

ENVIRONMENTAL CONTROL BOARD

Notice of Promulgation of Rule

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED in the Environmental Control Board (ECB) by Section 1049-a of the New York City Charter, and in accordance with Section 1043(b) of the Charter, the Environmental Control Board has amended Subchapter F of Chapter 3 of Title 48 of the Rules of the City of New York, relating to procedures for adjudications conducted by the Environmental Control Board, pertaining to sovereign or diplomatic immunity. This rule was published in The City Record on September 13, 2013 and a Public Hearing was held on October 16, 2013.

Statement of Basis and Purpose of Final Rule

The Environmental Control Board ("ECB") held a Public Hearing on October 16, 2013 on three (3) Proposed Rules concerning amendments to its Rules of Procedure, Department of Transportation ("DOT") Penalty Schedule, Food Vendor Administrative Code Penalty Schedule and the Health Code and Miscellaneous Food Vendor Violations Penalty Schedule. As a result of the October 16, 2013 Public Hearing, ECB has amended its rules of procedure to add a rule governing presentation and resolution of defenses based on sovereign or diplomatic immunity. One member of the public attended the Public Hearing and two (2) representatives of DOT and two (2) representatives of the Department of Mental Health and Hygiene ("DOHMH") attended the public hearing; the member of the public did not wish to testify on this Proposed Rule. No written comments were received.

The new rule appears as Section 3-96 of Subchapter F of Chapter 3 of Title 48 of the Rules of the City of New York. The City wants to maximize compliance of foreign governments, the United Nations and similar institutions ("Foreign Entities") with local building, environmental, fire, sanitation and other health and safety codes. When named as a respondent on a notice of violation ("NOV") returnable to the Environmental Control Board ("ECB"), a Foreign Entity may present a defense based on sovereign or diplomatic immunity. ECB currently does not have any specific procedure for adjudication of immunity defenses. As a result, processing of an NOV is generally suspended once immunity is invoked, leaving the unresolved violation pending indefinitely.

When an immunity defense is asserted, the City entity charged with serving as the official liaison with foreign governments (currently the Mayor's Office for International Affairs) may be able to achieve respondent's compliance or even payment of a penalty, either through direct negotiation or with the involvement of the U.S. State Department. The rule creates a process that provides for an adjournment of ECB proceedings when a defense of sovereign or diplomatic immunity is raised, that would allow the City entity charged with serving as the official liaison with foreign governments ("the liaison") to work with Foreign Entity respondents.

The rule provides that a defense of sovereign or diplomatic immunity may be presented in one of three ways:

1. In a writing received by ECB no less than seven days before the NOV is scheduled to be heard, in which case ECB will assign the NOV to a hearing officer when the defense is received; or
2. Orally or in writing at the hearing on the NOV, but only if the petitioning agency's representative is present at the hearing or if the respondent consents to an adjournment; or
3. By remote method in any case in which ECB's rules permit adjudication by remote method.

When a defense of sovereign or diplomatic immunity is presented, the hearing officer must issue an order adjourning the hearing for no less than 30 and no more than 60 days; setting forth in detail the violations alleged in the NOV; and giving notice to the liaison that the respondent has presented a defense based on sovereign or diplomatic immunity. ECB must promptly serve the liaison with the adjournment order. At a hearing held following an adjournment pursuant to this section, if the hearing officer determines that the respondent is entitled to immunity, he or she must dismiss the NOV without determining the respondent's liability. If the hearing officer determines that the respondent is not entitled to immunity, he or she must conduct a hearing on the NOV pursuant to applicable ECB rules.

Deleted material is in [brackets].

New matter 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.

Section 1. Title 48 of the Rules of the City of New York (RCNY) is amended to add a new section to read as follows:

§ 3-96 Defense Based on Sovereign or Diplomatic Immunity

(a) A respondent may present a defense based on sovereign or diplomatic immunity:

(1) in a writing that is received no later than seven business days before the date stated on the notice of violation by which the respondent may admit or deny the violation charged, in which event, the tribunal shall thereupon assign the matter to a hearing officer; or

(2) at a hearing orally or in writing, but only if a representative of the petitioning agency is present at the hearing or if the respondent at that time consents to an adjournment of the hearing; or

(3) in a response submitted in any case in which adjudication by remote method is allowed pursuant to section 3-32 of these rules.

(b) Upon presentation of a defense based on sovereign or diplomatic immunity, the hearing officer must issue an order:

(1) adjourning the hearing for no less than 30 and no more than 60 days;

(2) setting forth in detail the violations alleged in the notice of violation;

(3) giving notice to the City entity charged with serving as the official liaison with foreign governments, hereinafter referred to as "liaison," that the respondent has presented a defense based on sovereign or diplomatic immunity.

Any order issued pursuant to this subdivision must also be promptly served by the tribunal on the liaison.

(c) After the granting of an adjournment under subsection (b), either party may request to extend the time period of the adjournment. If the request is accompanied by a written submission from the liaison indicating more time is necessary for the parties to resolve the matter, the hearing officer must grant the request.

(d) (1) At a hearing held following an adjournment pursuant to this section, the hearing officer must issue a determination whether or not the respondent is entitled to sovereign or diplomatic immunity.

(2) If the hearing officer determines that the respondent is entitled to sovereign or diplomatic immunity, he or she must dismiss the notice of violation without a determination of the respondent's liability.

(3) If the hearing officer rejects the defense of sovereign or diplomatic immunity, a hearing on the violation must be conducted pursuant to the rules governing hearings in this Chapter.