



**The Legal Aid Society - Prisoners' Rights Project**

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June 13, 2008

Chair and Members of the New York City Board of Correction  
Richard Wolf, Esq., Executive Director  
New York City Board of Correction  
51 Chambers Street, Room 923  
New York, NY 10007

Re: Comments on Proposed Procedures for Consideration of Petitions for Rulemaking

To the Chair, Members, and Executive Director of the New York City Board of Correction:

The Legal Aid Society presented its rulemaking petition to the Board of Correction on February 29, 2008. The proposed regulation would establish procedures for submission, consideration, and determination of rulemaking, in accordance with City Charter § 1043(f). The Board granted the petition and formally proposed a regulation, with publication in the City Record on May 14, 2008. We appreciate the consideration given to our proposal, including the opportunity for a public hearing on the matter, and we offer the following comments on the Board's proposed rule, which made some significant modifications to the regulation as presented in our petition.

**I. In Section 4.01, the definition of "person" should be restored, and the definition of "petitioner" should include "agency," as we had proposed.**

Section 1043(f) of the City Charter, without defining "person," states: "Any person may petition an agency to consider the adoption of any rule." To avoid ambiguity, Legal Aid's petition contained the following definition of "person": "an individual, partnership, corporation, or other legal entity, including a governmental agency, and any individual or entity acting in a fiduciary or representative capacity."\* The Board's proposal eliminates Legal Aid's proposed definition of "person," and we urge that it be restored.

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\* The model for Legal Aid's proposal was the definition of "person" found in other agencies' rulemaking regulations: "Person shall mean an individual, partnership, corporation, or other legal entity, and any individual or entity acting in a fiduciary or representative capacity." Title 29 (Loft Board), Rules of the City of New York § 1-11(a); Title 35 (Taxi and Limousine Commission), Rules of the City of New York § 11-01; Title 43 (Mayor) Rules of the City of New York § 5-02; and Title 44 (Comptroller), Rules of the City of New York § 4-02. The only change proposed by Legal Aid to modify the language of these agencies' definition is the insertion of "including a governmental agency" to make clear that "legal entity" would be understood comprehensively. This makes sense because the Board of Correction's role is oversight of the Department of Correction, so requests for rulemaking may well originate from that Department, as well as from the Department of Health and Mental Hygiene, which is responsible for delivery of health and mental health care in the jails.

The definition of “person” is central to the regulation because it controls which petitions or requests for rulemaking will be governed by the promulgated procedures. We included this definition because its absence would engender confusion on whether some rulemaking requests, depending on their origin, might not be covered by the proposed rule. We sought to make clear that all entities, including government agencies, and not just individuals, who present rulemaking requests the Board, either formally or informally, must do so in accordance with the procedures and other requirements contained in this rule.

In addition to wholesale elimination of the definition of “person,” the Board’s proposal would delete the words “or agency” from the definition of “petitioner.” Legal Aid’s proposal defined “petitioner” as “the person or agency who files the petition.” In the Board’s version, “petitioner” means “the person who files the petition.” Similar to the impact of totally excising the definition of “person,” removing the term “agency” from the definition of “petitioner” would defeat the purpose of ensuring that all rulemaking requests, either formal or informal, and regardless of source, would be subject to all the requirements and procedures established by this rule. Therefore, “agency” should be put back into this definition. Further, the absence of a definition of “person” renders vague the definition of “petitioner.” Only if a suitably clear and comprehensive definition of “person,” including “agency,” as we originally proposed, were to be restored, would it be acceptable to remove “or agency” from the definition of “petitioner.” The explicit inclusion of “agency” in the definition of “person” would then include agencies as petitioners to whom the rule applies.

**II. To ensure openness and efficiency in the rulemaking petition process, the clear and explicit procedures contained in Legal Aid Society’s petition should be restored to the proposal in § 4.04.**

A. Legal Aid proposed that when a rulemaking petition is received, a notice of the submission shall be included in the public notice of the next regularly scheduled meeting, that the petition shall be sent to interested parties, and that the petition shall be considered at a public meeting rather than in executive session. These proposals were deleted.

As noted in our initial submission, these particular proposals were presented to ensure a well-informed, transparent, and efficient process. The Board’s Minimum Standards for NYC Correctional Facilities, in connection with variance requests, already contain provisions for consideration of the positions of interested parties and for public meetings on the variance requests. Min. Stds. § 1-15. These provisions necessarily require notice and an opportunity to comment. Adopting a similar approach with regard to rulemaking petitions, therefore, would be equally beneficial and would not be onerous.

In addition, Legal Aid proposed that if the Chair states an intention to deny a rulemaking petition, the matter will be placed before the Board at its next regularly scheduled meeting if any Board member objects to the denial within ten days of receipt of the Chair’s notice of denial. The Board’s proposal contains a somewhat similar provision for Board consideration of a

petition when the Chair has expressed an intent to deny, but does not specify that the petition will be considered at a Board meeting. Thus, there is a step in the process that would not necessarily be known to the public. In the interest of openness and transparency, the rule should declare that this type of action by the Board will take place at a open meeting.

Only by implication does the Board's proposal contain a provision that rulemaking petitions will be considered at a Board meeting. §4.04(b)(1) states: "Whenever the Chair decides to initiate rulemaking, the petition shall be made part of the record of the Board meeting at which rulemaking is initiated." There is no other reference, explicit or implicit, to consideration of any of these rulemaking matters at a Board meeting. Significantly, proposed §4.04(b)(2) is silent on the nature of the forum where petitions that the Chair intends to deny will be considered by the full board. It may be that under the Open Meetings Law, such matters can only be taken up at a Board meeting, but there is no reason for not specifying this in the regulation. An explicit statement of the meeting requirement takes on added importance in light of proposed § 4.04(b)(1), which would make the petition part of the record in the event the Chair grants it and proceeds to initiate rulemaking but is silent on making the petition part of the record where the Chair denies it. Obviously, if the Board considers the petition at a meeting, the petition would be part of the record and open to public view. But disputes could arise about whether the petition is part of the record if consideration does not occur at a meeting.

Finally, Legal Aid proposed that rulemaking petitions be considered in public rather than executive sessions. This is concomitant with due consideration of petitions at Board meetings. We reasoned that this provision would ensure an open and well-informed process. The Board's proposal removes this provision. It may be that the Board agrees with the spirit of the proposed requirement and simply felt it unnecessary to express it. To avoid any confusion or dispute on this point, this proposal should be restored.

**B.** Legal Aid proposed insertion of the word "provisional" to describe the action of the Chair in either denying, or stating the intention to deny, a petition. The purpose of the proposal was to reflect clearly the reality of the Chair's action, since all "denials" would be subject to some level of review, and ultimate reversal, by the Board, and therefore, in that sense, would be provisional. On the other hand, the Chair's grant of, or statement of intent to grant, a petition would not be provisional since the next step would be the initiation of rulemaking. Thus, "provisional" is an apt description of the procedural distinctions of grants and denials and should be retained in the interests of clarity.

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C. One other procedural matter in Legal Aid's petition has been omitted by the Board and should be restored. We proposed that when the Board considers whether to grant a rulemaking petition, i.e., following denial by the Chair, the petitioner shall be afforded the opportunity to address the Board. This proposal was presented for the purpose of promoting well-informed decision making. When a member's objection has placed a petition on the agenda, the Board can benefit from the petitioner's input. Therefore, this provision should also be restored.

Very truly yours,

Steve Banks  
John Boston  
Milton Zelermyer