Consumer Affairs

Comments Received by the Department of Consumer Affairs

on

Proposed Rule related to Amendment of Rules Regarding Grounds for License Suspension and Revocation

as made available for public inspection

From:	Brad Peters
To:	Rulecomments
Subject:	Proposed Rule Amendment Adding Subsection 1-20
Date:	Wednesday, December 5, 2018 8:52:35 AM

Re: Public Hearing – Wednesday – December 5, 2018

Proposed Rule Amendment Adding Subsection 1-20

To Whom It May Concern:

I have no opposition to this new Rule change in allowing the Department of Consumer Affairs the authority to suspend or revoke a current licensee from DCA in the event a licensee fails to make payment of civil penalties,however, I believe a caveat should be added to provide "due process" to any current licensee of the Department. When applying for a license any new applicant will be informed that his application cannot be processed until such time as monies due are paid to whatever agency imposed them. The applicant then, in dealing with the agency to whom the fines or penalties are due, will be properly informed and can then either make payment, enter into a payment plan or decide not to go forward.

However, any current licensee in good standing, should be informed by letter to the address on record for that license at the Department of Consumer Affairs, and giving a period of time – approximately 15 days – to resolve any monies owed prior to any suspension or revocation of the DCA licensee being imposed. The possibility exists that all notices to the company from another agency may have have been sent to a wrong address, never received by the licensee, and the licensee might be unaware that any civil penalties are owed by his/her company. By providing notice and allowing a short, but reasonable period of time, to clear up the matter affords "due process of law" to any licensee of the Department of Consumer Affairs.

By possessing a current license, in good standing, from DCA the law in some cases might recognize that the license is a "property right" that cannot be taken aware without "due process of law." We suggest that at Section 1-20 (b) 2. and 3. the following sentence be amended to to:

2. Licenses, permits or registrations may be suspended, and Renewal applications denied, *after Notice has been mailed by DCA to the licensee allowing 15 days to resolve any outstanding judgment(s)*, where …

3. Licenses, permits or registrations may be revoked or canceled *after Notice has been mailed by DCA to the licensee allowing 15 days to resolve any outstanding judgment(s)*, where …

This will provide notice to the licensee – could also be by certified mail – time to make payment prior to any action to suspend, revoke or cancel an existing license.

Thank you for your consideration

Brad Peters

Department of Consumer Affairs (DCA)
Public Hearing and Comment of Proposed Rules
December 5, 2018

Good morning Department of Consumer Affairs (DCA) Commissioner Lorelai Salas. I am Council Member Ben Kallos, I represent the Upper East Side, Midtown East, Roosevelt Island, and East Harlem, where we receive many quality of life complaints and where violations have failed to turn bad neighbors into good neighbors. That is why I authored Local Law 47 of 2016 and why I am here today to comment on the rules you have promulgated to improve quality of life throughout New York City.

Today, I ask DCA to make changes to the promulgated rules, in the following ways. For DCA must specify that it will proactively develop a process to obtain ECB violations from other issuing agencies. DCA must not ignore the factors considered in denying, suspending, terminating, or revoking a license. DCA must change the "one size fits all" approach to the thresholds in § 1-20(b) of the proposed rules. DCA must change "may" to "shall" throughout § 1-20(a) of the proposed rules to reflect the intent of this legislation and to eliminate any appearance that these rules are optional. DCA must meet the reporting requirements provided for in Local Law 47 of 2016.

The magnitude of the quality of life problems facing New York City is best measured by the staggering $1.6 billion owed to the City. This debt reflects many businesses that don't bother paying their violations, let alone changing their behavior. Still other businesses will pay the fines only as a "cost of doing business" while continuing to willfully harm the quality of their neighborhoods.

I authored Local Law 47 of 2016 to require agencies that issue quality of life violations returnable to the Environmental Control Board (ECB) and Office of Administrative Trials and Hearings (OATH) to consider outstanding and repeat violations when issuing, renewing or maintaining registrations, permits and licenses. This was in order to not only reduce this billions in debt owed to the city but most importantly to actually change behavior so that bad neighbors stop endangering public safety and harming quality of life.

To state it plainly, as a licensed driver, what deters drivers from speeding is not the fear of getting a speeding ticket. Instead, what acts as a deterrent is the knowledge that each ticket adds points to their license and that if they get eleven points in an eighteen-month period, their driver license may be suspended.

Local Law 47 of 2016 was enacted on April 21, 2016 and took effect 180 days later on October 18, 2016. I am disappointed that over the two years that have passed, other than Department of Finance there has been no implementation of Local 47 of 2016 by the thirteen different City agencies that write quality of life violations. However, I would like to thank the Department of Consumer Affairs for being the first agency with control over many of the most important registrations, permits, and licenses that are necessary for businesses to operate for promulgating rules. The proposed rules could go a long way to accomplish the goals set forth by Local Law 47 of 2016 with the following changes proposed below.

The Department of Consumer Affairs must take responsibility for obtaining information regarding outstanding or prior violations, preferably from another agency directly. § 1-20(a)(ii) of the proposed rules states in part, "an agency has provided the commissioner with the following information: the name, address, Department license number, and license category …" However, the rules do not specify how DCA will be "provided" with this information. This agency will either have to wait to be "provided" this information without regulations requiring that information be provided or force a bureaucratic process for me to author and the Council to pass and the Mayor to sign additional legislation creating such a formal process. In the alternative, DCA should specify that it will proactively obtain ECB violations from other issuing agencies. In the interim, DCA can simply review the OATH Hearings Division Case Status NYC Open Data set updated daily with 15.9 million records as of December 4, 2018. It is important to highlight, that this data set is apparently incomplete, and DCA should collaborate with other agencies to gather the necessary information. Failure to make this vital change would make the rest of these regulations moot as DCA would never be "provided" with information and could also ignore the NYC Open Data set. DCA must not be able to ignore the law simply because it can plead ignorance to outstanding and paid repeat violations.

The DCA must not ignore repeat violations that are otherwise required to be considered in an agency's determination in denying, suspending, terminating, or revoking a license. Specifically, the factors under § b(3) of Local Law 47 of 2016, which states in part, "where the violation ... was issued by such agency, whether such violation is one of a ***series*** of violations returnable to such board or tribunal, and the nature of the underlying violation..." (Emphasis added). § 1-20(b) of the proposed rules currently considers, "the amount of time that has passed since the applicant, … failed to satisfy a final judgement, order or decision ... from ECB or OATH, the amount of the civil penalty, and any such other matters as justice may require ..." The proposed rule is silent as to "series of violation" as required by Local Law 47 of 2016 § (b)(3). The DCA should add consideration of a series of violations to the rule and include the factors required by § b(3) of Local Law 47 of 2016.

DCA and fellow agencies who issue quality of life violations must work together to fine tune criteria that could cost a business its license, registration or permit, to exclude inescapable frequent violations while focusing on those that are indicative of a bad neighbor willfully harming quality of life. The thresholds proposed in § 1-20 (b) of the proposed rules are more harsh and arbitrary than actually doing the work of identifying relevant licenses or determining violations that impact business operations. Specifically, the proposed rules lay out the following thresholds:

> 1. New applications for licenses, permits or registrations may be denied where there is an outstanding final judgment of any amount older than thirty (30) days.
> 2. Licenses, permits or registrations may be suspended, and renewal applications denied, where outstanding final judgments are:
>
> A. Older than sixty (60) days; and
>
> B. Five hundred dollars ($500) or more.
>
> 3. Licenses, permits or registrations may be revoked or cancelled where outstanding final judgments are:
>
> A. Older than ninety (90) days; and
>
> B. One thousand dollars ($1,000) or more; and
>
> C. The applicant, licensee, permittee or registrant violated any provision the enforcement of which is within the jurisdiction of the Department in the previous five (5) years.

By contrast, § (b) of Local Law 47 of 2016 requires, in part:

> [s]uch rules shall include, but need not be limited to, factors to be considered in an agency's determination whether to deny, suspend, terminate or revoke, including:
> 1. whether such applicant ... has other unpaid penalties, taxes or other debt owed to the city;
> 2. the amount of the unpaid civil penalties ...
> 3. where the violation underlying the unpaid penalties imposed by (ECB or OATH) was issued by such agency, whether such violation is one of a series of violations returnable to such board or tribunal and the nature of the underlying violation; and
> 4. whether the unpaid civil penalties imposed (ECB and OATH) were imposed pursuant to a finding of default that was subsequently vacated or whether the applicant ... has made a request to vacate such default and obtain a new hearing pursuant to the rules of such board or tribunal.

In drafting this law, I could have included the very same thresholds for all licenses and all violations as proposed by DCA. However I was concerned that this "one size fits all" approach would result in an unintended impact on good neighbors while failing to change the behavior of

bad neighbors who this legislation is targeting. Some of these violations involve quality of life issues, others involve serious public health risks. The DCA should adopt rules that prioritizes public health risks first, ongoing nuisance that can be corrected, and behaviors that can easily be corrected and who's ongoing violation in and of itself demonstrates a willful disregard for the law and local quality of life.

The DCA should not give itself discretion to further ignore Local Law 47 of 2016 and must set clear criteria on when it "shall" act, leaving no question in the mind of bad neighbors of the consequences for their violations of quality of life. Further, the DCA's use of "may" instead of "shall" in the § 1-20 (b) fail to give the rules the necessary "bite" they require to achieve the intended deterrent effect I highlighted above with my driver's license example. The use of "may," as opposed to using "shall," as Local Law 47 of 2016 uses, make these rules appear as optional. Every use of the word "may" in §1-20(a) and (b) must be replaced with a "shall" particularly in subsections (1), (2), and (3). The DCA should use "shall" to reflect the intent of this legislation, to fix the underlying conditions listed in the violations are finally fixed, and deter future violations.

In some instances, the violator may be an individual or entity that owns or acts through multiple entities all of which may engage in the same course of conduct willfully neglecting the law resulting in harming public safety and quality of life. These types of individuals and entities have been difficult to identify in the past, as has been highlighted in the media with reports identifying Jared Kushner and Kushner Co. as one of the City's largest violators. Attention should be spent on identifying those who are specifically responsible for these violations and holding them accountable. The rules should allow for identification and punishment for either scenario. In adding this language, the DCA will help achieve one of the pursuits of this legislation, to stop individual from willfully harm the quality of their neighborhoods.

The DCA failed to propose any rule complying with the reporting requirements of Local Law 47 of 2016. The § (e) of the legislation requires:

> e. No later than September 1, 2017, and every year thereafter, an agency that exercises the authority granted by subdivision a of this § shall submit to the city council, and post on its website in a non-proprietary format that permits automated processing, a report based on data from the preceding fiscal year that includes:
>
> 1. the total number of applications for licenses, permits or registrations received by such agency;
>
> 2. the total number of applications for licenses, permits or registrations that were denied pursuant to subdivision a of this §;
>
> 3. the total number of licenses, permits or registrations that were suspended, terminated or revoked pursuant to subdivision a of this §; and
>
> 4. a list of the types of licenses, permits and registrations issued by such agency and the time period for which such licenses, permits and registrations are issued.

The proposed rules are completely silent on this requirement. This reporting simply is an accounting of information the DCA already has at its disposal. It requires minimal effort on the part of the DCA to comply with this requirement.

In conclusion, I urge the DCA to adopt the changes I offer to the proposed rules. The DCA must take responsibility for obtaining information regarding outstanding or prior violations, directly. The DCA must not ignore repeat violations that are required to be considered in an agency's determination in denying, suspending, terminating, or revoking a license. The DCA must set clear criteria on when it "shall" act, and the DCA must comply with the reporting required in Local Law 47 of 2016. Failure to adopt these changes will diminish the intended effect of Local Law 47 of 2016.

OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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December 5, 2018

Casey Adams
Director of City Legislative Affairs
Department of Consumer Affairs
42 Broadway, 8th Floor
New York, NY 10004

Re: Comment on DCA's proposed rules concerning the effect of non-payment of outstanding civil penalties on licensure.

We reviewed DCA's proposed subsection 1-20 concerning the effect of non-payment of outstanding civil penalties on licensure. Enclosed is a proposed red-line of the rule incorporating the following comments:

(1) Subsection 1-20(a)(i) of the proposed rule references "the New York City Environmental Control Board (ECB) or a tribunal of the New York City Office of Administrative Trials and Hearings (OATH)." Note that ECB is part of the OATH Hearings Division and does not exist as a separate tribunal. The proposed rule should simply refer to "a tribunal of the New York City Office of Administrative Trials and Hearings (OATH)" and all references to ECB should be removed.

(2) The proposed rule references "final judgment, order or decision" with respect to the imposition of civil penalties. OATH only issues decisions imposing civil penalties. Decisions and Orders previously issued by OATH are now simply called "decisions." While Charter section 1049-a provides that a penalty shall constitute a judgment that may be entered in civil court, this refers to a process that occurs in court long after the OATH decision is issued. The decision that imposes the penalty is never called a final judgment at OATH. The proposed rule should only refer to "decisions."

(3) Subsection 1-20(c) references settlement agreements or payment plans reached with the City for satisfaction of a final judgment, order or decision for civil penalties from ECB or OATH. OATH does not enter into settlement agreements with respondents and is not involved in this process. These occur before a hearing at OATH.

(4) Subsection 1-20(d) sets out when an OATH decision imposing civil penalties is considered final by DCA. We recommend citing to the relevant OATH procedural rules to be more explicit

as to when a decision is considered final and removing the term "resolved," as it is ambiguous and subject to interpretation. For instance, appeals decisions either granting or denying the appeal are final upon issuance of the decision by the Appeals Unit (48 RCNY § 6-19) or by the OATH Environmental Control Board (48 RCNY § 3-15). Motions to vacate a default decision may be filed at any time after the issuance of the default decision, and therefore, may be resolved at any time after the issuance of the decision. While OATH automatically vacates default decisions if the motion is filed within 60 days of the decision, the decision may also be vacated within 1 year if respondent provides a reasonable excuse for failure to appear (48 RCNY § 6-21(f)), and beyond the 1 year mark upon a showing of exceptional circumstances or in order to avoid injustice (48 RCNY § 6-21(f). DCA's rule must be clear as to when a default decision is considered final.

Please let us know if you have any questions about these comments.

Sincerely,

Simone Salloum
Senior Counsel

§ 1-20 Non-Payment of Civil Penalties.

(a) The Commissioner may deny a new or renewal application for any license, permit or registration, and may revoke, suspend, cancel, or terminate any license, permit or registration, if

(i) the applicant, licensee, permittee or registrant has failed to timely pay civil penalties imposed by ~~the New York City Environmental Control Board (ECB) or~~ a tribunal of the New York City Office of Administrative Trials and Hearings (OATH), and

(ii) an agency has provided the Commissioner with the following information: the name, address, Department license number and license category, where applicable, and information sufficient to determine the delinquency and monetary amount of the ~~outstanding final judgments of~~civil penalties owed by the applicant, licensee, permittee or registrant.

(b) In determining whether to exercise the power granted by paragraph (a) of this section, the Commissioner shall consider the amount of time that has passed since the applicant, licensee, permittee or registrant failed to satisfy a ~~final judgment, order or~~ decision ~~for~~ imposing civil penalties from ~~ECB or~~ OATH, the amount of the civil penalty, and any such other matters as justice may require, as follows:

1. New applications for licenses, permits or registrations may be denied where there is an outstanding ~~final judgment~~penalty of any amount older than thirty (30) days.

2. Licenses, permits or registrations may be suspended, and renewal applications denied, where outstanding ~~final judgments~~penalties are:

A. Older than sixty (60) days; and
B. Five hundred dollars ($500) or more.

3. Licenses, permits or registrations may be revoked or cancelled where outstanding ~~outstanding final judgments~~penalties are:

A. Older than ninety (90) days; and
B. One thousand dollars ($1,000) or more; and
C. The applicant, licensee, permittee or registrant violated any provision the enforcement of which is within the jurisdiction of the Department in the previous five (5) years.

(c) If the applicant, licensee, permittee or registrant breaches the terms of a settlement agreement or payment plan reached with the City for satisfaction of ~~a final judgment, order or decision for~~ civil penalties ~~from ECB or OATH~~, time will be calculated from the date of the breach or first missed payment, unless otherwise set forth in the agreement.

(d) For purposes of this subsection, a ~~judgment, order or~~ decision ~~for~~ imposing civil penalties from ~~ECB or~~ OATH is considered ~~"~~final~~"~~ when:

Commented [SS31]: The Environmental Control Board is part of the OATH Hearings Division and does not exist as a separate tribunal.

Commented [SS32]: See SS33.

Commented [SS33]: OATH only issues decisions imposing penalties. OATH no longer issues "decisions and orders." While Charter section 1049-a provides that a penalty shall constitute a judgment which may be entered in civil court, this only applies to certain summons adjudicated pursuant to 1049-a. More importantly, the decision that imposes the penalty is never called a final judgment. If you use the term "judgment", you are referencing a process that occurs in court, long after the OATH decision is issued.

Commented [SS34]: OATH does not enter into payment plans or settlement agreements with respondents. Those occur before a hearing at OATH and OATH is not a party to the settlement agreement.

1. The decision is not appealed by the deadline set forth in section 6-19 of title 48 of the Rules of the City of New York;

2. If the decision is a default decision, the decision is not vacated within sixty (60) days of the issuance of the default decision, pursuant to section 6-21 of title 48 of the Rules of the City of New York; or.

3. If the decision is appealed, ~~when a~~A~~n~~ appeals decision is issued pursuant to section 6-19 or section 3-15 of title 48 of the Rules of the City of New York.; ~~or motion to vacate challenging the judgment, order, or decision has been resolved;~~

~~2. The entity or legal representative against whom the judgment, order or decision was imposed fails to appeal within the time allotted by ECB or OATH; or~~

3. ~~The entity or legal representative against whom the judgment, order or decision was entered on default fails to move to vacate the judgment, order or decision within sixty (60) of the date entered.~~

Non-Payment Of Civil Penalties Proposed Rules
Testimony of Matthew Shapiro, Legal Director, Street Vendor Project

My name is Matthew Shapiro and I am the Legal Director of the Street Vendor Project (SVP) at the Urban Justice Center. SVP is a membership based organization with over 2,000 street vendor members in New York City. We organize vendors to build leaders who will have a voice in policies that affect them. We also provide legal and small business services to our members so they can keep and grow viable businesses. Our testimony today is based on SVP's seventeen year history working with street vendors in New York City.

SVP is concerned about the Department's proposed rule regarding increased consequences for non-payment of fines as it relates to licensed general vendors. As you are aware, the Department provides licenses for general vendors, renewable every year at the end of September. Moreover, the New York City Administrative Code already requires vendors to pay outstanding fines before renewal of their license. Section 20-456 states:

> b. **The commissioner may refuse to issue or renew a license if the applicant** has been found to have violated chapter one or subchapter one of chapter five of this title or the rules or regulations thereto, provided, however, that in the event of a conflict between the provisions of such chapter and subchapter and the provisions of this subchapter, the provisions of this subchapter shall prevail; **has pending any unanswered summonses or unsatisfied fines or penalties for violation of this subchapter or the regulations promulgated thereto**; or for any cause set forth in any other section of this chapter as a ground for suspension or revocation. (emphasis added)

This language connotes that general vendors must pay any outstanding fines before their yearly license renewal. In addition, general vendors receive their license renewal applications from the Department with notice of whether or not they need to obtain a "clearance" from OATH based on outstanding fines. This has resulted in a practice whereby licensed general vendors may wait until their license renewal time to pay outstanding fines. The time-period for outstanding fines from some general vendors could be as long as one-year, but fines are paid before a license is renewed.

The proposed rule, particularly § 1-20(b)(2) and (3) provide much harsher consequences for general vendors who may wait until their license renewal to pay outstanding fines. General vendors now run the risk of having the license revoked permanently if they have fines, totaling $1,000.00 outstanding for three months. We understand the need to collect outstanding fines, but this proposed rule could catch many vendors off-guard, simply because they were following existing practices in paying their fines just prior to license renewal.

Perhaps these proposed rules are necessary for other license categories where there aren't similar laws, already in effect, that require payment of outstanding fines prior to license renewal.

However, for licensed general vendors, the proposed rules are simply too severe and conflict with current law and practice. In order to avoid catching vendors off-guard, these proposed rules should only be applied to licensees where similar laws or rules do not exist for the collection of outstanding fines. This will fulfill the intent of the Local Law while not punishing general vendors for following existing law and practice. Thank you for the opportunity to comment on these proposed rules.