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Drug Test Reports Admissible Without Expert Testimony

In a license revocation proceeding brought by the Taxi and Limousine Commission, ALJ Alessandra Zorgniotti recommended revocation of the taxi driver's license based upon a positive drug test for marijuana. To establish the positive drug test result the Commission presented an affidavit from a toxicologist, with accompanying chain of custody form, toxicology reports and a confirmation from a medical review officer. ALJ Zorgniotti rejected the driver's argument that without witness testimony, the documentary proof provided by the Commission was insufficient to establish the charge. *Taxi & Limousine Comm'n v. Shakoor*, OATH Index No. 860/08 (Nov. 30, 2007).

Shakoor represents a break from past OATH precedent where expert witness testimony was required to lay the foundation for a positive drug test. ALJ Zorgniotti relied upon recent court decisions upholding findings of positive drug tests where the agency did not produce witness testimony. See *Fung v. Daus*, 2007 N.Y. Slip Op. 8863, 2007 N.Y. App. Div. LEXIS 11774 (1st Dep't Nov. 15, 2007) (court upheld revocation of a taxi driver's license based upon documentary proof without testimony from a live witness); *Layne v. New York State Bd. of Parole*, 256 A.D.2d 990, 684 N.Y.S.2d 4 (3d Dep't 1998) (drug report may be admitted into evidence without requiring witness testimony if the report is certified to ensure reliability); *Griffin v. Long Island Railroad, et al.*, 96-CV-4673 (E.D.N.Y. 1998) (due process does not require that in every case of a positive test result the employer produce at its own expense the individuals responsible for overseeing and administering the testing program).

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Licensing

Summary suspension of license for arrest may continue

The Administrative Code provides that the Taxi and Limousine Commission may suspend a license "for good cause shown relating to a threat to the public health, or safety and prior to giving notice and an opportunity for a hearing." By Commission rule, where the pre-hearing suspension is based upon the licensee's arrest, at the suspension hearing "the issue shall be whether the charges underlying the licensee's arrest, if true, demonstrate that the licensee's continued licensure during the pendency of the criminal charges would pose a threat to the health or safety of the public." ALJ Tynia Richard found that the licensee posed a threat to the health or safety of the public based upon proof of his arrest for second degree assault and criminal possession of a weapon and she recommended continuation of summary suspension. *Taxi & Limousine Comm'n v. Shahbaz*, OATH Index No. 1014/08 (Nov. 30, 2007).

Vehicle Retention

Beneficial ownership not found where driver was attending school in Rochester

The Police Department was not entitled to retain a vehicle pending final judgment in a forfeiture action where respondent was an innocent owner and the driver was not a beneficial owner. ALJ Faye Lewis found that the owner and parent of the driver had no reason to suspect that the vehicle would be used in furtherance of a crime. Additionally, the owner resided in Brooklyn, where the car is kept, while the driver was a college student living in Rochester. Thus, ALJ Lewis concluded that the driver was not the beneficial owner of the vehicle. *Police Dep't v. Moore*, OATH Index No. 1033/08, mem. dec. (Nov. 26, 2007).

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Loft Law

Abandonment application dismissed as time barred

ALJ Alessandra Zorgniotti found that an abandonment application was time barred under the amended Loft Board abandonment rule. The amended rule now requires abandonment applications to be filed within one year of the date the owner knew or should have known a unit was abandoned.

10(f). ALJ Zorgniotti dismissed the application filed on July 12, 2007, because the owner knew or should have known the unit was vacant when the building was purchased, over twenty years ago. *Matter of 103 W. 27th Street Realty, Inc.*, OATH Index No. 868/08 (Nov. 21, 2007).

Personnel

Disciplinary proceeding dismissed where proof showed conduct was more likely attributable to mental disability

ALJ Zorgniotti dismissed disciplinary charges after concluding that respondent's conduct was most likely due to a mental disability. The evidence showed that respondent failed to follow supervisor's orders, was absent without leave, intimidated and/or threatened supervisors, used inappropriate language, and was unruly. Respondent's counsel provided evidence that she had been involuntarily hospitalized for psychiatric evaluation, and several witnesses testified to respondent's bizarre behavior. Because a misconduct proceeding under section 75 of the Civil Service law requires a showing of willful or intentional conduct, this tribunal has held that unfitness caused by disability is more properly dealt with by a proceeding under section 72. *Human Resources Admin. v. Anonymous*, OATH Index No. 228/08 (Nov. 15, 2007).

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