

OATH

BenchNOTES

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Message from Chief Judge Rose Luttan Rubin



I, too, have a dream.

With many others in the justice system, I share with Dr. Martin Luther King a dream of liberty and justice for all. These ideals also are the theme of Law Day 2001.

My dream is of an administrative law system for New York City which reflects and honors the fairness, freedom from bias, scholarship and industry of its judges, where counsel, in a dispassionate and professional manner, defining the issues, present the relevant facts and law to the court and where litigants leave the courtroom with a sense that they were fairly dealt with. In our work at OATH, this dream is tested and measured each day in each case.

Lawyering and judging in the 21st Century confronts the premise that resolving disputes between person and person, employer and employee or nation and nation should be resolved by the rule of law rather than by arbitrary personal whim or superior force. As our culture

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UPDATE ON OATH WEBSITE

Some of the forms used by parties appearing at OATH proceedings are now available on our website (www.nyc.gov/oath). It is now possible to download or print a Notice of Appearance, Intake forms and three different Subpoenas. The forms must be submitted either in person, by mail or by facsimile. The availability of these forms on our website is just one of OATH's efforts to process our cases expeditiously and efficiently.

BenchNEWS

OATH welcomes Administrative Law Judge **Christopher D. Kerr**, who comes to OATH from the New York City Department of Consumer Affairs, where he served as an Administrative Law Judge and Acting Director of Adjudication. He has also been an Associate Attorney with the Departmental Disciplinary Committee of the New York State Supreme Court, Appellate Division, First Department. ALJ Kerr holds an A.B. from Harvard College, a J.D. from New York University School of Law, and an M.A. in public administration from the John F. Kennedy School of Government at Harvard University.

Kara Miller, Esq., OATH's new managing attorney, has worked as an Assistant Chief Administrative Law Judge for the New York City Taxi and Limousine Commission, an Impartial Hearing Officer for the New York City Board of Education in Special Education cases, and an Administrative Law Judge for the N.Y.C. Parking Violations Bureau. She is a graduate of Union College, George Washington University School of Law, and Fordham University Graduate School of Business Administration. Ms. Miller is an Adjunct Professor in the Business Law Department of Fordham University

Graduate School of Business where she teaches *Business Law and Marketing and the Law*.

Welcome to **Mary Williams**, who joined our staff in July, 2000 as a confidential secretary. She has worked as a legal secretary in several law firms and for many years in a philanthropic organization. She has raised two children, who are now both working adults.

Xin Wang, a Pace University graduate student in computer science, works for OATH in information technology support. Her predecessor, **Joanna Trzpis**, graduated from Pace this past winter and left OATH for a career in the private sector.

Alexandra Fisher, Esq. has been a law clerk at OATH since July 1998. Recently, she accepted a position with the New York City Fire Department in their Legal Affairs Bureau. OATH wishes her success in her new position.

Administrative Law Judge **Dierdra Tompkins** retired from OATH after seventeen years of commendable service.

OATH DECISIONS¹

DISCIPLINARY PROCEEDINGS

A. Insubordination

Often employees defend charges of insubordination on First Amendment grounds or by citing exceptions to the “obey now, grieve later” principle. The majority of the following cases, however, implicate other issues which arise.

A petitioner must establish three elements to prove that an employee engaged in misconduct by refusing to obey an order: 1) that an order was communicated to the employee and that the employee knew or should have known of the order; 2) that the content of the order was unambiguous; and 3) that the employee wilfully refused to obey the order.

In *Department of Environmental Protection v. Schnell*, OATH Index No. 2262/00 (Oct. 25, 2000), ALJ Rosemarie Maldonado determined that a supervisor was insubordinate when he refused to answer a superintendent’s questions about a field visit and refused to obey the superintendent’s order to turn off a tape recorder during a meeting. Instead, the employee continued to run the tape recorder, followed the superintendent out into the work area, and disrupted the workplace by continually brandishing

¹ This issue covers OATH decisions from September 2000 through February 2001. Although OATH findings are primarily recommendations, all findings cited in BenchNotes have been adopted by the agency head involved unless otherwise noted. An asterisk following a citation indicates that the agency has not yet taken final action on the case.

the microphone near the superintendent’s and his co-workers’ faces in an intimidating manner. The employee claimed that he was under no obligation to comply with the order to turn off the tape recorder because the superintendent did not use the words “direct order.” This claim was found to be spurious. The tape recording (introduced into evidence by the employee) established that the superintendent unequivocally told the employee to stop taping their conversation and that the employee acknowledged the request but refused to comply.

The ALJ rejected the employee’s claim that he did not have to answer the superintendent’s questions about the field visit because the superintendent’s inquiry constituted harassment. Employees are obligated, with limited exceptions, to obey all supervisory orders. The employee’s conduct undermined his effectiveness as a supervisor and demonstrated a conscious disregard of his responsibilities. ALJ Maldonado determined that the 10-day suspension requested by the Department was an appropriate penalty.

In *Department of Housing Preservation and Development v. Ray*, OATH Index Nos. 1460/00 & 2135/00 (Sept. 14, 2000),* ALJ Faye Lewis heard several charges brought against a clerical associate, including charges of incompetence and insubordination. The employee was found to have been insubordinate when she stormed into her supervisor’s office, cursing, and engaged in disruptive and unprofessional behavior. She was further insubordinate in failing to report for an assignment and by continuously being discourteous and unresponsive in her e-mail communications with her supervisor. In one such communication regarding her posting job vacancy notices, the employee wrote, “Regardless of what the date was, when did I receive it. If you want it on the board let me know and I would put it on the board for two days (if it makes sense to you to put it on the board for two days) so be it. Let me know!!!!!!”

The ALJ considered numerous factors in her penalty recommendation, including the fact that, while the employee had a prior disciplinary record, the greatest prior penalty assessed had been an 18-day suspension. Nevertheless, determining that the employee's persistent insubordination, incompetence and general unwillingness to do her job outweighed the possibility that a lengthy suspension might lead to a change in behavior, ALJ Lewis recommended termination.

ALJ Charles McFaul determined in *Department of Sanitation v. Montalto*, OATH Index No. 189/01 (Sept. 28, 2000), that the Department's evidence was sufficient to establish that a sanitation worker had been insubordinate toward two supervisors when she was loud, used profanity, and challenged the supervisors' authority to inquire why her truck was not returned to work following completion of the morning break. The ALJ also found that one of the supervisors was the first to use profanity when he asked the employee why her truck was not back in service. While the supervisor's use of profanity did not excuse the employee's insubordination, the ALJ concluded that it was a mitigating factor in assessing a penalty. Additional factors mitigating the penalty recommendation were the employee's fairly minor prior disciplinary record and a certificate of appreciation from the agency head. The ALJ recommended a six-day suspension.

Civil Service Law section 75(2) provides the right to union representation when an employee is the potential subject of disciplinary action. The employee in *Human Resources Administration v. Delgado*, OATH Index No. 1909/00 (Nov. 15, 2000) raised the provision as a defense after being charged with storming out of a meeting with his supervisor. ALJ Lewis determined that the employee, an Eligibility Specialist, left the meeting without supervisory permission and without a legal basis to do so. The employee alleged that he asked for union representation during the meeting. Finding that a meeting to discuss past errors and to devise a plan to avoid them

in the future was not an event which might subject the employee to potential disciplinary action, ALJ Lewis determined that representation was not mandated and that the employee had been insubordinate in leaving the meeting. *See also Department of Sanitation v. Gentile*, OATH Index No. 1207/96 (Feb. 27, 1997), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-49-A (July 21, 1998).

Employees have a right to discuss worker issues with management. However, an employee does not have a right to have such a discussion on demand at the precise moment he feels compelled to do so. In *Department of Sanitation v. Chunn*, OATH Index No. 322/01 (Jan. 29, 2001), ALJ Ray Fleischhacker determined that a sanitation worker's insistence on disturbing his superior officer's work, after the supervisor made clear that he was busy with urgent matters, to the point of refusing to leave the office after being ordered to do so, constituted insubordination. Referring to the superior officer's home life, making profane references, raising racial issues, invoking the possibility of a lawsuit, and challenging his superior officer to close the door on him, constituted gross disrespect. Given the employee's insubordinate conduct, his improper challenge to his superior officer, and his disrespectful statements, the ALJ recommended a suspension of fifteen days.

Health and Hospitals Corporation (Lincoln Medical and Mental Health Center) v. Serrano, OATH Index No. 2064/00 (Feb. 21, 2001),* a default proceeding, dealt with a psychiatric health technician who was charged with being insubordinate for refusing to follow an order to light the cigarettes of psychiatric patients and to monitor their smoking, a hospital practice that was subsequently discontinued. ALJ Lewis noted that the deleterious effects of second-hand cigarette smoke are well known. However, as the employee did not appear at trial, he did not rebut testimony about the possibility of monitoring patients from an anteroom, and he did not explain

DISABILITY PROCEEDINGS

his defense that he was a recently converted ex-smoker. Thus, he failed to furnish information about when he had quit smoking and how that bore upon his decision not to obey the order. The record was devoid of evidence from which a finding could be made that it would have been injurious to the employee's health and safety to comply with the order, such that the health exception to the "obey now, grieve later" rule would apply. See *Reisig v. Kirby*, 62 Misc. 2d 632, 309 N.Y.S.2d 55 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008, 299 N.Y.S.2d 398 (2d Dep't 1969). Additionally, the employee was absent on seventeen days within a twelve-month period, which the ALJ determined was excessive. The ALJ recommended that a 20-day suspension, as sought by the petitioner, was the appropriate penalty for these two findings of misconduct.

B. Disruption of the Workplace

Where two employees engage in a physical and verbal altercation in the work place, both are generally considered to have engaged in misconduct, regardless of who began the altercation, if both are willing participants. Self-defense is a complete justification for participating in a fight only when an employee has no reasonable means to avoid a confrontation. Thus, in *Taxi and Limousine Commission v. Fletcher*, OATH Index No. 2527/00 (Oct. 16, 2000),* a Commission cashier was involved in a physical and verbal altercation with a fellow employee, which occurred in front of staff and members of the public. During the altercation, the employee shoved, yelled, and used expletives. ALJ Dierdra Tompkins found that the employee initiated the altercation and then continued the fight. The employee had been involved in several similar unprofessional incidents over the course of nine years, negatively affecting the workplace. Termination was recommended as the appropriate penalty in this case.

A. Placement on Leave

In *Department of Finance v. Serra*, OATH Index No. 583/01 (Nov. 14, 2000), ALJ Maldonado recommended that the employee, a clerical associate, be placed on a Civil Service Law section 72 medical leave where the Department's evidence demonstrated that she was not mentally fit to perform her job duties. The employee failed to appear at the hearing and refused to cooperate with a psychiatric evaluation. The absence of a medical evaluation did not bar a finding that the employee had a mental disability which prevented her from performing her duties. The Department's lay witnesses, including the employee's supervisor, a manager who works in the employee's area, the department's EEO officer and a deputy commissioner, described numerous examples of the employee's increasingly irrational, disruptive and paranoid behavior. For example, the employee had taken a sick leave day, but came to the office at about 2:00 p.m. In a very loud and hostile manner that drew everyone's attention, she yelled for her supervisor and began explaining a problem she was experiencing. Apparently, the employee, intending to visit her dermatologist, had become upset when she found out that the doctor had moved two blocks away and was sharing an office with a gynecologist. She loudly insisted that her supervisor knew why that had occurred and persisted that it must be an omen. Respondent "ranted" for approximately 10 minutes while office workers decided whether security should be called. The ALJ determined that an adverse inference may be drawn where, as here, an employee in a section 72 proceeding does not testify to explain the behavior established by the petitioner. The Department alternatively pleaded misconduct

pursuant to section 75, alleging that the employee was insubordinate for refusing to participate in the psychiatric evaluation. The ALJ recommended dismissal of this charge, finding that the refusal was not an intentional or wilful act but, rather, was “attributable to” the employee’s mental disability.

B. Request for Accommodation

In *Human Resources Administration v. Delgado*, OATH Index No. 1909/00 (Nov. 15, 2000), the employee was brought up on several charges of misconduct, including an allegation that he had punched a co-worker. The employee’s counsel, approximately two months after the employee was served with the charges in this matter, argued that the employee, an Eligibility Specialist, suffered from a manic-depressive bipolar disorder and requested an accommodation pursuant to the Americans with Disabilities Act (“ADA”). ALJ Lewis determined that a request for an accommodation is prospective only and cannot justify past misconduct. The ADA does not immunize an employee from discipline for misconduct resulting from his or her disability. Inasmuch as the employee’s request for an accommodation was made after the events at issue, the disciplinary proceeding or any potential penalty would not constitute discrimination prohibited by the ADA. Finding that the employee committed several acts of misconduct, including punching a co-worker, ALJ Lewis recommended that the employee be suspended for 60 days, without credit for time served pre-trial. Although precedent existed for terminating the employee, the ALJ cited mitigating factors in her penalty recommendation, including the employee’s efforts to seek and continue treatment for his disorder, lack of evidence in the employee’s personnel file of prior physical aggression or similar misconduct, the lack of a prior disciplinary record and “good” to “very good” performance evaluations.

C. Reinstatement from Leave

The employee, in *Human Resources Administration v. Farber*, OATH Index No. 1664/00 (Dec. 7, 2000), sought reinstatement to her position as an attorney level III after being out on voluntary medical leave for over one year. The employee suffers from migraine headache syndrome and claimed that her condition had improved enough to return to work. ALJ Raymond Kramer credited expert testimony and opinions of the employee’s treating physician, the Director of the Roosevelt Hospital Headache Institute, regarding the employee’s improved condition and her ability to function at work, as well as the employee’s own positive assessment of her condition, over the conclusion of the agency’s expert witness, a psychiatrist, that the employee had not sufficiently recovered to return to work but was, instead, permanently disabled and should seek social security disability. Accordingly, the ALJ recommended reinstatement.

Similarly, in *Department of Housing Preservation and Development v. Edmonds*, OATH Index No. 597/01 (Jan. 4, 2001), the employee, an office associate, had been out on voluntary medical leave and claimed to be sufficiently recovered from her condition to seek reinstatement. Three medical experts’ opinions established that the employee was unfit to return to work due to a paranoid disorder which resulted in her threatening to shoot co-workers at the agency. The employee offered two medical evaluations in support of her request to resume work. These evaluations, however, failed to include any discussion of the employee’s threatening conduct at work. This omission led ALJ Maldonado to conclude that the employee’s doctors were not informed about the section 72 proceeding and the serious events which were its catalyst. While the petitioner bears the burden of proof in a section

72 reinstatement proceeding, the employee has an obligation to meet petitioner's evidence in order to overcome it. See *Human Resources Administration v. Bartolo*, OATH Index No. 1211/94 (Nov. 3, 1994), *aff'd*, N.Y.C. Civ. Serv. Comm'n Item No. C95-72-1 (Jan. 3, 1995). The petitioner's medical expert, who testified at the hearing, concluded that the employee's previously diagnosed delusional disorder remained unchanged and that the employee was unfit to work. ALJ Maldonado found this medical conclusion persuasive and recommended that the application for reinstatement be denied.

PRACTICE AND PROCEDURE

A. Hearsay

Although hearsay is admissible in administrative hearings and may form the sole basis for a finding of fact, the evidence must have certain indicia of reliability. *Human Resources Administration v. Delgado*, OATH Index No. 1909/00, report and recommendation at 6-7 (Nov. 15, 2000). The agency in this case failed to sustain charges relating to alleged inappropriate behavior by its employee, an Eligibility Specialist, toward a client representative. ALJ Lewis found that the evidence introduced by the agency, consisting of two memoranda, lacked the requisite indicia of reliability, necessitating dismissal of the charges. One memorandum, prepared by the employee's supervisor, recounted what the client representative told him. The supervisor was not an eyewitness to the events and the client representative did not testify at the hearing. The second memorandum was deserving of more weight since its author, a co-worker, claimed to be a witness to the incident. However,

the co-worker's memorandum accused the employee of having made "false accusations" toward other authorized representatives and of being anti-Semitic. In the absence of the testimony of the author of the second memorandum, and given the bias expressed by the co-worker, the hearsay statement in her memorandum was not sufficiently reliable to constitute adequate proof of misconduct.

ALJ Tompkins found that a nurse's aide verbally and physically abused an elderly, infirm resident of Coler-Goldwater Hospital when she refused to heed the resident's wish not to be washed because there was a gentleman outside her window. *Health and Hospitals Corporation (Coler-Goldwater Memorial Hospital) v. Mohabir*, OATH Index No. 1806/00 (Sept. 28, 2000). The aide called the resident a "black son of a bitch" and told her to go back to Africa. The aide also hit the resident in the leg with a vase. The charge was upheld solely on the hearsay testimony of a registered nurse who had been called by the resident and informed of the nurse's aide's misconduct. The resident did not testify. Although arrangements were made to take the resident's testimony at the hospital, the resident, not wishing to see the employee fired, refused to testify to the events.

For hearsay to constitute the sole evidence of misconduct, the hearsay must be so reliable and probative that a reasonable inference of the existence of a fact may be culled therefrom. In finding the evidence probative and reliable, the ALJ considered the following factors: the known identity of the declarant, the extent of the declarant's personal knowledge of the facts, the detail and specificity of the hearsay evidence, the centrality of the evidence to the case and the independence of the declarant. After reviewing the employee's prior disciplinary record, ALJ Tompkins recommended termination as the appropriate penalty for this misconduct.

In *Health and Hospitals Corporation (Kings County Hospital Center) v. Moore*, OATH Index No. 2101/00 (Dec. 19, 2000), the employee, a psychiatric technician, was charged with physically abusing a patient by striking him in the eye while attempting to restrain him. The patient was treated for an eye injury. To establish its case, the hospital relied on two hearsay accounts of the events: that of the alleged patient-victim, and that of another patient who was in the vicinity of the occurrence. The alleged victim did not report the injury after the incident, despite having had several opportunities to do so. Testimony of a supervising nurse and a hospital investigator, who interviewed the injured patient, established that the patient was unable positively to identify the person who had struck him. With regard to the patient who claimed to be an eyewitness, testimony at trial established that her account was tenuous, at best, as it was likely that she had not been in a position to have viewed the alleged abuse during the attempt to restrain the patient. Furthermore, the declarant had a documented history of seeking to cause difficulties for institution employees, and her account, as related at trial by a hospital investigator, did not coincide with a written statement she had prepared the day after the incident. Thus, the hearsay evidence, despite the documented injury to the patient's eye, was not sufficiently credible to support petitioner's allegation. ALJ Donna Merris recommended dismissal of the charges.

Police Department v. Mikowski, OATH Index Nos. 541, 1663 & 1804/00 (Feb. 9, 2001), a Civilian Complaint Review Board ("CCRB") initiated case, involved two police officers accused of having used their batons to strike a fleeing suspect. The Department's case was based solely on hearsay accounts of the incident rendered by the complainant and a witness to some of the events. The two officers were involved in a car chase with the complainant, who, during the course of the chase, struck several parked vehicles and caused a telephone pole to

snap in half. In his CCRB account, the complainant admitted that he had been drinking prior to the incident. He was unable to identify the officer who allegedly struck him after he had been caught, and he indicated that he was struck with a gun, not a baton. The photographs of his injuries were consistent with those an individual might suffer during a car accident. Therefore, ALJ Kramer recommended dismissal of all charges against both officers.

B. Service of Process

Three cases during this reporting period touched on the jurisdictional prerequisites for proceeding with disciplinary hearings. In *Department of Environmental Protection v. Torres*, OATH Index No. 194/01 (Sept. 27, 2000), ALJ Kramer determined that attempted personal service, registered mail service and certified mail service of the charges and notice of the hearing at the employee's last known address of record were not sufficient to find him in default. The Department knew that the employee was incarcerated and awaiting trial. No attempt to serve him in prison was made. At the ALJ's direction, the Department subsequently submitted proof of service of the charges and of a notice of impending default upon the employee, in accordance with the procedures for serving detained inmates on Rikers Island. This was sufficient to establish the prerequisites for finding the employee in default. The ALJ further found that the employee's involuntary pre-trial incarceration was not a bar to proceeding in his absence. *See Rao v. Gunn*, 73 N.Y.2d 759, 536 N.Y.S.2d 47 (1998).

Chief ALJ Rose L. Rubin determined in *Department of Transportation v. Deloach*, OATH Index No. 2287/00 (Oct. 18, 2000) that the employee, a technician, was properly served with the notice of the hearing and charges when they

were handed to her, even though she refused to sign an acknowledgment. The record demonstrated that the employee had actual notice of the hearing when she accepted a copy of the notice.

Similarly, in *Department of Sanitation v. Carter*, OATH Index No. 1128/00 (Sept. 19, 2000), counsel for the employee, a sanitation worker, moved to dismiss three charges for lack of proper service. The Department's evidence demonstrated that the charges were delivered to the employee, but that the employee refused to sign for them. ALJ Merris found that, absent testimony from the employee, a statement by his attorney that his client was not served was insufficient to overcome the Department's documentary evidence to the contrary. An employee cannot nullify service by refusing to accept a copy of the charges. Therefore, the motion to dismiss was denied.

C. Adjournments

In *Department of Buildings v. Banton*, OATH Index No. 2124/00 (Sept. 18, 2000), the respondent's attorney procured a five-week adjournment the day before the scheduled hearing due to the attorney's "abdominal discomfort." The day before the adjourned hearing date, he again sought an adjournment for the same condition. Medical documents were submitted for both dates. ALJ John Spooner denied the second request as untimely and as unwarranted because it was identical in timing and nature to the previous request, and thus, suggestive of deceptive delaying tactics. A request for an adjournment due to actual engagement, made by a substituted attorney on the morning of the trial, was also denied. *See* 48 RCNY § 1-32.

ALJ Maldonado denied a motion to adjourn the disciplinary proceedings in *Human Resources Administration v. Rickenbacker-Miller*, OATH Index No. 603/01 (Dec. 12, 2000).

The charges alleged that the employee, an Eligibility Specialist, took possession of a client's Electronic Benefits Transfer Card and used it to access funds for her own use. The employee's counsel requested the adjournment based on the argument that related criminal charges were pending and that participating in the administrative proceeding would deny the employee her right against self-incrimination as guaranteed by the Fifth Amendment. The ALJ denied the motion, citing long-standing precedent holding that an employee's constitutional rights are not violated by the conduct of a disciplinary administrative hearing while a criminal proceeding is pending on charges arising out of the same set of facts. *See Taxi and Limousine Commission v. Myers*, OATH Index No. 410/87 (Mar. 10, 1988).

D. Motions

A Claims Specialist in *Comptroller v. Nagle*, OATH Index No. 753/01, memorandum decision (Jan. 9, 2001), moved, pre-trial, to suppress statements and evidence derived therefrom, alleging that he was questioned without notification of his right to union representation as required under Civil Service Law section 75(2). ALJ Fleischhacker determined that the initial interview did not focus in on the employee as a potential recipient of discipline. He was one of thirty employees being questioned with regard to an unauthorized search of DMV records. Therefore, his initial statement and the documents he initially produced at the interview, were admissible. However, once the investigation focused on the employee, which was immediately after he was first questioned, he should have been advised of his rights. The ALJ determined that the additional statements he made and documents he produced at the continued interview could not be used against him in the disciplinary proceeding as per Civil Service Law section 75(2).

The employee also sought disclosure of certain information redacted from the documents which the agency produced. The ruling on the suppression motion had pared the documents sought from 110 to five. Because neither party disclosed what specific information was redacted, no decision was made on that aspect of the motion. The ALJ adopted the agency's suggestion that an *in-camera* review of the documents take place prior to trial.

In *Silva v. Gitto*, OATH Index No. 263/01, memorandum decision (Jan. 18, 2001), a case referred to OATH by the N.Y.C. Commission on Human Rights, the complainant moved to add a new respondent based on information gleaned during discovery. There was no objection made at that time by opposing counsel. ALJ Fleischhacker granted the motion pursuant to section 1-13 of the Commission's Rules of Practice (Title 47 of the RCNY) and section 1-25 of this tribunal's Rules of Practice (Title 48 of the RCNY). Subsequently, the newly named respondent moved to be dismissed from the case, on statute of limitations grounds, because no complaint had been filed against him within one year after the alleged discrimination against the petitioner took place. The new respondent was first named in a second amended complaint approximately five years after the last act of discriminatory conduct allegedly occurred. The N.Y.C. Administrative Code provides that, "The commission shall not have jurisdiction over any complaint that has been filed more than one year after the alleged unlawful discriminatory practice or act of discriminatory harassment or violence as set forth in chapter six of this title occurred." Admin. Code § 8-109(e)(Lenz & Riecker CD-ROM 2000). Citing to a Commission on Human Rights case, *Osgood v. New York Telephone Company*, Complaint No. 06162176-EP, Decision on Motion (Jan. 21, 1994), the ALJ granted the motion to dismiss the complaint as against the newly added respondent.

At the close of trial in *Triborough Bridge and Tunnel Authority v. Metz*, OATH Index No. 746/01 (Jan. 18, 2001),* ALJ Spooner denied the employee's motion for a continuance to take the testimony of his wife, holding that the employee, a bridge and tunnel officer, was aware before and during the trial that his wife was an eyewitness to the charged events, but had chosen not to call her as a witness. A post-hearing motion to submit an affidavit from the employee's wife was denied on the grounds that the "new" evidence sought to be admitted was not new, as it had been available to the employee at the time of trial.

Matter of Pelli, OATH Index Nos. 1195-96/01, memorandum decision (Jan. 11, 2001) involved Loft Law access and unreasonable interference applications which were consolidated for conference and trial. Applicant/owner, who brought the access portion of the proceeding, argued that the uncertainty of whether a trial would take place and, if so, when the testimony of one witness, a plumber, might be taken, justified use of a speaker phone to take the testimony of that witness. ALJ McFaul concluded that these uncertainties were insufficient grounds to excuse the witness from appearing in court. While administrative hearings tend to be less formal than traditional court trials, it is imperative that a complete, legally sound record be made, and that due process be accorded the parties. It would be difficult for a witness on the telephone to respond to questions relating to documents produced at the hearing. A better alternative would be to place the witness on call. *See* 48 RCNY § 1-46.

LOFT LAW

A. Regulated Rent

After the Loft Board upheld ALJ Fleischhacker's determination of coverage in *Matter of DeLong*, OATH Index No. 266/99 (Oct. 4, 1999), *aff'd*, Loft Bd. Order No. 2457 (Dec. 13, 1999), *application for reconsideration denied*, Loft Bd. Order No. 2500 (Mar. 30, 2000), the matter was remanded for determination of the covered occupants' legal regulated rent and overcharges, if any. On remand, in *Matter of DeLong*, OATH Index No. 1165/00 (Nov. 1, 2000),* ALJ Fleischhacker found that applicants, protected residential occupants, were entitled to overcharges which preceded a related finding of abandonment (*Matter of Argento*, OATH Index No. 518/99 (Oct. 4, 1999), *aff'd*, Loft Bd. Order No. 2457 (Dec. 13, 1999), *application for reconsideration denied*, Loft Bd. Order No. 2500 (Mar. 30, 2000)) that involved only a portion of the floor on which the tenants resided. The tenants were additionally entitled to prospective rent regulation. *Matter of White*, Loft Bd. Order No. 2194, 17 Loft Bd. Rptr. 386 (Dec. 18, 1997). Because the owner did not register the building until April 1998, and the unit until August 1998, he was not entitled to increases for legalization efforts (29 RCNY § 2-12), until September 1998. Because the owner had not made demand therefor, he was not entitled to any rent increases under the interim rent guidelines (29 RCNY § 2-06). The ALJ calculated the overcharge to be \$29,610.00, and the regulated rent was set at \$127.20 per month. *See also Matter of Rolf*, OATH Index No. 135/01 (Nov. 30, 2000), *aff'd*, Loft Bd. Order No. 2598 (Dec. 19, 2000).

B. Unreasonable Interference and Diminution of Services

The protected tenant in *Matter of McGehee*, OATH Index No. 1306/00 (Dec. 1, 2000), *aff'd*, Loft Bd. Order No. 2599 (Dec. 19, 2000), filed an application with the Loft Board alleging that the building owner's legalization plan unreasonably interfered with the use of her unit because it deprived her of the use of a roof garden. The credible evidence made it clear that a roof garden had been maintained by each occupant of the second floor since at least 1977. Petitioner resided in the unit for sixteen years, during which she had use of the roof, which adjoined her apartment, with the owner's knowledge and consent. The building was sold in 1998. The new owner requested the occupant to remove her belongings from the roof and to stop using the roof. Thereafter, he omitted the roof from his legalization plan. Leases with the current tenant, covering the period between 1984 and 1996, made no mention of the roof. Nevertheless, ALJ Fleischhacker granted the tenant's application entitling her to continued use of the roof garden. The ALJ held that the terms of the leases between the original and present owner and petitioner were ambiguous on the issue of entitlement to occupy the roof. Precedent makes it clear that the long-term use in the circumstances of this case required a finding that the owner's plan unreasonably interfered with the tenant's occupancy of her unit and constituted a diminution of services.

C. Access and Unreasonable Interference

In *Matter of Pelli*, OATH Index Nos. 1195-96/01 (Feb 26, 2001),* ALJ McFaul consolidated for hearing two applications referred by the Loft Board. In one, the owner of the premises alleged that the tenants had unreasonably denied access to their apartment for maintenance and repair work. The tenants' application alleged that

the owner unreasonably interfered with their residential use by not performing legalization work in conformity with the narrative statement and plans filed with the Loft Board and the Department of Buildings. Although the ALJ found the tenants did in fact deny access, he recommended that the access application be dismissed because the owner had not satisfied his obligations under the narrative statement process, the very reason the tenants denied access in the first place. The tenants' proof demonstrated that the owner disregarded the work required by the narrative statement and made changes to the plans without notifying the Loft Board or the tenants. ALJ McFaul recommended that the unreasonable interference application be granted based on the tenants' showing. Based on the knowing and willful interference with the tenants' residential occupancy, the ALJ recommended that a \$7,500 fine be imposed and that it be supplemented by a finding of harassment. 29 RCNY § 2-01(h) (Lenz & Riecker CD-ROM 2000).

LABOR LAW

Prevailing Wage

In *Office of the Comptroller v. Navarro Special Cleaning Services, Inc.*, OATH Index No. 2247/00 (Feb. 9, 2001), a prevailing wage proceeding, a contractor contended that a bankruptcy order of settlement, which discharged two workers' claims for additional wages owed, required dismissal of the Labor Law section 235 (building services) prevailing wage proceeding. ALJ Spooner held that the claims were discharged by the bankruptcy order and probably precluded payment of the claims out of the moneys being withheld from the contractor by the City, without approval of the Bankruptcy Court. The ALJ fur-

ther held that this discharge did not bar adjudication of the claims pursuant to Labor Law section 235 or the issuance of penalties or willfulness findings under section 235. The ALJ found that one worker's complaint and detailed diary notes of his work assignments, along with the absence of any contradictory records from the contractor, were sufficient to establish that the worker was employed on the City contract, as he claimed. Relying on additional evidence, the ALJ determined that the contractor failed to pay five workers the prevailing wage for work on City projects and that this failure to pay was willful. For such willful violation, the ALJ recommended that the contractor be fined 25% of the total violation and, based upon its deliberate falsification of payroll records, that the contractor be debarred from all governmental contracts and subcontracts within New York State for a period of five years.

CONFLICTS OF INTEREST LAW

In a food permit revocation proceeding, *Department of Health v. Mall Deli Corp.*, OATH Index No. 213/01 (Nov. 1, 2000), ALJ Spooner held that a former Department employee, who left the agency five months before the hearing, was not permitted to appear as one of respondent's representatives, pursuant to section 2604 (d)(2) of the City Charter, which imposes a one-year ban on former public servants from appearing before the agency they worked for. The ALJ ruled that an appearance at OATH constituted an appearance before the Department because the transcript and the ALJ's recommendation would be forwarded to the agency head for a final decision.

Three civil penalty proceedings were consolidated for trial and referred to OATH pursuant to section 2603(h) of the Charter, section 12-110 of the Administrative Code and section 2-03(a) of

the Conflicts of Interest Board's procedural rules for hearings. *Conflicts of Interest Board v. Three Public Servants*, OATH Index Nos. 2406, 2412 & 2415/00 (Oct. 12, 2000). Under the petitioner's rules, respondents' failure to answer the petitions constituted admissions of all of the allegations contained therein. The petitioner was required only to "submit for the record an offer of proof" of the pertinent facts. 53 RCNY § 2-02(c)(3) (Lenz & Riecker CD-ROM 2000). Nonetheless, petitioner produced evidence showing that each respondent was obligated to file a financial disclosure form, but either failed to do so, or did so late, failing to pay the late filing fines in violation of section 12-110 of the Administrative Code. Two respondents were each assessed a \$10,000 penalty by ALJ Maldonado for failing to file financial disclosure reports, with reductions in the fine provided if respondents filed the reports within certain specified deadlines. One respondent was assessed a \$500 penalty for failing to pay the statutory fine for filing her disclosure report after the statutory deadline.

ALJ Spooner mediated a settlement in *Conflicts of Interest Board v. Finkel*, OATH Index No. 694/01. The case involved New York City Housing Authority Board Member Kalman Finkel's use of his office to help obtain a computer programmer's job for his daughter with Interboro Systems Corporation, a company with a \$4.3 million contract with the Housing Authority. Mr. Finkel agreed to pay a fine of \$2,250 to settle the matter.

SINGLE ROOM OCCUPANCY LAW

Under Local Law 19 of 1983, the Commissioner of the Department of Buildings will not approve plans or permit applications for

alteration or demolition of single room occupancy multiple dwellings ("SRO") unless the Commissioner of the Department of Housing Preservation and Development ("HPD") certifies that there has been no harassment of the lawful occupants of the dwelling within the thirty-six month period prior to the date of the application for such certification. N.Y.C. Admin. Code § 27-198(b). Upon review of an application for a certificate of no harassment, if the HPD Commissioner has reasonable cause to believe that harassment occurred during the relevant time period, a hearing is required to determine whether, in fact, such harassment occurred. N.Y.C. Admin. Code § 27-2093(d)(4).

The issue before ALJ Lewis in *Department of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00 (Dec. 7, 2000) was whether a certificate of no harassment should be issued to an owner of an SRO building. Section 27-2093(a) of the Administrative Code defines harassment as conduct by or on behalf of an owner of an SRO, including the interruption or discontinuance of essential services which is intended to cause a legal tenant to vacate the unit. Section 27-2093(b) creates a presumption against the owner of an SRO, holding that any statutory act defined in section 27-2093(a) shall be presumed to have been committed with an intent to cause a legal tenant to vacate the unit. In this case it was not contested that certain services to the tenant were interrupted or discontinued, most notably the tenant's use of the communal third floor bathtub. Since the tenant did not have a shower in her unit, this left her without bathing facilities. Here, however, respondent convincingly rebutted the presumption of intent. ALJ Lewis found that the tenant had never permitted respondent into her apartment. Thus respondent, who knew that three similar apartments in the building had shower units, did not know that this tenant's apartment lacked a shower. Additionally, respondent had made many good faith attempts, after learning that the tenant lacked shower facilities, to install a shower unit in

the tenant's apartment, all of which were rebuffed by the tenant. The tenant was not credible in testifying that she permitted the owner access, or that the owner interfered with her mail, or intentionally caused the disruption of gas services for the building. Therefore, the ALJ recommended that a certificate of no harassment be issued.

APPEALS

A. Contract Dispute Resolution Board ("CDRB")

The contractor in *Matter of Perini/O & G II, J.V. v. Department of Transportation*, OATH Index No. 1520/00 (Nov. 14, 2000) brought a claim for compensation for the costs of additional bond premiums incurred as a result of substantial change orders issued on a contract to repair the south roadways on the Williamsburg Bridge. The Board, chaired by OATH ALJ Kramer, found, contrary to petitioner's arguments, that Article 26 of the contract, governing compensation for extra work, was unambiguous with regard to its intention that such increased bond premiums be included in the markup permitted the contractor for extra work under subdivision (8) of Article 26. The Board also rejected petitioner's argument that performance bonds and insurance were one and the same under the contract, noting that they were referred to and treated separately throughout the contract. To the extent that there was any arguable ambiguity in the contract with respect to the reimbursement for these bond costs, the contractor had an obligation to clarify it prior to bidding and could not rely on non-binding representations from respondent's field office personnel or its own interpretation of the contract. Petitioner's claims for the increased bond premiums of two of its subcontractors, as a result of the

change orders issued, had no contractual basis and were denied.

Petitioner's Schedule K argument (that a federally mandated provision requires "fair and equitable" compensation for significant changes in work) did not rely on new material or documentation not previously before the Office of the Comptroller, but was simply a new theory of recovery based on the same contract terms which were before the Office of the Comptroller. Therefore, the advancement of the argument before the Board was not an unauthorized supplementation of the record and did not violate 9 RCNY § 4-09 (g)(3). However, the Board rejected the argument because the contract already provided a basis for adjustment in compensation in such circumstances under the unambiguous terms of Article 26 of the contract. Secondly, the equitable remedy provided for in Schedule K may only be exercised by the agency Commissioner, who previously declined to do so. The Board has no power to fashion equitable remedies, but must instead limit its review to contract interpretation.

An appeal was also filed with the Contract Dispute Resolution Board by petitioner, Parsons Coach Ltd., to resolve a claim for additional compensation against the Department of Transportation in connection with a contract for the transportation of students requiring special education. Contract disputes are heard by the head of the agency for which the services are performed. If the claim is denied, an appeal may be taken to the Comptroller. Here, after the Comptroller denied the claim, the petitioner appealed to the CDRB. The petitioner moved to strike from the record before the CDRB and from the agency's pre-oral argument Memorandum of Law, materials and references to those materials independently gathered by the Comptroller in his investigation of the agency head's decision denying the request for additional funds. The materials were annexed to the Comptroller's decision and consisted of letters to and from the recipient

of the transportation services. ALJ/Board Chair Fleischhacker held that the gathering and reliance upon unsworn statements by the Comptroller, obtained *ex parte* from non-parties, was not authorized by section 4-09 of the Procurement Policy Board's Rules, Administrative Code sections 7-201 and 7-203, or New York City Charter section 93. He granted the motion to strike the added materials from the record. *Parsons Coach Limited v. Department of Transportation*, OATH Index No. 203/01, memorandum decision (Jan. 31, 2001).

B. Prequalified Vendor Appeals

Pursuant to N.Y.C. Charter section 324(b), a plumbing company appealed to OATH from an agency determination revoking its prequalified vendor status. *Judah Plumbing & Heating, Inc. v. Department of Housing Preservation and Development*, OATH Index No. 410/01, memorandum decision (Dec. 18, 2000). The agency had found that the plumbing company lacked business integrity based on the behavior of its plumber, who during a site inspection by an agency inspector, using an inaccurate and superseded version of the work description, told the plumber that he would not be paid because all of the work was not completed in accordance with the description. During the discussion which followed, the plumber used profanity toward the inspector. An agency's revocation of a vendor's prequalified status on the grounds that the vendor lacks business integrity has generally been upheld. All of the prior cases involved vendor activities which were inherently dishonest. None of these cases rested upon a finding that an isolated use of profanity or a show of anger undermined a vendor's business integrity. Accordingly, ALJ Spooner reversed the agency determination, holding that the record failed to demonstrate a reasonable link between the plumber's use of inappropriate language and the revocation of the company's prequalified status.

C. Name-Clearing Hearing

A probationary police officer was terminated for sexual misconduct, menacing and three charges of providing false statements during an Internal Affairs Bureau interview. Pursuant to a stipulation and by order of the New York Court of Appeals in *Swinton v. Safir*, 93 N.Y.2d 758, 697 N.Y.S.2d 869 (1999), the officer was granted a name-clearing hearing. *Matter of Swinton*, OATH Index No. 2381/00 (Jan. 29, 2001).^{*} The sole purpose of such a hearing is to give the discharged employee an opportunity to clear his name. Reinstatement is not an available outcome. The burden of proof is on the person seeking to refute the charges made against him.

In this case, the Department presented questionable hearsay statements which were of minimal probative value in proving the allegations of sexual misconduct. For this reason, the evidence presented by the Department did not outweigh the testimony presented by petitioner at the hearing. Two charges of providing false statements to an investigative body were also found unproven based on this tribunal's assessment that any discrepancies from prior statements could be attributed to inadvertent error. However the evidence concerning menacing was compelling in nature. The 911 tapes recording the victim's three frantic calls for assistance established that petitioner threatened her with a gun. In addition, the record was clear that petitioner made one intentionally false statement during his investigatory interview, as charged by the Department. Accordingly, ALJ Maldonado determined that the discharged employee failed to refute two of the five allegations which led to his termination.

Chief Judge Rubin's Message

(continued from page 1)

becomes more and more complex, so does the potential for disputes in our courts, including OATH. The sophistication and diversity of the issues presently resolved by OATH Administrative Law Judges are demonstrated by the summaries of decisions presented in this issue of *BenchNOTES*.

Fair minded persons join in the efforts to bring to reality the realization of justice in each dispute, the goal for the legal process as a whole. That these aspirations elude us too frequently is one reason for the annual Law Day programs which are celebrated in courts of law all over our country. The hope is that by repetition and reinforcement, the fundamental prerequisites to a mature, well founded legal process are achievable by all involved, by the litigants, the witnesses, the lawyers, the judges and the support personnel.

We, in the administrative law sector of the law, labor under the ambiguity arising from a still evolving concept of a forum which operates as part of, or in proximity to, the executive. The executive, here the mayor, looks to the adjudicatory forum for a special awareness of the executive's objectives and an expectation that the forum will operate within that framework. In turn, the non-agency litigant fears that the forum will be unduly influenced by the executive's interests and will be restrained in dealing with those of the non-agency litigant.

Fortunately, the operation of OATH is demonstrating, concededly in a still evolving framework, that the administrative law tribunal can function even handedly with respect to the rights of all parties, whether executive or non-agency litigant. The salient concept remains the separation of the prosecution of charges and claims from their resolution, as occurs in a central, neutral, independent adjudicatory tribunal, of which OATH is an example.

I perceive that OATH's *raison d'etre* is to do justice, one case at a time, an ambitious target,



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ROSE LUTTAN RUBIN
Chief Administrative Law Judge

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NOTICE

All parties are required to attend conferences and trials and to be prepared to proceed at the time scheduled. 48 RCNY §§ 1-30(a), 1-45. Sanctions may be imposed upon a finding of persistent failure to observe these rules. 48 RCNY § 1-13(b).

but realistic. I am appreciative of the confidence and the encouragement which Mayor Rudolph W. Giuliani has demonstrated and the support of the four Deputy Mayors to whom we were, in turn, responsible, Peter Powers, Randy Mastro, Joseph Lhota and, presently, Robert Harding.

As the mayor changed the way in which our City is managed, he simultaneously embraced and encouraged the reality of a central, impartial independent adjudicatory tribunal as an element of good city governance. For this we applaud him and his administration.