

**MESSAGE FROM CHIEF JUDGE
ROBERTO VELEZ**

THE FORUM OF FIRST RESORT
Update on Mediation Center

In 2003, I reported to you that the Center for Mediation Services (CMS) had opened its doors with a two-fold mission: 1) to mediate workplace disputes referred by City agencies in an expedited manner; and 2) to provide dispute resolution and conflict management training to City employees to assist them in resolving workplace disputes. I am pleased to report that CMS mediators have met both goals.

As of July 30, 2004, CMS received 36 referrals from seven City agencies, including Police, Fire, DEP, Health, Education, Law and HHC. Out of the 36 referrals, CMS mediators were able to convene a mediation with the parties in 22 cases. Since mediation is a voluntary process, both parties have to agree to participate. On average, CMS mediators were able to schedule the mediations within 34 days of referral and, once at the table, they were able to facilitate an amicable resolution in an average of three hours.

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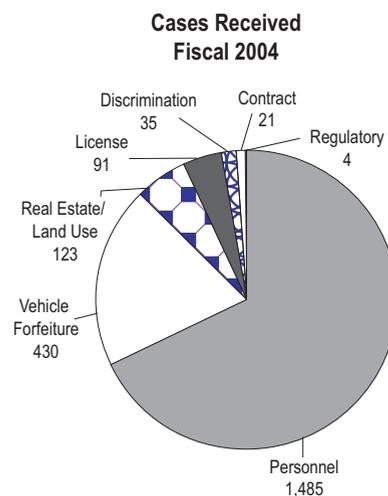


From Left: Chief Judge Roberto Velez, Paulette Lundy, Assistant Commissioner, Office of Equal Employment Opportunity, NYC Fire Department, Caroline Laguerre-Brown, Assistant Director, Office of Equal Employment Opportunity, NYC Fire Department

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ANNUAL REPORT



This thirtieth issue of *BenchNOTES* incorporates OATH's annual report to the Mayor, which begins at page 7.

Developing E-File System

OATH continues to work towards the implementation of a new case management system before the end of the current fiscal year. The new system is needed to fully support OATH's collection and storage of electronic files, as OATH shifts from paper files to electronic files. The new system will also permit OATH to replace its analog tape recording using magnetic cassette tapes with a digital recording system using digitally produced electronic audio files. In addition, the new case management system will provide enhanced reporting of statistical reports and automated calendar functions.

OATH's case management needs are being addressed as part of a multi-agency initiative involving other agencies located at 40 Rector Street. Guided by a May 2003 needs



assessment for OATH and three other Rector Street agencies, OATH, the Office of Labor Relations and the Office of Collective Bargaining are developing customized case management applications in conjunction with a larger project already under way at the City's Law Department. The multi-agency case management project relies upon a core customizable, off-the-shelf software application. With this rollout, scheduled for the spring of 2005, OATH will move substantially closer to its goal of becoming a "paperless" court.

Chief Judge's Message

(continued from page 1)

Out of the 22 cases mediated, 20 cases concluded with successful resolutions, which means a 91% success rate. The disputes that were not resolved were referred back to the agency. Thus far, we are mediating and resolving disputes in an extremely efficient if not expedited manner. The benefits to the agencies are obvious: when EEO officers and disciplinary advocates refer less serious cases to mediation, they are free to focus on the more complicated cases. The benefits to employees are just as obvious: the mediation process allows the employees to shape their own agreement, which makes for a more durable and productive resolution.

With respect to the second goal, CMS training teams have presented conflict management training to two agencies: the Department of Housing Preservation and Development and the Fire Department. HPD facilitators were trained in

how to facilitate settlement negotiations in landlord and tenant cases brought to Housing Court. The training was so successful that HPD staff asked CMS trainers to do a follow-up training for supervising HPD facilitators. With respect to the Fire Department, the training team recently conducted a half-day training in conflict management for newly promoted Fire Alarm Dispatch Supervisors. The training was specifically designed for dispatch supervisors whose work involves overseeing the dispatching of fire companies to emergencies throughout the City. They work 12- and sometimes 18-hour shifts and interact with firefighters and the public under stressful situations. One of the main training themes was that low-level disagreements, if left unaddressed, can develop into more serious disputes that can affect the entire workplace. Using a series of hypothetical scenarios ranging from a minor disagreement to a serious widespread conflict, the CMS trainers assisted the group in analyzing conflict types and applied different methods for effective resolution. All of the participants found the

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OATH DECISIONS¹

DISCIPLINARY PROCEEDINGS

A. Misappropriation

In *Department of Correction v. Nuzzo*, OATH Index 506/04 (Dec. 9, 2003), Judge Rosemarie Maldonado found that an assistant deputy warden wrongfully possessed over \$1,000 of department property in his home and had made false statements about the matter at a Mayor's Executive Order 16 interview. Judge Maldonado rejected respondent's claim that the property was garbage salvaged from a flooded basement, based upon credible testimony from investigators that the property was in good condition. Termination was imposed as the penalty for the egregious breach of trust.

In *Administration for Children's Services v. Poyer*, OATH Index No. 789/04 (Feb. 2, 2004), Judge Donna Merris found that Administration proved that respondent knowingly made excessive withdrawals of funds from her accounts at the Municipal Credit Union for a period of two months immediately following September 11, 2001 without sufficient deposits to cover the withdrawals. Termination was recommended; employee resigned.

B. Mishandling of funds

School custodians are in charge of large budgets for maintenance and supplies. Under their collective bargaining agreement, custodians are to return any unspent funds at the end of the year, although they are permitted to keep a certain maximum amount instead of salary. Custodians are also

required to submit quarterly reports for all expenditures.

In *Department of Education v. Young*, OATH Index No. 1139/03 (Sept. 19, 2003), a custodian was charged with violating Department rules by failing to return more than \$100,000 in excess funds and failing to adequately account for claimed expenditures from 1999 to 2001. Judge John Spooner found that the custodian failed to repay or otherwise account for these funds. The custodian contended that his employer had condoned custodians' practice of submitting late expense reports. The judge found that the agency had condoned the late submission of reports prior to March 21, 2001, but the employee was on notice thereafter that his continuing failure to account for expenditures would be punished as misconduct. In light of the seriousness of the proven misconduct, the judge recommended termination of the custodian's employment.

C. Insubordination

With limited exceptions, under the "obey now, grieve later" principle, an employee may be disciplined for refusing to obey an order by his or her supervisor. If the employee believes the order is improper or unlawful the employee is bound to obey the order first and later file a grievance seeking relief. In *Health and Hospitals Corporation (Coler-Goldwater Hospital) v. Hinkson*, OATH Index No. 163/04 (Nov. 18, 2003), respondent, a respiratory therapist, was charged with insubordination for failing to follow two written directives to report for mandatory overtime. On both occasions, respondent informed the hospital that he was too tired to work overtime. Judge Rosemarie Maldonado found that respondent engaged in misconduct under the "obey now, grieve later" rule. Respondent's vague testimony failed to establish that his refusal to work was justified by the threat to his and his patients' health and safety. Considering the difficulties of the work schedule as mitigation, the ALJ recommended a 15-day suspension.

¹ This issue covers OATH decisions from September 2003 through February 2004. In those cases where OATH findings are 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.

D. Lack of qualification

An employee may be disciplined for failing to meet a qualification requirement of his or her position. In *Department of Parks and Recreation v. Miller*, OATH Index No. 483/04 (Jan. 7, 2004), respondent, an urban park ranger, was charged with failing to obtain special patrolman certification from the Police Department. Such certification was a bona fide job qualification. At trial, petitioner proved that respondent's certification was denied. Judge Rosemarie Maldonado found that respondent was unqualified and unfit for the position and recommended termination.

E. Negligent performance of duties; neglect of duty

In several cases during the reporting period, City employees were found to have neglected their duties or negligently performed their duties, sometimes with dire consequences. One such case, heard by Judge Tynia Richard was *Human Resources Administration v. Bellamy*, OATH Index No. 1665/03 (Jan. 9, 2004). There, a homeless man, who had no food and no money to buy food, went to an HRA facility and applied for benefits with his two children. Respondent, an eligibility specialist, denied the man and his family benefits because he lacked identification for his children. Agency policy required that the eligibility specialist give the applicant food stamps the same day, even without identification. Petitioner charged respondent with negligently failing to perform her duties. At the hearing, respondent argued that she received inadequate training as to the agency's policies. Judge Richard found that respondent negligently performed her duties and recommended that she be suspended for sixty days.

In *Health & Hospitals Corporation (Metropolitan Hospital Center) v. Swakeen*, OATH Index No. 269/04 (Feb. 11, 2004), Judge Faye Lewis found that an operating room technician neglected his duty in that he could not be located for nearly two hours when needed in the operating room; a penalty of 30 days' suspension was recommended.

In *Department of Correction v. Andrejcisk*, OATH Index No. 1537/03 (Feb. 12, 2004),* a correction officer was charged with neglect of duty where an inmate died during respondent's overnight tour. Judge John Spooner found that respondent failed to comply with the applicable departmental rule in that he did not check inmates for "signs of life." The autopsy report indicated that the inmate had died of a heart attack between 10:20 p.m. and 12:20 a.m., and the officer, who conducted four tours of the area after 12:30 a.m., did not discover that the inmate was dead until 3:35 a.m., just after his fourth tour. ALJ Spooner recommended a 10-day suspension.

Finally, in *Department of Education v. Leonardi*, OATH Index Nos. 150/04 & 151/04 (Feb. 25, 2004), *modified on penalty*, Chancellor's Decision (Apr. 5, 2004), respondents, carpenters employed by the Department of Education, were observed sitting in a private vehicle in front of a school for three and one-half hours. Respondents claimed that they could not make the required bathroom repairs because they could not find the custodian, as per school procedure. Judge Donna Merris found that the respondents neglected their duty by failing to communicate with their supervisor to receive an alternate assignment and by failing to contact the principal of the school, who could have arranged to get respondents access so they could make the assigned repairs. ALJ Merris recommended a 25-day suspension based on each respondent's long tenure with the department and lack of any prior disciplinary record. The Chancellor terminated both respondents.

F. Off-duty misconduct

As mentioned in the previous issue of BenchNotes, this tribunal has long held that City employees may be disciplined pursuant to section 75 of the Civil Service Law for off-duty misconduct, but only where the agency establishes that the off-duty conduct has a nexus to the employee's job or the conduct involves moral turpitude. In *Human Resources Administration v. Beauford*, OATH Index No. 1517/03 (Dec. 5, 2003),* Judge Raymond Kramer held that the agency could not sanction

respondent, a custodian, for conduct resulting in an off-duty misdemeanor arrest for drug possession, finding the agency failed to demonstrate a nexus between respondent's job and the off-duty misconduct. Nevertheless, Judge Kramer recommended termination for the insubordination and time and leave violations that the agency proved at trial.

Agencies may seek to discipline employees for misconduct in connection with arrests. In *Department of Correction v. Tolliver*, OATH Index No. 1616/03 (Sept. 25, 2003), a correction officer was charged with engaging in misconduct in connection with an off-duty physical altercation which resulted in his arrest. Judge Rosemarie Maldonado noted that an employee cannot be disciplined for an arrest, instead the agency must prove the underlying facts of the activity charged. Here, Judge Maldonado found that the agency failed to prove its case by a preponderance of the evidence. There was no independent witness to the alleged assault and no contemporaneously written statement by respondent about the events. In addition, both parties showed strong bias against each other. Thus, the charge was dismissed.

One variation of this type of misconduct is failure to report an arrest to the agency. In *Department of Correction v. Shepard*, OATH Index No. 1631/03 (Jan. 30, 2004), *modified on penalty*, Comm'r Dec. (Apr. 2, 2004), a correction officer was charged with failing to report an arrest to the Department. The officer testified that she notified a union delegate of her arrest. Judge Spooner reasoned that the officer's notification of the union delegate did not relieve her of her obligation to notify the Department in writing of the arrest. However, the judge found that such notification provided mitigation of the penalty and recommended a one-day suspension and reimbursement for four pre-trial suspension days. The Commissioner accepted the judge's findings of fact, but imposed a five-day suspension for the proven misconduct.

G. Fault requirement

This tribunal has held that there is no strict liability under section 75 of the Civil Service Law. To discipline an employee for misconduct, an agency must establish that the employee was at fault, either through a showing that the employee was reckless, careless or negligent or the employee violated a law, rule or regulation.

In three cases, OATH judges recommended dismissal of charges, finding that the agency did not prove that the respondent was at fault. *Dep't of Correction v. Ingram*, OATH Index No. 320/04 (Feb. 13, 2004); *Dep't of Correction v. Faust*, OATH Index No. 105/04 (Jan. 26, 2004); *Dep't of Sanitation v. Hoffman*, OATH Index No. 539/04 (Nov. 2, 2003). In *Ingram*, respondent, a correction officer, was charged with failing to supervise an inmate. Judge Rosemarie Maldonado recommended dismissal of the charge, finding insufficient proof that respondent was responsible for an inmate walking unescorted in a corridor. In *Faust*, Judge Ray Kramer found petitioner failed to prove that respondent correction officer intentionally or negligently failed to appear for a mutual exchange tour.

In *Hoffman*, OATH Index No. 539/04 (Nov. 21, 2003), respondent, a district superintendent, was charged with not enforcing the agency's code of conduct against a subordinate sanitation worker, who was observed by a Department investigative officer during a four-day surveillance to have committed various rules infractions while on his route. A supervisor is not strictly liable for the conduct of his subordinates, and absent a showing of some fault by respondent, he could not be held liable for his underling's misconduct or for failing to enforce the conduct code against him. Judge Ray Kramer found that petitioner did not prove fault here, where respondent was not the employee's field supervisor but was primarily assigned to administrative work in the garage, was not required to make field inspection trips with any particular frequency or at any particular time, and was not aware of the infractions until later.

REAL PROPERTY

A. Zoning

Accessory uses of residentially zoned property are permissible only if they are "incidental to" and "customarily found in connection with" the principal use. In *Department of Buildings v. Owners, Occupants and Mortgagees of 119-34 192nd Street, Queens*, OATH Index No. 1224/03 (Dec. 23, 2003) Judge Tynia Richard found that home renovation, although not expressly so listed in the zoning resolution, is logically an accessory use of residential property. She also noted that "occasional maintenance of one's own vehicle is logically an accessory use of the driveway." Judge Richard found that respondent's home renovation work, which went on for eighteen years, was not incidental. Petitioner proved that respondent used his residentially zoned property for storage of building materials and junk salvage in violation of the zoning resolution, and therefore the premises should be padlocked pursuant to section 26-127.2 of the Administrative Code.

B. Loft Law

1. Challenge to sale of fixtures

The Loft Law entitles protected occupants to sell fixtures that they have installed in their loft to an incoming tenant, subject to the owner's right to elect to buy the fixtures for fair market value. Loft Board regulations provide for (a) an outgoing tenant to notify the owner of a proposed fixture sale to an incoming tenant, and (b) the owner to notify the tenants that it is exercising its option to buy the fixtures for fair market value or challenging the proposed sale.

In *Matter of 79 Warren Street Associates, LLC*, OATH Index No. 749/03 (Jan. 13, 2004), *aff'd*, Loft Bd. Order No. 2852 (Mar. 18, 2004), a co-owner of an Interim Multiple Dwelling ("IMD") building filed an application challenging the sale of fixtures between outgoing and incoming tenants. The co-owner's predecessor in interest, an estate,

had served the tenant with a notice of election to buy the improvements as required. However, the tenant ignored the notice and proceeded with the sale. Judge Spooner found that the estate's notice of election was valid and that the sale that occurred violated the Board's regulations and the statutory right of IMD owners to purchase fixtures. Judge Spooner recommended that the Loft Board give the owner thirty days to purchase the fixtures.

In a related application, *Matter of Herlihy*, OATH Index No. 1523/03 (Jan. 13, 2004) *aff'd*, Loft Bd. Order No. 2852 (Mar. 18, 2004), the other co-owner of the same IMD building sought a determination whether the second and fourth floors were deregulated because occupants of the floors were residing with owners. Judge Spooner denied the application as to the second floor, finding no legal basis for the relief requested. The fourth floor occupant was found not to be a protected occupant because the sale of improvements was invalid.

2. Coverage and rent overcharge

In *Matter of Andrew Bradfield, LLC*, OATH Index No. 1345/03 (Nov. 18, 2003), *aff'd in part, modified in part*, Loft Bd. Order No. 2845 (Feb. 19, 2004), the owner of an IMD sought a finding that the occupants of the second floor unit were not subject to rent regulation. This proceeding was consolidated with *Matter of Edidin*, OATH Index No. 1590/03 (Nov. 18, 2003), *aff'd in part, modified in part*, Loft Bd. Order No. 2845 (Feb. 19, 2004), a proceeding in which the occupants of the second floor unit sought rent-regulated coverage under the Loft Law as well as a finding of rent overcharge against the owner. Judge Merris found that the second floor tenants were protected occupants and that the unit had not been deregulated by virtue of a sale of rights, sale of fixtures, or an abandonment of the unit by the former protected tenant. Judge Merris found that the tenants were overcharged in a total amount of \$24,669. In calculating the overcharge, Judge Merris allowed the owner to offset the amount by the rent the tenant collected from a subtenant. The Loft Board upheld the finding of coverage, but did not permit the offset, modifying the rent overcharge amount to \$35,169.40.

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The annual report data illustrates the scope of OATH's adjudicatory authority and the array of different City agencies, boards and commissions for whom we hear cases. During Fiscal Year 2003, OATH docketed 1,640 cases emanating from 27 mayoral agencies and 8 non-mayoral agencies, including 3 state public authorities. During Fiscal Year 2004, OATH docketed 2,189 cases emanating from 28 mayoral agencies and 5 non-mayoral agencies, including 2 state public authorities

While the major portion of OATH's caseload has historically involved personnel cases, we also hear a substantial number of cases involving other areas of law, including vehicle forfeiture cases referred by the Police Department, license and regulatory matters referred by the Department of Buildings and the Department of Health and Mental Hygiene, landlord and tenant matters referred by the Loft Board and the Department of Housing Preservation and Development, zoning cases referred by the Department of Buildings, discrimination complaints referred by the City Commission on Human Rights and contract claims filed by contractors.

Case Filings and Dispositions By Case Type	Fiscal Year 2003		Fiscal Year 2004	
	Filings	Dispositions	Filings	Dispositions
Personnel				
Discipline	1,233	1,312	1,442	1,345
Disability	12	14	19	11
Financial Disclosure/Other Chapter 68 (CIB)	1	1	20	19
Forfeiture				
Vehicle (POL)	-	-	430	425
License				
Expediter Suspension, Other License Cases (DOB)	20	21	2	1
Restaurant Closures (DOH)	98	99	89	87
Regulatory				
Limited Supervisory Check, Other Building Code (DOB)	3	6	8	8
Real Estate/Land Use				
Loft Board Applications	73	72	39	42
Zoning Violations (Padlock Closures (DOB))	66	65	68	73
Single Room Occupancy Harassment (HPD)	4	5	12	5
Contracting				
Prevailing Wage (COM)	2	4	1	1
Prequalification Denial Appeal (DDC)	1	1	1	-
Contract Dispute Resolution Bd. Decisions (7 agencies)	102	85	19	33
Discrimination				
Discrimination Complaints (CCHR)	21	26	35	28
Other Cases				
Other Cases (DEP, POL)	4	4	4	6
Total	1,640	1,715	2,189	2,084



Case Activity (For cases filed in each Fiscal Year)	Fiscal Year 2003				Fiscal Year 2004			
	1	2	3	4	1	2	3	4
Mayoral Agencies								
Admin. for Children's Services	38	29	9	-	26	15	8	3
Buildings	92	51	41	-	78	39	32	7
Citywide Admin. Services	21	15	6	-	10	9	1	-
Civilian Complaint Review Bd.	-	-	-	-	2	1	1	-
Consumer Affairs	3	3	-	-	2	2	-	-
Correction	501	450	50	1	567	430	59	78
Design and Construction	10	5	5	-	8	1	6	1
Education	16	14	2	-	34	24	3	7
Employees' Retirement System	2	2	-	-	1	1	-	-
Employment	1	1	-	-	-	-	-	-
Environmental Protection	13	6	7	-	24	11	8	5
Finance	6	5	1	-	6	6	-	-
Financial Info. Services Agency	1	1	-	-	1	1	-	-
Fire	26	21	5	-	38	28	6	4
Health	107	97	10	-	105	94	-	11
Homeless Services	22	14	8	-	23	21	1	1
Housing Preservation and Dev.	95	92	2	1	21	13	-	8
Human Resources Admin.	173	127	45	1	261	222	25	14
Comm'n on Human Rights	24	21	3	-	35	24	-	11
Info. & Telecommunications Tech.	-	-	-	-	3	3	-	-
Juvenile Justice	6	5	1	-	3	2	1	-
Law	-	-	-	-	1	1	-	-
Loft Board	73	42	24	7	39	21	8	10
Parks and Recreation	7	4	3	-	9	3	6	-
Office of Payroll Admin.	1	1	-	-	-	-	-	-
Police	45	35	9	1	430	395	35	-
Probation	6	6	-	-	12	11	-	1
Sanitation	62	31	31	-	68	26	27	15
Transportation	15	6	9	-	47	28	11	8
Taxi and Limousine Comm'n	2	-	2	-	1	-	1	-
Other Agencies								
City Clerk	1	1	-	-	-	-	-	-
Comptroller	6	4	2	-	5	1	1	3
Conflicts of Interest Bd.	1	1	-	-	20	17	3	-
Health and Hospitals Corp.	180	145	35	-	235	174	49	12
Housing Authority	4	3	1	-	-	-	-	-
Office of Special Narcotics	1	1	-	-	-	-	-	-
Transit Authority	31	25	6	-	36	29	5	2
Triborough Bridge & Tunnel Auth.	48	42	6	-	38	32	5	1
Total	1,640	1,306	323	11	2,189	1,685	302	202

Key to Columns: 1 = New Cases Filed 2 = Settled or Withdrawn Without Trial
3 = Decided After Trial 4 = Pending as of 9/7/2004



All Case Dispositions (By Fiscal Year)	Fiscal Year 2003			Fiscal Year 2004		
	1	2	3	1	2	3
Mayoral Agencies						
Admin. for Children's Services	33	10	43	15	10	25
Buildings	52	41	93	42	41	83
Citywide Admin. Services	15	3	18	9	3	12
Civilian Complaint Review Bd.	-	-	-	1	1	2
Consumer Affairs	1	-	1	4	-	4
Correction	501	45	546	458	70	528
Design and Construction	2	4	6	4	7	11
Education	13	2	15	25	5	30
Employees' Retirement System	3	1	4	1	-	1
Employment	1	-	1	1	-	1
Environmental Protection	4	8	12	12	10	22
Finance	6	-	6	5	1	6
Financial Info. Services Agency	1	-	1	1	-	1
Fire	30	10	40	30	8	38
Health	95	14	109	93	10	103
Homeless Services	21	9	30	19	3	22
Housing Preservation and Dev.	84	4	88	19	1	20
Human Resources Admin.	129	46	175	217	34	251
Comm'n on Human Rights	28	1	29	26	2	28
Info. & Telecommunications Tech.	-	-	-	1	-	1
Juvenile Justice	7	1	8	2	-	2
Law	-	-	-	1	-	1
Loft Bd.	45	27	72	31	13	44
Parks and Recreation	5	1	6	3	8	11
Office of Payroll Administration	-	-	-	1	-	1
Police	35	14	49	391	35	426
Probation	6	-	6	10	-	10
Sanitation	47	28	75	24	24	48
Taxi and Limousine Commission	-	-	-	-	3	3
Transportation	6	10	16	16	10	26
Other Agencies						
City Clerk	1	-	1	-	-	-
Comptroller	4	3	7	1	2	3
Conflicts of Interest Bd.	1	-	1	16	3	19
Health and Hospitals Corp.	155	37	192	160	54	214
Housing Authority	2	1	3	1	-	1
Office of Special Narcotics	1	-	1	-	-	-
Transit Authority	27	8	35	29	5	34
Triborough Bridge & Tunnel Auth.	25	1	26	42	10	52
Total	1,386	329	1,715	1,711	373	2,084

Key to Columns: 1 = Settled or Withdrawn Without Trial

2 = Decided After Trial

3 = Total Dispositions

(continued from page 6)

3. Diminution of services

Loft Board regulations prohibit an owner from diminishing services provided for in a lease or rental agreement or if there is no lease or rental agreement in effect, the lease or rental agreement most recently in effect. In *Matter of 9-01 44th Drive Tenants Association*, OATH Index No. 224/04 (Jan. 21, 2004), *aff'd*, Loft Bd. Order No. 2851 (Mar. 18, 2004), the tenants of an IMD sought a finding that the building owner denied them their right to freight elevator service on a twenty-four-hour basis. Judge Maldonado found that the tenants had unlimited freight elevator service as of June 21, 1982, the effective date of the Loft Law, and that the owner's denial of elevator service violated the minimum housing maintenance standards set forth in section 2-04 of the Loft Board's rules. Judge Maldonado rejected the owner's argument that a 1995 agreement between the owner and tenants, stating that "freight elevator service shall be subject to reasonable regulation by the landlord," allowed the owner to limit the tenants' right to twenty-four-hour elevator service, where such access continued for seven years after the agreement was executed.

4. Unreasonable interference

In *Matter of Slotkin*, OATH Index No. 741/03 (Nov. 24, 2003), *aff'd*, Loft Bd. Order No. 2853 (Mar. 18, 2004), a Loft Board-initiated unreasonable interference application, the second floor tenants of an IMD sought a finding that the owner's plan to install a passenger elevator through their kitchen interfered with the use of their unit. Judge Merris found that the owner's plan unreasonably interfered with the tenant's use of the premises because it was not required for legalization and construction of the elevator would necessitate significant reconstruction of the unit, causing considerable short term disruption.

PRACTICE POINTER

Pre-marked exhibits facilitate the hearing.

LICENSING

In *Department of Health v. 966 Gurat Restaurant*, OATH Index No. 236/04 (Sept. 17, 2003), *modified on penalty*, Comm'r Dec. (Oct. 1, 2003), Judge Faye Lewis found that the continued operation of a food service establishment by respondents would constitute an imminent health hazard. Given the history of repeated serious violations, and a prior incident involving fecal contamination of food, Judge Lewis recommended that respondents' food service permit be revoked. The commissioner adopted Judge Lewis' findings and penalty; additionally ordering that no new permit to operate a food service establishment be issued to respondent for at least two years.

WATERSHED

OATH has jurisdiction to review decisions made by the New York City Department of Environmental Protection pursuant to the city and state watershed protection regulations, 15 RCNY § 18-28. During the reporting period, two cases were decided; both were appeals from the department's denial of variances from requirements governing subsurface sewage treatment systems (SSTS).

In *Frackman v. Department of Environmental Protection*, OATH Index Nos. 1228/03 & 1229/03 (Oct. 1, 2003), property owners appealed the agency's denial of their application for a variance from the rules that govern the construction of subsurface sewage treatment systems. Petitioners own 5.18 acres of property in the Town of Kent (Putnam County), within in the Boyd's Corner Reservoir drainage basin and submitted applications for a variance seeking to be exempted from four different portions of the watershed regulations. DEP's First Deputy Commissioner denied the variance, finding that the proposed absorption area for the SSTS is within 100 feet of a watercourse, in violation of 15 RCNY section 18-38(a)(5). The Deputy Commissioner also found the owners' proposed mitigation measures insufficient.

OATH Judge John B. Spooner determined that the owners failed to demonstrate that the Deputy Commissioner abused his discretion, noting that it is uncontroverted that their proposal does not meet the requirements of section 18-38 of the regulations in that the proposed SSTS will be 73 to 79 feet from the watercourse. The Deputy Commissioner concluded that neither increasing the width of the impervious barrier at the lower end of the SSTS from two to ten feet, nor construction of a silt fence, were as protective of the water supply as the standards for regulated activities set forth in these rules and regulations. Nothing in the appeal papers established that these conclusions were unreasonable.

In *Buckskin Realty, Inc. v. Department of Environmental Protection*, OATH Index No. 216/04 (Dec. 30, 2003),* petitioner appealed the agency's denial of its request for a variance from the SSTS requirements. Petitioner had acquired 16 lots in the Town of Windham (Greene County), within the Schoharie Reservoir drainage basin. Petitioner submitted an application for approval of an on-site SSTS for one of its lots, as well as a separate application for a variance to construct and use an on-site SSTS to treat human and household wastes from a three-bedroom, single-family residence. Petitioner's request for a variance sought an exemption from the prohibition of SSTS's on land with slopes greater than 15 percent. 10 NYCRR 75, Appendix 75-A.4(a)(1).

DEP's First Deputy Commissioner found that petitioner failed to demonstrate that it would suffer a substantial hardship from denial of the variance. On appeal, petitioner reiterated its substantial hardship argument, and also argued that its application for SSTS approval and application for a variance should be deemed approved by default, because the department did not make a determination on either application until after the requisite time period. Judge Faye Lewis found that petitioner's SSTS application should, in fact, be deemed approved due to the department's failure to comply with the time constraints imposed by 15 RCNY section 18-23(d)(6)(i). However, Judge Lewis rejected petitioner's assertion that the default approval subsumed or made irrelevant the variance application:

"Because the SSTS application called for a slope in excess of [15 percent], it was not in compliance with the regulations, and would not be compliant unless the pending variance application was granted. Thus, it would be unreasonable to consider the default approval of the SSTS application to be other than limited in nature, that is, contingent upon the approval of the pending variance application. To hold otherwise would be to subvert the regulatory scheme for the protection of the water supply by precluding the Department from making a decision on a variance application."

Judge Lewis also rejected the petitioner's claim of substantial hardship. Petitioner asserted that it would lose more than \$65,000 as a result of the denial of the variance, and that DEP's calculation of the financial hardship was incorrect. Petitioner's engineering report indicated that "[w]ithout these variations from the standards, construction of this residence on this property is not feasible." However, Judge Lewis held that "speculation as to possible lost profits and failure to maximize economic return is insufficient to demonstrate substantial hardship where, as here, petitioner has made no showing that the parcel can not be used for other, albeit less profitable uses. . . . [Petitioner's] conclusory assertion is not sufficient to demonstrate a 'substantial hardship.'"

VEHICLE FORFEITURE

As announced in the Chief Judge Velez' message in the last issue of BenchNotes, the United States Court of Appeals for the Second Circuit ruled in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), *cert. den.*, __ U.S. __, 123 S. Ct. 2640 (2003), that persons whose cars were seized following an arrest are entitled to a prompt hearing to determine whether the Police Department may retain the vehicle as an alleged instrumentality of a crime pursuant to section 14-140 of the Administrative Code pending a forfeiture hearing. OATH was designated by United States District Court Judge Mukasey to hold post-seizure vehicle retention hearings brought by the Police Department to determine its right to

retain the seized vehicle. *Krimstock v. Kelly*, 99 Civ. 2041 (MBM), amended order and judgement (Jan. 22, 2004). During the reporting period the first vehicle retention hearing was conducted by Judge Charles Fraser. *Police Dep't v. McFarland*, OATH Index No. 124/04, mem. dec. (Feb. 24, 2004).

In *McFarland*, Judge Fraser noted that in vehicle retention hearings the Police Department bears the burden of proving, by a preponderance of the evidence, three points: (i) that probable cause existed for the arrest pursuant to which the vehicle was seized; (ii) that it is likely that the Department will prevail in a civil action for forfeiture of the vehicle; and (iii) that it is necessary that the vehicle remain impounded pending final judgment in the forfeiture action. Judge Fraser found the vehicle owner's guilty plea to driving while intoxicated established the first two points. Regarding the third point, Judge Fraser noted that the Department is entitled to retain the vehicle upon proof that retention is necessary to preserve the vehicle from loss, sale or destruction, or to protect the public from further drunk driving by the respondent.

Judge Fraser held that for the Department to prevail on the "necessary to retain" point, it had to prove that its retention of the vehicle pending the forfeiture action would prevent more than an ordinary risk to either public safety or of loss or destruction of the vehicle. If ordinary risk was sufficient, no hearing would be required because all vehicles are at risk of loss by theft, depreciation or damage due to accident. Instead, to justify continued retention the Department must prove a *heightened* risk to either public safety or of loss or destruction of the vehicle.

Judge Fraser opined that proof of an accident while driving drunk coupled with proof of an especially high blood alcohol reading may be sufficient to establish the "necessary to retain" point, but here he found the Department's evidence was insufficient to prove the respondent was involved in an accident or if there was an accident, it was "anything more than a minor fender bender." Nor did the Department prove that respondent's blood alco-

hol reading was unusually high, where it failed to offer a breathalyzer result into evidence. As the Department did not meet its burden on all three points, Judge Fraser ordered the car be returned to respondent.

CONFLICTS OF INTEREST

Financial Disclosure Law

The City of New York has strong financial disclosure rules designed to promote accountability on the part of public servants and to prevent prohibited conflicts of interests between public servants' official duties and their private interests. Elected and political party officials, candidates for public office and certain categories of City officers and employees are required to file annual financial disclosure reports with the Conflicts of Interest Board. In July 2003, the City Council replaced the old financial disclosure law with a new version of the law. Local Law No. 43 of 2003 repealing and reenacting Administrative Code section 12-110. The new law eliminated the filing requirement for managers with little potential for conflict and it increased the salary threshold for City officers and employees who are required to file based solely on their salary.

OATH heard one financial disclosure case during the reporting period. In *Conflicts of Interest Board v. Three Public Servants*, OATH Index Nos. 361/04, 366/04 & 370/04 (Nov. 6, 2003), *aff'd*, Conflicts of Interest Bd. Case No. FD2003-8 (Dec. 15, 2003) (361/04); *aff'd*, Conflicts of Interest Bd. Case No. FD2003-13 (Dec. 15, 2003) (366/04); *modified on penalty*, Conflicts of Interest Bd. Case No. FD2003-17 (Jan. 17, 2004) (370/04), 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 Board's procedural rules for hearings. The petitions charged that each respondent was required by section 12-110 of the Administrative Code to file a financial disclosure report for calendar year 2001. One respondent was

charged with failing to file a disclosure report (Index No. 361/04) and the other respondents were charged with failing to pay the statutory fine for filing their disclosure reports after the statutory deadline (Index Nos. 366/04, 370/04). Upon respondents' default, petitioner produced evidence showing that each respondent was obligated to file a financial disclosure form, but either failed to do so at all, or did so late and failed to pay the late filing fines. Judge Suzanne Christen recommended a graduated penalty scheme for the non-filing respondent and \$1,000 fines for the non-payer respondents. The Conflict of Interest Board affirmed the penalty for the non-filing respondent and one non-payer respondent, and reduced the penalty to a \$200 fine for the other non-payer respondent.

CONTRACTS

A. Contract Dispute Resolution Board

The Contract Dispute Resolution Board hears claims by suppliers against City agencies arising out of City contracts. The proceedings are guided by the rules of the Procurement Policy Board. The Contract Dispute Resolution Board is chaired by an OATH Judge. The other two members of the three-person Board are a representative from the Mayor's Office of Contracts and an unaffiliated person selected from a pre-qualified roster of neutrals maintained by OATH. During the reporting period, the Board issued seven final determinations on claims brought by suppliers.

In *Sterling Sanitary Supply Corp. v. Department of Citywide Administrative Services*, OATH Index No. 1677/03, mem. dec. (Dec. 19, 2003), the contractor, a supplier of floor wax stripper, sought additional compensation in the amount of \$11,625 from the Department of Citywide Administrative Services, claiming that the five-gallon unit of measure used by the Department was erroneous. The contract provided that the contractor supply the quantity of 10,000, in the unit of issue of "5/GAL," at a unit price of \$7.75. The contractor maintained that the bid unit price is based upon

a one-gallon unit, not five gallons. The Contract Dispute Resolution Board, chaired by Chief Judge Roberto Velez, denied the contractor's claim, finding that to the extent that there was an ambiguity in the contract, the burden was upon the contractor to seek a clarification of any such ambiguity before submitting its bid.

In *American Wrecking Corp. of New Jersey v. Department of Sanitation*, OATH Index No. 229/04, mem. dec. (Dec. 22, 2003), the contractor filed a claim arising from an agreement to demolish and remove structures at the Greenpoint Incinerator. It sought \$1.25 million in additional compensation from the Department of Sanitation based upon its claim that conditions not known to it at the time of bidding made its anticipated method of demolition and removal of structures impossible, requiring the contractor to use a more expensive method. The contractor argued that it was not permitted to conduct a meaningful pre-bid inspection of the structures and the Department's pre-bid representation that as-built drawings were unavailable for inspection was made in bad faith. The Contract Dispute Resolution Board, chaired by Judge Rosemarie Maldonado denied the claim, finding that the contractor assumed the risk when it submitted its bid knowing it had incomplete information.

In *Solid Waste Services, Inc. v. Department of Environmental Protection*, OATH Index No. 1488/03, mem. dec. (Feb. 2, 2004), the contractor filed a claim arising from an agreement to transport and process biosolids from the City's waste treatment plants to out-of-state facilities. It sought a determination from the Contract Dispute Resolution Board that the Department of Environmental Protection wrongfully terminated the contract, claiming that the Department's action was arbitrary. The Department had terminated the contract, alleging the contractor had repeatedly failed to meet its tonnage requirements under the contract. The Contract Dispute Resolution Board, chaired by Judge Tynia Richard, found the contractor's prolonged failure to meet the Active Commitment Quantity and to maintain adequate back-up capacity to be a material breach. Therefore, the Board found that the Department was entitled to terminate the contract.

In *D. Gangi Contracting Corp. v. Department of Parks & Recreation*, OATH Index No. 1642/03, mem. dec. (Nov. 13, 2003), the Department of Parks and Recreation notified D. Gangi – the general contractor on a park renovation contract – in April 2001 that it would only pay half of the amount of an invoice D. Gangi had submitted for security work performed by a subcontractor, due to deficiencies in the work provided. After D. Gangi reduced its payment to the subcontractor, the subcontractor sued D. Gangi and in November 2002, attained a judgment against D. Gangi for \$14,431, plus interest.

The contractor filed a Notice of Dispute with the Department of Parks and Recreation in December 2002, seeking \$43,587 representing the cost of the judgment, plus attorneys fees, expenses and witness fees. The Department denied the claim as time-barred and the contractor thereafter appealed to the Contract Dispute Resolution Board. The contract and Procurement Policy Board rules required the contractor to file a claim with the Department within 30 days of the "determination or action that is the subject of the dispute." 9 RCNY § 4-09(d)(1) (nylp.com 2003). The Board, chaired by Judge Charles McFaul, found that the dispute arose when the Department reduced payment for security services and not when the court decision was issued. Because the contractor filed nineteen months after the claim arose, the claim was dismissed as time-barred.

In *Oly Bus Corp. v. Department of Transportation*, OATH Index No. 486/04, mem. dec. (Oct. 27, 2003), the contractor sought \$80,477.40 in compensation for providing extra-contractual pre-kindergarten transportation services for the Department of Transportation. The contractor moved to preclude the Department from answering the petition because the agency head's decision, which formed the basis for this appeal, failed to provide a reasoned explanation for denying its claim as required by the Procurement Policy Board rules. The Contract Dispute Resolution Board, chaired by Judge Donna Merris, denied the contractor's motion because the agency head's determination informed the contractor of the reasons for the

denial. Judge Merris noted that the process contemplated a complete absence of an explanation for denying payment, permitting the contractor to continue through the appeal process without prejudice. In addition, the Board found that the commissioner properly delegated authority to the Department's contracting officer to make the agency determination and had authority to make binding decisions under the contract, despite the officer's personal involvement in the administration of the contract.

The merits of *Oly Bus Corp.* concerned the contractor's agreement with the Department to provide pre-kindergarten transportation services from January to December 2002 on a "where and when" basis. In December 2002, the Department directed the contractor to provide the services at a rate of \$33.20 per pupil per day under the contract after another transportation contract was rescinded because of bid specification errors. The contractor performed the services under protest. The contractor argued that the contract required it to perform only where a prior contract was terminated, where a prior contract was defaulted, or where new programs were created without a transportation contract in place. The Board denied petitioner's claim finding that the contract required petitioner to perform the services where the contract had been rescinded.

In *Promatech, Inc. v. Department of Design and Construction*, OATH Index No. 460/04, mem. dec. (Feb. 9, 2004), the contractor sought \$1,026,780 from the Department of Design and Construction based on the Department's alleged failure to respond to the contractor's demand for a final accounting. The Contract Dispute Resolution Board, chaired by Judge Ray Kramer, held that a demand for a final accounting on a contract is not the type of dispute contemplated by section 29.1 of the contract. The Board found that the Department had not denied any or all of contractor's claim, but had simply not yet made a final accounting as to the amount the contractor was owed under the contract. Pursuant to section 29.4(A) of the contract, a dispute arises when the commissioner's representative makes a determination with which the contractor disagrees. Because there had been no final account-

Suzanne Christen has left OATH for an administrative position in academia. Judge Christen served as an Administrative Law Judge at OATH from 1991 to August 2004. She was the editor of BenchNotes issues 28 and 29. We hope she enjoys much success in her new endeavor.

Cherron Howard-Williams is the new Office Manager at OATH. Ms. Howard-Williams has worked for the Finance Department in parking violations as the assistant manager of the customer assistance phone line, as an income support supervisor for the Human Resources Administration and as a timekeeper for the Police Department.

Gina Rodriguez has joined OATH's calendar unit. Ms. Rodriguez previously worked for the Taxi and Limousine Commission. OATH has

also added a security officer, Officer Alvin Petersen. Officer Petersen is a retired NYC correction officer.

OATH Law Clerk David Leon was admitted to the New York State bar on June 28, 2004. Mr. Leon also wrote an article entitled "Mediation at the New York City Office of Administrative Trials and Hearings," which was published in the April 2004 edition of the Association for Conflict Resolution (Greater New York Chapter) Online Newsletter, at www.acrgny.org/acrgnynews.pdf.

Three law interns spent their summer at OATH: Daniela Kulikov, who will be starting her third year this fall at New York Law; Helen Su, who will begin her third year this fall at Fordham Law School; and D. Hardison Wood, who will begin his third year this fall at Cardozo Law School.

ing as to the monies owed to petitioner under the contract, the Board found that no justiciable dispute had arisen and that contractor's claim for resolution of its final payment request was not properly before the Board. Therefore, the Board dismissed contractor's claim without prejudice.

B. Prequalified Vendor Appeals

In *Kapadia v. Office of the Comptroller*, OATH Index No. 788/04, mem. dec. (Jan. 5, 2004), a certified public accountant appealed a Comptroller's office determination revoking the prequalified vendor status of his audit firm. The Comptroller revoked the firm's prequalified vendor listing based upon "material representations" in a Vendex questionnaire. The record indicated that on January 10, 2003, the accountant submitted a Vendex questionnaire swearing that he had a fifty percent interest in the firm. In March 2003 the accountant submitted an affidavit asserting that he

had sold his interest in the firm to his partner, effective January 1, 2003. When subsequently asked by the Comptroller to explain the contradictory sworn statements, the accountant admitted that his January 10th submission was inaccurate but not intentionally false, because at the time he made that statement he was negotiating with his partner about a possible extension of his relationship with the firm. Judge Spooner found that the Comptroller decision was not arbitrary and capricious, as the contradictory sworn statements, one of which must be false, reflected poorly upon his integrity and reliability.

PROCEDURE

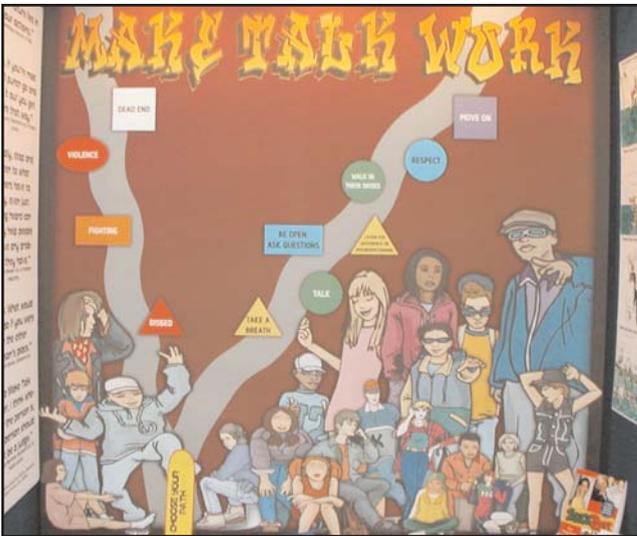
In *Department of Environmental Protection v. Elliott*, OATH Index No. 1647/03, mem. dec. (Feb. 17, 2004), petitioner refused to obey Judge Suzanne Christen's direction to proceed with the

Chief Judge's Message

(continued from page 2)

training very useful and recommended that it should be offered throughout the Department.

In conclusion, feedback from the participating agencies has been extremely favorable and, in the next several months, we will work to increase the number of referrals from City agencies. We will also work to increase the number of agencies that use our training services. I encourage EEO officers, disciplinary advocates, and union representatives to visit our website or contact us for more information on this free service.



ADR in NYC and the World -- "Make Talk Work" exhibit on display at John Jay College, co-sponsored by OATH and John Jay Dispute Resolution Consortium.

OATH DECISIONS

(continued from page 15)

hearing after a request for an adjournment was denied. Petitioner sought the adjournment claiming that its main witness was unavailable because he was recovering from surgery. Under OATH rule 1-46, an administrative law judge has discretion to alter traditional trial sequence. The judge directed petitioner to proceed with its other four witnesses and informed petitioner that the trial would be continued to produce the missing witness at a later date. After petitioner refused to go forward, the judge granted the motion to dismiss for failure to prosecute.



40 Rector Street
New York, NY 10006
(212) 442-4900
Fax (212) 442-8910
TDD (212) 442-4939
OATH@oath.nyc.gov
www.nyc.gov/oath

MICHAEL R. BLOOMBERG
Mayor of the City of New York

ROBERTO VELEZ
Chief Administrative Law Judge

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EDITOR
Martin Rainbow, Esq.

PRODUCTION
Frank Ng, Esq.

CONTRIBUTORS
Deputy Chief ALJ Charles McFaul
Supervising ALJ Charles Fraser
Arthur Bangs, Esq.
Robert Gatto, Esq.
David Leon, Esq.

PRACTICE POINTERS

Pre-trial stipulations can avert
the need for witness testimony.

A party intending to introduce documents into evidence shall bring to trial copies of those documents for the administrative law judge, the witness, and the other parties. 48 RCNY § 1-42.

Absent extraordinary circumstances, no application shall be made or argued by any representative who has not filed a notice of appearance. 48 RCNY § 1-11(c).