COMMENTS TO PROPOSED RULE CHANGES TO 60 RCNY CHAPTER 2

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Proposed § 2-04 Construction and Waiver.

It is unclear what circumstances would justify the Commission's waiving of, potentially, the applicability of the rules, and this prompts a: Why would rules being established at all? It would, at least, be helpful if a brief example were included explaining why the rules would need to be abrogated.

It also must be noted that decisional law makes very clear that an agency acts unreasonably when it fails to follow its own rules.

Proposed § 2-06 Computation of Time.

At present, the 30-day appeal time limit in 60 RCNY has been interpreted to mean the same day in the month following the date of an agency notice. This is in accord with the way the General Construction Law § 30, calculates a month's time:

"A number of months after...a certain day shall be computed by counting such number of calendar months from such day...and shall include the day of the month in the last month so counted having the same numerical order in days of the month as the day from which the computation is made, unless there be not so many days in the last month so counted, in which case the period computed shall expire with the last day of the month so counted."

The proposed rule will have us counting calendar days to determine the 30-day limit, and this is potentially confusing for attorneys who are used to the standard of the General Construction Law in litigation, and for others.

The proposed rule should be changed to provide that a 30-day period is computed the same way that a month is calculated in the General Construction Law: 30 days means the same numbered day in the following month, and that if the time runs from the last day of a month then the last day of the following month is the deadline. Also, the usual extension exceptions for Saturdays, Sundays and holidays should be part of the rule.

The proposed rule also should include that where a disqualification notice is served upon a candidate by email, and where the notice contained in the email is dated earlier than the email transmission date, then the 30-day appeal period runs from the date of transmission.

The proposed rule also should include the same presumption about mail service of notice as contained in proposed rule § 3-05(a), so that the mailing of a notice adds five days to the permitted response time.

Proposed § 2-07(b) Filing of Papers.

Presently, appeals submitted to the Commission are then distributed by the Commission to the other parties. The proposed rule would make this the responsibility of the litigants, and there is no provision for proof of service.

The proposed rule should be changed to provide that the Commission will continue to distribute copies of all filings to the other parties, as the current practice makes clear that all parties have been served, and thus avoids claims of surprise. Placing this duty in the hands of litigants, the vast a majority of whom appear *pro se*, is an invitation to needless procedural trouble. If the Commission faced only represented appellants, the proposed change would be nothing but a statement of longstanding legal practice. But most appellants have no comprehension of such responsibilities, never will read 60 RCNY, and usually do not even read Commission notices very carefully; mostly resulting from a fear of legal-looking documents.

Proposed § 2-15 Hearings Generally.

In keeping with longstanding opposition by my office to the way that the Commission essentially has eliminated the holding of hearings, this proposed rule should be changed either to provide that no one gets a hearing, or that everyone gets a hearing.

The existence of a process that grants the undeniably more favorable opportunity through live presentation to some appellants, while denying all others the same treatment, is an offense to sensibility.

Proposed § 2-16 Post-Hearing Submissions

The proposed rule permits post-hearing submissions at the discretion of the Commission. The proposed rule should be changed to provide that such submissions may be made as a matter of right, but within a specified time, and provided that the submission does not exceed a particular size/length unless otherwise permitted by the Commission.

Again, if one person is going to be permitted an extra procedure, it should be given to all.

Proposed § 2-17 Public Access to Hearings

The proposed rule states that the Commission may, in its discretion, permit public attendance at non-CSL § 76 hearings. Given that the decisions in such cases are not made public, it must be asked, why ever would the contents of the hearings be made public?

Further, if CSL § 75 and other hearings are to be made public, then they should be made public in all cases, not just cases selected by the Commission.

If it is the intent of the Commission to permit only certain kinds of outside persons to attend particular hearings, such as the family members of an appellant, then the proposed rule should provide examples of the types of special situations which would cause the Commission to open the hearing.

Finally, the decision to allow public attendance at non-CSL § 76 hearings should require the consent of all parties, either in writing or on the record.

Proposed § 2-19(b) Adjournments.

As with the comment offered above regarding the filing of papers, the Commission should notify all relevant parties of granted adjournments.

Proposed § 2-21 Witnesses and Documents.

Unless resolved by pre-hearing conference, the proposed rule should indicate a procedure whereby litigants can determine whether possibly objectionable witnesses or documents can be submitted at hearing. This is particularly important respecting witnesses, as there have been cases in the past where witnesses who appeared were not permitted to give testimony. Thus, resolution of possible objections should be made before witnesses appear for a hearing.

Additionally, at least with *pro se* litigants, the Commission should require that litigants submit to the Commission whatever documents the litigants intend to submit at a hearing, and then the Commission can forward the documents to the other parties. Again, this will eliminate procedural problems with unsophisticated litigants, as admissibility issues can be resolved prior to a hearing.

Proposed § 2-23 Failure to Appear.

The proposed rule is ambiguous about when an unexplained failure to appear will result in case dismissal. Such a rule obviously cannot provide for all the possible circumstances that must be considered when making such a decision, but it can be less ambiguous, and much more cautionary.

The proposed rule should be changed to provide that unexplained failure to appear will result in dismissal, unless good cause for the lack of explanation and failure to appear can be shown. This would be in accord with longstanding legal practice generally.

Proposed § 2-24(b) Official Notice.

Included in the list of items of which the Commission may take official notice should be added the word "laws."

Proposed § 2-25(c) The Hearing Recording.

The inclusion in the proposed rule that *"Audio and/or video recordings of hearings...shall be the official record of proceedings before the Commission, notwithstanding the existence of any other transcript or recording,"* may well prove to be a problem for litigants as well as the Commission in court proceedings following Commission action. Under the proposed rule, there could be materials possessed by the Commission, relevant in subsequent litigation to one or more parties, but which the proposed rule might prevent the court from considering.

The proposed rule should be changed to provide only that recordings shall be made a part of the official record, thus not foreclosing from the record any other relevant materials.

As an alternative, the proposed rule should be changed to provide that the Commission shall state on the record precisely what materials are included in the official record.

Proposed § 2-27(b), (c) Motions.

(b) Again, the proposed rule should be changed to provide that the Commission will forward copies of all Motions to the other parties, and not leave this task to unsophisticated litigants.

(c) The proposed rule infers that it is the applicant who will decide if a time period shorter than 30 days is required for the adverse party to respond, e.g., that the applicant can serve a Motion on 10 days notice. The proposed rule should be changed to make clear that the response time is 30 days, unless the Commission directs otherwise. Thus, a party would be required to obtain Commission approval to file and serve a Motion returnable with less than 30 days notice.

Proposed § 3-02 Untimely Appeals.

CSL § 76(1) provides that: *"If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed, such written notice to be delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail, such person shall be allowed an additional three days in which to file such appeal."*

The proposed rule effectively adds to the language of CSL § 76 by providing that: *"If an appeal is untimely filed with the Commission... The Commission may, in its discretion, deem an appeal to be timely and accept it for processing."*

As an attorney who might represent a litigant who filed their § 76 appeal beyond the 20-day deadline, I am buoyed by the possibility that the Commission could cure such default by administrative discretion. But, I am equally cautious about whether authority to enrich the statute rests with the Commission.

Proposed § 3-03 Agency Submissions.

Again, as with similar comments elsewhere herein, the proposed rule should be changed to provide that the Commission will forward copies of submissions to the other parties.

Proposed § 3-04 Proceedings.

As noted elsewhere herein, the proposed rule should be changed to provide either that no hearings will occur, or that all appellants will be entitled to a hearing.

Proposed § 3-07(a), (c) Proceedings.

(a) As noted elsewhere herein, the proposed rule should be changed to provide either that no oral arguments will occur, or that all appellants will be entitled to present oral argument.

(c) The proposed rule states that the Commission may determine if witnesses can appear, and then goes on to provide that the Commission may determine, in its discretion, if character witnesses can appear.

The proposed rule should be changed to provide that if an appeal involves an issue regarding the appellant's character, then the appellant shall have the right to call character witnesses, subject to reasonable limitations of time arising where there are a large number of character witnesses, and provided that the witness testimony will be relevant. In cases where the number of character witnesses is too large to permit all to testify at a hearing, then excluded witnesses should be permitted to offer relevant written statements regarding the appellant's character.

Additionally, the proposed rule should be changed to add a paragraph (d), for the following reasons:

Pursuant to the New York Public Health Law, where an agency employment determination is based upon medical reasons, the employment candidate has a right to obtain a copy of the agency medical file, and at least one court has held that this includes an agency psychological file.

Further, more than twenty-five years ago, the Commission directed the New York City Police Department to provide to all psychologically disqualified candidates a copy of the agency psychological file as part of the candidate's Commission appeal process. This directive was in addition to the agency's obligation to provide the file to the appeal psychologist. The Department never has complied with this directive.

As a result, the proposed rule should be changed to include a paragraph (d) which provides that agencies are required to provide a copy of the psychological file to any disqualified candidate who appeals their disqualification, and who requests a copy of the file.