

OATH

## BenchNOTES

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## MESSAGE FROM CHIEF JUDGE ROBERTO VELEZ

### *OATH'S STRATEGIC PLAN*

When Mayor Bloomberg appointed me Chief Judge, he asked me to investigate whether OATH was truly meeting its mission of providing a fair, economical, and efficient forum for resolving disputes. To gather the necessary information, I quickly met with OATH judges and staff, the users of the OATH system and professionals in the field. Based on my findings, I am pleased to report that OATH is meeting its mission because of the hard work of prior Chief Judges - - Charles D. McFaul and Rose Luttan Rubin - - and the competent judicial staff. I am also pleased to report that OATH is meeting the new challenges of continuing to provide excellent services in the face of ever dwindling resources, and providing them with a greater emphasis on accountability and customer satisfaction.



From left: Chief Judge Roberto Velez, Mayor Michael Bloomberg, Managing Attorney Kara Miller

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As a first step, we are drafting a strategic plan that prioritizes goals and identifies the resources to implement them. Our hope is that this plan, which we expect to finalize this summer, will serve as the point of reference for management decisions and will set the standard to which OATH holds itself when setting goals and evaluating progress. With these thoughts in mind, we have identified the three major priorities, which I will outline below.

**Mediation:** As the Mayor stated in his first State of the City address, a major goal of this administration is to reduce the City's costs associated with litigation. One way to accomplish this goal is to use alternative means to resolve disputes, such as mediation. We plan to create a Mediation Center that will serve the needs of City agencies and employees to resolve their disputes quickly and cost effectively. Thus far, we have approached several

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# OATH DECISIONS<sup>1</sup>

## DISCIPLINARY PROCEEDINGS

### A. Unnecessary or Excessive Use of Force

This tribunal frequently hears cases brought by law enforcement agencies in which it is alleged that a police officer, correction officer or hospital special officer employed gratuitous or excessive force while in the performance of his or her duties.

In *Dep't of Correction v. Menge*, OATH Index No. 1828/01 (Oct. 10, 2001),\* the respondent captain was observed on videotape surreptitiously spraying a substance, most likely pepper spray, into the cell of an inmate who refused to close his food slot. While such conduct, in some circumstances, would be acceptable under departmental directives, in the particular circumstances, it amounted to unnecessary and excessive force.

Unacknowledged uses of force expose the City to heightened potential liability. The respondent's misconduct was further exacerbated by his status as a supervisor. While demotion of the captain, who had little tenure in his position, would not have been inappropriate, ALJ Ray Fleischhacker adopted the Department advocate's recommendation of a sixty-day suspension without pay.

An excessive force charge was dismissed by ALJ Donna Merris in *Police Dep't v. Benitez*, OATH Index No. 1496/01 (Nov. 16, 2001). The respondent police officer was charged with kicking a civilian on the left side of his face during an arrest for marijuana possession, following an extended chase by several officers. The ALJ

found that petitioner could not establish the allegation by a preponderance of the credible evidence, citing credibility issues with petitioner's witnesses. The complainant's testimony was not credible because he did not see the officer kick him, could not recognize her at trial, and stated that she had blonde hair, while the officer's hair was brown. The complainant exhibited bias, admitting that he was interested only in avoiding further prosecution for a second marijuana possession offense. The complainant's mother was not credible because she did not see the respondent kick her son and identified the officer based on information given to her by the complainant at the precinct following her arrest for interfering with the arresting officers.

Two other department witnesses both stated that the offending officer had blonde hair. The ALJ found these two witnesses' testimony vague and inconsistent with each other and with the complainant's version. The ALJ found that the force used was consistent with the necessity to subdue the complainant, who was resisting arrest at the time. Medical evidence of an abrasion to the left side of the complainant's face was not consistent with a kick or bruising blow. Instead, the abrasion was more consistent with a scrape against a hard surface such as the concrete that the complainant was lying face down on during the officers' attempt to place handcuffs on him. Moreover, the complainant's testimony that the officers punched and kicked him many times in the back and head was not documented medically or by other testimony.

The respondent correction officer in *Dep't of Correction v. Simmons*, OATH Index No. 1352/01 (Sept. 5, 2001), after engaging in an acceptable physical altercation with an inmate, was directed by a captain to stand back. He did so, but when another officer had a problem keeping control over the inmate, and the inmate turned to spit at the respondent, the officer sprang

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<sup>1</sup> This issue covers OATH decisions from September 2001 through February 2002. 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.

forward and struck the inmate in the head. ALJ Fleischhacker found that the force employed was excessive. Considering the employee's unblemished record and noting that there was some mitigation in this case because the officer's attack upon the inmate was not unprovoked, the ALJ recommended a suspension without pay for 40 days.

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## B. Drugs & Alcohol

OATH has adjudicated substance abuse cases for many years, originally determining that "reasonable cause" was necessary to require a civil service employee to undergo a drug test, then later deciding issues raised by random testing of employees in safety-related positions. During this reporting period, several cases of interest were decided.

In *Dep't of Sanitation v. Richins*, OATH Index No. 167/01 (Oct. 15, 2001), ALJ Ray Kramer found that despite the agency's inability to prove that the employee engaged in an off-duty drug transaction, the observed activities gave the agency a legitimate basis to test the employee for drug use. The positive test results for cocaine merited termination of employment in light of the fact that the sanitation worker had a substantial disciplinary record and had twice before violated the agency's substance abuse policy and procedures. The harsh result was merited despite the employee's sixteen-year tenure and his recent enrollment in a drug treatment program.

In *Human Resources Admin. v. Prescott*, OATH Index No. 1775/01 (Dec. 10, 2001), ALJ Rosemarie Maldonado found that the preponderance of the evidence did not prove that an employee was intoxicated at work. Although his supervisor detected the smell of alcohol on the employee's breath, he did not make any other observation that would support the conclusion that the employee was intoxicated. In fact, the

supervisor sent the employee back to work. See *Human Resources Admin. v. Honey*, OATH Index No. 435/89 (Oct. 20, 1989) (the smell of alcohol does not necessarily prove that an employee is intoxicated). Moreover, the supervisor's testimony, that a second supervisor believed the employee was incapable of working, was too tenuous to be accorded probative weight. Accordingly, the tribunal found that the intoxication charge was not supported by the record. See also *Human Resources Admin. v. Adams*, OATH Index No. 342/02 (Jan. 16, 2002).\*

In *Dep't of Correction v. Mixon-Coley*, OATH Index No. 330/02 (Dec. 10, 2001),\* ALJ Suzanne Christen found that the agency presented undisputed proof of a positive test result for cocaine metabolite in the employee's system. The employee offered the affirmative defense of unknowing ingestion through oral sex performed on her by her husband between 48 and 58 hours prior to the drug test. ALJ Christen found the testimony of the husband and the employee contradictory and unworthy of belief. In particular, the husband's testimony about how much cocaine he bought and used, and the manner in which he used it, which would have been lethal, according to the employee's own expert, was not worthy of belief. The ALJ recommended termination of employment.

In *Fire Dep't v. Choi*, OATH Index No. 1417/01 (Feb. 14, 2002), ALJ Charles McFaul rejected a firefighter's claim that the active element of a controlled substance, hydrocodone, was found in his urine because he was taking prescribed pain medication. The employee could not furnish a prescription and neither his doctor's nor his pharmacy's records noted a prescription for medication containing the substance. While the employee had been prescribed a pain killer, the active ingredient would not test positive for hydrocodone. Accordingly, ALJ McFaul upheld the charges and recommended termination of employment.

### C. Chain of Command

*Dep't of Parks and Recreation v. Caban*, OATH Index No. 2023/01 (Oct. 22, 2001) presented a unique situation under the obey now, grieve later principle. A Parks Department employee was charged with insubordination. The Department's witnesses credibly testified that the employee refused to obey an order to cease pouring soapy water into an outdoor drain — a violation of a policy instituted to protect Central Park wildlife. ALJ Maldonado rejected the employee's argument that he was not obligated to obey the order because the person issuing it was not an employee of the Department. The Central Park Conservancy and the Department had entered into a contractual agreement for the purpose of maintaining Central Park. This unique arrangement allowed the chain of command to operate as a hybrid between the entities. Accordingly, the preponderance of the evidence belied the employee's claim that he was not required to obey. In light of the employee's very good performance rating and lack of a prior disciplinary record, the ALJ recommended a two-day suspension.

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### D. Intent as a Necessary Element of Misconduct

It is well-established that a finding of misconduct cannot be made under section 75 without a finding of the requisite intent or negligence in the performance of one's duties.

*Dep't of Sanitation v. Clifton*, OATH Index No. 2173/01 (Nov. 5, 2001) involved a veteran sanitation worker with no significant prior disciplinary history, who had requested emergency leave, but subsequently failed to document it, as agency rules required. Although the rule regarding documentation is couched in mandatory terms, ALJ Kramer credited the employee's claim that the nature of his emergency, staying up all night due to marital strife and then feeling too

mentally and physically exhausted to safely perform his duties as scheduled the following day, was of a type not reasonably able to be documented. The employee, who had the burden of proving his claimed inability to comply with an agency rule, met his burden. Since the employee's rule violation was unintentional, he did not commit misconduct for which he could be sanctioned. Accordingly, the ALJ recommended that the charge be dismissed.

In *Dep't of Sanitation v. Richards*, OATH Index No. 1579/01 (Nov. 16, 2001), the employee, a sanitation supervisor, was charged with failing to properly supervise his work crews, as evidenced by the failure of his crews to complete a portion of their assignment in picking up recyclable materials. ALJ Kramer found that petitioner failed to establish sufficient proof of fault on the employee's part. An agency must prove fault on a civil servant's part to discipline the employee for misconduct. Mere errors of judgment, lacking in wilful intent and not so unreasonable as to be considered negligent, are not a basis for discipline. Nor is strict liability a basis for finding misconduct in the disciplinary context, and, thus, an employee cannot be disciplined simply by showing, without more, that he failed to complete a portion of his assignment. *Richards*, at 11.

In *Taxi & Limousine Comm'n v. Khan*, OATH Index Nos. 1888/01 & 1937/01 (Nov. 1, 2001),\* the Commission's proof of meter tampering consisted solely of the discovery of one inch of exposed insulation on one of the wires attached to the taxi meter. The condition would only have been visible by close inspection under the dashboard. Based upon this proof, the Commission charged all drivers on the rate card with meter tampering. While the Commission dropped the charges against two of the drivers, the other two appeared at the hearing and denied any knowledge of the tampering. ALJ John Spooner held that the Commission's proof was insufficient to establish that the drivers knew of the illegal con-

dition or could have discovered it by exercising due diligence. In so holding, he rejected the Commission's contention that 35 RCNY § 2-31 (d) (providing an affirmative defense to meter tampering) was intended to create a presumption that all authorized taxi drivers know of an illegal condition if found on a taxi meter.

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### **E. Hearsay**

Hearsay issues frequently arise in hearings before this tribunal. While it is well beyond dispute that hearsay is admissible in an employee disciplinary proceeding ("Compliance with technical rules of evidence shall not be required" - section 75(2)), whether or not the ALJ will place reliance on the hearsay, and, if so, how much, is determined on an individual case basis considering the factors first set forth in *Dep't of Correction v. McKenzie*, OATH Index No. 268/82 (Apr. 2, 1984).

In *Transit Authority v. Francis*, OATH Index No. 234/02 (Dec. 19, 2001), *modified on penalty*, Authority determination (Feb. 11, 2002), the employee, a maintenance supervisor, was charged with failing to identify, report, and correct a serious safety defect (a wide gauge between tracks). Petitioner offered a report with handwritten notations from a superintendent, documenting his observations of the wide gauge. The employee objected to its introduction because the superintendent was not produced at trial and, therefore, could not be cross-examined as to those observations, including his notation that the gap could be seen "plainly." ALJ Faye Lewis declined to give the notation any weight because the notation concerned the central issue in the case, the declarant was known, and petitioner provided no reason why the declarant was not called.

Nevertheless, the charge was sustained where evidence established that the supervisor failed to follow standard procedure to obtain and review a computerized graph of track conditions that would have put him on notice of the defect.

In *Dep't of Correction v. Brown*, OATH Index No. 1789/01 (Dec. 18, 2001),\* the credibility determination clearly favored the Department's witness, a captain who conducted a home visit at the employee's house. The employee had reason to be vexed with the captain, who had only recently generated a sick leave complaint against the employee. Therefore, the captain's testimony, that the employee hung up the phone, slammed the door, used profane language and acted in an intimidating manner toward the captain, was credited.

ALJ Fleischhacker determined that the respondent's submission, a notarized letter of a plumber allegedly present at the employee's house at time of the incident, should not be given substantial weight. The witness was not unavailable; it was merely inconvenient for him to attend the hearing. Further, the witness had an interest in testifying on behalf of the employee, given the work he had done for the employee and considering the possibility for future work.

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### **F. Other Cases of Interest - Right To Representation at Interview**

In *Health and Hospitals Corp. (Sea View Hospital Rehabilitation Center and Home) v. Cantres*, OATH Index No. 500/02 (Jan. 15, 2002), the undisputed proof established that an employee, about to be questioned about a confrontation with a co-worker, was provided with at least 10 minutes in which to procure a union representative to accompany him into an interview with a supervisor, as required under section 75(2). When the employee refused the assistance of the union steward because the employee regarded him as incompetent, and insisted on the presence of another union official, who he was unable to reach by telephone, the employer properly treated the employee's refusal to be questioned as an act of disobedience to a lawful order. ALJ Spooner recommended a 30-day suspension without pay.

## DISABILITY PROCEEDINGS

Disability issues are raised in both disciplinary proceedings, usually as a defense, and in hearings held pursuant to sections 71, 72 and 73 of the Civil Service Law. In the first two cases, the issue arose in a disciplinary context.

In *Dep't of Correction v. Michaels*, OATH Index No. 1870/01 (Nov. 15, 2001), an employee who had been absent for two years offered proof that a medical disability prevented her from working, excused her absence, and warranted converting the disciplinary hearing to a disability leave hearing. ALJ Spooner held that, because the employee made no showing that her medical condition impaired her ability to comply with the Department's notification and documentation requirements, the charge as to violation of these requirements should be sustained. Holding that the employee's documentation was insufficient in content and dependent upon the employee's doubtful truthfulness in recounting her subjective symptoms of pain, ALJ Spooner concluded that the charges of absenteeism should be sustained and that conversion to a disability leave proceeding was not warranted. The judge held that the only appropriate penalty for an employee found to have been absent without authority for over two years was termination.

In *Human Resources Admin. v. Varone*, OATH Index No. 695/01 (Dec. 26, 2001), an employee was charged with absence without authority based upon a series of unauthorized latenesses. As an affirmative defense, the employee asserted that the latenesses were caused by a disability, a sleep disorder, of which petitioner knew, but failed to reasonably accommodate, as required by the Americans with Disability Act ("ADA"). The latenesses occurred following a Civil Service Commission mandate to reinstate the employee, with instructions to the agency to accommodate the employee's sleep disorder.

Petitioner, upon reinstatement, transferred the employee, a computer specialist, to a unit that required more face-to-face interaction with other employees during regular business hours, a responsibility he did not have at his prior unit. In addition, petitioner offered the employee a two-hour flexible time band for arrival and departure, e.g., arrive as late as 11:00 a.m. and depart as late as 7:00 p.m. The employee was at work for three weeks when the agency began to cite him for lateness. The employee asked for a more flexible accommodation, but no discussions with supervisors ensued.

ALJ Merris determined, after a review of current case law, that the offered accommodation was unreasonable because: 1) petitioner failed to engage in a good faith interactive process; and 2) the two-hour flexibility was, under the circumstances, unreasonable, based on evidence that the employee might be able to comply with a more flexible schedule allowing him to arrive later than 11:00 a.m. See *Humphrey v. Memorial Hospitals Ass'n*, 239 F.3d 1128 (9th Cir. 2001) (employer has affirmative duty under the ADA . . . to explore further arrangements to offer a reasonable accommodation before terminating employee, notwithstanding an already allowed accommodation which had proven ineffective). Petitioner, therefore, in these circumstances, could not overcome the affirmative defense and the charges were dismissed.

In *Housing Authority v. Liebman*, OATH Index No. 642/02 (Jan. 9, 2002),\* ALJ Christen found that the employee, a statistician in the audit department, was unfit to perform the primary duties of his position, i.e., copying, proofreading, delivering and filing documents, due to his mental disability, obsessive compulsive disorder, which resulted in improper copying and hoarding of a large volume of agency and personal documents, which he should not have had in his possession.

Discovery that the employee prepared to remove to personal storage a large volume of sensitive agency and employee-related documents that the employee was not authorized to possess, gave the agency the probable cause required under CSL section 72(5) to place the employee on immediate emergency pre-hearing involuntary leave. Permitting the employee to remain on the job would have severely interfered with operations because his presence at the work place would have negatively affected office morale, the agency would have had to lock everything down and the employee's continued presence could have exposed the agency to potential legal liability.

## PRACTICE AND PROCEDURE

### A. Statute of Limitations

In a case in which an employee was charged with excessive latenesses and absences without authorization, *Board of Education v. Freeman*, OATH Index No. 1248/01 (Sept. 7, 2001),\* ALJ Christopher Kerr held that the section 75 statute of limitations is an affirmative defense, and is waived if not raised. Judicial notice of the statute of limitations may not be taken *sua sponte*.

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### B. Pro Se Appearance; Subpoenas

In *Admin. for Children's Services v. Lin*, OATH Index No. 1812/01 (Nov. 9, 2001), ALJ Spooner found that a civil service employee's right to a fair hearing was fully effectuated where he was afforded the opportunity to obtain counsel, chose to dismiss his attorney and represent himself, and where the dismissed attorney and a union representative were present at all times during the hearing, available to offer legal advice. *Lin*, at 3, and cases cited therein.

ALJ Spooner denied the employee's application to subpoena two agency witnesses. The facts that the employee sought to elicit from the witnesses were uncontroverted and testified to by other witnesses. The ALJ therefore found the proposed testimony, at best, cumulative as to undisputed and immaterial facts.

In *Taxi & Limousine Comm'n v. Jean*, OATH Index No. 1884-85/01 (Dec. 21, 2001),\* ALJ McFaul excused a taxi driver's counsel on the day of trial where the driver failed to complete a retainer agreement with the attorney before trial and the attorney informed the driver that she no longer represented him. Although the attorney never filed a written notice of appearance, she did appear by conference call to obtain an adjournment of the original trial date. The attorney's telephone conference call constituted an appearance under 48 RCNY § 1-11(a), notwithstanding her failure to subsequently file a written notice of appearance.

After counsel was excused, the driver requested a second adjournment on the day of trial so that he could retain new counsel. The motion was denied because the driver failed to complete a retainer agreement, and he provided no assurance that a further adjournment would prompt him to retain counsel. The driver's post-trial motion to reopen the hearing was denied because there was no indication that he would introduce new evidence and reopening the hearing would not affect the driver's general denial defense or the outcome of the case.

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### C. Motion to Supplement Record

A post-hearing motion to supplement the record made before the issuance of a report and recommendation is directed to the trial judge's discretion and requires a showing that the proposed new evidence might reasonably alter the outcome or the penalty; that there was substantial reason the evidence was not offered at trial; and

# REAL PROPERTY PROCEEDINGS

that the granting of the motion would not unduly prejudice the adverse party. 48 RCNY § 1-52. In *Dep't of Sanitation v. Manzi*, OATH Index No. 1753/01 (Dec. 4, 2001),\* a motion to supplement was denied by ALJ Merris because the documents offered would not have affected the outcome or the penalty recommendation.

In *Dep't of Buildings v. Owners, Occupants and Mortgagees of 1410-1414 Vyse Avenue, Bronx*, OATH Index No. 699/02 (Feb. 22, 2002),\* a padlock proceeding, ALJ Merris again faced an issue regarding post-hearing supplementation of a record. Here, the property owner defaulted on the date of the hearing, although his counsel appeared near the end of the hearing and was instructed to make an application to vacate the default. The ALJ granted the application only to the extent of allowing proof that the owner had a meritorious defense to the allegation that his use of the property violated the City's zoning resolution.

## D. Evidence

In *Matter of Kasher v. BLF Holding Corp.*, OATH Index No. 262/99 (Oct. 26, 2001), *aff'd in part, rev'd in part*, Loft Bd. Order No. 2704 (Feb. 7, 2002), CALJ Rose Rubin denied a loft law tenant's application to exclude from evidence a tape recording of his conversations with a security guard, where the tape was made by the security guard without the tenant's knowledge. The CALJ held that OATH lacks jurisdiction to exclude the tape pursuant to CPLR § 4506(1), which provides that the motion to suppress be made before a justice of the Supreme Court in the district where the proceeding is pending. Further, since the security guard was a party to the conversation and consented to the taping, the taping was not illegal within the meaning of state law (Penal Law §§ 250.00(2), 250.05). *Kasher*, at 63-64.

## A. Loft Law

*Matter of Kasher v. BLF Holding Corp.*, OATH Index No. 262/99 (Oct. 26, 2001), *aff'd in part, rev'd in part*, Loft Bd. Order No. 2704 (Feb. 7, 2002), involved an harassment application brought by a loft tenant against the building owner. The owner moved that the tenant be sanctioned for filing an harassment application in bad faith. The Loft Board may fine a complainant up to \$1,000 per violation where the Board finds that the harassment application was filed in bad faith or in wanton disregard for the truth (29 RCNY § 2-02(c)(2)(iii)). Reviewing prior Loft Board precedent (*Kasher*, at 76-77), CALJ Rubin noted that the Loft Board has imposed sanctions only in the most egregious circumstances. The Chief ALJ found the tenant's filing of twelve charges of direct acts of harassment was made without regard for the truth and, accordingly, recommended a \$1,000 fine for bad faith filing. Chief ALJ Rubin further recommended that the maximum \$1,000 fine be assessed against the owner for its ongoing, persistent denial of elevator service, even in defiance of an Order of the New York City Civil Court, Housing Part (29 RCNY § 2-02(d)(1)(ii)). The Board upheld the limited findings of harassment, but it declined to fine the applicants.

*Matter of Moran*, OATH Index No. 2016/00 (Feb. 7, 2002)\* involved an application by a tenant for protected occupant status. The tenant first leased the unit in 1991. In 1983, four tenants (tenant-owners) acquired title to the building from its owner. Prior to the transfer of title, but after a contract had been signed, the tenant-owners entered into an agreement with the then tenant of the applicant's unit in which they bought out his rights. ALJ Kramer found that the tenant-owners' status fell within the definition of an

owner for the purpose of a valid sale of rights pursuant to Multiple Dwelling Law § 286(12). The prior owner's registration of the unit as one covered under the Loft Law did not vitiate the sales agreement. Neither did the tenant-owners' failure to timely file a record of the sale with the Loft Board, as the Board's rules only provide for a civil penalty as a consequence of a failure to file. Therefore, the coverage application was denied.

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## **B. Padlock Law**

In *Dep't of Buildings v. Owners, Occupants and Mortgagees of 700 East 17th Street, Brooklyn*, OATH Index No. 1905/01 (Feb. 7, 2002),\* the Department alleged that the basement/cellar of a residential premises was being used illegally as a commercial establishment, a wig shop. ALJ Kerr found that the home owner had established that the use was a home occupation, although beauty parlors and barber shops specifically do not qualify for home occupation status, holding that the zoning resolution should be strictly construed, being in derogation of fundamental common-law property rights. Accordingly, he dismissed the zoning violation proceeding.

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## **C. Single Room Occupancy Law**

A Certificate of No Harassment must be obtained by an owner who seeks to convert a single room occupancy building to another use. The Department of Housing Preservation & Development (HPD) investigates whether acts of harassment occurred during the thirty-six months pre-dating the application for a certificate, and, if so, may deny the application. OATH conducts a hearing where the agency has made a preliminary finding that harassment occurred.

In *Dep't of Housing Preservation and Development v. Mamudoski*, OATH Index No. 771/01 (Feb. 21, 2002),\* ALJ Christen noted that

post-application acts of harassment may also be considered, reasoning that to hold otherwise would allow owners to commence harassing acts with impunity once an application was filed. See also *Dep't of Housing Preservation and Development v. Robinson*, OATH Index No. 376/02 (Jan. 10, 2002).\*

# **APPEALS**

## **Contract Dispute Resolution Board**

In *Bedford Construction Corp. v. Dep't of Design & Construction*, OATH Index No. 1974/01 (Nov. 9, 2001), a contractor sought additional compensation in the amount of \$32,964.75 from the Department of Design and Construction for sewer installation work. In its claim, the contractor contended that the City's flawed design resulted in cracks in the concrete bedding, which required additional work to repair. Although Article 24 of the Contract required the contractor to repair defects, the contractor argued that it should not be financially responsible for repairing cracks caused by the City, pursuant to *MacKnight Flintic Stone Co. v. City of New York*, 160 N.Y. 72, 54 N.E. 661 (1899). The City contended that the cracks were caused by vibratory pile drivers, which the contractor used to install the section of sewer where the cracks were discovered. Based on the record, the Board, chaired by ALJ Spooner, found that the contractor's method of construction was the cause of the cracks and that the contractor was obligated to repair the cracks without additional compensation under the terms of the contract.

## OATH AN INNOVATOR IN TECHNOLOGY

In February, OATH and the 40 Rector Technology Group (“RecTech”) embarked upon a new technology project aimed at bringing electronic filing to OATH and the other City agencies located at 40 Rector by 2003. In the first phase of the project, RecTech will commission a needs assessment by an outside consultant to provide guidance for completion of the joint electronic filing project. RecTech has submitted a grant application to the New York State Archives to fund this assessment and anticipates that, if the grant is successful, the City will fund the remainder of the evaluation.

OATH ALJ John Spooner, manager of the RecTech electronic filing project, anticipates that the project will produce one or more browser-based, internet-compatible applications which will meet all of the agencies’ case tracking, document management, and online filing needs. The new electronic filing will permit OATH to absorb an anticipated increase in caseload with a minimal increase in staff and to strive to become a “paperless court.” OATH will join the ranks of judicial innovators such as the federal courts for the Eastern District of New York, which began electronic filing and case management four years ago.



Brian Andersson, Commissioner of the Department of Records and Information Services; John Spooner, OATH ALJ and Chair of the 40 Rector Technology Group (“RecTech”); Ellen Karsh, Director of the Mayor’s Office of Grant Administration; and John Van Gorder, Executive Director of the Leon Lowenstein Foundation, at the April 11, 2002, RecTech meeting.

In a related initiative, OATH and two other 40 Rector agencies have agreed to share portions of their network in order to conserve costs and staff. Beginning in May, OATH, the Office of Collective Bargaining, and the Board of Standards and Appeals plan to combine network resources in order to lower operating costs and increase administrative efficiency. The RecTech model of sharing resources among City agencies has been praised for its vision and innovation. In remarks delivered on March 25, 2002, Gino Menchini, the Commissioner of the Department of Information Technology and Telecommunications, mentioned RecTech as an example of how smaller City agencies can achieve savings and efficiency by consolidating resources.

## BenchNEWS

On March 13, 2002, **CALJ Roberto Velez**, **ALJ Ray Fleischhacker** and law clerk **Frank Ng** attended a luncheon at New York Law School for leaders in City government. The luncheon affords law students the opportunity to learn about governmental agencies and available positions.

On April 25, 2002, Bring Your Children To Work Day, OATH hosted approximately 100

children of the staff of five agencies with offices at 40 Rector Street: OATH, OCB, OLR, TLC and CCRB. **ALJ Suzanne Christen** played a large role in organizing the joint agency effort, and conducted a mock trial for the children.

Confidential secretary **Carol Plant** recently returned from maternity leave now that baby Michael is 9 months old.

## NEW DOB HEARINGS AT OATH

In March, 2001, the City Council passed Local Law 14 of 2001, effective June 17, 2001, which codified Administrative Code section 26-127.3. The law declares illegal outdoor signs to be a public nuisance and provides for the removal of an illegal sign after a hearing at OATH.

The law will be enforced by the Department of Buildings. The hearings will be similar to padlock proceedings. Notice of the proceeding must be served on the property owner, the mortgagee of record and other persons having a recorded interest in the property. If the sign is under the control of an outdoor advertising company, notice must be served on the company, if the address of the company is “reasonably ascertainable.”

The two issues to be determined at the hearing are: (i) whether the sign has a surface area greater than two hundred square feet; and (ii) whether the sign was erected in violation of the Zoning Resolution, the Administrative Code or DOB rules. If the ALJ finds in the affirmative on both questions, then s/he may recommend that the Commissioner order removal of the sign, or the sign structure or both. Section 27-127.3(d) specifies that an owner or other person with an interest in the property cannot defend based on a lack of knowledge or non-participation in the erection or maintenance of the illegal sign.

After posting the Commissioner’s removal order at the property for ten days, DOB may employ a licensed sign hanger to remove the sign. The costs of removal may be recovered from the property owner or the outdoor advertising agency in a court action.

The law also added new Administrative Code section 26-253, providing that a Department of Buildings permit is required in certain commercial and manufacturing districts before erection and maintenance of an outdoor sign, if the sign is visible from an arterial highway or public park. Fines for violating this section are recoverable in court or before the Environmental Control Board.

Local Law 14 additionally requires outdoor advertising companies to register with DOB (Admin. Code § 26-260). DOB may, after notice and a hearing at OATH, revoke, suspend, fine or refuse to renew the registration of a registered company for grounds specified in subdivision d of section 26-260. One such ground is the making of false statements in any application or certification filed with DOB.

Pursuant to section 26-262, an outdoor advertising agency whose registration has been revoked becomes ineligible for an award of a City franchise or concession and is barred from administering an advertising program for a City franchisee or concessionaire for five years. That section also provides for criminal penalties, and civil penalties (fines) enforceable at ECB.



ALJ Ray Fleischhacker, Special Assistant to the Mayor Ester Fuchs, and former Mayor David Dinkins at an event celebrating Ms. Fuchs’s tenure as a Columbia University Professor.

## Message From Chief Judge Velez

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agencies with this idea and the input has been very favorable. Judge Ray Kramer, who is spearheading this project, is working closely with the Mayor's Office and plans to open the Mediation Center by year's end.

**A Paperless Court:** As with most courts, OATH's case filing and records management process is paper-based. To eliminate the expenses of maintenance and storage, OATH plans to implement an electronic records management system that will provide a paperless environment for case management. The electronic file management system will permit the parties to file their pleadings via the Internet and search an on-line version of OATH's calendar for available dates. The "paperless court" (or the "E-Filing System", as we refer to it within OATH) will yield numerous benefits,



Corporation Counsel Michael Cardozo speaking with with ALJ Ray Kramer about the the creation of the OATH Mediation Center

such as increasing the efficiency of case tracking, greatly improving accessibility to case information, reducing the costs of maintaining file folders, and serving as a backup in the event of a major catastrophe, such as the attack on the World Trade Center. Judge John Spooner, who has taken the lead in this project, hopes to begin to roll out parts of the E-Filing System by next year.

**Stakeholder Advisory Committee:** In keeping with the Mayor's goal of enhancing service to the users of City services, we are examining ways to increase the participation of our users in planning and evaluating the adjudication process. One way we have planned to increase involvement is by establishing a committee of OATH users, which will meet on a regular basis to discuss how case processing and administrative procedures can be improved. The Stakeholder Advisory Committee, as it will be called, will consist of City disciplinary directors, union officials, private attorneys and City Hall staff. We hope that the Advisory Committee will give our users a real opportunity to have a say in how we run our tribunal and thereby improve the services we provide.

The strategic plan that we at OATH have set forth is ambitious, but with your assistance and input, I believe it is achievable. I look forward to meeting and working with you in the future.



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