

RESPONSE TO COMPTROLLER AUDIT OF DOHMH/HEARINGS DIVISION

At the outset, OATH would like to correct a misimpression about its role in City government. As discussed at the recent exit conference with respect to the preliminary report, OATH is an independent agency charged with the responsibility of adjudicating administrative summonses in a fair and timely manner. It functions as a court. DOHMH, on the other hand, is a City agency charged with enforcement of the laws to protect the public health and safety. DOHMH does so, in part, by charging individuals and businesses with violations of the law in what are called Notices of Violations (NOVs or summonses), which are adjudicated at OATH. The two agencies are entirely independent of the other. There is not, nor should there be, any cause and effect correlation between the functions of the court and the functions of the enforcement agency. Doing so would undermine the impartial adjudication process created at OATH. The OATH procedural rules provide both the petitioning agency and respondent with an opportunity to be heard using a uniform set of rules that applies evenly to both parties.

It is the separation between adjudication and enforcement that the auditors apparently disregarded or missed. Thus, the findings of the Comptroller's Audit ("Audit") display in several ways a fundamental misunderstanding of OATH's function and procedures. We ask that those errors in understanding be removed from the report. For example, OATH's function is not one of policing the public health. Its role is adjudication. If the public health were implicated in a case scheduled for a pending hearing, DOHMH may continue to inspect the premises, issue violations where they exist, and shut down a facility for a condition that poses a severe risk to the public health or safety without the intervention of OATH.

Indeed, as an independent administrative tribunal, it is inappropriate for OATH to instruct a party as to defects in its pleading or procedures, except through the decisions of its hearing officers and administrative law judges. Moreover, aiding one party in preparing their case would compromise OATH's position as an impartial tribunal. The audit team's recommendations ignore the basic mission of an independent court. Policing the conduct of an enforcement agency would be consistent with and therefore inappropriate court advice to a party as to how to prosecute its cases. Moreover, the audit team's interpretation of the data often was in error. In addition, there are places where the Audit's objectives appear to be misguided and its approach and analysis misconceived.

Following are the audit findings and recommendations, as well as OATH's reply.

- I. **The Audit criticizes the length of time for reschedules using a data sample of 51 out of over 37,000 cases (just over a tenth of one per cent of the database available to them). Many of the criticisms are unfounded, as explained below.**

Hearings Were Not Rescheduled in a Timely Manner

Audit findings: OATH has not established formal standards to govern the amount of time that may elapse between a scheduled hearing date and its rescheduled date. This increases the likelihood of delays in the hearings and adjudication process. In addition, a delay in the process might contribute to the public being subjected to increased health and safety risks. (Pages 6-7 of the report)

Audit Recommendations:

1. *OATH should develop formal written standards to govern the timeframes for rescheduled hearings and clearly communicate these standards to its staff.*
2. *OATH should monitor staff compliance with the standards to ensure that hearings are rescheduled in a timely manner.*
3. *OATH should consider modifying ATAS to flag for review those hearings that are not rescheduled within the required timeframes and use that as a monitoring and instruction tool for staff.*

OATH does not agree with these recommendations.

- 1) OATH does in fact have formal standards governing hearing reschedules. Pursuant to OATH Rule 6-01, an adjournment is obtained after the commencement of a hearing. A reschedule is obtained before the hearing. Prior to July 1, 2015, our rules provided for multiple “reschedules” which could be requested by either party. By amendment effective July 1, 2015, OATH Rule 6-05 allows each party one reschedule, though it does not limit the length of time. The amendment was created to eliminate repeated pre-hearing reschedules.
- 2) OATH does not establish the amount of time allowed in a reschedule by rule, in order to allow the parties to obtain the time they need to adequately prosecute or defend consistent with fairness to all sides. However, there is an internal protocol of 21 days. When a reschedule is requested by any party, OATH’s calendar unit will pick a date based upon the date next available on the calendar and the needs of the parties.
- 3) OATH’s rule limiting the number of reschedules available -- aided by the adversary system itself -- provides an adequate backstop to excessive delay. The Audit findings do not demonstrate a need to adopt a formal mandate, a draconian measure that would ignore the legitimate needs of parties. The Audit points to 23 out of 52 rescheduled hearings (a tiny sample out of over 37,000 hearings conducted) that were rescheduled for a new date more than 21 calendar days later. An arbitrary mandate would serve no purpose, particularly where the small number of reschedules cited in this audit is no indication of a problem with the system as it exists.
- 4) As stated in the introduction to this Response, the audit emphasizes a public health role that OATH does not have. Moreover, the timing of the hearing has no relation to compliance. A hearing only determines whether there existed a violation at a particular moment on a particular day. Nothing more.
- 5) There is no need for OATH to modify ATAS “to flag for review those hearings that are not rescheduled within the required timeframes,” because no such timeframes exist in any law or rule. ATAS work flows are developed based on defined business rules. Since there is no business rule on timeliness of reschedules, there is no rationale for modifying ATAS.

II. The Audit makes recommendations that were implemented by OATH prior to commencement of the Audit.

[Improper Handling of NOV's That Were Filed Subsequent to the Scheduled Hearing Dates](#)

Audit findings: When DOHMH fails to file an NOV with OATH until after the scheduled hearing date and the respondent appears at OATH for the scheduled hearing, the case cannot be heard. In this situation, OATH's procedures require a letter to be issued to the respondent that states that a hearing could not be

held and that OATH will not reschedule the hearing or make a decision on any of the violations cited on the NOV. ATAS has been programmed to reject the NOV that has been filed with OATH subsequent to the scheduled hearing date and to place the NOV in the Late Delivery Case Folder. In order to be heard by OATH, DOHMH would need to reissue the NOV to the respondent that provides a new hearing date and time.

However, the audit found that in some instances OATH improperly rescheduled some of these hearings and did not send the cases back to DOHMH and require new NOV's to be served in order for the process to begin again. Such cases could increase costs to the City based on duplication of efforts where a case has been improperly rescheduled by OATH, only to be dismissed and then refiled. (pages 7-8 of the report)

Audit Recommendations:

- 4. OATH should monitor the filing of NOV's more closely to ensure that those NOV's filed subsequent to the scheduled hearing date are rejected by ATAS, placed in the Late Deliver Case Folder and provided to DOHMH on a regular basis.*
 - 5. OATH should ensure that it does not reschedule hearings on NOV's filed after the scheduled hearing dates.*
- 1) The Audit found that 265 cases were improperly scheduled for hearing even though filed by DOHMH filed after the original scheduled hearing date and were not "rejected" by OATH. They recommend OATH monitor such late filings. OATH is currently monitoring late filings in accordance with a practice adopted in or around March 2015. OATH saw the need in fiscal year 2015 to tighten its protocol for handling NOV's received after the hearing date contained on the NOV. Under our current procedure, such late filings are rejected and are not rescheduled for hearing. Thus, recommendations 4 and 5 have already been satisfied.
 - 2) The Audit's concern that DOHMH is not notified of late filings is unwarranted. DOHMH has read-only access to ATAS and can access this information without requiring OATH, an impartial adjudicatory body, to prepare and send error reports to DOHMH and other enforcement agencies. It is inappropriate and not OATH's responsibility to police their internal processes.

III. Support for Performance Data Submitted for the Mayor's Management Report.

OATH will take this recommendation into consideration during upcoming tribunal division mergers. However, at this time OATH maintains records of how the MMR performance data is arrived at each month, which go through several levels of review. This methodology has proved adequate in informing OATH management of the performance of this tribunal since its transfer from DOHMH to OATH. Any form of "instancing" of the ATAS database for the purpose snapshotting the detailed back up data each month would require resources well beyond what OATH has as its disposal at this time and serves no practical managerial purpose.

IV. Data Reliability Concerns.

It bears noting that the data was not found to be unreliable, only that the data was not being tracked in ATAS. ATAS has no current ability to separately track Hearings by Telephone, which consists of new technology that was not in existence when ATAS was developed. This is a software deficiency that cannot be remedied until OATH has completed the development of ATAS to accommodate another substantial high priority project. To compensate for this temporary deficiency, OATH created the Access database, which was provided to the audit team to review the Hearings by Telephone.

V. Lack of an ATAS User Manual.

ATAS was not originally proprietary to OATH. ATAS was created by DOHMH and has been in use at OATH since 2011 when the DOHMH tribunal was merged into OATH. OATH has created a draft User Manual which we are unable to complete until other high-priority ATAS projects are completed.

VI. OATH has already explained to the auditors why a case may legitimately have a hearing date less than 15 days from service of the NOV. These arguments were fundamentally misunderstood.

Some Hearings Scheduled Too Soon After Service of NOV

Audit findings: Notwithstanding a statutory requirement that hearings on NOVs may not be scheduled to occur until 15 calendar days after service of the NOVs on the respondents, our review of ATAS data revealed that 122 had their original hearing dates scheduled by DOHMH for fewer than 15 calendar days after the NOVs had been served. These prematurely scheduled hearing dates ranged from only 3 days after the NOVs had been served to 14 days after. . . . ATAS generally flags NOVs whose scheduled hearing dates differ from the dates that had been offered by DiRAD to the inspectors and places the NOVs in a Docketing Exception Folder for resolution. However, OATH simply removes them from the Docketing Exception Folder and places them in a Case Ready Folder without informing DOHMH about these scheduling errors. Scheduling an original hearing date too early can disadvantage the respondent since there is a chance that the respondent would not receive the NOV before the scheduled hearing date, which would result in a default decision being issued against the respondent. . . . (pages 10-11 of the report)

- 1) Contrary to the Audit conclusion, there is no “statutory requirement” that hearings be scheduled at least 15 days after service of the NOV. There is an OATH Rule that regulates the content of the NOV and requires it contain a hearing date that “must be at least 15 days after the NOV is served, unless another date is required by applicable law” (48 RCNY 6-08(c)(4)).
- 2) OATH does not select the original hearing date, nor should it. DOHMH’s issuing inspector selects the date from among suggested dates provided by the DIRAD system, a system created by DOHMH and used by their inspectors to schedule hearings. The Audit did not establish there was any violation of Rule 6-08, even by DOHMH, as their review of the data set did not control for cases that properly allow the hearing to be scheduled in less than 15 days -- as “required by applicable law.” Indeed, the audit team seemed surprised when this provision of Rule 6-

- 08(c)(4) was brought to its attention at the pre-Exit meeting.
- 3) The “required by applicable law” exception to Rule 6-08 includes instances where hearings are expedited, by law, due to a hazardous condition or where respondent has requested an earlier hearing date. OATH reviewed the audit data and found that both factors were present in a sampling of the 122 cases singled out by the audit team.
 - 4) OATH reviewed 14 cases out of the 122 cases determined by the Audit to be “untimely” scheduled. Among the 14 cases were: A) 7 that were sent by ATAS to the Exceptions Folder where problem entries are automatically sent due to a discrepancy; B) 3 that were entitled to expedited processing because of sealing or closure of the business; and C) 3 that had a hearing date scheduled more than 15 days after service on the NOV but the hearing was held earlier because respondent requested it; and D) 1 that was scheduled exactly 15 days from the inspection date. Thus, the 14 cases that OATH reviewed actually were either timely scheduled or errors were caught by the protections in place and resolved. OATH did not check the entire sample, but assumes that further investigation would uncover more of the same. It is important to note that OATH was able to find these errors in the Audit analysis from the data and documents that OATH provided to the audit team.
 - 5) Where a case does not fall within the Rule 6-08 exception and the original hearing date is scheduled less than 15 days from service, it is not “untimely”; timeliness is typically a measure of the length of time from the date of occurrence to the date of service, as in a statute of limitation. Thus, early scheduling is not a “timeliness” issue in this regard and is not a basis for dismissal of an NOV. Early scheduling is remedied, simply, by postponing the hearing to a date more convenient to the respondent, to allow respondents a reasonable opportunity to prepare a defense and without any prejudice to the respondent. There is no additional cost to DOHMH of re-serving the NOV or re-inspection as neither is required; and if they were, it would be the result of DOHMH’s own failure to schedule the matter properly, not OATH’s.

VII. OATH explained to the auditors that DOHMH’s scheduling of hearing dates more than 30 days from service of the NOV (i) was not improper, (ii) did not harm respondents, and (iii) was simply remedied. Their conclusions to the contrary are erroneous.

Hearings Scheduled Too Long After Service of NOV

Audit findings: Although the applicable statutes do not provide for a maximum time period within which DOHMH must schedule a hearing upon the issuance of an NOV, OATH officials stated that original hearings should generally be scheduled within 30 days of the NOVs having been served on the respondents. However, the audit found that of the 29,343 cases that had decisions rendered (including defaults and adjournments)¹ during Fiscal Year 2015, 5,764 (20 percent) were not scheduled within 30 days. Of the 5,764 cases for which the original hearings were scheduled to be held more than 30 calendar days after the NOVs were served, 270 were scheduled for more than 45 days after the NOVs had been served; 97 of the 270 were scheduled for more than 90 days (up to almost two years) after the NOVs had been served. (pages 11-12 of the report)

Audit Recommendation:

10. *The Mayor's Office of Operations should advise OATH and DOHMH to consider revising their hearing scheduling practices and procedures to minimize the possibility of improper hearing dates being set, including having DOHMH limit its inspectors' hearing scheduling options to the ones presented by DiRAD.*

- 1) This finding is built on several faulty premises. Most significantly, there is **no rule** that regulates how late a hearing might be scheduled after service of an NOV.
- 2) The Audit lists a series of supposed consequences of a "late scheduled" hearing, none of which are encountered. It states: "the scheduling errors can delay the resolution of the NOVs" which "alone could leave a cloud of uncertainty over a small business owner" and "delay the resolution of a potential public health risk." "In addition, improperly scheduled hearings could cost the parties extra time and money because they could lead to needless appearances by the respondents at OATH on cases that OATH won't hear." This is flatly untrue. A respondent may reschedule a hearing for an earlier date, in accordance with our rules, thus ending any uncertainty and giving the respondent the option of choosing a better date. There is no "cloud of uncertainty" or "extra time and money" or "needless appearance" necessary. OATH will never deny a respondent a hearing on an NOV filed in accordance with OATH rules, and as stated above there is no rule that regulates how late a hearing may be scheduled after service.
- 3) If the public health were implicated in a case scheduled for hearing more than 30 days after service, DOHMH can exercise its enforcement authority to shut down the facility for a condition that poses a severe risk to the public health or safety.
- 4) The Audit recommendation is misguided. The Auditors have a fundamental misunderstanding of the ability of the petitioner agency to choose a hearing date at any time it deems appropriate. There is a remedy to address timeliness, and the appropriate forum to do so is either at a hearing, or in the case of a default, on a motion to vacate the default decision. Any *ex parte* correspondence with the petitioner questioning the reason for scheduling a hearing for a particular date would inappropriately compromise OATH's neutrality.

Regardless of when a case is scheduled, OATH's function is to adjudicate the case. It is not to police, regulate or train the enforcement agency or advise it of applicable legal requirements. To do so in any way would be inappropriate. The remedy for any failure by the petitioning enforcement agency lies in the adjudication process.