



## OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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## BenchNOTES

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#### **OATH rules or agency rules, which apply?**

Parties and their representatives who appear at OATH should be aware of the procedural rules governing their case. Generally, OATH's rules of practice, title 48 of the Rules of the City of New York (RCNY), govern all procedural issues that arise in cases heard at OATH.

If, however, the referring agency has a procedural rule addressing the matter at issue, then the referring agency's rule governs rather than OATH's rule. 48 RCNY § 1-03 (Lexis 2008) (OATH's rules of practice apply "to the conduct of all cases . . . except to the extent that this chapter may be superseded by CAPA or other provision of law").

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#### **Withdrawal from representation at OATH**

Practitioners should know that once they appear in a case at OATH, they may not withdraw from representation without permission of the trial judge, on application.

Withdrawals will not be granted absent consent of the client or "when other cause exists as delineated in the applicable provisions of the Code of Professional Responsibility." 48 RCNY § 1-12 (a).

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## Last Month's OATH Decisions

### Personnel

#### **Poor attendance record, without showing absences were due to a disability, insufficient to put employee on leave.**

ALJ Kevin Casey rejected the Fire Department's attempt to place a fire alarm dispatcher on an involuntary leave of absence. Although respondent had a poor attendance record, poor attendance alone is not enough to place an employee on involuntary leave under section 72 of the Civil Service Law.

ALJ Casey found that the Department failed to prove that respondent's absences were due to a disability. He recommended dismissal of the petition because the evidence showed that respondent has a condition that is easily treatable and does not interfere with her ability to work. *Fire Dep't v. Ceglia*, OATH Index No. 204/08 (Feb. 1, 2008).

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### Licensing

#### **License revocation recommended for driver of for-hire vehicle who assaulted TLC officers.**

ALJ Casey recommended revocation of the license of a for-hire vehicle driver who, in two separate incidents, punched and bit TLC officers, and caused his open car door to strike an officer when the officers stopped his vehicle to investigate possible infractions.

Respondent's denial of all charges at the hearing was contradicted by guilty pleas in criminal court, where he admitted committing assault and attempted assault. *Taxi & Limousine Comm'n v. Jalloh*, OATH Index No. 1301/08 (Feb. 5, 2008).

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### Vehicle Retention

#### **Owner's arrest for trademark counterfeiting did not show risk to public safety necessary to justify retention of car.**

ALJ Tynia Richard rejected the Police Department's argument that it was entitled to retain respondent's vehicle to protect public safety.

The vehicle was seized as a result of the respondent's arrest for selling counterfeit handbags. The crime of trademark counterfeiting alone does not constitute the heightened risk to public safety necessary for the Department to retain a vehicle.

The ALJ rejected the Department's argument that respondent's previous arrests demonstrated a pattern of illegal use of the vehicle. The respondent had no convictions on his record, and no evidence was presented that the prior arrests involved criminal activity in his vehicle. *Police Dep't v. Weng*, OATH Index No. 1472/08, mem. dec. (Feb. 6, 2008).

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## Loft Law

### **Late filing after 5 p.m. on due date excused, default vacated.**

By Loft Board rule, a party who has not filed a timely answer will be declared in default and will be barred from participation at the hearing, unless the party files an application to be relieved from default within 30 days from the date of mailing of the default determination.

To be relieved of the default, the application must show that good cause existed for the failure to file an answer and it must present a non-frivolous defense.

In a case concerning an unreasonable interference application, ALJ Joan Salzman granted the building owner's application to vacate her default.

The Loft Board had rejected the owner's answer as untimely when she filed it by fax on the day it was due, but after the Board's offices were closed for the day. The Board date-stamped the answer as received the next morning.

The respondent had understood the Board's deadline rule to mean that a submission would be timely if it was faxed before midnight on the day it was due.

ALJ Salzman found that the respondent's reading of the Board's rule was reasonable since the rule does not specify close of business as the deadline. She also found respondent presented a non-frivolous defense to the petition. *Matter of Weadick*, OATH Index No. 1555/08, mem. dec. (Feb. 22, 2008).

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## Contracts

### **City not liable for cost of extra work caused by a fire on the Queensboro Bridge.**

A contractor hired by the City to paint the Queensboro Bridge sought an additional \$1,263,336 in compensation for costs associated with extra work caused by a worksite fire on the bridge. The Contract Dispute Resolution Board (CDRB), chaired by ALJ Alessandra Zoragniotti, denied the claim.

Although the cause of the fire is in dispute, that issue is not within the CDRB's jurisdiction. Interpreting the contract, the CDRB found that the petitioner was under an "absolute obligation" to protect its work against any damage.

The only exceptions to the absolute obligation are showings of bad faith, gross negligence, or willful misconduct by the other party. No such showing was made here. *L&L Painting Co., Inc. v. Dep't of Transportation*, OATH Index No. 280/08, mem. dec. (Feb. 8, 2008).

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