

ENVIRONMENTAL CONTROL BOARD

Notice of Promulgation of Rule

NOTICE IS HEREBY GIVEN PURSUANT TO THE AUTHORITY VESTED in the Environmental Control Board (ECB) by Sections 1043(b) and 1049-a of the New York City Charter, ECB has amended 48 RCNY Section 3-31(c) of ECB's rules of procedure. The rule clarifies that a single attempt at service of a notice of violation (NOV) may be sufficient to constitute "a reasonable attempt" under New York City Charter Section 1049-a, which provides requirements that agencies must fulfill prior to the delivery or posting of certain NOV's. The rule was published in The City Record on December 6, 2013, and a Public Hearing was held on January 8, 2014.

Statement of Basis and Purpose of Final Rule

The Environmental Control Board (ECB) held a public hearing on January 8, 2014, regarding amendments to section 48 RCNY 3-31(c) of its rules of procedure. The rule clarifies that a single attempt at service of a notice of violation may be sufficient to constitute "a reasonable attempt" under Section 1049-a(d)(2)(b) of the New York City Charter ("Charter"). Section 1049-a does not contain a definition of "reasonable attempt," but ECB decisions have long held that a single attempt is sufficient. However, recent court decisions have created some confusion as to the correct standard. Therefore, ECB has codified its decisions via rulemaking. Four (4) members of the public attended the January 8, 2014, public hearing and two (2) members of the public testified on the proposed rule. Two written comments were received. The Board has considered the testimony from the 2 members of the public and the 2 written comments.

The Current Rule

ECB's rules of procedure, as found in 48 RCNY 3-31(c), regulate the service of certain notices of violation (NOV). A person accused of violating a provision of the Charter or the City's Administrative Code under ECB's jurisdiction is known as a respondent.

Under Charter Section 1049-a(d)(2)(a), an agency typically must serve a NOV to a respondent in the same manner as is prescribed by article three of the Civil Practice Law and Rules (CPLR) or article three of the Business Corporation Law (BCL). However, the Charter also includes a number of exceptions. Section 1049-a(d)(2)(a)(i) allows for service of a NOV by delivering the notice to a person employed by the respondent on or in connection with the premises where the violation occurred. Section 1049-a(d)(2)(a)(ii) allows for service of a NOV issued by the Department of Sanitation, the Department of Buildings, or the Fire Department by affixing such notice in a conspicuous place to the premises where the violation occurred.

Charter Section 1049-a(d)(2)(b) provides that these exceptions only apply after “a reasonable attempt” has been made to serve the NOV in a manner permitted by article three of the CPLR or article three of the BCL. The Charter does not contain a definition of “reasonable attempt,” but ECB has long interpreted the language so that a single attempt could satisfy the requirement. ECB’s interpretation is based on the plain language of section 1049-a(d)(2)(b), which requires “a reasonable attempt” (emphasis added), and also the section’s legislative history. The State Legislature added section 1049-a(d)(2)(b) to the Charter with the intent that the new language would “eliminate the time-consuming, costly and often unrewarding process now entailed in identifying and locating the person responsible for the violation.” Governor’s Memorandum on Approval, Bill Jacket, L. 1979, ch. 623. The rule ensures that the legislative intent behind the creation of section 1049-a(d)(2)(b) is codified in ECB’s rules of procedure.

ECB’s authority to implement this rule is found in Section 1049-a of the New York City Charter.

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.

Section 1. Section 3-31 (c) of Title 48 of the Rules of the City of New York (RCNY) is amended to read as follows:

(c) Service: A notice of violation issued by a petitioner may be served on a respondent in accordance with the methods set out in §1049-a(d)(2) of the New York City Charter which render the tribunal's decision and order automatically docketable in Civil Court, or alternatively as provided by the statute, rule or other provision of law governing the violation alleged. Lawful service in a manner other than that provided for in §1049-a(d)(2) shall give the tribunal jurisdiction to hold a hearing or render a decision and order whether after hearing or in default thereof, but such decision and order shall not be entered in Civil Court or any other place provided for entry of civil judgments without court proceedings.

For the purpose of service of notices of violation pursuant to New York City Charter 1049-a(d)(2)(a)(i) and (ii), the term “reasonable attempt” as used in New York City Charter 1049-a(d)(2)(b) may be satisfied by a single attempt to effectuate service upon the respondent or another person upon whom service may be made as provided for by article three of the civil practice law and rules or article three of the business corporation law.