

## **New York City Department of Consumer and Worker Protection**

### **Notice of Adoption**

Notice of Adoption to amend rules related to the adjudicatory authority the Department of Consumer and Worker Protection (“Department”) delegates to the Office of Administrative Trials and Hearings (“OATH”).

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED IN the Commissioner of Consumer and Worker Protection by Sections 1043, 2203(f) and 2203(h)(1) of the New York City Charter, and in accordance with the requirements of Section 1043 of the New York City Charter, that the Department amends Sections 6-01 and 6-02 of Title 6 of the Rules of the City of New York.

This rule was proposed and published on December 21, 2020. A remote public hearing was held on January 20, 2021.

### **Statement of Basis and Purpose of Rule**

The Department is amending rules related to the adjudicatory authority it delegates to the Office of Administrative Trials and Hearings (“OATH”). Local Law 80 of 2020 amended the New York City Charter, section 2203(h)(1), by adding the following: “Where the department has delegated any adjudicatory powers to the office of administrative trials and hearings, for all cases heard by the adjudicatory body authorized to conduct trials in such office, the office of administrative trials and hearings shall issue a recommended decision which the commissioner may adopt, reverse, modify, or remand in whole or in part for additional proceedings.”

This rule amendment implements the new law by clarifying which decisions issued by OATH must be recommended decisions subject to the already-existing procedures for recommended decisions in Section 6-02 of Chapter 6 of Title 6 of the Department’s rules. These amendments also amend the procedures for the Department’s review of recommended decisions by:

- Explaining that the Department may adopt, reverse, modify, or send back to OATH for development of a complete record, any recommended decision issued by OATH;
- Requiring that a petition or summons to start a case that will result in a recommended decision include a statement notifying the respondent of the recommended decision and its review by the Department;
- Allowing any party to the proceeding to submit a written argument to the Department setting forth why the OATH decision should or should not be followed;
- Clarifying what the Department may consider when reviewing a recommended decision from OATH; and
- Creating a procedure to allow the Department to reopen or modify any order or decision issued by the Department.

Finally, this rule also amends the language in section 6-01 to clarify that the Department delegates its adjudicatory powers contained in the New York City Charter to OATH and to clarify what types of cases the Department will file with the OATH trials division.

New material is underlined.

[Deleted material is in brackets.]

“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.

### **Rule Amendments**

Section 1. Section 6-01 of Subchapter A of Chapter 6 of Title 6 of the Rules of the City of New York is amended as follows:

(a) Except as otherwise provided in this subchapter, the adjudicatory powers granted to the Commissioner of the Department of Consumer Affairs ("Commissioner") under the New York City Charter, the Administrative Code of the City of New York ("Administrative Code") and New York State law to conduct hearings, issue decisions, impose fines and civil penalties, and order any other relief are hereby delegated to the Office of Administrative Trials and Hearings ("OATH").

(b) Nothing in this rule shall prohibit the Commissioner from exercising powers conferred upon the Commissioner, including, but not limited to:

(1) the power to suspend a license, without an adjudication, pursuant to Administrative Code § 20-104(e)(3);

(2) the powers with respect to unlicensed activities pursuant to Subdivisions (b)(2), (b)(3), and (b)(4) of Administrative Code § 20-105; and

(3) the power to order that a premises be sealed under the Administrative Code or any other City, State or Federal law conferring such power upon the Commissioner.

(c) The Department will file the following cases with the adjudicatory body authorized to conduct trials at OATH pursuant to chapter 1 of title 48 of the Rules of the City of New York:

(1) all proceedings commenced to enforce a law within the Department’s jurisdiction that regulates relationships in the workplace or that confers rights or benefits on workers, including, but not limited to, the Earned Safe and Sick Time Act set forth in chapter 8 of title 20 of the Administrative Code, provisions related to Fair Work Practices set forth in chapter 12 of title 20 of the Administrative Code, provisions related to mass transit benefits set forth in chapter 9 of title 20 of the Administrative Code, provisions related to displaced grocery workers set forth in section 22-507 of the Administrative Code, provisions related to a prevailing wage for building service employees in city leased or financially assisted facilities set forth in section 6-130 of the Administrative Code, or provisions related to a living wage for employees in city financially assisted workplaces set forth in section 6-134 of the Administrative Code;

(2) all proceedings in which the Department seeks discretionary revocation, suspension, or denial of a license;

(3) all proceedings in which the Department seeks more than one hundred thousand dollars in civil penalties, consumer restitution, other monetary relief, or any combination thereof;

(4) all proceedings involving four or more consumers against the same respondent; and

(5) all proceedings in which four or more witnesses testify and the Department seeks more than fifty thousand dollars in civil penalties, consumer restitution, other monetary relief, or any combination thereof.

§ 2. Subchapter A of Chapter 6 of Title 6 of the Rules of the City of New York is amended as follows:

§ 6-02 Recommended Decisions.

(a) OATH shall issue a recommended decision [for]in the following cases:

(1) all proceedings heard by the adjudicatory body authorized to conduct trials at OATH pursuant to chapter 1 of title 48 of the Rules of the City of New York; and

(2) all violations of the following statutes and of rules or regulations promulgated pursuant to such statutes: Article 13-F of the New York State Public Health Law; [Section 194] Article 11 of the New York State General Business Law; Article 5 of the New York State General Business Law; and Sections 192, 192-a, 192-b, and 192-c of Article 16 of the New York State Agriculture and Markets Law. [The Commissioner or the Commissioner's authorized designee may adopt, reverse, remand or modify such recommended decision in whole or in part.]

(b) Upon issuance of OATH's recommended decision in the matter, the Commissioner or the Commissioner's authorized designee may adopt, reverse, or modify that recommended decision. Where the Commissioner or the Commissioner's authorized designee determines that the record in the underlying proceeding has not, in whole or in part, been fully developed, he or she may send the case or claim back for development of a complete record. If the Commissioner or Commissioner's authorized designee sends back a case or claim to OATH, OATH shall issue a recommended decision at the conclusion of the additional proceedings.

(c) For all cases requiring a recommended decision pursuant to subdivision a of this section, the petition or summons must include a statement notifying the respondent that OATH will issue a recommended decision that the Commissioner or the Commissioner's authorized designee may adopt, reverse, modify, or send back to OATH in whole or in part for further proceedings.

(d) Within thirty (30) days of the issuance of the recommended decision, [the respondent]any party to the proceeding may submit to the Commissioner by regular mail, email, or delivery to the Department at its main office, a written argument [why the decision should or should not be followed] setting forth the reasons why the Commissioner should adopt, reverse, or modify the decision, or send the decision, in whole or in part, back to OATH for additional proceedings. The Commissioner may prescribe one or more forms to be used for submission of such argument, which may include a specific email and office address. The Commissioner or the Commissioner's authorized designee will consider any challenge made by any party provided that the party timely made its objection known to OATH and that the grounds for such challenge are limited to those set forth to OATH.

[(c)](e) Not less than sixty (60) days after the issuance of the recommended decision, the Commissioner or the Commissioner's authorized designee will issue a written decision affirming, reversing or modifying the [recommendation] recommended decision, or sending the matter back to OATH for further proceedings. Except as provided in subdivision [d]f of this section, or with respect to written decisions that send back any part of a matter to OATH for additional proceedings, the Commissioner's decision adopting, reversing, [remanding ]or modifying the recommended decision shall constitute a final agency determination. The written decision from the Commissioner or the Commissioner's authorized designee will be based on a review of the recommended decision and may consider the trial record from OATH, written arguments submitted to the Department pursuant to subdivision d of this section, any motion papers or other written submissions filed at OATH, and any other OATH decisions bearing on the merits of the case.

[(d)](f) If the Commissioner or the Commissioner's authorized designee adopts a recommended decision issued by OATH for a finding of default, and thereafter OATH finds sufficient grounds to vacate the default, the default and the Commissioner's original decision shall be vacated and a new hearing shall be allowed on all of the charges in the original notice of violation. The recommended decision resulting from such hearing will be subject to the provisions of this section.

(g) Whenever the interests of justice so require, the Commissioner or the Commissioner's authorized designee may reopen, vacate, or modify any final determination, provided that such action may only be taken prior to the commencement of a judicial proceeding to review such determination. Notwithstanding the preceding sentence of this subdivision, after the commencement of a judicial proceeding to review such determination, the Commissioner or the Commissioner's authorized designee may reopen, vacate, or modify any final determination upon the consent of the parties or judicial order.