



# City of New York

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## OFFICE OF THE COMPTROLLER

Scott M. Stringer  
COMPTROLLER



## MANAGEMENT AUDIT

**Marjorie Landa**

Deputy Comptroller for Audit

Audit Report on the Hearings of the Office  
of Administrative Trials and Hearings on  
Notices of Violations Issued by the  
Department of Health and Mental Hygiene

ME16-064A

**June 30, 2016**

<http://comptroller.nyc.gov>



THE CITY OF NEW YORK  
OFFICE OF THE COMPTROLLER  
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NEW YORK, NY 10007

SCOTT M. STRINGER  
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June 30, 2016

To the Residents of the City of New York:

My office has audited the New York City Office of Administrative Trials and Hearings (OATH) to determine whether it provides hearings and adjudicates cases relating to Department of Health and Mental Hygiene (DOHMH) violations in a timely manner. We conduct audits such as this to increase accountability and to ensure that City agencies are meeting their responsibilities in a timely manner.

The audit found that OATH's Health Hearings unit generally conducts hearings and adjudicates cases relating to DOHMH violations in a timely manner. However, the audit also revealed that OATH needs to improve the scheduling of its hearings. In particular, OATH did not consistently reschedule hearings in a timely manner; did not properly handle most of the Notices of Violations (NOVs) that were improperly filed by DOHMH after the scheduled hearing dates; and did not maintain adequate support for the performance data submitted for the Mayor's Management Report (MMR). Further, there were certain weaknesses in the reliability of OATH's Administrative Tribunal Automation System (ATAS) data. Finally, the audit identified additional scheduling weaknesses that resulted in hearings being scheduled fewer than 15 days after the service of an NOV and well past the 30-day goal for hearing dates.

The audit makes nine recommendations to OATH, including that it develop formal written standards to govern the timeframes for rescheduled hearings and clearly communicate these standards to its staff; that it monitor the filing of NOVs more closely to ensure that those NOVs filed after their scheduled hearing dates are rejected by ATAS and reported to DOHMH; that it generate and maintain adequate support for the performance data on the Health Hearings unit that is submitted for inclusion in the MMR; and that it more closely monitor the accuracy of information recorded in ATAS to ensure that the information is complete and accurate. The audit also made one recommendation to the Mayor's Office of Operations (MOO) that it advise OATH and DOHMH to consider revising their hearing scheduling practices and procedures to minimize the possibility of improper hearing dates being set.

The results of this audit have been presented to OATH and MOO officials. OATH's comments have been considered in preparing this report, and its complete written response is attached to this report. MOO did not respond to the report.

If you have any questions concerning this report, please e-mail my Audit Bureau at [audit@comptroller.nyc.gov](mailto:audit@comptroller.nyc.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read "Scott M. Stringer".

Scott M. Stringer

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# THE CITY OF NEW YORK OFFICE OF THE COMPTROLLER MANAGEMENT AUDIT

## Audit Report on the Hearings of the Office of Administrative Trials and Hearings on Notices of Violations Issued by the Department of Health and Mental Hygiene

ME16-064A

### EXECUTIVE SUMMARY

The objective of this audit was to determine whether the Health Hearings unit of the New York City (the City) Office of Administrative Trials and Hearings (OATH) provides hearings and adjudicates cases relating to Department of Health and Mental Hygiene (DOHMH) violations in a timely manner. The Health Hearings unit at OATH is responsible for conducting hearings on Notices of Violations (NOVs) issued by DOHMH that are challenged by the NOV recipients (the respondents). NOVs issued by DOHMH allege one or more violations of the City's Health Code and/or other public health-related laws. The violations cited in the NOVs are associated with various types of occupations and enterprises, including food service establishments, day care centers, day camps, swimming pools, street fairs, hospitals, barber shops, tattoo parlors, tanning salons, and funeral homes. The overwhelming majority of these DOHMH cases received by OATH, approximately 90 percent, relate to food service establishments.

The process that results in a hearing before the Health Hearings unit begins at DOHMH after a DOHMH inspector discovers a violation. The inspector must then identify the violation and enter a hearing date on the NOV, and issue it to the respondent. If the respondent challenges an NOV, he or she must attend the scheduled hearing, which is required by regulation to be scheduled no less than 15 calendar days after the NOV is served.

By regulation, for OATH to conduct a hearing, a copy of the NOV served on the respondent must have been filed with OATH prior to the hearing date entered on the NOV. Once an NOV has been filed, OATH's responsibility begins. OATH provides various ways for a respondent to contest an NOV—in person, by mail, by phone, or online. At the conclusion of an in-person hearing, the Hearing Officer informs the respondent either that the decision will be issued that day or that it will be mailed to the respondent within one week. According to OATH's website, for a hearing conducted by mail, by phone or online, the respondent should receive the Hearing Officer's decision within 30 days.

During the initial part of the scope period of this audit (from July 1, 2014, through June 30, 2015), each party could reschedule the hearing up to three times. During the latter part of the audit



scope period (from July 1, 2015, through December 31, 2015), each party could only reschedule the hearing date one time. Any subsequent request for a new hearing date must be approved by a Hearing Officer.

According to the Mayor's Management Report (MMR) for Fiscal Year 2015, the Health Hearings unit received a total of 37,776 cases, conducted 34,013 hearings, and rendered 23,731 decisions during the year.

## Audit Findings and Conclusions

The audit revealed that OATH's Health Hearings unit generally conducts hearings and adjudicates cases relating to DOHMH violations in a timely manner. However, the audit also revealed that OATH needs to improve the scheduling of its hearings to decrease inefficiencies for all parties to its proceedings and to increase the protection of public health and safety. In particular, OATH did not consistently reschedule hearings in a timely manner. In addition, OATH did not properly handle most of the NOV's that were improperly filed by DOHMH after the scheduled hearing dates. Also, OATH did not maintain adequate support for the performance data submitted for the MMR. Further, there were certain weaknesses in the reliability of OATH's Administrative Tribunal Automation System (ATAS) data and OATH lacked a user manual for ATAS, which is necessary to ensure that ATAS data is properly entered and used. Finally, we identified additional scheduling weaknesses that resulted in hearings being scheduled fewer than 15 days after the service of an NOV and well past the 30-day goal for hearing dates. Because the processes that contributed to these improper scheduling dates appear to relate to both OATH and DOHMH and the interaction between the two, we make one recommendation to the Mayor's Office of Operations that it advise DOHMH and OATH to consider revising their hearing scheduling practices and procedures to minimize the possibility of improper hearing dates being set.

## Audit Recommendations

To address these issues, this report makes a total of 10 recommendations, including the following:

- OATH should develop formal written standards to govern the timeframes for rescheduled hearings and clearly communicate these standards to its staff.
- OATH should monitor the filing of NOV's more closely to ensure that those NOV's filed after their scheduled hearing dates are rejected by ATAS and reported to DOHMH.
- OATH should generate and maintain adequate support for the performance data on the Health Hearings unit that is submitted for inclusion in the MMR.
- OATH should more closely monitor the accuracy of information recorded in ATAS related to manually filed NOV's to ensure that the information is complete and accurate. OATH should develop and implement an ATAS user manual to ensure that ATAS data is entered and used properly.

## Agency Response

In its response, OATH officials generally agreed with four of the audit's nine recommendations addressed to OATH, partially agreed with one, disagreed with three and did not address one. In addition, the Mayor's Office of Operations did not respond to the one recommendation that was addressed to it.

Unfortunately, OATH's response included misstatements and reflected a lack of understanding of the audit findings and recommendations. A detailed discussion of OATH's response is provided in the body of the report.

# AUDIT REPORT

## Background

OATH was established in 1979 to improve the administrative hearing process in New York City government. OATH's primary mission is to conduct impartial administrative hearings and to issue timely decisions on those hearings.

OATH consists of two divisions—the Trials Division and the Hearings Division. These two divisions conduct nearly 300,000 trials and hearings each year.

- The Trials Division holds trials on administrative cases, including disciplinary cases involving City employees; human rights and discrimination cases; Loft Law cases;<sup>1</sup> and cases involving City license revocations and car seizures.
- The Hearings Division is comprised of three separate tribunals that adjudicate cases involving NOV's issued by various City agencies: the Environmental Control Board, the Taxi and Vehicle for Hire Hearings unit, and the Health Hearings unit.

This audit is of the Health Hearings unit, which is responsible for conducting hearings on NOV's issued by DOHMH that are challenged by the NOV recipients (the respondents). NOV's issued by DOHMH allege one or more violations of the City's Health Code and/or other laws relating to health. These cases are associated with various types of entities, including food service establishments, day care centers, day camps, swimming pools, street fairs, hospitals, barber shops, tattoo parlors, tanning salons, and funeral homes. Approximately 90 percent of the DOHMH cases received by OATH relate to food service establishments.

The process that results in a hearing before the Health Hearings unit begins at DOHMH. After a DOHMH inspector discovers a violation, the inspector is required to call OATH's interactive voice response calendar application system known as DiRAD<sup>2</sup> to obtain a docket number and the next available hearing date and time in the borough in which the NOV was issued.<sup>3</sup> The inspector then enters the information obtained from DiRAD on the NOV and issues it to the respondent. If the respondent challenges an NOV, he or she must attend the scheduled hearing, which is required by regulation<sup>4</sup> to be scheduled no less than 15 calendar days after the NOV is served.<sup>5</sup>

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<sup>1</sup> The Loft Law applies to the conversion of buildings previously used for manufacturing, commercial, or warehousing purposes to residential use.

<sup>2</sup> The application is based on a product developed by DiRAD Technologies, Inc.

<sup>3</sup> The Health Hearings unit has a hearing location in each of the five boroughs. The Brooklyn and Manhattan locations are the only ones open five days a week (from 9 a.m. to 5 p.m.). The remaining locations are open up to four days a week. A respondent must go to the hearing location listed on the NOV.

<sup>4</sup> Here, and elsewhere in the report, where we referred in the draft report to "statute" or "statutory requirement," we now refer in the final report to "regulation" or "regulatory requirement," respectively.

<sup>5</sup> DOHMH offers food establishments a chance to settle cases instead of participating in a hearing at OATH. Settlement offers are mailed to food establishments shortly after the NOV's are issued. In order for respondents to accept the settlement offers (which can be done in-person, online, or by mail), they must accept the violations, waive the right to a hearing and pay the settlement amounts offered by DOHMH, which are lower than the established fine amounts. Non-food establishments are not provided the opportunity to settle and must have a hearing (in-person, online, by mail, or by phone) on their NOV's.

DOHMH inspectors of food establishments are equipped with hand-held devices, while inspectors of other types of establishments generally are not.<sup>6</sup> For the inspectors with hand-held devices, the NOV's are prepared electronically, printed, handed or mailed to the respondents, and automatically uploaded into DOHMH's FACTS II computer system. These NOV's are then filed with OATH via a nightly data feed to ATAS.<sup>7</sup> For those inspectors who do not have hand-held devices, NOV's are prepared manually and handed or mailed to the respondents, and then either delivered in person or emailed to OATH so that they can be manually entered and filed in ATAS.

By regulation, for OATH to conduct a hearing, the relevant NOV must have been filed with OATH prior to the hearing date recited in the NOV. Accordingly, if a respondent appears at OATH for a scheduled hearing and an NOV has not yet been filed with OATH, no case will appear on the calendar and the case cannot be heard. In such an instance, DOHMH must restart the process by issuing a new NOV to the respondent that provides a new hearing date and time, and this new NOV must then be filed with OATH for that hearing to be held.

Once an NOV has been filed, OATH's responsibility begins. OATH provides various ways for a respondent to contest an NOV—in person, by mail, by phone, or online. When in-person hearings are held, the respondents can either represent themselves or have attorneys or other authorized representatives appear with them or on their behalf. Upon arriving at OATH, a respondent (and/or the respondent's representative) signs in at the waiting room. That appearance results in the generation of a Notice of Appearance. Thereafter, a Hearing Officer will call the case to be heard and listens to the testimony of the respondent, any witnesses, and the DOHMH inspector (if asked to attend by DOHMH), and reviews any documents presented. These proceedings are audio recorded. At the hearing's conclusion, the Hearing Officer informs the respondent either that the decision will be issued that day or that it will be mailed to the respondent within one week. According to OATH's website, for a hearing conducted by mail, by phone or online, the respondent should receive the Hearing Officer's decision within 30 days.

Prior to the scheduled hearing date, the respondent and DOHMH are each allowed to request the hearing to be rescheduled one time by submitting a Request for a New Hearing Date form. Prior to July 1, 2015, a maximum of three requests to reschedule were allowed from each party. Any subsequent request for a new hearing date must be approved by a Hearing Officer. The granting of such a request is considered to be an adjournment.

If a respondent fails to appear at a scheduled hearing, send a representative, or otherwise respond as allowed by mail, phone or online, the respondent is in default. In that case, a default decision is issued by the Hearing Officer against the respondent, who is automatically found to be in violation of the cited requirement, and a penalty is imposed. The respondent may file a motion to vacate a default (i.e., apply to reopen the case) by submitting a Request for a New Hearing After a Failure to Appear form within 60 days of the date that the default decision was mailed. If the application is received on time and is the respondent's first such request, it will be automatically granted and the respondent is sent a written notice from OATH with a new hearing date and time. If the application is received after 60 days or is the respondent's second request, then the respondent must provide a written statement along with supporting documents explaining why he or she failed to appear for the hearing or otherwise respond to the NOV.

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<sup>6</sup> The determination of which inspectors at DOHMH carry hand-held devices is made by DOHMH and not OATH and so was not reviewed in connection with this audit of OATH.

<sup>7</sup> ATAS has been in use since July 2010 and contains a central repository of Health Hearings unit information, including NOV's filed, proceedings held, written evidence admitted, rescheduling forms submitted, and decisions rendered.



Either party can appeal a Hearing Officer's decision. To do so, the party must submit a Hearings Division Appeal Application form to OATH and provide a copy to the other party. If the respondent is the appellant, he/she must pay all related fines.<sup>8</sup> These steps must be taken within 30 days if the decision was issued to the respondent in person or within 35 days if the decision was mailed. The non-appealing party has an opportunity to respond to an appeal by submitting a Hearings Division Response to Appeal form within 30 days of being served with the appeal application (or within 35 days of the appeal application having been mailed by the respondent). After reviewing the record from the original hearing and the arguments made on both the appeal application and the response to appeal form, the OATH Appeals Unit makes a decision to affirm, reverse, modify or remand the original decision. This decision must be made within 90 days of the receipt of the appeal application. According to the MMR for Fiscal Year 2015, the Health Hearings unit received a total of 37,776 cases, conducted 34,013 hearings, and rendered 23,731 decisions during the year.<sup>9</sup>

## Objective

To determine whether the OATH Health Hearings unit provides hearings and adjudicates cases relating to DOHMH violations in a timely manner.

## Scope and Methodology Statement

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the City Charter.

The scope of this audit covers the period from July 1, 2014, through December 31, 2015. Please refer to the Detailed Scope and Methodology at the end of this report for the specific procedures followed and the tests conducted during this audit.

## Discussion of Audit Results with OATH

The matters covered in this report were discussed with OATH officials during and at the conclusion of this audit. A preliminary draft report was sent to OATH and discussed at an exit conference held on May 23, 2016. We submitted a draft report to OATH on June 8, 2016, with a request for comments. We received a written response from OATH on June 21, 2016.

In its response, OATH officials generally agreed with four of the audit's nine recommendations addressed to OATH, partially agreed with one, disagreed with three and did not address one. In addition, the Mayor's Office of Operations did not respond to the one recommendation that was addressed to it.

Unfortunately, OATH's response included misstatements and reflected a lack of understanding of the audit findings and recommendations. A detailed discussion of OATH's response is provided

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<sup>8</sup> The respondent will receive a full refund if the violations are ultimately reversed by the Appeals Unit.

<sup>9</sup> According to OATH, the 34,013 hearings in Fiscal Year 2015 led to 23,731 decisions, 9,310 defaults (failures to appear), 841 adjournments, and 131 pending cases.

in the body of the report, and the full text of OATH's response is included as an addendum to this report.

# FINDINGS AND RECOMMENDATIONS

The audit revealed that OATH's Health Hearings unit generally conducts hearings and adjudicates cases relating to DOHMH violations in a timely manner. However, the audit also revealed that OATH needs to improve the scheduling of its hearings to decrease inefficiencies for all parties to its proceedings and to increase the protection of public health and safety. In particular, OATH did not consistently reschedule hearings in a timely manner. Also, OATH did not properly handle most of the NOV's that were filed by DOHMH after the scheduled hearing dates. In addition, OATH did not maintain adequate support for the performance data submitted for the MMR. Further, there were certain weaknesses in the reliability of ATAS data and OATH lacked a user manual for ATAS, which increases the chance of improper use of the system. Finally, we identified additional scheduling weaknesses that resulted in hearings being scheduled fewer than 15 days after the service of an NOV and well past the 30-day goal for hearing dates. Because the processes that contributed to these improper scheduling dates appear to relate to both OATH and DOHMH and the interaction between the two, we make one recommendation to the Mayor's Office of Operations that it advise DOHMH and OATH to consider revising their hearing scheduling practices and procedures to minimize the possibility of improper hearing dates being set.

## Hearings Were Not Rescheduled in a Timely Manner

OATH has not established formal standards to govern the amount of time that may elapse between a scheduled hearing date and its rescheduled date. This increases the likelihood of delays in the hearings and adjudication process and potentially disadvantages the respondents by prolonging the resolution of their cases. In addition, delays in the disposition of the NOV's might contribute to the public being subjected to increased health and safety risks.

According to OATH's procedures, there are four situations where it is permissible for a request to reschedule a hearing to be made and granted:

- Prior to a scheduled hearing, the respondent or DOHMH can submit a request to reschedule the hearing. An OATH Health Hearings unit operations clerk is responsible for granting a new hearing date.
- Prior to a scheduled hearing, a respondent can request a hearing-by-phone. An OATH Hearings by Alternative Means Unit clerk is responsible for granting a hearing-by-phone request and setting a date.
- During a scheduled hearing, the respondent can request that the hearing be adjourned and rescheduled, typically to have the inspector attend the hearing. If the Hearing Officer grants the request, a Health Hearings unit operations clerk schedules the new hearing date.
- Within 60 days of a default decision, the respondent may submit a request for the case to be reopened. If the application is received on time, a Health Hearings unit operations clerk is responsible for granting a new hearing date.

According to an OATH official, the Health Hearings unit has discretion to decide the length of time between the original hearing date and the rescheduled hearing date, although OATH aims generally to reschedule hearings within one to three weeks (7 to 21 calendar days), depending

upon the availability of the parties involved. The official further stated that any request to reschedule a hearing beyond this timeframe would be considered an unusual circumstance that would warrant supporting documentation to justify and, absent demonstrated unusual circumstances, the requests should be denied.

Our review of 51 sampled cases revealed 32 cases had a total of 52 rescheduled hearings. We found that OATH did not reschedule hearings in a timely manner based on its informal standard. Specifically, 23 (44 percent) of the 52 hearings were rescheduled more than 21 calendar days later, averaging 28.4 days later and ranging from 22 to 39 days later. To determine the timeliness of OATH's rescheduling of hearings, we calculated the number of days between the scheduled and rescheduled hearing dates for each of the 52 rescheduled hearings. Based on OATH's informal standard, we considered 21 calendar days to be the target time period within which a hearing should be rescheduled.

In one case, an NOV filed with OATH noted six violations resulting from a June 2, 2014, inspection of a swimming pool and sauna at a spa. The violations included the pool having an insufficient level of chlorine and the sauna having a defective timer. The originally scheduled hearing indicated on the NOV was rescheduled three times. One hearing was rescheduled for 28 days after the previously scheduled date and another was rescheduled for 39 days later. As a result, it took 123 days (a little over four months) from the time that the inspection occurred for a decision (sustaining the violations) to be rendered on this case. When, as in this case, hearing dates are repeatedly delayed, the violations cited on the NOV are less likely to be addressed in a timely manner, which would increase the risk to the health and safety of the public.

## Recommendations

1. OATH should develop formal written standards to govern the timeframes for rescheduled hearings and clearly communicate these standards to its staff.
2. OATH should monitor staff compliance with the standards to ensure that hearings are rescheduled in a timely manner.

**OATH Response to Recommendations 1 and 2:** "OATH does in fact have formal standards governing hearing reschedules. Pursuant to OATH Rule 6-01, an adjournment is obtained after the commencement of a hearing. A reschedule is obtained before the hearing. Prior to July 1, 2015, our rules provided for multiple 'reschedules' which could be requested by either party. By amendment effective July 1, 2015, OATH Rule 6-05 allows each party one reschedule, though it does not limit the length of time. The amendment was created to eliminate repeated pre-hearing reschedules.

"OATH does not establish the amount of time allowed in a reschedule by rule, in order to allow the parties to obtain the time they need to adequately prosecute or defend consistent with fairness to all [sides]. However, there is an internal protocol of 21 days. When a reschedule is requested by any party, OATH's calendar unit will pick a date based upon the date next available on the calendar and the needs of the parties.

"OATH's rule limiting the number of reschedules available—aided by the adversary system itself—provides an adequate backstop to excessive delay. The Audit findings do not demonstrate a need to adopt a formal mandate, a draconian measure that would ignore the legitimate needs of parties. The Audit points to 23 out of 52 rescheduled hearings (a tiny sample out of over 37,000 hearings

conducted) that were rescheduled for a new date more than 21 calendar days later. An arbitrary mandate would serve no purpose, particularly where the small number of reschedules cited in this audit is no indication of a problem with the system as it exists.

“As stated in the introduction to this Response, the audit emphasizes a public health role that OATH does not have. Moreover, the timing of the hearing has no relation to compliance. A hearing only determines whether there existed a violation at a particular moment on a particular day. Nothing more.”

**Auditor Comment:** OATH confirms that it has an internal protocol of attempting to reschedule hearings within 21 days of the originally scheduled hearing. Our concern is that OATH did not include this standard as part of its written procedures, thereby failing to provide adequate instruction to staff as to how rescheduling requests should be handled. Our recommendation envisions the establishment of a flexible written standard that would guide most reschedulings but allow exceptions to be made to accommodate reasonable requests.

OATH questions our sample size of 52 rescheduling requests but fails to note that it provided ATAS datasets to us in a manner that precluded us from performing a review of the entire population of reschedulings. As a result, we reviewed a sample to identify possible system weaknesses. In its response, OATH does not offer an explanation as to why 44 percent (23 out of 52) of the requests reviewed did not follow its internal protocol. Thus, we see no basis to alter our findings and recommendations.

OATH also argues that it does not have a public health role to play in its adjudication of DOHMH NOVs. We disagree with the narrow framing of OATH’s role. As OATH officials have stated, OATH is a neutral adjudicatory body. As such, its role is to adjudicate NOVs issued by DOHMH related to health and safety violations. OATH’s adjudicatory function and its neutrality are not inconsistent, however, with the fact that it is one of many City actors that, through their work, help to protect the health and safety of New Yorkers. Accordingly, we urge OATH officials to consider the audit findings and recommendations in the context of the effect that OATH’s operations and rules have on the entities that appear before them and on the public as a whole.

3. OATH should consider modifying ATAS to flag for review those hearings that are not rescheduled within the required timeframes and use that as a monitoring and instruction tool for staff.

**OATH Response:** “There is no need for OATH to modify ATAS ‘to flag for review those hearings that are not rescheduled within the required timeframes,’ because no such timeframes exist in any law or rule. ATAS work flows are developed based on defined business rules. Since there is no business rule on timeliness of reschedules, there is no rationale to modify ATAS.”

**Auditor Comment:** OATH’s argument that ATAS modifications should be limited to only those requirements that are formally documented in laws or rules reflects an unnecessarily narrow interpretation of what constitutes “business rules” and limits the agency’s ability to utilize ATAS to help it manage its operations. We believe that the timely rescheduling of hearings is an important enough matter to justify OATH having ATAS flag those reschedulings that exceed its internal protocol. We therefore urge OATH to implement this recommendation.



## Improper Handling of NOV's That Were Filed Subsequent to the Scheduled Hearing Dates

When DOHMH fails to file an NOV with OATH until after the scheduled hearing date and the respondent appears at OATH for the scheduled hearing, the case cannot be heard.<sup>10</sup> In this situation, OATH's procedures require a letter to be issued to the respondent that states that a hearing could not be held and that OATH will not reschedule the hearing or make a decision on any of the violations cited on the NOV. ATAS has been programmed to reject an NOV that has been filed with OATH subsequent to the scheduled hearing date and to place the NOV in the Late Delivery Case Folder. On a sporadic basis, a report is sent to DOHMH that identifies such rejected NOV's. In order for the case to be heard by OATH, DOHMH would need to reissue the NOV to the respondent that provides a new hearing date and time.

However, the audit found that in some instances OATH improperly rescheduled these hearings; OATH did not send the cases back to DOHMH and require new NOV's to be served in order for the process to begin again. Specifically, of the 37,756 cases that were filed with OATH during Fiscal Year 2015, we found 298 cases that were filed subsequent to the scheduled hearing dates, but that OATH correctly rejected only 33 of these.<sup>11</sup> The remaining 265 cases (89 percent) were filed with OATH from one to 356 days (almost a year) after the scheduled hearing dates and hearings were improperly rescheduled by OATH rather than being rejected and sent back to DOHMH.

Such cases could increase costs to the City based on duplication of effort where a case has been improperly rescheduled by OATH, only to be dismissed and then refiled.

### Recommendations

4. OATH should monitor the filing of NOV's more closely to ensure that those NOV's filed subsequent to the scheduled hearing dates are rejected by ATAS, placed in the Late Delivery Case Folder and provided to DOHMH on a regular basis.
5. OATH should ensure that it does not reschedule hearings on NOV's filed after the scheduled hearing dates.

**OATH Response to Recommendations 4 and 5:** "The Audit found that 265 cases were improperly scheduled for hearing even though filed by DOHMH ... after the original scheduled hearing date and were not 'rejected' by OATH. They recommend OATH monitor such late filings. OATH is currently monitoring late filings in accordance with a practice adopted in or around March 2015. OATH saw the need in fiscal year 2015 to tighten its protocol for handling NOV's received after the hearing date contained on the NOV. Under our current procedure, such late filings are rejected and are not rescheduled for hearing. Thus, recommendations 4 and 5 have already been satisfied.

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<sup>10</sup> As previously noted, pursuant to regulation, an NOV must be filed with OATH prior to the scheduled hearing date (Title 48, §6-08(a)(2) of the Rules of the City of New York).

<sup>11</sup> To arrive at the total of 37,756 cases filed during Fiscal Year 2015, we combined cases from two reports OATH provided to us. First, we sorted the report containing 34,474 cases that were filed during Calendar Year 2015 and determined that there were 19,208 cases filed from January 1, 2015, through June 30, 2015. We then combined these cases with another report provided to us containing 18,548 cases that were filed during the first half of Fiscal Year 2015 (July 1, 2014, through December 31, 2014).

“The Audit's concern that DOHMH is not notified of late filings is unwarranted. DOHMH has read-only access to ATAS and can access this information without requiring OATH, an impartial adjudicatory body, to prepare and send error reports to DOHMH and other enforcement agencies. It is inappropriate and not OATH's responsibility to police their internal processes.”

**Auditor Comment:** We commend OATH for recognizing the need to tighten its protocol for handling NOV's received after the scheduled hearing dates recorded on the NOV's. Notwithstanding OATH's assertion that it has improved its monitoring of late filings since March 2015, our review of OATH's dataset for July 1, 2015, through December 31, 2015, found that OATH had not rejected 5 (26 percent) of the 19 cases in which DOHMH filed the NOV's subsequent to the scheduled hearing dates, which suggests that its changes have not been entirely effective.

In addition, OATH's statement that it would be inappropriate to inform DOHMH about its late filings contradicts statements made by OATH officials during the audit that they did just that by sporadically sending reports to DOHMH identifying the NOV's that were rejected by ATAS for having been filed subsequent to the scheduled hearing date. Furthermore, although we discussed the issue of late filings with OATH during the course of the audit, it was not until its written response that OATH argued that the recommendation is unnecessary because DOHMH can access information regarding late filings through its read-only access to ATAS. However, in its response, OATH does not explain how extensive DOHMH's read-only access is, nor does it explain how DOHMH would use this access to obtain information about those NOV's filed late, so we are unable to determine the degree to which this functionality would satisfactorily address the issue upon which the recommendation is based.

## **Inadequate Support for the Performance Data Submitted for the Mayor's Management Report**

OATH does not maintain adequate supporting evidence for the Health Hearings unit's performance data submitted for inclusion in the MMR. As a result, we were unable to determine whether the OATH Health Hearings unit data in the MMR is accurate.

The MMR is a government “report card” that measures various aspects of City agency performance and indicates whether the agencies are delivering services efficiently, effectively, and expeditiously. According to the MMR issued in September 2015, the Health Hearings unit received a total of 37,776 cases from DOHMH, conducted 34,013 hearings, and rendered 23,731 decisions during Fiscal Year 2015. In November 2015, OATH provided us with the monthly totals for each of these categories during Fiscal Year 2015. Although the sum of the monthly totals for these categories matched the grand totals that were reported in the MMR, OATH was unable to provide case lists that supported these monthly totals. As a result, we were unable to determine whether the monthly totals were accurate.

OATH officials informed us that because ATAS, the source of the monthly totals, is a live system that permits revision of case information, OATH is unable to create case lists to support the monthly totals previously submitted for the MMR. For example, because ATAS only shows the latest decision date on a case, if an original decision on a case is rendered in Fiscal Year 2015 and an appeals decision on the same case is rendered in Fiscal Year 2016, a case list generated by ATAS now would not credit the Health Hearings unit with having rendered a decision on the

case in Fiscal Year 2015. Because OATH did not generate and save case lists when it calculated and submitted its monthly totals for the MMR, it has no support for the performance data reported in the MMR. By generating and saving such case lists, OATH would be able to test the reliability of its performance data (by, for example, looking for anomalies such as duplicates and clearly erroneous data entries). Without greater assurance that its performance data is accurate, OATH needs to be very cautious in making any managerial decisions based on this data.

## Recommendation

6. OATH should generate and maintain adequate support for the performance data on the Health Hearings unit that is submitted for inclusion in the MMR.

**OATH Response:** “OATH will take this recommendation into consideration during upcoming tribunal division mergers. However, at this time OATH maintains records of how the MMR performance data is arrived at each month, which go through several levels of review. This methodology has proved adequate in informing OATH management of the performance of this tribunal since its transfer from DOHMH to OATH. Any form of ‘instancing’ of the ATAS database for the purpose [of] snapshotting the detailed backup data each month would require resources well beyond what OATH has a[t] its disposal at this time and serves no practical managerial purpose.”

**Auditor Comment:** We are pleased that OATH officials will take this recommendation into consideration. Without detailed support for its performance data, there is no assurance that the totals reported to the public in the MMR are accurate.

## Data Reliability Concerns

OATH uses a Microsoft Access database, called the Health Hearings by Telephone Scheduling and Tracking Database (the Telephone Database), to schedule phone hearings and track phone adjudications. OATH’s ATAS list of cases for which decisions were rendered during Fiscal Year 2015 included in-person hearings, hearings by mail, and hearings online in the “Type of Hearing Conducted” field. No data was presented on hearings by phone.

By comparing information in the Telephone Database to data on the ATAS list, we found that 88 cases identified as being hearing-by-phone cases in the Telephone Database were incorrectly designated as hearing-by-mail cases in ATAS. For OATH to be in a better position to monitor its hearings by alternative means, it should have accurate information on the use of the three alternative means.

The audit also found some discrepancies between the information recorded on the 28 manually filed NOV’s in our sample and the information recorded in ATAS. If the weaknesses that led to the minor discrepancies are not corrected, OATH’s ability to maintain fully accurate and complete data will be compromised. Specifically, pertinent information recorded on 13 (46 percent) of the 28 manually filed NOV’s either was not entered in ATAS at all or was entered incorrectly. For example, the suite or apartment numbers were indicated as part of the respondents’ mailing or establishment addresses on four NOV’s, but were not recorded as part of the addresses in ATAS. In another example, the business names of the respondents (i.e., the “Trade Name” or the “Doing Business As” name) were indicated on eight NOV’s, but were not recorded in ATAS.

It is important for OATH to maintain accurate information on its cases, especially regarding business names and addresses, to ensure that OATH's mailings to respondents are delivered properly.

## Recommendations

7. OATH should ensure that it maintains accurate information on the use of hearings by alternative means.

**OATH Response:** "It bears noting that the data was not found to be unreliable, only that the data was not being tracked in ATAS. ATAS has no current ability to separately track Hearings by Telephone, which consists of new technology that was not in existence when ATAS was developed. This is a software deficiency that cannot be remedied until OATH has completed the development of ATAS to accommodate another substantial high priority project. To compensate for this temporary deficiency, OATH created the Access database, which was provided to the audit team to review the Hearings by Telephone."

**Auditor Comment:** We are pleased that OATH implies that it will eventually remedy the deficiency of ATAS not being able to track hearings by phone. As a point of clarification, the data in ATAS was unreliable to the extent that we found hearing-by-phone cases identified as hearing-by-mail cases.

8. OATH should more closely monitor the accuracy of information recorded in ATAS related to manually filed NOV's to ensure that the information is complete and accurate.

**Auditor Comment:** OATH did not address this recommendation in its response.

## Lack of an ATAS User Manual

OATH does not have an ATAS manual for its employees to use as a guide when operating ATAS. (ATAS has been in use since July 2010.) ATAS contains a central repository of case information, including NOV's filed, proceedings held, written evidence admitted, rescheduled forms submitted, and decisions rendered. According to the Director of Technology Strategy and Implementation, an ATAS manual was created by DOHMH when it was responsible for hearing and adjudicating health cases. However, OATH never received a copy of the manual when this function and ATAS were transferred to OATH.

In the absence of an ATAS user manual, management is less able to ensure that staff entering and using hearings and adjudications data in it are properly performing their tasks.

## Recommendation

9. OATH should develop and implement an ATAS user manual to ensure that ATAS data is entered and used properly.

**OATH Response:** "ATAS was not originally proprietary to OATH. ATAS was created by DOHMH and has been in use at OATH since 2011 when the DOHMH tribunal was merged into OATH. OATH has created a draft User Manual which we are unable to complete until other high-priority ATAS projects are completed."

**Auditor Comment:** We are pleased that OATH is working on a user manual as we suggest. We urge the agency to complete it and to consider the relevant findings and recommendations from this audit when doing so.

## Other Matters

### Hearings Scheduled by DOHMH Too Soon or Too Long After Service of NOV

#### Hearings Scheduled Too Early

Notwithstanding a regulatory requirement that hearings on NOVs may not be scheduled to occur until 15 calendar days *after* service of the NOVs on the respondents, our review of Fiscal Year 2015 ATAS data revealed that 122 had their original hearing dates scheduled by DOHMH for fewer than 15 calendar days after the NOVs had been served.<sup>12</sup> These prematurely scheduled hearing dates ranged from only 3 days after the NOVs had been served to 14 days after. While relative to the 29,343 NOVs served in this period, this is a very small number, the fact that any NOVs were scheduled for hearings fewer than 15 days after the NOV was served reflects a material system weakness, since the timing of the hearing is a regulatory requirement.

The source of these scheduling errors is not clear. In the normal course, DiRAD should prompt DOHMH inspectors to select a hearing date from one of three options: (1) an expedited hearing date, such as the closing of an establishment, in which case the hearing must be scheduled 15 days after the NOV is served; (2) a routine hearing date for an NOV that was personally served on the respondent, in which case the hearing must be scheduled 21 days after service; and (3) a routine hearing date for an NOV that was mailed to the respondent, in which case the hearing must be scheduled within 30 days. However, inspectors are not limited to these dates.

ATAS generally flags NOVs whose scheduled hearing dates differ from the dates that had been offered by DiRAD to the inspectors and places the NOVs in a Docketing Exception Folder for resolution. However, OATH simply removes them from the Docketing Exception Folder and places them in a Case Ready Folder without informing DOHMH about these scheduling errors.

Scheduling an original hearing too early can disadvantage the respondent since there is a chance that the respondent would not receive the NOV before the scheduled hearing date, which would result in a default decision being issued against the respondent. And even if the respondent did receive the NOV and did not default, the respondent might not have had sufficient time to prepare an adequate defense. At the same time, scheduling an original hearing too early can also disadvantage DOHMH because it could be the basis for a dismissal of the NOV. This would require DOHMH to send an inspector to re-inspect the condition and reissue the NOV, if necessary, all of which would potentially increase costs.

At the exit conference, OATH officials presented evidence relating to a sample of 14 of the 122 cases that were prematurely scheduled. For 7 of the 14 cases, OATH claimed that after the DOHMH inspectors entered hearing dates on the NOVs that were less than 15 days from the dates of service, ATAS recognized the errors and placed those NOVs in the Docketing Exception Folder. We confirmed that these cases (along with 2 other cases in the sample of 14) were placed in the Docketing Exception Folder. However, as noted above, this only led to OATH removing

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<sup>12</sup> Title 48, §6-08(c)(4) of the Rules of the City of New York.



them from the Docketing Exception Folder and placing them in a Case Ready Folder without informing DOHMH that the hearings for these cases had been scheduled too soon after service.

In two cases, OATH claimed that the hearing dates were not erroneously scheduled early by inspectors. For these two cases, OATH did not notice in its review that the hearing dates in the ATAS dataset that OATH had given us were wrong and that these dates incorrectly indicated that the hearings had been scheduled too soon. In two other cases, OATH claimed that early hearing dates needed to be scheduled because the establishment was closed or the inspector had been blocked from completing the inspection. However, for one case, the date of service of the manually filed NOV was entered incorrectly into ATAS, which again led to an incorrect indication in the ATAS dataset that OATH had given us that the hearing had been scheduled too soon. For the second case, the inspector for an unknown reason used a scheduled hearing date offered by DiRAD from a call he made to DiRAD two weeks earlier. As a result, the inspector scheduled the hearing for 11 days after the NOV was served. The Hearing Officer dismissed the case as a result of the hearing having been scheduled to be held fewer than 15 days from the NOV service date. In the last case, OATH mistakenly claimed that the time period from July 21, 2014 (the NOV service date), to August 4, 2014 (the scheduled hearing date), was 15 days when it was in fact 14 days.

**OATH Response:** “Contrary to the Audit conclusion, there is no ‘statutory requirement’ that hearings be scheduled at least 15 days after service of the NOV. There is an OATH Rule that regulates the content of the NOV and requires it contain a hearing date that ‘must be at least 15 days after the NOV is served, unless another date is required by applicable law’ (48 RCNY 6-08(c)(4)).

“OATH does not select the original hearing date, nor should it. DOHMH’s issuing inspector selects the date from among suggested dates provided by the DIRAD system, a system created by DOHMH and used by their inspectors to schedule hearings. The Audit did not establish there was any violation of Rule 6-08, even by DOHMH, as their review of the data set did not control for cases that properly allow the hearing to be scheduled in less than 15 days—as ‘required by applicable law.’ Indeed, the audit team seemed surprised when this provision of Rule 6-08(c)(4) was brought to its attention at the pre-Exit meeting.”

**Auditor Comment:** The audit team was “surprised” not by the existence of this provision in Rule 6-08(c)(4), but rather by the fact that OATH did not address our email request that it identify other applicable laws that would supersede the 15-day rule.

**OATH Response:** “The ‘required by applicable law’ exception to Rule 6-08 includes instances where hearings are expedited, by law, due to a hazardous condition or where respondent has requested an earlier hearing date. OATH reviewed the audit data and found that both factors were present in a sampling of the 122 cases singled out by the audit team.

“OATH reviewed 14 cases out of the 122 cases determined by the Audit to be ‘untimely’ scheduled. Among the 14 cases were: A) 7 that were sent by ATAS to the Exceptions Folder where problem entries are automatically sent due to a discrepancy; B) 3 that were entitled to expedited processing because of sealing or closure of the business; and C) 3 that had a hearing date scheduled more than 15 days after service on the NOV but the hearing was held earlier because respondent requested it; and D) 1 that was scheduled exactly 15 days from the inspection date. Thus, the 14 cases that OATH reviewed actually were either timely scheduled or errors were caught by the protections in place and

resolved. OATH did not check the entire sample, but assumes that further investigation would uncover more of the same. It is important to note that OATH was able to find these errors in the Audit analysis from the data and documents that OATH provided to the audit team.”

**Auditor Comment:** As stated above in the report, OATH officials also presented this argument at the exit conference for this audit. Unfortunately, OATH officials failed to recognize that the draft report we submitted to OATH for comment clearly shows that none of these 14 cases supports its claim that these cases were handled appropriately by OATH or that an exception to the 15-day rule was a factor in any of them. We urge OATH to carefully review our final audit report, which reflects consideration of all of the arguments presented by the agency.

**OATH Response:** “Where a case does not fall within the Rule 6-08 exception and the original hearing date is scheduled less than 15 days from service, it is not ‘untimely’; timeliness is typically a measure of the length of time from the date of occurrence to the date of service, as in a statute of limitation. Thus, early scheduling is not a ‘timeliness’ issue in this regard and is not a basis for dismissal of an NOV. Early scheduling is remedied, simply, by postponing the hearing to a date more convenient to the respondent, to allow respondents a reasonable opportunity to prepare a defense and without any prejudice to the respondent. There is no additional cost to DOHMH of re-serving the NOV or re-inspection as neither is required; and if they were, it would be the result of DOHMH’s own failure to schedule the matter properly, not OATH’s.”

**Auditor Comment:** As noted in the report in our discussion of one of the 14 cases, at least one of its own Hearing Officers disagrees with OATH on this point because the Hearing Officer dismissed the NOV for the sole reason that the hearing had been scheduled to be held fewer than 15 days from the NOV service date. We therefore find no basis to alter our finding.

## Hearings Scheduled Too Late

Although the applicable regulations do not provide for a maximum time period within which DOHMH must schedule a hearing upon the serving of an NOV, OATH officials stated that original hearings should generally be scheduled within 30 days of the NOVs having been served on the respondents. However, the audit found that of the 29,343 cases that had decisions rendered (including defaults and adjournments) during Fiscal Year 2015, 5,764 (20 percent) were not initially scheduled on the NOVs within 30 days.<sup>13</sup> Of the 5,764 cases for which the original hearings were scheduled to be held more than 30 calendar days after the NOVs were served, 270 were scheduled for more than 45 days after the NOVs had been served; 152 of the 270 were scheduled to be held more than 60 days after the NOVs had been served; and 97 of the 270 were scheduled for more than 90 days (up to almost two years) after the NOVs had been served.

Although ATAS often flags such cases, this only leads to OATH removing them from the Docketing Exception Folder and placing them in a Case Ready Folder without informing DOHMH that the hearings for these cases had been scheduled to be held too long after service. However, informing DOHMH of scheduling errors would likely improve the timeliness of the resolution of outstanding NOVs, an outcome that would benefit both parties and the public as well. A prompt

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<sup>13</sup> Although we cite certain ATAS data reliability concerns in this report, we concluded that ATAS data was sufficiently reliable for audit testing purposes.

resolution of violations can help provide clear guidance to the respondents in a timely manner as to exactly what steps need to be taken to be in compliance.

OATH officials told us that it is not their responsibility to inform DOHMH that a hearing has been scheduled for fewer than 15 days or more than 30 days after an NOV has been served on a respondent. They further stated that assisting DOHMH by informing the agency of such scheduling errors might raise questions about OATH's impartiality. OATH officials noted that as an independent adjudicative body, it is important that it both be neutral and be perceived as being neutral. They stated that they cannot take actions that are seen as favoring only the respondents or the City agencies.

While we understand that OATH is not required to inform DOHMH of scheduling errors, we note that these errors potentially have a significant negative impact on the parties and the public as a whole. Preliminarily, the scheduling errors can delay the resolution of the NOV's. This fact alone could leave a cloud of uncertainty over a small business owner respondent. It could also delay the resolution of a potential public health risk. In addition, improperly scheduled hearings could cost the parties extra time and money because they could lead to needless appearances by the respondents at OATH on cases that OATH won't hear and needless expense for DOHMH when it must re-inspect a location and reissue an NOV to start the process all over again.

The processes that result in the dates set for hearings involve both OATH and DOHMH. If OATH is unwilling to assume the role of informing DOHMH about improperly scheduled hearings, DOHMH needs to limit the scheduling options for the inspector to the ones presented by DiRAD. DOHMH could require its inspectors to select one of the scheduling options provided by DiRAD and not permit them to enter other dates on the NOV's.

**OATH Response:** "This finding is built on several faulty premises. Most significantly, there is no rule that regulates how late a hearing might be scheduled after service of an NOV."

**Auditor Comment:** OATH attempts to identify a conflict where there is none. The report clearly states that there is no maximum time period set by law or rule within which DOHMH must schedule a hearing upon the serving of an NOV. Nonetheless, OATH officials told us during the audit that hearings should generally be scheduled within 30 days of the NOV's having been served on the respondents. In fact, this standard has been programmed into DiRAD itself so that the system offers inspectors hearing dates that are no more than 30 days from the dates that the NOV's are served on the respondents.

**OATH Response:** "The Audit lists a series of supposed consequences of a 'late scheduled' hearing, none of which are encountered. It states: 'the scheduling errors can delay the resolution of the NOV's' which 'alone could leave a cloud of uncertainty over a small business owner' and 'delay the resolution of a potential public health risk.' 'In addition, improperly scheduled hearings could cost the parties extra time and money because they could lead to needless appearances by the respondents at OATH on cases that OATH won't hear.' This is flatly untrue. A respondent may reschedule a hearing for an earlier date, in accordance with our rules, thus ending any uncertainty and giving the respondent the option of choosing a better date. There is no 'cloud of uncertainty' or 'extra time and money' or 'needless appearance' necessary. OATH will never deny a respondent a hearing on an NOV filed in accordance with OATH rules, and as stated above there is no rule that regulates how late a hearing may be scheduled after service.

“If the public health were implicated in a case scheduled for [a] hearing more than 30 days after service, DOHMH can exercise its enforcement authority to shut down the facility for a condition that poses a severe risk to the public health or safety.”

**Auditor Comment:** OATH’s contention that hearing scheduling errors never inconvenience respondents strains credulity. Furthermore, there is a potential health risk to delayed hearings. As we noted above, until the validity of a violation is resolved by an OATH Hearing Officer, it is likely that the respondent will be reluctant to change its practices or equipment, leading to potential health risks for the public.

## Recommendation

10. The Mayor’s Office of Operations should advise OATH and DOHMH to consider revising their hearing scheduling practices and procedures to minimize the possibility of improper hearing dates being set, including having DOHMH limit its inspectors’ hearing scheduling options to the ones presented by DiRAD.

**Mayor’s Office of Operations Response:** The Mayor’s Office of Operations did not respond to this recommendation.

**Auditor Comment:** The Mayor’s Office of Operations does a disservice to the public by failing to respond to this recommendation. If DOHMH would limit its inspectors’ hearing scheduling options to the ones presented by DiRAD, and if OATH would facilitate this change by adjusting its procedures to coincide with the change, then the issue of OATH informing DOHMH about hearings that are scheduled to be held too soon or too long after the NOV’s have been served on the respondents could largely be resolved. Therefore, we reaffirm our recommendation that the Mayor’s Office of Operations advise DOHMH and OATH to revise their procedures to address the problem of hearing scheduling errors.

**OATH Response:** “The Audit recommendation is misguided. The Auditors have a fundamental misunderstanding of the ability of the petitioner agency to choose a hearing date at any time it deems appropriate. There is a remedy to address timeliness, and the appropriate forum to do so is either at a hearing, or in the case of a default, on a motion to vacate the default’s decision. Any *ex parte* correspondence with the petitioner questioning the reason for scheduling a hearing for a particular date would inappropriately compromise OATH’s neutrality.”

**Auditor Comment:** We preliminarily discussed this issue with OATH officials and modified the draft report and recommendation based on those discussions. We urge OATH to carefully review our final audit report, which reflects consideration of all of the information provided to us.

## DETAILED SCOPE AND METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective. This audit was conducted in accordance with the audit responsibilities of the City Comptroller as set forth in Chapter 5, §93, of the City Charter.

The scope of this audit covers the period from July 1, 2014, through December 31, 2015.

To obtain an understanding of OATH's hearings process for cases relating to NOV's issued by DOHMH, we reviewed the following:

- Executive Order 32, dated July 25, 1979, which established OATH to professionalize the administrative hearing system serving City government;
- Executive Order 148, dated June 8, 2011, which expanded OATH's jurisdiction by transferring DOHMH's administrative tribunal to OATH;
- The *Interagency Agreement* between OATH and DOHMH, dated July 1, 2011, which set forth the provisions of the transfer of the DOHMH tribunal to OATH, including the transfer of personnel and ATAS, and each agency's responsibilities concerning DiRAD;
- Title 48, Chapter 6, of the Rules of the City of New York (RCNY), entitled *Rules of Practice Applicable To Cases Before the Health Tribunal At OATH*, which governed the hearings and adjudication process prior to July 1, 2015;
- The *Notice of Promulgation of Rule*, which contains, among other things, the revisions of Title 48, Chapter 6, of the RCNY that became effective on July 1, 2015. The purpose of these revisions was to streamline OATH's processes, provide greater consistency across tribunals, and allow new types of cases to be assigned to OATH in the future;
- The *Summary of Changes to the OATH Health Tribunal*, which summarizes the key changes to Title 48, Chapter 6, of the RCNY;
- Fiscal Year 2015 Mayor's Management Report; and
- OATH's published Annual Reports for 2012, 2013, and 2015 (there was no published report in 2014).

To obtain an understanding of the various informational and instructional materials available to the general public on the OATH website regarding the hearings, default, and appeals processes, we reviewed the following:

- Various OATH brochures outlining the roles of the respondent, DOHMH, and the Health Hearings unit, including the brochures entitled, *What is the OATH Hearings Division?*, *Defaulted Cases: What You Should Know*, and *Should I Appeal?*;
- OATH's *Frequently Asked Questions (FAQ)*, which includes information concerning Health Hearings unit locations, the days and hours of operation, and the steps that a respondent must take to contest an NOV; and



- Health Hearings unit statistics regarding cases received from DOHMH during Fiscal Year 2015.

To familiarize ourselves with ATAS and its various features and functions regarding NOV, proceedings, written evidence, and decisions, we interviewed the Legal Support and Deputy Operations Manager, who also provided a demonstration of this system. In addition, to obtain an understanding of how ATAS communicates with DOHMH's FACTS II computer system regarding the filing of NOV, we inquired with OATH's Director of Technology Strategy and Implementation, who was instrumental in the creation of ATAS. Based on this information and our own read-only access to the system, we assessed ATAS processes and controls to determine whether OATH properly segregated duties and identified and addressed areas of potential risk.

To obtain an understanding of how OATH is responsible for adding docket numbers and available hearing dates in DiRAD for the DOHMH inspectors to use, we observed a demonstration of this telecommunications system by the Docketing Supervisor of the Health Hearings unit. In addition, we interviewed the Operations Manager, who is responsible for overseeing DiRAD and the administrative operations of ATAS.

To obtain an understanding of the responsibilities of Health Hearings unit officials and the controls in place in relation to the handling of health hearings and adjudications, we interviewed the Assistant Commissioner/Senior Counsel of OATH and the Health Hearings unit's Deputy Commissioner and Assistant Commissioner.

To gain a more detailed understanding of the in-person (live) hearings process and the types of decisions rendered, we interviewed the Managing Attorney from the Health Hearings unit who is responsible for the Queens and Staten Island locations and a Hearing Officer at the Manhattan location. We also interviewed the Managing Attorney/Senior Counsel of the Hearings by Alternative Means Unit within the Health Hearings unit, who is responsible for overseeing the Hearing Officers conducting hearings by phone, by mail, or online. To obtain an understanding of the appeals process, we interviewed a Hearing Officer from the Appeals Unit.

We reviewed the MMR for Fiscal Year 2015 for information on the number of cases received by the Health Hearings unit, the number of hearings conducted, and the number of decisions rendered. We then requested supporting documentation from the Health Hearings unit to determine whether the reported numbers were accurate.

On January 14, 2016, OATH provided us with an ATAS dataset containing hearing and adjudication information on a total of 34,474 cases that were filed during Calendar Year 2015. On January 26, 2016, OATH provided us with an ATAS hearing and adjudication dataset on a total of 18,548 cases that were filed during the second half of Calendar Year 2014. (By combining these datasets, we had hearing and adjudication information for cases filed during Fiscal Year 2015 and the first half of Fiscal Year 2016.) Also on January 26, 2016, OATH provided an ATAS hearing and adjudication dataset on a total of 29,343 cases that had Fiscal Year 2015 disposition dates. For each case, the datasets presented the docket number, the NOV issuance date, whether the NOV was filed manually or electronically with OATH, the NOV filing date, the scheduled hearing date and time, any rescheduled hearing date, the type of hearing conducted (in-person, by mail, or online), the actual hearing date, the case disposition date, and the case status (e.g., decision rendered or settlement accepted).<sup>14</sup>

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<sup>14</sup> The disposition date shown in ATAS reflects the latest decision on a case. For example, if a respondent submits an appeal, the disposition date shown in ATAS is the date of the appeal decision.

As part of our review of the hearings and adjudication data, we checked for any anomalies, such as duplicate docket numbers and inappropriate field entries. In addition, we compared the 89 Fiscal Year 2015 hearing-by-phone cases identified in an Access database, the Health Hearings by Telephone Scheduling and Tracking Database, to the dataset containing 29,343 cases that had Fiscal Year 2015 disposition dates.

We also determined whether manual NOV's filed with OATH were entered into ATAS accurately. To do so, we randomly selected a total of 20 manual NOV's from the Docketing Supervisor's files that had been received by OATH and that had original scheduled hearing dates during the period September through December 2015. We compared certain information recorded on the manual NOV's with corresponding data in ATAS. Next, we randomly selected 10 manual NOV's received by OATH between August and December 2015 from the OATH dataset we received containing 34,474 cases filed during Calendar Year 2015. We determined whether certain dataset information on the cases matched the available information on the NOV's in OATH's hard-copy files.

We obtained Notice of Violation Transmittal Reports (which list all manual NOV's that were delivered in person by DOHMH to OATH) for eight randomly selected days during Fiscal Year 2015. We determined whether each of the 186 NOV's listed on these reports were recorded in ATAS. We also calculated the number of days between the dates the NOV's were received to the dates that the NOV's were entered into ATAS to determine the timeliness of OATH's recording of NOV information in ATAS.

We also calculated the number of days between the dates the NOV's were filed to the dates of the originally scheduled hearings to determine whether NOV's were filed prior to the scheduled hearing dates, as required. We also determined whether the originally scheduled hearing dates were between 15 and 30 calendar days after the NOV's were served, as required.

As part of our testing of in-person hearings, we randomly selected 18 days during Fiscal Year 2015 and obtained reports from OATH of all the cases that were scheduled to be heard on each of these days. From these 18 reports, we judgmentally selected 18 cases (one case per day). In addition, we randomly selected another 16 days during Fiscal Year 2015 and obtained reports from OATH of all the cases that were filed on each of these days. From these 16 reports, we judgmentally selected 18 cases. We ensured, as part of our judgmental sample selection of 36 cases, that we selected cases from each borough and a variety of entity types.<sup>15</sup>

As part of our testing of hearings by alternative means, we randomly selected three months—July 2014 for hearings by phone, October 2014 for hearings by mail, and January 2015 for online hearings. We obtained reports from the Hearings by Alternative Means Unit on these cases, which included hearing and adjudication date information. From these reports, we judgmentally selected 15 cases—five with phone hearings, five with mail hearings, and five with online hearings.

For each of the total of 51 sampled cases (36 in-person and 15 hearings-by-alternative-means cases), we obtained documentation from ATAS, which included scanned hard-copy documents (including the filed NOV, written evidence submitted by the respondent or DOHMH, rescheduling requests submitted by the respondents or DOHMH, forms showing that OATH granted rescheduled hearings, settlement offers made by DOHMH, acceptance of settlement offers by the respondents, original decisions rendered, and appeal documentation and decisions) as well as

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<sup>15</sup> The types of entities in our sample selection included food service establishments, day camps, swimming pools, day care centers, and funeral homes.

various ATAS screenshots displaying, for example, Case History, NOV, and Case Notes. For these 51 cases, we compared the information in ATAS to the information in the datasets provided to us by OATH on January 14 and 26, 2016. In addition, we compared the information on hard-copy documents that were scanned into ATAS to data that was entered into ATAS to determine whether the information matched.

For the 51 cases, we then calculated the number of days between each rescheduled hearing date to determine the timeliness of rescheduled hearings. To determine timeliness, we used the informal criteria OATH outlined to us in an email. (According to the email, rescheduled hearing dates should be between one and three weeks from the previously scheduled hearing dates.) Finally, we determined whether OATH accepted from either party more than the maximum of three requests for rescheduled hearings.

For the 51 cases, we also calculated the number of days between the actual hearing dates and the disposition dates to determine whether original decisions were rendered in a timely manner. We compared our results to the criteria. For in-person hearings, we used the informal criteria OATH outlined to us in an email. (According to the email, a decision should be rendered on the same day as the hearing. However, if more time is needed for a Hearing Officer to work on a case, then the decision should be rendered within one week of the hearing.) For hearings by alternative means, we used the criteria presented on OATH's website that decisions should be received by the respondent within 30 days.

On November 30, 2015, OATH provided us with a dataset containing information on a total of 284 appeal applications that were received during Fiscal Year 2015. We reviewed this data to determine whether the appeal applications were submitted to OATH within 30 days of the original decisions having been issued in person (or within 35 days of the original decisions having been mailed). In addition, we reviewed this and related ATAS data and documentation to determine whether appeal decisions were rendered within 90 days of the receipt of the appeal applications.

Although the results of our sampling tests were not statistically projected to their respective populations, these results, together with the results of our other audit procedures and tests, provide a reasonable basis for us to assess the timeliness of OATH's handling of cases relating to NOVs issued by DOHMH.



100 CHURCH STREET, 12<sup>TH</sup> FLOOR, NEW YORK, NEW YORK 10007

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

June 21, 2016

By Hand Delivery

Majorie Landa  
Office of the Comptroller  
1 Centre Street, Room 1100  
New York, NY 10007

RE: Audit Report on the Hearings of the Office  
Of Administrative Trials and Hearings on Notices  
Of Violations Issued by the Department of Health and  
Mental Hygiene  
ME16-064A

Dear Ms. Landa:

Attached please find a copy of OATH's response to the draft report on the Hearings of the Office of Administration Trials and Hearings on Notices of Violations Issued by the Department of Mental Health and Hygiene.

If you require anything further, please contact this office.

Sincerely,

A handwritten signature in blue ink, appearing to read "Fidel F. Del Valle", is written over the typed name.

Fidel Del Valle, Esq.  
Commissioner and Chief Administrative Law Judge



## RESPONSE TO COMPTROLLER AUDIT OF DOHMH/HEARINGS DIVISION

At the outset, OATH would like to correct a misimpression about its role in City government. As discussed at the recent exit conference with respect to the preliminary report, OATH is an independent agency charged with the responsibility of adjudicating administrative summonses in a fair and timely manner. It functions as a court. DOHMH, on the other hand, is a City agency charged with enforcement of the laws to protect the public health and safety. DOHMH does so, in part, by charging individuals and businesses with violations of the law in what are called Notices of Violations (NOVs or summonses), which are adjudicated at OATH. The two agencies are entirely independent of the other. There is not, nor should there be, any cause and effect correlation between the functions of the court and the functions of the enforcement agency. Doing so would undermine the impartial adjudication process created at OATH. The OATH procedural rules provide both the petitioning agency and respondent with an opportunity to be heard using a uniform set of rules that applies evenly to both parties.

It is the separation between adjudication and enforcement that the auditors apparently disregarded or missed. Thus, the findings of the Comptroller's Audit ("Audit") display in several ways a fundamental misunderstanding of OATH's function and procedures. We ask that those errors in understanding be removed from the report. For example, OATH's function is not one of policing the public health. Its role is adjudication. If the public health were implicated in a case scheduled for a pending hearing, DOHMH may continue to inspect the premises, issue violations where they exist, and shut down a facility for a condition that poses a severe risk to the public health or safety without the intervention of OATH.

Indeed, as an independent administrative tribunal, it is inappropriate for OATH to instruct a party as to defects in its pleading or procedures, except through the decisions of its hearing officers and administrative law judges. Moreover, aiding one party in preparing their case would compromise OATH's position as an impartial tribunal. The audit team's recommendations ignore the basic mission of an independent court. Policing the conduct of an enforcement agency would be consistent with and therefore inappropriate court advice to a party as to how to prosecute its cases. Moreover, the audit team's interpretation of the data often was in error. In addition, there are places where the Audit's objectives appear to be misguided and its approach and analysis misconceived.

Following are the audit findings and recommendations, as well as OATH's reply.

- I. **The Audit criticizes the length of time for reschedules using a data sample of 51 out of over 37,000 cases (just over a tenth of one per cent of the database available to them). Many of the criticisms are unfounded, as explained below.**

### Hearings Were Not Rescheduled in a Timely Manner

*Audit findings: OATH has not established formal standards to govern the amount of time that may elapse between a scheduled hearing date and its rescheduled date. This increases the likelihood of delays in the hearings and adjudication process. In addition, a delay in the process might contribute to the public being subjected to increased health and safety risks. (Pages 6-7 of the report)*



*Audit Recommendations:*

1. *OATH should develop formal written standards to govern the timeframes for rescheduled hearings and clearly communicate these standards to its staff.*
2. *OATH should monitor staff compliance with the standards to ensure that hearings are rescheduled in a timely manner.*
3. *OATH should consider modifying ATAS to flag for review those hearings that are not rescheduled within the required timeframes and use that as a monitoring and instruction tool for staff.*

**OATH does not agree with these recommendations.**

- 1) OATH does in fact have formal standards governing hearing reschedules. Pursuant to OATH Rule 6-01, an adjournment is obtained after the commencement of a hearing. A reschedule is obtained before the hearing. Prior to July 1, 2015, our rules provided for multiple "reschedules" which could be requested by either party. By amendment effective July 1, 2015, OATH Rule 6-05 allows each party one reschedule, though it does not limit the length of time. The amendment was created to eliminate repeated pre-hearing reschedules.
- 2) OATH does not establish the amount of time allowed in a reschedule by rule, in order to allow the parties to obtain the time they need to adequately prosecute or defend consistent with fairness to all sides. However, there is an internal protocol of 21 days. When a reschedule is requested by any party, OATH's calendar unit will pick a date based upon the date next available on the calendar and the needs of the parties.
- 3) OATH's rule limiting the number of reschedules available -- aided by the adversary system itself -- provides an adequate backstop to excessive delay. The Audit findings do not demonstrate a need to adopt a formal mandate, a draconian measure that would ignore the legitimate needs of parties. The Audit points to 23 out of 52 rescheduled hearings (a tiny sample out of over 37,000 hearings conducted) that were rescheduled for a new date more than 21 calendar days later. An arbitrary mandate would serve no purpose, particularly where the small number of reschedules cited in this audit is no indication of a problem with the system as it exists.
- 4) As stated in the introduction to this Response, the audit emphasizes a public health role that OATH does not have. Moreover, the timing of the hearing has no relation to compliance. A hearing only determines whether there existed a violation at a particular moment on a particular day. Nothing more.
- 5) There is no need for OATH to modify ATAS "to flag for review those hearings that are not rescheduled within the required timeframes," because no such timeframes exist in any law or rule. ATAS work flows are developed based on defined business rules. Since there is no business rule on timeliness of reschedules, there is no rationale for modifying ATAS.

**II. The Audit makes recommendations that were implemented by OATH prior to commencement of the Audit.**

*Improper Handling of NOV's That Were Filed Subsequent to the Scheduled Hearing Dates*

*Audit findings: When DOHMH fails to file an NOV with OATH until after the scheduled hearing date and the respondent appears at OATH for the scheduled hearing, the case cannot be heard. In this situation, OATH's procedures require a letter to be issued to the respondent that states that a hearing could not be*

*held and that OATH will not reschedule the hearing or make a decision on any of the violations cited on the NOV. ATAS has been programmed to reject the NOV that has been filed with OATH subsequent to the scheduled hearing date and to place the NOV in the Late Delivery Case Folder. In order to be heard by OATH, DOHMH would need to reissue the NOV to the respondent that provides a new hearing date and time.*

*However, the audit found that in some instances OATH improperly rescheduled some of these hearings and did not send the cases back to DOHMH and require new NOV's to be served in order for the process to begin again. Such cases could increase costs to the City based on duplication of efforts where a case has been improperly rescheduled by OATH, only to be dismissed and then refiled. (pages 7-8 of the report)*

*Audit Recommendations:*

- 4. OATH should monitor the filing of NOV's more closely to ensure that those NOV's filed subsequent to the scheduled hearing date are rejected by ATAS, placed in the Late Deliver Case Folder and provided to DOHMH on a regular basis.*
  - 5. OATH should ensure that it does not reschedule hearings on NOV's filed after the scheduled hearing dates.*
- 1) The Audit found that 265 cases were improperly scheduled for hearing even though filed by DOHMH filed after the original scheduled hearing date and were not "rejected" by OATH. They recommend OATH monitor such late filings. OATH is currently monitoring late filings in accordance with a practice adopted in or around March 2015. OATH saw the need in fiscal year 2015 to tighten its protocol for handling NOV's received after the hearing date contained on the NOV. Under our current procedure, such late filings are rejected and are not rescheduled for hearing. Thus, recommendations 4 and 5 have already been satisfied.
  - 2) The Audit's concern that DOHMH is not notified of late filings is unwarranted. DOHMH has read-only access to ATAS and can access this information without requiring OATH, an impartial adjudicatory body, to prepare and send error reports to DOHMH and other enforcement agencies. It is inappropriate and not OATH's responsibility to police their internal processes.

### **III. Support for Performance Data Submitted for the Mayor's Management Report.**

OATH will take this recommendation into consideration during upcoming tribunal division mergers. However, at this time OATH maintains records of how the MMR performance data is arrived at each month, which go through several levels of review. This methodology has proved adequate in informing OATH management of the performance of this tribunal since its transfer from DOHMH to OATH. Any form of "instancing" of the ATAS database for the purpose snapshotting the detailed back up data each month would require resources well beyond what OATH has as its disposal at this time and serves no practical managerial purpose.



**IV. Data Reliability Concerns.**

It bears noting that the data was not found to be unreliable, only that the data was not being tracked in ATAS. ATAS has no current ability to separately track Hearings by Telephone, which consists of new technology that was not in existence when ATAS was developed. This is a software deficiency that cannot be remedied until OATH has completed the development of ATAS to accommodate another substantial high priority project. To compensate for this temporary deficiency, OATH created the Access database, which was provided to the audit team to review the Hearings by Telephone.

**V. Lack of an ATAS User Manual.**

ATAS was not originally proprietary to OATH. ATAS was created by DOHMH and has been in use at OATH since 2011 when the DOHMH tribunal was merged into OATH. OATH has created a draft User Manual which we are unable to complete until other high-priority ATAS projects are completed.

**VI. OATH has already explained to the auditors why a case may legitimately have a hearing date less than 15 days from service of the NOV. These arguments were fundamentally misunderstood.**

[Some Hearings Scheduled Too Soon After Service of NOV](#)

*Audit findings: Notwithstanding a statutory requirement that hearings on NOVs may not be scheduled to occur until 15 calendar days after service of the NOVs on the respondents, our review of ATAS data revealed that 122 had their original hearing dates scheduled by DOHMH for fewer than 15 calendar days after the NOVs had been served. These prematurely scheduled hearing dates ranged from only 3 days after the NOVs had been served to 14 days after. . . . ATAS generally flags NOVs whose scheduled hearing dates differ from the dates that had been offered by DIRAD to the inspectors and places the NOVs in a Docketing Exception Folder for resolution. However, OATH simply removes them from the Docketing Exception Folder and places them in a Case Ready Folder without informing DOHMH about these scheduling errors. Scheduling an original hearing date too early can disadvantage the respondent since there is a chance that the respondent would not receive the NOV before the scheduled hearing date, which would result in a default decision being issued against the respondent. . . . (pages 10-11 of the report)*

- 1) Contrary to the Audit conclusion, there is no “statutory requirement” that hearings be scheduled at least 15 days after service of the NOV. There is an OATH Rule that regulates the content of the NOV and requires it contain a hearing date that “must be at least 15 days after the NOV is served, unless another date is required by applicable law” (48 RCNY 6-08(c)(4)).
- 2) OATH does not select the original hearing date, nor should it. DOHMH’s issuing inspector selects the date from among suggested dates provided by the DIRAD system, a system created by DOHMH and used by their inspectors to schedule hearings. The Audit did not establish there was any violation of Rule 6-08, even by DOHMH, as their review of the data set did not control for cases that properly allow the hearing to be scheduled in less than 15 days -- as “required by applicable law.” Indeed, the audit team seemed surprised when this provision of Rule 6-

- 08(c)(4) was brought to its attention at the pre-Exit meeting.
- 3) The “required by applicable law” exception to Rule 6-08 includes instances where hearings are expedited, by law, due to a hazardous condition or where respondent has requested an earlier hearing date. OATH reviewed the audit data and found that both factors were present in a sampling of the 122 cases singled out by the audit team.
  - 4) OATH reviewed 14 cases out of the 122 cases determined by the Audit to be “untimely” scheduled. Among the 14 cases were: A) 7 that were sent by ATAS to the Exceptions Folder where problem entries are automatically sent due to a discrepancy; B) 3 that were entitled to expedited processing because of sealing or closure of the business; and C) 3 that had a hearing date scheduled more than 15 days after service on the NOV but the hearing was held earlier because respondent requested it; and D) 1 that was scheduled exactly 15 days from the inspection date. Thus, the 14 cases that OATH reviewed actually were either timely scheduled or errors were caught by the protections in place and resolved. OATH did not check the entire sample, but assumes that further investigation would uncover more of the same. It is important to note that OATH was able to find these errors in the Audit analysis from the data and documents that OATH provided to the audit team.
  - 5) Where a case does not fall within the Rule 6-08 exception and the original hearing date is scheduled less than 15 days from service, it is not “untimely”; timeliness is typically a measure of the length of time from the date of occurrence to the date of service, as in a statute of limitation. Thus, early scheduling is not a “timeliness” issue in this regard and is not a basis for dismissal of an NOV. Early scheduling is remedied, simply, by postponing the hearing to a date more convenient to the respondent, to allow respondents a reasonable opportunity to prepare a defense and without any prejudice to the respondent. There is no additional cost to DOHMH of re-serving the NOV or re-inspection as neither is required; and if they were, it would be the result of DOHMH’s own failure to schedule the matter properly, not OATH’s.

**VII. OATH explained to the auditors that DOHMH’s scheduling of hearing dates more than 30 days from service of the NOV (i) was not improper, (ii) did not harm respondents, and (iii) was simply remedied. Their conclusions to the contrary are erroneous.**

Hearings Scheduled Too Long After Service of NOV

*Audit findings: Although the applicable statutes do not provide for a maximum time period within which DOHMH must schedule a hearing upon the issuance of an NOV, OATH officials stated that original hearings should generally be scheduled within 30 days of the NOVs having been served on the respondents. However, the audit found that of the 29,343 cases that had decisions rendered (including defaults and adjournments)<sup>1</sup> during Fiscal Year 2015, 5,764 (20 percent) were not scheduled within 30 days. Of the 5,764 cases for which the original hearings were scheduled to be held more than 30 calendar days after the NOVs were served, 270 were scheduled for more than 45 days after the NOVs had been served; 97 of the 270 were scheduled for more than 90 days (up to almost two years) after the NOVs had been served. (pages 11-12 of the report)*



*Audit Recommendation:*

10. *The Mayor's Office of Operations should advise OATH and DOHMH to consider revising their hearing scheduling practices and procedures to minimize the possibility of improper hearing dates being set, including having DOHMH limit its inspectors' hearing scheduling options to the ones presented by DiRAD.*

- 1) This finding is built on several faulty premises. Most significantly, there is **no rule** that regulates how late a hearing might be scheduled after service of an NOV.
- 2) The Audit lists a series of supposed consequences of a "late scheduled" hearing, none of which are encountered. It states: "the scheduling errors can delay the resolution of the NOVs" which "alone could leave a cloud of uncertainty over a small business owner" and "delay the resolution of a potential public health risk." "In addition, improperly scheduled hearings could cost the parties extra time and money because they could lead to needless appearances by the respondents at OATH on cases that OATH won't hear." This is flatly untrue. A respondent may reschedule a hearing for an earlier date, in accordance with our rules, thus ending any uncertainty and giving the respondent the option of choosing a better date. There is no "cloud of uncertainty" or "extra time and money" or "needless appearance" necessary. OATH will never deny a respondent a hearing on an NOV filed in accordance with OATH rules, and as stated above there is no rule that regulates how late a hearing may be scheduled after service.
- 3) If the public health were implicated in a case scheduled for hearing more than 30 days after service, DOHMH can exercise its enforcement authority to shut down the facility for a condition that poses a severe risk to the public health or safety.
- 4) The Audit recommendation is misguided. The Auditors have a fundamental misunderstanding of the ability of the petitioner agency to choose a hearing date at any time it deems appropriate. There is a remedy to address timeliness, and the appropriate forum to do so is either at a hearing, or in the case of a default, on a motion to vacate the default decision. Any *ex parte* correspondence with the petitioner questioning the reason for scheduling a hearing for a particular date would inappropriately compromise OATH's neutrality.

Regardless of when a case is scheduled, OATH's function is to adjudicate the case. It is not to police, regulate or train the enforcement agency or advise it of applicable legal requirements. To do so in any way would be inappropriate. The remedy for any failure by the petitioning enforcement agency lies in the adjudication process.