of a motion timely made by the Department before the return date of the subpoena, or on the hearing examiner's own motion, may deny, quash or modify a subpoena if it is unreasonable, insufficiently relevant to the adjudication or has been shown to be wrongfully issued.

(d) If the hearing examiner determines that a subpoena has not been complied with, and that there is no good cause for such failure to comply, the hearing examiner may proceed with the hearing upon finding that the record, document or testimony subpoenaed is not necessary to the proof or defense of a violation or a fair adjudication of the merits, or the hearing examiner may preclude evidence offered by the non-complying party that is related to the subpoena, or may dismiss the particular violation the proof of which appears to the hearing examiner to be reasonably dependent on the material or person subpoenaed, but not produced.

§7.15 **Disqualification of hearing examiners.**

(a) Grounds for disqualification. A hearing examiner shall not preside over a hearing in accordance with the provisions of subdivisions (D) and (E) of §103 of Appendix A of Title 48 of the Rules of the City of New York. A hearing examiner who determines his or her disqualification shall withdraw from the proceeding by notice on the record and shall notify the Director of such withdrawal.

(b) Motion to disqualify. Whenever a party asserts for any reason that a hearing examiner must be disqualified from presiding over a particular proceeding, such party may file with the Director a motion to disqualify and remove the hearing examiner. Such a motion must be supported by affidavits setting forth the alleged grounds for disqualification. The Director shall furnish a copy of the motion to the hearing examiner whose removal is sought, and the hearing examiner shall have seven days to reply. Unless the hearing examiner disqualifies himself or herself within seven days of the receipt of the motion, the Director shall promptly determine the validity of the alleged grounds, either directly or on the report of another hearing examiner appointed to conduct a hearing for that purpose.

§7.17 **Review Board.**

(a) There shall be a Review Board within the Department which shall consist of three persons, namely a person appointed by the Board who is an attorney in the Office of the General Counsel of the Department and who has been admitted to practice law in the State of New York for a period of at least five years; another person appointed by the Board who is an attorney admitted to practice in the State of New York for a period of at least five years; and a person appointed by the Board who has at least five years experience in public health activities who may, but need not be, an employee of the Department. The attorneys appointed to the Review Board shall be in good standing at the time of appointment and continuously during their term of service, and shall meet any additional requirements of experience and knowledge of administrative law as the Board may impose. Hearing examiners are not qualified to be members of the Review Board. The Board of Health may at any time remove a member of the Review Board for cause following an opportunity to be heard.

(b) The Review Board shall have jurisdiction to review all final decisions, other than default decisions, of the hearing examiners to determine whether the facts found therein are supported by substantial evidence in the record, and whether the findings and determinations of the hearing examiner, as well as the penalty imposed, are supported by law. The Review Board shall not consider any evidence that was not presented to the hearing examiner. Decisions of the Review Board shall be made by a majority of its members. The Review Board shall have the power to reverse, to remand or to modify the decision appealed from or to reduce the amount of the penalty imposed within the minimums established by this Code or other applicable law.

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

(d) The Review Board shall promptly issue a written decision affirming, reversing, remanding or modifying the decision appealed from, a copy of which shall be served on the respondent by certified or registered mail, stating the grounds upon which the decision is based. Where appropriate, the decision shall order the repayment to the respondent of any penalty that has been paid. If the Review Board does not act on an appeal within one hundred eighty days after the notice of appeal is filed, or within such an extended time as may be agreed upon by the parties, the appeal shall be deemed to be granted. The decision of the Review Board shall be the final determination of the Department as to the imposition of any fine, penalty and forfeiture.

(e) The Review Board shall have no jurisdiction to entertain appeals by the Department of any decision of a hearing examiner.

(f) The Commissioner may appoint a person of suitable experience and similar qualifications to serve on the Review Board temporarily whenever there is a vacancy on the Review Board or a member is absent and unable to serve, pending the appointment of a person by the Board to fill the vacancy.

§7.19 **Disqualification of member of Review Board.**

(a) Grounds for disqualification**.** A member of the Review Board shall not review a final decision of a hearing examiner in accordance with the provisions of subdivisions (D) and (E) of §103 of Appendix A of Title 48 of the Rules of the City of New York. A member who

determines his or her disqualification shall withdraw from the review by notice on the record and shall notify the Board of such withdrawal.

(b) Whenever a party asserts for any reason that a member of the Review Board must be disqualified from presiding over a particular proceeding, such party may file with the Board a motion to disqualify and remove such member. Such a motion must be supported by affidavits setting forth the alleged grounds for disqualification. The Board shall furnish a copy of the motion to the member whose removal is sought, and, thereafter, the member shall have seven days to reply. Unless the member disqualifies himself or herself within seven days of the receipt of the motion, the Board shall promptly determine the validity of the alleged grounds, either directly or on the report of another hearing examiner appointed to conduct a hearing for that purpose.

(c) Whenever a member of the Review Board is disqualified, the Board shall appoint a person of suitable experience to serve on the Review Board to determine the appeal in question.

§7.21 **Registration and disqualification of certain authorized representatives.**

(a) Any person who represents two or more respondents before the Tribunal within a calendar year shall, as a condition precedent to such representation, register with the Tribunal as a representative. Any person who appears on behalf of a respondent before the Tribunal shall be prohibited from appearing before the Tribunal on behalf of any other respondent within the same calendar year without having completed such registration. A representative shall register by completing and submitting a form provided by the Department, and such form shall be accompanied by proof acceptable to the Department identifying the representative, and shall include such other information as the Department may require. Registered representatives shall notify the Tribunal within ten business days of any change in the information required to be stated on the registration form. The Department may charge a reasonable fee in accordance with applicable law to cover the cost of processing and maintaining registrations and may issue each representative a registration card and identification number. Attorneys admitted to practice in New York State shall not be required to so register.

(b) Attorneys, registered representatives or other authorized representatives may be permanently or temporarily barred by the Commissioner from representing any respondents before the Tribunal, and in the case of registered representatives their registration revoked or suspended, upon a finding by the Office of Administrative Trials and Hearings, or successor agency, issued after an opportunity to be heard has been afforded, that they have engaged in improper conduct, including but not limited to one or more of the following:

(1) Disorderly, disruptive or obstructive conduct, as set forth in §7.03(c)(4) of this Article, on more than one occasion, regardless of whether the representative was barred from participating in a specific hearing by a hearing examiner in accordance with said §7.03(c)(4);

(2) Submitting any false or forged document either as evidence in a matter being adjudicated at the Tribunal, or as proof of representation of a respondent;

(3) Any violation of §3.15 or §3.19 of this Code; or

(4) Any criminal conviction of a type that does not fall within the protections afforded under Article 23A of the New York State Correction Law.

§7.23 **Computation of time.**

In computing any period of time prescribed or allowed by this Article, the day of the act or default from which the designated period of time begins to run shall not be included, but the last day of the period shall be included unless it is a Saturday, Sunday or legal holiday, in which case the period shall be extended to the next day which is not a Saturday, Sunday or legal holiday. Whenever a party has the right or is required to do some act within a prescribed period of time after the service of a document and the document is served by mail, five days shall be added to the prescribed period of time.