OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

100 CHURCH STREET, 12TH FLOOR, NEW YORK, NEW YORK 10007

FIDEL F. DEL VALLE
COMMISSIONER
CHIEF ADMINISTRATIVE LAW JUDGE
(212) 933-3001

TYNIA D. RICHARD
DEPUTY COMMISSIONER
& GENERAL COUNSEL
(212) 933-3015

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VIA EMAIL

New York City Commission on Human Rights
22 Reade Street
New York, NY 10007
policy@cchr.nyc.gov

Re: NYC Commission on Human Rights Proposed Rules of Practice

The Office of Administrative Trials and Hearings ("OATH") submits the following comment to the rule proposal.

OATH was created by Executive Order in 1979 and made a Charter agency in 1981 under Chapter 45-a, thus becoming the central Tribunal for city adjudication. Charter § 1048(1) ("There shall be an office of administrative trials and hearings which shall conduct adjudicatory hearings for all agencies of the city unless otherwise provided for by executive order, rule, law or pursuant to collective bargaining agreements."). OATH's origin dovetails with the enactment of the City Administrative Procedure Act ("CAPA"), found in Chapter 45 of the Charter, which established minimum standards for due process in administrative hearings and professionalized the process of city adjudication. From its beginning, OATH administrative law judges were to be appointed to a five-year term by the Chief Administrative Law Judge of OATH (Charter § 1049(1)(a)), rather than by the Mayor, thus isolating them from any political processes. The goal behind OATH was to usher in a standard for administrative judges to preside over city administrative proceedings as neutrals, independent of the prosecuting city agency, and impartially.

We write today to convey concerns about the rule proposal and its affect upon OATH's adjudication process and ability to fulfill its Charter mandate. See Charter § 1043(a) ("Each agency is empowered to adopt rules necessary to carry out the powers and duties delegated to it by or pursuant to federal, state or local law. No agency shall adopt a rule except pursuant to this section. Each such rule shall be simply written, using ordinary language where possible."). OATH is

designated as "the tribunal for the impartial administration and conduct of adjudicatory hearings for violations of [the] charter, the administrative code of the city of New York," and other applicable rules. Charter § 1048(2). At the same time, the Commission retains the ability to accept, reject or modify a Report and Recommendation issued by OATH.

Charter section 1049(2)(a) states that "the chief administrative law judge shall establish rules for the conduct of hearings, in accordance with the requirements of chapter [45] of the Charter." See Charter § 1049(3) (listing the panoply of judicial tasks that OATH ALJs are authorized to perform: conducting settlement conferences; administering oaths, examining witnesses, overseeing and regulating discovery procedures; issuing subpoenas; regulating the course of the hearing; disposing of procedural requests; making recommended or final findings of fact or decisions as authorized by law; and taking any other action authorized by law).

(1) Proposed Rule § 1-69 newly creates two processes for reopening a trial conducted at OATH after it is concluded and provides for the additional proceeding to be conducted by the Commission.

The first paragraph in rule proposal § 1-69 (hereinafter "[a]") would give the Commission's Chair the power, sua sponte, at any time prior to commencement of a judicial proceeding, to reopen the proceeding or vacate or modify its order. The rule provides no standard to be applied and rests solely on an interpretation of when "justice so requires." We believe the practical effect is to deprive respondents of finality to the proceeding and to require, after the expense of a full OATH trial, a re-litigation of matters once thought complete. It also allows the Commission to preside over this new proceeding as both trier of fact and prosecutor. Although the Chair is separate from the Law Enforcement Bureau which acts as prosecutor in these cases, it would be very difficult for a respondent/litigant to see any difference between the two under this rule.

Calling this process a "reopening" seems a misnomer, since reopening a trial conducted by an OATH ALJ would have to occur at OATH. Rather than reopening the OATH trial, it appears the Commission is creating a new hearing in which the Commission is the trier of fact. The rule is not clear on whether the reopening would occur after CHR has rendered a final determination. We assumed this to be the case because Administrative Code § 8-123 (Judicial Review) is cited in proposed rule § 1-69. If a "reopened" proceeding would require further adjudication at OATH, it would create the possibility of multiple OATH trials on the same matter. We note there is no history of cases being referred out of OATH without all relevant issues having been adjudicated.

The second paragraph in rule proposal § 1-69 (hereinafter "[b]") empowering the Chair to order supplemental briefing and hold a supplemental hearing is similar to [a] in that it also deprives respondents of finality. It differs in that, unlike the interest of justice provision in [a], [b] provides no basis for the Chair to seek this expansion of the proceeding and no process to which respondents are given notice. In addition, there seems to be no predicate for it set forth in Administrative Code § 8-121.

Proposed § 1-69 (Reopening of Proceeding) states as follows:

[a] Prior to the commencement of a judicial proceeding under § 8-123 of Code, the

> Chair may, on its own or on the motion of any party, order any proceeding reopened or vacate or modify any order or determination, whenever justice so requires.
>
> [b] In addition, the Office of the Chair may order supplemental briefing or hold a supplemental hearing after the issuance of a report and recommendation and a hearing at OATH. A request from a party seeking leave to file supplemental briefing or for a supplemental hearing must be included in written comments filed under § 1-66 of this chapter.

(2) <u>Proposed rules §§ 1-14(c) and 1-37(a) create barriers to due process for respondents.</u>

a. Requiring Waiver of Affirmative Defenses -- § 1-14(c)

The current rule § 1-14(c), in accordance with Administrative Code § 8-111, requires that respondents file a written, verified answer and requires that all affirmative defenses be stated separately in the answer. The rule proposal empowers the Commission to "deem" waived all affirmative defenses and mitigating factors that are not stated separately in the answer, unless good cause is shown. It is important to note that the answer is due 30 days after service of the complaint, which is followed by the Commission's investigation of the matter and then a probable cause determination – all of which generally occurs weeks, months, or more, **<u>prior to</u>** scheduling trial at OATH.

This is a significant disadvantage to respondents, many of whom are unrepresented by counsel at that early stage and unschooled in the impact of such a waiver. Conversely, the Commission is expert at these very proceedings and, under this rule, establishes further advantage to itself as the petitioner in the case. This imbalance is an aspect of the proceeding that an OATH ALJ would take into account in rendering decision on the question of a waiver, should the motion be made. However, the rule proposal takes the authority of such a due process review out of the hands of the ALJ. Moreover, OATH's rules do not "deem" waived or automatically preclude a respondent from asserting a defense that was not articulated in the answer. OATH rule 1-25 allows amendment as of right until 25 days prior to trial, and thereafter on consent or on motion to the ALJ.

Proposed § 1-14(c) (Answer) states as follows:

> (c) Form and content of answer. The answer must be verified as to the truth of the statements therein and must, in consecutively numbered paragraphs that correspond to those in the complaint, specifically admit, deny, or explain each allegation, unless the respondent is without knowledge or information sufficient to form a belief about the allegation, in which case the respondent must so state, and such statement will operate as a denial. Any allegation in the complaint not specifically denied or explained will be deemed admitted unless good cause to the contrary is shown. To the extent that the respondent denies only part of an allegation, the respondent must state the extent of its denial and also state its response to the

remaining portions of the allegation. All affirmative defenses and all mitigating factors recognized under the NYCHRL must be stated separately in the answer, or will be deemed waived, unless good cause to the contrary is shown.

b. Precluding Respondent from Offering Evidence or Asserting Claims or Defenses—§ 1-37(a)

This rule proposal empowers the Commission to preclude respondent from offering evidence or asserting defenses, specifying that the Chair may issue orders that make adverse inferences, prohibit the introduction of claims, defenses, evidence, or testimony, and strike claims, defenses, or pleadings. The rule proposal also directly contravenes OATH's longstanding rule requiring unresolved discovery disputes be presented to the presiding ALJ, who may issue orders related to discovery. See 48 RCNY § 1-33. Issuing such orders is intrinsic to conduct of a trial and without which it would be difficult for a judge to exercise control over or ensure fairness of the process. Although OATH's rules allow for preclusion as a discovery sanction, it is the ALJ who has the discretion to impose such a sanction (witness or evidence preclusion, an adverse inference, or, under exceptional circumstances, dismissal or default). 48 RCNY § 1-33(d)(3). Allowing the Chair to issue an order that limits the scope of the trial not only forces the ALJ to relinquish control over the proceeding, but demonstrates to the respondent that the scales are tipped against them and in the city's favor. It is rightfully the neutral trier of fact who retains the discretion to determine the scope of evidence presented at trial and in the pleadings, as is characteristic of sound adjudication. See Charter § 1046 (establishing minimum standards for city adjudication). Thus, we view the rule proposal as a curtailment of OATH's authority and powers granted under the Charter.

Proposed 1-37(a) (Enforcement of Investigatory Demands and Subpoenas) states as follows:

(a) Investigatory Demands. The Law Enforcement Bureau may file a letter motion to compel compliance with an investigatory demand with the Office of the Chair. Such motion must include a copy of the full investigatory demand and an affirmation stating efforts taken by the Law Enforcement Bureau to procure compliance with the demand, including efforts to confer with the subject of the demand. Opposition to a motion to compel compliance with an investigatory demand must be filed and served on the Law Enforcement Bureau and the Office of the Chair within 14 days of service of the motion. The Law Enforcement Bureau may file and serve a reply within 7 days of service after the opposition is filed. The Chair must promptly issue an order on the motion to compel.

In the event that a person fails to comply with an order compelling testimony or the production of evidence pursuant to an investigatory demand, the Chair may, on its own motion or at the request of the Law Enforcement Bureau, issue such order as may be just with regard to the non-compliance, including but not limited to: (i) holding that the issues to which the testimony or evidence are relevant will be resolved against the non-compliant person; (ii) prohibiting the non-compliant person from supporting or opposing designated claims or

defenses or from introducing designated evidence or testimony into the record; or (iii) striking out claims, affirmative defenses, or pleadings or parts thereof.

(3) The Commission's adjudication authority, as set forth in the Administrative Code.

We have included reference to Administrative Code provisions that provided authority for the Commission's adjudicatory power, undoubtedly an integral tool that enhanced the Commission's ability to enforce the city's anti-discrimination laws -- while it was conducting its own adjudications. However, ongoing use of the power to create procedural rules for its hearings, without limitation, does conflict with the Commission's transfer of its power to adjudicate to OATH in or around 1997 (see Notes to 47 RCNY § 1-71 (Referral of Complaints to OATH)). As a result, the Commission ostensibly retains powers over the trial process that are incongruous for a prosecutor to maintain over an accused, and that raise serious questions of due process when the provisions are heavily weighted in the Commission's favor. We question whether any residual adjudicatory powers were retained, or were extinguished upon transfer to OATH.

In accordance with its Charter mandate "as the tribunal for the impartial administration and conduct of adjudicatory hearings" (Charter § 1048(2)), OATH must have authority over the provision of due process in its proceedings. OATH's purpose is to act as the City's impartial tribunal, not to be a figurehead. It would be a grave disservice to the people of the city of New York were OATH to become a façade behind which city agencies, ultimately, preside over their own adjudications.

Thank you for your attention to this matter.

Very truly yours,

Tynia D. Richard
Deputy Commissioner/General Counsel