

# **PETITION FOR RULEMAKING**

**RE: NEW YORK CITY BOARD OF CORRECTION  
PROCEDURES FOR SUBMISSION, CONSIDERATION, AND  
DISPOSITION OF PETITIONS FOR RULEMAKING**

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**PETITION FOR RULEMAKING RE: NEW YORK CITY BOARD OF CORRECTION PROCEDURES RELATED TO SUBMISSION, CONSIDERATION, AND DISPOSITION OF PETITIONS FOR RULEMAKING**

This is a petition for rulemaking pursuant to City Charter § 1043(f). A petition for rulemaking is the means by which anyone, including members of the general public, may place an issue before a City government agency and request that the agency enact rules governing a particular subject matter.

This petition requests the Board of Correction to promulgate rules for the handling of rulemaking petitions. The absence of such rules violates the Charter.

The Charter requires agencies to adopt procedural rules governing “submission, consideration and dispositions of [rulemaking] petitions.” The Board of Correction currently has no rules setting forth the procedures to be followed when rulemaking petitions are submitted. The “Rules of Procedure of the New York City Board of Correction,” most recently revised and adopted in an Executive Session of the January 2006 board meeting, do not include anything related to rulemaking procedures or to board action on rulemaking petitions.

Aside from violating the Charter, this vacuum creates confusion affecting potential participants in the rulemaking process, including the board, the agency it regulates, and the general public. For these reasons, it is in the interest of all concerned for the board to promulgate procedural rules for acting on rulemaking petitions and to bring itself into compliance with the Charter.

The New York City Department of Health and Mental Hygiene (DOHMH) is among the agencies and boards that have complied with § 1043(f) of the Charter. DOHMH has adopted formal procedures for submission and consideration of rulemaking petitions presented to the Board of Health (Title 24 Rules of the City of New York, New York City Health Code §§ 9.01 *et seq.*). In many respects, those rules serve as a useful model for the Board of Correction to consider adopting for its own use.

We propose that the board promulgate, as a permanent regulation, the rules of procedure, contained in the appendix to this letter, to govern its action when in receipt of a petition for rulemaking under § 1043(f) of the City Charter. These rules are adapted from the above-cited Board of Health procedures, but have been modified to refer to the Board of Correction, its chair and members, and to incorporate provisions to preserve the role of the entire board and to bolster public awareness and participation during the petition process.

These rules would bring much needed clarity, transparency, and efficiency to the rulemaking process. The recent Standards amendment process was characterized by confusion, *ad hoc* procedures, and much less than optimal public participation. Numerous commenters on the published proposals for amending the board’s standards included new proposals for regulatory change, both in written submissions and oral presentations, that were not included in the board’s proposals. They were not considered. Arguably, in the absence of any formal

procedural requirements, they could and should have been treated as rulemaking petitions. It does not appear that those proposals are being treated by the Chair or by the board as rulemaking petitions, nor to our knowledge have any of their authors been informed of any further steps they should take in order for their proposals to be considered. These events illustrate why it is essential for practical reasons (as well as for fulfillment of legal requirements) that the board spell out procedures for the guidance of the public.


The procedural rules we have proposed below set forth clear requirements for the content of rulemaking petitions. They would apply to any petitioner, whether a member of the general public or an agency such as the Department of Correction. In this manner, members of the public and governmental agencies would be treated evenhandedly, and all requests to change or add to the standards would be matters of public record. Although the City Charter requires the board to consult with the Department of Correction and the Mayor's Office prior to promulgation of minimum standards in the form of rules, that requirement does not give the department a privileged position during the petition phase of rulemaking.

Pursuant to § 1043(f) of the Charter, the proposed procedural rules preserve the authority of the Chair to make the initial determination of whether to deny petitions or to embark on the rulemaking process. However, the rules would also create a fair procedure and an opportunity for members of the board to override the decision of the Chair and consider rulemaking petitions notwithstanding the Chair's intent to deny. The opportunity for any member to object to the chair's denial of a petition, and thereby bring the matter to the entire board for consideration, corresponds to a similar provision in the above-cited Health Code. Title 24 Rules of the City of New York, New York City Health Code § 9.05(f). Finally, a requirement for public announcement, in the City Record meeting notice, of the submission of a rulemaking petition, and the provision for consideration of the petition by the board at an open meeting, would establish an intelligible and well-informed process with early public involvement and great potential for avoiding protracted rulemaking. Again, we base our proposals in part on the recent experience with the Standards amendments. It seems clear that the process was both protracted and made more contentious by the lack of input from anyone outside the board and the Department of Correction until after the proposals were finally formulated and placed before the public.

For the foregoing reasons, we present our petition for rulemaking to the board.

Dated: February 29, 2008

Respectfully submitted,



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## **APPENDIX**

### **TEXT OF PROPOSED NEW YORK CITY BOARD OF CORRECTION REGULATION RE: SUBMISSION, CONSIDERATION, AND DISPOSITION OF PETITIONS FOR RULEMAKING**

**TEXT OF PROPOSED NEW YORK CITY BOARD OF CORRECTION REGULATION  
RE: SUBMISSION, CONSIDERATION, AND DISPOSITION OF  
PETITIONS FOR RULEMAKING**

**I. Definitions.**

(a) "Person" shall mean an individual, partnership, corporation, or other legal entity, including a governmental agency, and any individual or entity acting in a fiduciary or representative capacity.

(b) "Petition" shall mean a request or application for the board to add to, alter, amend or repeal a rule or regulation of the New York City Board of Correction, including any minimum standards adopted pursuant to § 626(e) of the New York City Charter, or to take other action in accordance with §1043 of the City Administrative Procedure Act (New York City Charter, Article 45).

(c) "Petitioner" shall mean the person or agency who files a petition

(d) "Rule" shall have the meaning set forth in § 1041(5) of the New York City Charter and shall mean generally any statement or communication of general applicability that (1) implements or applies law or policy or (2) prescribes the procedural requirements of an agency, including an amendment, suspension, or repeal of any such statement or communication.

**II. Application**

This article shall govern the procedures by which any person may petition the Board of Correction to commence rulemaking pursuant to § 1043(f) of the New York City Charter. The provisions of the article shall be applicable to all requests or applications to add to, alter, amend, or repeal any rule, regulation, or standard of the board, including all such requests or applications originating from or submitted by another agency of government.

**III. Procedures for submitting petitions; responses to petitions.**

(a) Any person may petition the board to consider the adoption of a rule. The petition must contain the following information:

- (1) The rule to be considered, with proposed language for adoption;
- (2) A statement of the board's authority to promulgate the rule and its purpose;
- (3) Petitioner's argument(s) in support of adoption of the rule;
- (4) The period of time the rule should be in effect;
- (5) The name, address and telephone number of the petitioner or his or her authorized representative;
- (6) The signature of petitioner or his or her representative.

(b) Any change in the information provided pursuant to §(a)(5) shall be communicated promptly in writing to the office of the board.

(c) All petitions should be typewritten, if possible, but handwritten petitions shall be accepted, provided they are legible.

**(d) All petitions shall be delivered or mailed to the office of the board.**

**(e) Upon receipt of a petition submitted in the proper form, the secretary to the board will stamp the petition with the date it was received and will assign the petition a number. The secretary will forward the petition to the members of the board and to board staff. Following receipt of the petition, a notice regarding submission of the petition will be included in the public notice of the next regularly scheduled meeting of the board. The petition shall also be forwarded to interested parties, including prisoners and their representatives, public officials, and legal, religious, community and labor organizations.**

**(f) Within sixty days from the date the petition is received by the secretary, the chair shall either provisionally deny such petition in a written statement containing the reasons for denial, or shall state in writing the intention to grant the petition and to initiate rulemaking on the subject matter by a specified date. The chair of the board is hereby delegated and authorized to grant or deny the petition pursuant to § 1043(f) of the New York City Charter, as further provided in this article.**

**(g) In cases where the chair provisionally denies a petition to initiate rulemaking, the petition, the provisional denial, and the reasons for the denial, shall be expeditiously provided to the members of the board. Any member of the board may object to a denial of a petition, and an objection made within ten (10) business days of the chair's notice to the board of his or her intention to deny shall cause the petition to be placed before the entire board, at the next regularly scheduled meeting, for consideration as to whether such petition should be granted or denied. If less than 10 days remain before the next regularly scheduled meeting when the chair notifies the board members of the intent to deny a rulemaking petition, the board's consideration of the petition shall take place at the meeting subsequent to the next regularly scheduled meeting. Proceedings concerning petitions for rulemaking shall be conducted publicly and not in executive session. At any meeting where the board considers a petition for rulemaking, the petitioner shall be afforded an opportunity to address the board. If the board by majority vote determines to grant the petition, then the board shall initiate rulemaking on the subject matter by a specified date.**

**(h) In all cases where the chair or the board has granted a petition to initiate rulemaking, the actual petition shall be made part of the record before the board at the time that the rulemaking is initiated. In proceeding with such rulemaking, the board shall not be bound by the language proposed by petitioner, but may amend or modify such proposed language at the board's discretion. Nor shall the board be bound to enact the substance of a petition to initiate rulemaking which has been granted by the chair.**

**(i) The chair's decision to grant, or deny a petition in the absence of the objection of any member of the board, or a decision by the board to grant or deny a petition, shall be, pursuant to New York City Charter §1043(f), a final decision which is not subject to judicial review.**

**(j) In the event the petition needs to be placed before the entire board pursuant to subsection (g) above and the sixty (60) day time period specified to decide a petition is about to expire, the chair may deny the petition, provided that the petition shall thereupon be automatically renewed, or, upon the consent of the petitioner, the chair may extend the time for consideration beyond the sixty (60) day period specified by §1043(f) of the New York City Charter.**