

OATH

BenchNOTES

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Department of Information Technology and Telecommunications Awards Presentation

On October 10, 2002, the Department of Information Technology and Telecommunications ("DoITT") selected RecTech as the recipient of the 2002 Excellence in Technology Award for "Best IT Collaboration Among Agencies." RecTech is a collaboration of eight NYC agencies located at 40 Rector Street in lower Manhattan, created to share technology and other resources. The member agencies include the Board of Standards and Appeals, the Campaign Finance Board, the Civilian Complaint Review Board, the Commission on Human Rights, the Office of Administrative Trials and Hearings, the Office of Collective Bargaining, the Office of Labor Relations and the Taxi and Limousine Commission. RecTech was convened in an effort to achieve enhanced systems support and cost savings through the pooling of resources.



Judge John Spooner, DoITT Commissioner Gino Menchini, Chief Judge Roberto Velez, and Deputy Chief Judge Charles McFaul at DoITT awards presentation.

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Judge Spooner, RecTech's chair since its inception in early 1996, accepted the award on behalf of the Committee reemphasizing the innovative and collaborative elements which have made RecTech a success. The RecTech committee members honored by DoITT include:

- Charles McFaul, Deputy Chief Administrative Law Judge (OATH)
- Ken O'Brien, Chief of Systems Administration (CFB)

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ANNUAL REPORT

This twenty-seventh issue of BenchNOTES incorporates OATH's annual report to the Mayor, which begins at page 9. We hope that this information proves interesting and useful to our readers.

OATH DECISIONS¹

DISCIPLINARY PROCEEDINGS

A. Penalties; Mitigation and Exacerbation

This issue of BenchNotes will discuss at some length the assessment of penalties under section 75 of the Civil Service Law, and related Administrative Code provisions, including matters in mitigation and in exacerbation of penalties. Any discussion of penalties must begin with the seminal case of *Pell v. Board of Education*, 34 N.Y.2d 222, 239, 356 N.Y.S.2d 833, 846 (1974). In *Pell*, the Court of Appeals determined that termination of the employment of six employees was not so disproportionate to their offenses as to be shocking to one's sense of fairness. The Court set forth various factors to be considered in making such a determination. 34 N.Y.2d at 234-35, 356 N.Y.S.2d at 842-43. The Court rather clearly opines that employees of agencies such as the Police, may be subject to greater penalties than non-law enforcement employees; and that morally grave misconduct, such as larceny or fraud, or a breach of trust, should not be subject to the constraints imposed by notions of progressive discipline or mitigating circumstances.

Certain acts of misconduct almost invariably result in imposition of the ultimate penalty, termination of employment, irrespective of an employee's prior work record. In *Health and Hospitals Corporation (Kings County Hospital Center) v. Wright*, OATH Index No. 467/02 (Mar. 22, 2002), ALJ Donna Merris found that a special hospital police officer struck a psychiatric patient in the face, causing multiple fractures to the patient's nose, after the patient had spit at the officer on consecutive days. In light of the long-held

policy of the Corporation, finding employee violence towards patients wholly unacceptable, ALJ Merris recommended termination of employment despite the absence of prior disciplinary matters. Compare *Health and Hospitals Corporation (Coney Island Hospital) v. Smith*, OATH Index No. 525/02 (Mar. 8, 2002), in which ALJ John Spooner recommended a sixty-day suspension instead of termination for a psychiatric technician who engaged in a profane and angry verbal altercation with a psychiatric patient and attempted to strike the patient. ALJ Spooner considered that the employee had reacted to volatile remarks made by the patient, had not had any physical contact with the patient, and had a generally good work record.

A similar termination policy is practiced by the Department of Sanitation in so-called "trade waste" cases. These cases involve sanitation workers who pick up refuse from or generated by commercial establishments, which Department policy regards as corruption. The policy explicitly states that no proof need be shown that a gratuity was given. Thus, in *Department of Sanitation v. Martello*, OATH Index Nos. 1210-11/02 (June 17, 2002), ALJ Suzanne Christen recommended termination of the employment of two sanitation workers, who removed a truckload of construction debris from a residential premises undergoing renovation by commercial contractors. After the OATH decision, one of the respondents reached a settlement with the Department for a penalty short of termination, but which included a period of probation, a penalty that cannot be imposed in a disciplinary proceeding.

Department of Correction v. Barnswell, OATH Index No. 733/02 (Apr. 24, 2002) represents a third class of cases where termination of employment is the usual result. Undue familiarity with inmates is one of the most serious acts of misconduct in which a correction officer can

¹ This issue covers OATH decisions from March 2002 through August 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.

engage. Here, a correction officer was involved in a transaction with an inmate both while the inmate was incarcerated and after the inmate's release, which is also forbidden, without first notifying the agency.

ALJ Ray Fleischhacker found the mitigatory circumstances, that the respondent, for years, had been an innovator in both his community and at his job as a recreation officer, were outweighed by his prior disciplinary record. The ALJ also considered the respondent's numerous false statements at both the Mayoral Executive Order No. 16 interview and at the hearing about his dealings with the inmate, before, while and after the inmate was incarcerated. Therefore, the ALJ recommended termination of employment.

Another act of misconduct that most frequently results in termination of employment is illegal drug use by police or correction officers. Both agencies have a "zero tolerance" policy. *Police Dep't v. Roman*, OATH Index No. 356/91 (Apr. 26, 1991), *aff'd*, Comm'r Dec. (Oct. 25, 1991), *aff'd*, 198 A.D.2d 143, 603 N.Y.S.2d 856 (1st Dep't 1993); *Dep't of Correction v. Singleton*, OATH Index No. 1344/02 (July 29, 2002). However, the Civil Service Commission has held that penalties in drug-related cases should be considered on a case by case basis. *See, e.g., Dep't of Correction v. Schick*, OATH Index No. 1380/95 (June 28, 1995), *modified on penalty*, NYC Civ. Serv. Comm'n Item No. CD 96-38 (Mar. 29, 1996).

In a case where there was little precedent, *Triborough Bridge and Tunnel Authority v. Perkins*, OATH Index No. 1571/02 (May 22, 2002), ALJ Merris reasoned that termination was the most appropriate sanction. In *Perkins*, a bridge and tunnel officer was found to have fallen asleep while refueling a vehicle, causing a large spillage of fuel. The employee had a minor disciplinary history except for a finding in 2000 that he slept intermittently while collecting tolls, which had resulted in a fifteen-day suspension.

Citing the safety risk created by the employee's conduct and the prior disciplinary history, which included related misconduct, ALJ Merris stated that the employee's acceptance of full responsibility for the incident and remorse over it did not mitigate the penalty. Before a penalty could be imposed, the employee resigned.

Finally, in *Board of Education v. Jochees*, OATH Index No. 345/02 (Aug. 5, 2002),* ALJ Fleischhacker pondered whether an employee's misconduct merited demotion or termination of employment. The employee, a carpenter supervisor, had been observed on ten occasions outside of her assigned school districts during the work day. On four of those occasions she was seen reading a newspaper in her car during the work day, and either taking excessively long lunch hours or conducting personal business during work hours. Mitigatory circumstances included the employee's attendance at AA meetings as the personal business she engaged in on most occasions, as a recovering alcoholic, the difficulties she experienced with her male counterparts as the only woman in the carpenter trade, and her tenure of 16 years without prior incident. Exacerbating circumstances included the nature of the misconduct, which involved both theft of time and submission of false records.

Ultimately, ALJ Fleischhacker decided in favor of recommending termination for three reasons. Not all of the personal business was related to attending AA meetings, nor were the falsified records limited to keeping the AA meetings a secret from the workplace. The employee's job as a supervisor in the field was, or if demoted, as a worker in the field, would be largely unsupervised. Finally, and most importantly, the employee's testimony at the hearing, two years after the incidents, continued to express her disdain for accurate record keeping, making sure she spent a wholly productive work day, and fulfilling her supervisory duties of inspecting the work of her subordinates.

In the cases that follow, termination was not the recommended penalty for the reasons set forth. *Dep't of Sanitation v. Marquez*, OATH Index No. 1209/02 (July 12, 2002) is a case that explores both progressive discipline and the priority over section 75 given to Administrative Code provisions regarding discipline of three of the four (the Correction Department has no such provision) uniformed services. Discipline of sanitation workers is governed by Administrative Code section 16-606. That section allows for two possible penalties: forfeiture of pay or suspension without pay for up to thirty days or termination of employment. In *Marquez*, the employee was found guilty in six separate cases which had been consolidated for trial. Despite the serious nature of the misconduct, which included repeated acts of insubordination and the falsification of a record, and the employee's poor attitude at trial, which suggested that he was not about to reform his behavior, ALJ Ray Fleischhacker rejected recommending termination of employment. Honoring the principle of progressive discipline (the employee had had six prior disciplinary findings, but the highest penalty had been a forfeiture of three vacation days), the ALJ determined that suspension was a more appropriate penalty.

OATH has held that because Administrative Code section 16-606 has not been interpreted to preclude penalties for each set of charges, as has been imposed by court decisions under Civil Service Law section 75, each separate incident is subject to a maximum thirty-day suspension. Given all the circumstances, the ALJ recommended a suspension without pay of 120 days.

In *Transit Authority v. Wagh*, OATH Index No. 517/02 (July 11, 2002), ALJ Merris recommended a penalty short of termination, which had been sought by the agency. The employee had refused to work on an assigned project, compiling and editing a manual. ALJ Merris found that the employee's twenty-five year tenure and lack of any prior disciplinary action mitigated against

such a substantial penalty. Instead a suspension was recommended and imposed.

In *Human Resources Administration v. Streat*, OATH Index No. 1387/02 (July 2, 2002), it was found that an employee on two occasions sent fraudulent agency forms to her utility company in order to delay the utility from cutting off her electrical service. Despite the severity of the misconduct, ALJ Christen found mitigation in the employee's long tenure, her competent job performance, her unblemished disciplinary record, and the absence of any evidence that submission of the forms was intended to or could have resulted in agency funds being used to pay the respondent's utility bill. The ALJ mentioned two other mitigating factors: the employee was the sole support of her four children and had not been receiving child support payments at the time in question; and she demonstrated sincere remorse for her conduct. Therefore, instead of recommending the employee's termination, ALJ Christen recommended a sixty-day suspension, which was subsequently imposed.

A sixty-day suspension, instead of termination was recommended by ALJ Merris in *Department of Transportation v. Davis*, OATH Index No. 1042/02 (July 9, 2002)* despite the employee having engaged in the following misconduct: excessive absences, barring the way of a supervisor, and falsely identifying himself as a police officer at the scene of a minor traffic accident. The ALJ invoked the principle of progressive discipline, noting that the employee had never before engaged in misconduct and that the confrontation with the supervisor did not include verbal threats or physical action. Consideration was also given to the fact that the employee had suffered a chronic injury on the job several years earlier.

All of these cases illustrate that OATH's Administrative Law Judges exercise considerable discretion in making penalty recommendations. Certain facts, such as length of tenure or prior

disciplinary record, may be relied on, depending on the nature of the misconduct. Each Administrative Law Judge attempts to fashion an appropriate penalty in each case.

B. Workplace Assignments

Department of Youth & Community Development v. Hollins, OATH Index No. 1287/02 (June 17, 2002)* involved the failure of an employee to report back to work after the disaster at the World Trade Center. The employee's workplace, several blocks from the Trade Center, was vacated on September 11. A week later, the staff re-occupied the building. The employee reported to work that day, but not thereafter. Nevertheless, the employee, having expressed her concerns about health and safety in correspondence, was granted medical leave for approximately two weeks. Again, the employee failed to appear at work when her leave ended.

ALJ Raymond Kramer noted that the employee's correspondence with this tribunal appeared calculated to raise the health and safety exception to the obey now-grieve later principle. However, having failed to appear at the disciplinary hearing, the employee failed to assert the exception, which is an affirmative defense. Further, the agency offered proof that the work site was in compliance with safety protocols and that the employee was the only one of two hundred staff members who failed to report back to the work site. ALJ Kramer, while mindful of the severe stress, anxiety and disruption created for thousands of people who worked in the vicinity of the Trade Center, noted that eight months had elapsed and that the clean-up at Ground Zero had been completed. "While a certain flexibility in an employer's response to workers' needs and concerns should be expected after such a unique event, it is also true that at some point there must be a return, as much as possible, to 'business as usual.'" Because the employee failed to demonstrate justification for her lengthy absence with-

out leave, ALJ Kramer recommended termination of employment.

In *Human Resources Administration v. Minima*, 1532/01 (May 16, 2002), a caseworker assigned to a Manhattan office, refused to accept a temporary fifteen-day emergency transfer to an office in the Bronx. He claimed that he felt his safety would be endangered if he ran into a former client who had repeatedly threatened him a year or so earlier. The employee had already successfully employed this reason to avoid a transfer to Brooklyn with the rest of his office, having then cited the client's residence in that borough. ALJ Kramer found that the employee's claimed safety risk was not supported by any evidence. Indeed, the employee had remained at a Manhattan location even though the client's conduct had occurred at that location. A thirty-day suspension was recommended.

And, in *Department of Correction v. Buford*, OATH Index No. 388/02 (June 17, 2002), ALJ Merris held that an employee should have obeyed an order, then grieved it. The employee, a correction officer, sought to reverse a change of assignment. Instead of taking the newly assigned post, the employee disputed the assignment with a supervisor, then waited 20-30 minutes to discuss the matter with a higher level supervisor, thereby failing to timely report to the post. The ALJ recommended a ten-day suspension, crediting the employee's tenure and good record.

C. Other Cases of Interest

1. Right to Representation Revisited

In Benchnotes 26, we highlighted a case that rejected a claimed violation of Civil Service Law section 75(2) because the employee took too long to procure a union representative. *Health and Hospitals Corp. (Seaview Hospital) v. Cantres*, OATH Index No. 500/02 (Jan. 15, 2002). During this reporting period a section 75(2) claim

was upheld in *Human Resources Administration v. Williams*, OATH Index No. 226/02 (Mar. 7, 2002).

In *Williams*, the employee, a clerical associate level III, was charged, along with a co-worker, with theft of agency property from another co-worker's desk, and with providing false information during an investigation of the matter. ALJ Kramer suppressed the use of statements made by the employee to Department of Investigation investigators during an investigatory interview regarding the theft incident, because the employee was not advised, orally or in writing, as required, of her right to representation at the interview pursuant to Civil Service Law section 75(2). At the time of the interview, the investigators were in possession of a secretly recorded videotape showing the employee and a co-worker removing property from another worker's desk. Thus, the employee, at the time of the interview, was clearly a "potential subject of disciplinary action" and should have been advised of her right to representation. Nor did petitioner meet its heavy burden in seeking to establish the employee's waiver of her right to representation, particularly where the employee was unaware of such right. The proper remedy for a violation of Civil Service Law section 75(2) is barring the agency's use, in its case-in-chief, of any resultant improperly obtained statements. Because the charge alleging the employee's provision of false information during an investigation was predicated entirely on her tainted interview statements, that charge was dismissed.

However, ALJ Kramer held that a statement obtained in violation of Civil Service Law section 75(2), although inadmissible in an agency's case-in-chief, is nevertheless admissible for impeachment purposes, as a prior inconsistent statement, once an employee elects to testify in his or her disciplinary hearing, so long as the statement was not coerced or involuntarily made. The ALJ rejected the employee's argument that a knowing and intelligent waiver of the right to rep-

resentation had to be demonstrated, as required in certain federal criminal cases involving a violation of a defendant's Sixth Amendment right to counsel, before such statements could be used even for impeachment purposes. Here, the statements made by the employee to the investigators, although made without representation, were nevertheless voluntary and could be used to impeach her once she elected to testify.

Employing Penal Law standards of accomplice liability (Penal Law § 20.00), ALJ Kramer found that the employee acted in concert with a co-worker in stealing property from a colleague's desk, and was thus equally culpable for the items that her accomplice stole.

2. Circumstantial Evidence

In *Department of Correction v. Morgan*, OATH Index Nos. 2037-38/01 (Mar. 29, 2002), ALJ Christopher Kerr found by the preponderance of the evidence that a handgun entered the Queens Detention Center through articles of clothing brought for an inmate by his girlfriend. To reach the inmate's third-floor housing area, the weapon must have gone undetected in searches conducted by the correction officer in the package room at the visitor search post, and by the correction officer at the A post entrance to the housing area. Because the contraband should have been discovered in the course of a proper and thorough search, both correction officers were found to have failed to perform their duties efficiently.

3. Judicially sealed records

In *Department of Correction v. McConey*, OATH Index No. 496/02 (Apr. 18, 2002), the agency attempted to prove an employee's misconduct in a case where criminal charges had first been brought, and the criminal records had been sealed. ALJ Kerr ruled inadmissible police reports that had been judicially sealed following the dismissal of the criminal charges. However, reports prepared by a Department of Correction

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MESSAGE FROM CHIEF JUDGE
ROBERTO VELEZ

OATH'S INNOVATIONS IN TECHNOLOGY

During his first months in office, Mayor Bloomberg has promoted the use of technology as a way to improve access to government, as well as to increase productivity and accountability within City agencies. Here at OATH, we have been striving to meet these goals for years. The prior OATH Chief Judges - - Charles McFaul and Rose Rubin - - embraced technology as a tool to improve the operation of OATH. They were responsible for implementing a local area network, an office wide e-mail system, performance-monitoring databases, and an electronic library of decisions. Under their leadership, they helped to nurture two initiatives, that have been recognized by experts in the fields of technology and government as outstanding examples of innovation.

The first initiative is the Rector Street Technology Committee or, as we fondly call it, "RecTech." RecTech is a working committee of MIS Directors from the eight City agencies based at 40 Rector Street, whose goal is to leverage technological resources to better serve these agencies. The agencies' collaborative efforts have resulted in several successful cost-saving projects: a joint e-mail gateway, a building-wide security system, and a shared CD-ROM law library that is the equivalent of a traditional library of over 5,000 volumes. Presently, OATH will be jointly operating a network with one of the other agencies and sharing the annual salary of the network's administrator. This type of cooperation generally does not occur in City government.

"Government organizations all over the country will do well to learn from the lessons of these eight agencies."

DoITT Commissioner Gino Menchini

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The Center for New York City Law's annual "Civic Fame" award presentation at New York Law School. From left: ALJ Spooner, NYLS Academic Affairs Director Meg Reuter, Professor Ross Sandler, Deputy Chief ALJ McFaul, former Chief ALJ Rubin, NYLS Dean Matasar, Chief ALJ Velez.

RecTech has proven so successful that the Department of Information Technology and Telecommunications ("DoITT") selected it as the recipient of the 2002 Excellence in Technology Award for "Best IT Collaboration Among Agencies." Judge Spooner, RecTech's chair since its inception, accepted the award on behalf of the Committee and eloquently reemphasized the innovative and collaborative elements of RecTech. The award presentation is covered on Page 1.

The second initiative is OATH's collaboration with the Center for New York City Law at New York Law School to establish an Internet library of administrative law decisions. Through the hard work of OATH staff, Prof. Ross Sandler and his staff at the Center, the website has become a valuable repository of information for litigants and other entities doing business with the City. The joint project was started in 1999 with the initial objective of making some 4,000 OATH decisions available through the Center's website. Having achieved that objective in 2001, our collaboration continued and now the Center's website hosts administrative decisions from three other City agencies. The Center's administrative law library has become a unique and important research tool for administrative decisions interpreting and applying City laws and rules. Our significant contribution to the development of the website was recently recognized by Prof. Sandler and New York Law School Dean Matasar, who presented OATH with the 2002 Civic Fame Award. This award is given to those entities that have made a substantial contribution to the field of municipal administrative law.

So, here at OATH, we continue the tradition of innovation in the field of technology. Our latest effort is to develop a paperless court system. 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. Early this year, we received a grant from the NYS Department of Education to move this project forward. I hope that by the end of Fiscal Year 2004, we will begin a phase-in of this important project. OATH plans to continue to use new technology to streamline the adjudication process and to improve the services we provide to our users.

NYS LGRMIF Grant Awarded to OATH

OATH was awarded a New York State Local Governmental Records Management Improvement Fund grant to conduct a needs assessment for its paperless court initiative. The grant will support a needs assessment to determine the costs of conversion from a paper-based records management system to an electronic system. OATH plans to implement a electronic records management system that will, among other things, permit electronic filing and retrieval of documents.

Last year's 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 2002, OATH docketed 1,829 cases emanating from 26 mayoral agencies and six non-mayoral agencies, including two 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 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.

OATH's operations were seriously disrupted by the attack on the World Trade Center and we were relocated from our offices for several weeks. The relocation limited access to case files and calendar activity was suspended until we identified alternate space in which to hold hearings. As a result, fewer cases were docketed, settlement rates declined and case processing time frames increased. We anticipate improved performance in these areas this year.

Case Filings and Dispositions By Case Type - Fiscal Year 2002

		Filings	Dispositions
Personnel	Discipline	1,502	1,505
	Disability	16	16
	Financial Disclosure/Other Chapter 68 (CIB)	1	1
License	Expediter Suspension, Other License Cases (DOB)	17	16
	Restaurant Closures (DOH)	156	155
	Taxi Owner/Operator Violations (TLC)	-	5
Regulatory	Limited Supervisory Check, Other Building Code (DOB)	11	10
Real Estate/Land Use	Loft Board Applications	42	81
	Zoning Violations (Padlock Closures - DOB)	47	46
	Single Room Occupancy Harassment (HPD)	5	9
Contracting	Prevailing Wage (COM)	2	2
	Contractor Debarment	-	-
	Prequalification Denial Appeal	-	-
	Contract Dispute Resolution Board Decisions	9	23
Discrimination	Discrimination Complaints (CHR)	19	12
Other Cases	Other Cases	2	2
Total		1,829	1,883

New Cases Filed - Fiscal Year 2002	1	2	3	4
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Mayoral Agencies

Admin. for Children's Services	56	38	16	2
Buildings	78	34	38	6
Citywide Admin. Services	13	11	1	1
Civilian Complaint Review Bd.	3	3	-	-
Correction	744	679	31	34
Design and Construction	8	6	1	1
Education	10	7	2	1
Employees' Retirement System	3	2	1	-
Employment	1	-	-	1
Environmental Protection	8	3	3	2
Finance	21	21	-	-
Fire	26	8	6	12
Health and Mental Hygiene	166	109	57	-
Homeless Services	46	33	10	3
Housing Preservation and Devel.	18	13	3	2
Human Resources Admin.	243	209	25	9
Comm. on Human Rights	21	13	-	8
Juvenile Justice	2	-	-	2
Loft Board	42	14	18	10
Parks and Recreation	15	15	-	-
Police	27	19	5	3
Probation	5	4	1	-
Sanitation	66	30	23	13
Transportation	8	4	3	1
Youth Services	1	-	1	-

Other Agencies

Comptroller	5	3	1	1
Conflicts of Interest Board	1	1	-	-
Health and Hospitals Corp.	124	91	27	6
Housing Authority	2	1	1	-
Transit Authority	45	35	5	5
Triborough Bridge & Tunnel Auth.	21	18	3	-

Total	1,829	1,424	282	123
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Key to Columns:

1 = Cases Calendared
 2 = Cases Settled or Withdrawn Without Trial

3 = Cases Decided After Trial
 4 = Cases Pending as of 9/25/2002

Case Dispositions - Fiscal Year 2002	1	2	3
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Mayoral Agencies

Admin. for Children's Services	54	38	16
Buildings	77	36	41
Citywide Admin. Services	12	11	1
Correction	690	649	41
Design and Construction	9	6	3
Education	12	11	1
Employees' Retirement System	1	1	-
Environmental Protection	8	7	1
Finance	20	20	-
Fire	27	19	8
Health and Mental Hygiene	169	108	61
Homeless Services	45	33	12
Housing Preservation and Devel.	31	27	4
Human Resources Admin.	258	226	32
Comm. on Human Rights	11	11	-
Loft Board	82	39	43
Parks and Recreation	16	15	1
Police	34	19	15
Probation	5	4	1
Sanitation	82	38	44
Taxi and Limousine Comm.	7	1	6
Transportation	13	9	4
Youth Services	1	-	1

Other Agencies

Comptroller	5	3	2
Conflicts of Interest Board	1	1	-
Health and Hospitals Corp.	132	105	27
Housing Authority	4	2	2
Transit Authority	47	40	7
Triborough Bridge & Tunnel Auth.	30	26	4

Total	1,883	1,505	378
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Key to Columns:

1 = Cases Calendared
 2 = Cases Settled or Withdrawn Without Trial

3 = Cases Decided After Trial

(continued from page 6)

investigator were allowed, even though they were partly based upon the excluded police records, because they had been completed prior to the sealing of the police files.

4. Inmate Suicide

Inmate suicides are an anathema to the Department of Correction and are generally considered preventable. In *Department of Correction v. Maldonado*, OATH Index No. 1005/01 (May 31, 2002), after an inmate suicide, the Department brought charges against an officer and a captain, claiming that their failure to efficiently perform their duties led to the inmate's death by suicide.

ALJ Merris found that the employees had done much of what they were supposed to do. The correction officer notified the captain about the inmate's possibly aberrant behavior (refusing to eat or to leave his cell), the captain interviewed the inmate, and the officer completed a mental health referral slip. However, the form had not been submitted to the clinic and the inmate had not been placed under special observation before he took his life, in large measure because the captain was re-assigned to a different area for several hours to address a breach of security and then given an overtime post elsewhere.

ALJ Merris found that the correction officer, whose tour ended before the inmate's death, but before leaving had notified oncoming staff of the problem, had acted reasonably and committed no misconduct. With regard to the captain, the ALJ found that she had attempted to notify her housing area replacement and had exercised discretion in determining that an immediate referral of the inmate to the clinic was not warranted. Thus, the captain acted reasonably under the circumstances and, at worst, committed a non-disciplinable error of judgment.

5. Theft of post-Sept. 11 World Trade Center supplies

As late as August 2002 (overwithdrawals from ATMs at the Municipal Credit Union, NY Times, Aug. 6, 2002), there continued to be reports of how citizens took advantage of the World Trade Center tragedy for their own gain. *Department of Sanitation v. Blount*, OATH Index No. 1127/02 (June 11, 2002) is one such case. The events occurred on September 16, 2001, at an emergency relief center set up to distribute clothing and other items to Ground Zero rescue workers. A police lieutenant, in charge of the operation, observed a sanitation worker in uniform pick up a substantial number of items and place them in a car. When confronted, the worker, who was off-duty, stated that he intended to take the supplies to a nearby Sanitation garage. The lieutenant directed the employee to return the items, then notified Sanitation supervisors.

ALJ Spooner rejected the employee's claim that he was temporarily homeless due to domestic problems and that he only picked up a small number of items for personal use. By identifying himself as a Sanitation employee, the employee committed cognizable off-duty misconduct. Describing the employee's actions as theft, motivated by deceit and greed, and a desire to exploit the World Trade Center tragedy, ALJ Spooner recommended termination of the worker's employment.

DISABILITY PROCEEDINGS

In *Department of Probation v. Vargas*, OATH Index No. 953/02 (Mar. 20, 2002),* a probation officer sought reinstatement after having been placed on disability leave due to psychological problems. However, the City-appointed psychiatrist who examined the

employee concluded that, due to the aberrant thought processes caused by her schizophrenia, her lack of commitment to continuing treatment, and the inherent stresses of the probation officer position, she was unfit to return to work. At trial, the psychiatrist amplified on the reasons for this conclusion, indicating that respondent's counselor voiced agreement with his opinion. Respondent's sole argument in support of her contention that she was fit consisted of her opinion that she believed she could return to work. Based upon the un rebutted psychiatric evidence, ALJ Spooner found that the employee remained unfit and that the reinstatement appeal must be denied.

Department of Environmental Protection v. Johnson, OATH Index No. 1095/02 (July 9, 2002) involved an employee who fell asleep while performing a field assignment and was charged with misconduct. The agency was aware that the employee suffered from sleep apnea, but claimed he did not employ frequently enough special equipment he had been given to keep him wakeful during the day. Indeed, on the previous evening, the employee had not utilized the equipment. A physician who examined the employee on behalf of the City opined that the employee would be able to perform his duties if he complied with treatment, and the employee produced medical documentation which diagnosed his condition. Two years earlier, the employee had been on section 72 medical leave for several months in order to undergo surgery related to his condition.

ALJ Kerr found that the employee had established that he had fallen asleep as a result of a medical condition, not misconduct. Therefore, the ALJ recommended dismissal of the charge, finding that the employer's sole remedy was to seek disability leave under section 72. See *Dep't of Correction v. Aviles*, OATH Index No. 457/02 (Apr. 18, 2002) (Kramer, ALJ) and *Dep't of Correction v. Howell*, OATH Index No. 1012/02 (June 27, 2002) (Lewis, ALJ), in which employees were found guilty of misconduct for sleeping on duty.

Board of Education v. Jochems, OATH Index No. 345/02 (Aug. 5, 2002),* also raised disability issues, as the employee argued that her conduct, which, in part, consisted of attending AA meetings during the work day, was the result of her alcoholism, which was exacerbated by sexual discrimination she suffered in the workplace. ALJ Fleischhacker rejected any link to protection of employees suffering from disabilities, finding that the employee had been a recovered alcoholic for over ten years, and that alcoholism, in any event, does not constitute a defense to charges alleging theft of time or falsification of records.

PRACTICE AND PROCEDURE

A. Motion to Dismiss

1. In *Department of Correction v. Battle*, OATH Index No.1052/02 mem. dec. (May 15, 2002), ALJ Kramer dismissed without prejudice to re-submission, a letter deemed to be a motion to dismiss charges on Statute of Limitation grounds, where the "motion" failed to comply with the minimal standards for pre-trial motions set forth in OATH Rule § 1-34.

2. In *Matter of Neal*, OATH Index No. 352/02, mem. dec. (July 31, 2002), a Loft Board proceeding regarding non-compliance and harassment claims, ALJ Lewis granted a pre-trial motion to dismiss only a part of the harassment claim because certain statements attributed to the owner's representative could not possibly be found to be harassment. ALJ Lewis cited black letter law in denying the remainder of the motion. The facts asserted by the petitioning party's pleading must be taken as true and the petitioner given the benefit of every possible favorable inference. All that need be shown is that the facts alleged fit within any cognizable legal theory. The other claims survived the dismissal motion upon the ALJ's finding that there were at least arguable legal theories by which the petitioner could succeed.

B. Motion to Adjourn

In *Department of Correction v. Jones*, OATH Index No.1400/02 (July 10, 2002), ALJ Christen denied a motion for an adjournment on the day of trial. Although the employee's attorney appeared, the employee failed to appear in the three hours granted counsel to find his client. No explanation was ever furnished by the employee.

LICENSES

This reporting period saw a number of cases involving a variety of City licensees.

A. Crane Operator

Department of Buildings v. Keenan, OATH Index No. 2124/01 (May 6, 2002) involved a crane operator's license. The Building Code grants the Buildings Commissioner the authority to suspend or revoke a license for violations of the Building Code or laws, rules and regulations relating to the trade of the licensee. The proceeding arose out of a crane accident which occurred on April 6, 2001, in the vicinity of Second Avenue and 40th Street. The respondent, who held a Class A Hoist Machine Operator license, was hired to lift a 6,600 pound engine from a flatbed delivery truck to the second floor of a material hoist elevator at a construction site.

A consulting engineer had submitted plans that the City approved. Thereafter, the contractor rented a crane which the respondent brought to the site. On the date of the accident, the contractor did not have an engineer on site, as required, or an engineer's certificate of on-site inspection. Further, in order to complete the job, the licensee had to move the crane to a spot not contemplated in the engineer's plan. As the crane began to lift the engine, it tilted and had to be stabilized, while

a second crane secured the engine. As discovered later, the respondent had set up the crane at a location contrary to the plans, and on steel plates which were covering an open trench.

ALJ Maldonado determined that the licensee, who had been licensed since 1962, knew or should have known of the multiple safety lapses, and that his reliance on the foreman's verbal instructions, instead of the engineer's plan, was negligent. Although the agency asked for revocation of the license, ALJ Maldonado found a six-month suspension to be more appropriate, given the 40 years the respondent had held the license, with only one prior adjudication. Further, the ALJ found the construction company personnel in part responsible for the accident.

B. Architect Self-Certification

ALJ Maldonado also presided over *Department of Buildings v. Pettit*, OATH Index No. 190/02 (July 30, 2002), a proceeding in which the agency sought to exclude an architect from participation in procedures allowing for limited supervisory checks of plans and applications based upon an architect's or engineer's self-certification that a job complies with applicable laws, codes and regulations. It was found that the architect had failed to obtain the necessary approval of the Landmarks Preservation Commission before filing for a work permit for a building in a landmarked district. In another instance, the architect filed for limited review for a project that did not qualify for the procedure. In a third incident, the architect filed an incorrect application, seeking an alteration permit rather than a construction permit. Finally, in twenty-eight cases, the respondent failed to file necessary papers one year after issuance of a permit.

ALJ Maldonado recommended the architect's exclusion from participation in the limited supervisory review process, finding that he could not be relied upon to exercise his professional judgment in an area that implicated public safety.

C. Expeditors

In *Department of Buildings v. Robinson*, OATH Index No. 1117/02 (Mar. 11, 2002), ALJ Fleischhacker revoked an expeditor's license, because in his application the respondent had failed to disclose that he had been convicted of a felony involving drug sales in 1991. Such omission merited revocation of the license in light of the public safety issues surrounding the work of expeditors.

In *Department of Buildings v. Grant*, OATH Index No. 1370/02 (July 17, 2002),* ALJ Spooner barred an expeditor from visiting the Building Department's Manhattan Borough Office for sixty days, finding that the respondent had failed to produce proper identification and then disregarded an order to leave the building. Revocation of the license, as urged by the Department, was not warranted because the conduct did not display poor moral character or rise to the level of misconduct found in other cases in which revocation was recommended.

D. Food Vendor Permits

Department of Health v. Medrano Enterprises Ltd., OATH Index No. 1506/02 (May 22, 2002) involved the agency's attempt not to renew the permit of a mobile food vendor. In 1997, the current permittee purchased the shares of a food vendor business which held a food vendor permit. In 1998 and 2000, the Department renewed the permit. While conducting an audit, the agency discovered the transfer of ownership of the business. The applicable Administrative Code provisions bar the transfer of permits and define a transfer as including "any change of fifty per cent or more of the ownership." ALJ Spooner rejected the defense of waiver and estoppel, based upon the two renewals, stating that the defense is generally ineffective against a government body and that the equitable relief of estoppel is not avail-

able in administrative proceedings. Finally, there was no showing, as required, that the party invoking estoppel had relied on the agency's actions to his detriment. Accordingly, ALJ Spooner recommended that the Department of Health deny renewal of the food vendor permit.

REAL PROPERTY PROCEEDINGS

A. Loft Law

In *Matter of Munzer*, OATH Index Nos. 2109-10/01 (May 13, 2002), a tenant who had filed an application for Loft Law coverage, failed to appear at the scheduled hearing after several adjournments had been granted and the case had been marked final. Rejecting the tenant's eve of trial request to withdraw the application without prejudice, ALJ Spooner dismissed the application with prejudice for failure to prosecute.

B. Single Room Occupancy Hearings

Department of Housing Preservation & Development v. Greaux, OATH Index No. 1457/02 (Aug. 30, 2002)* involved the elderly owner of an SRO, who had, at the time of trial, sold the building in question, and a single remaining tenant who claimed that he had been harassed in an effort to coerce him to leave the building. Owners of SROs must apply for and receive a Certificate of No Harassment from the Department of Housing Preservation and Development before they can obtain a permit to alter or demolish the premises. In order to obtain the certificate, the owner must have refrained from harassing its tenants for a thirty-six month period prior to the date the application was filed. Following OATH precedent, ALJ Fleischhacker held that he could also consider whether the owner engaged in harassment

between the date of filing and the date of trial. The ALJ found that the owner had engaged in harassment by repeatedly misinforming the tenant of his right to remain on the premises and repeatedly stating that he would have to leave by certain dates, by threatening to shut down utilities and make a communal kitchen inaccessible to the tenant, and by having an agent threaten the tenant. Therefore, he recommended that the Department not issue the Certificate of No Harassment.

LABOR LAW § 220 PREVAILING WAGE PROCEEDINGS

OATH hears cases referred by the Office of the Comptroller in which debarment of a contractor is sought because of alleged Labor Law violations on public works. Most often the violation is the contractor's or a subcontractor's failure to pay prevailing wages to its employees for work performed on City contracts. Prevailing wages, *i.e.*, wages comparable to those paid for similar jobs in private industry, are determined and published each year by the Office of the Comptroller.

In *Office of the Comptroller v. Causeway Construction Corp.*, OATH Index No. 1694/02 (Aug. 21, 2002), ALJ Kramer found that a violation of Labor Law section 220 had occurred. In *Causeway*, a default proceeding, it was alleged that the company willfully failed to pay two of its employees prevailing wages on three public works contracts with the Parks Department. The employees, who had filed complaints with the Comptroller, testified at the hearing about their hourly wages and produced pay stubs. Although the company failed to produce its records, Parks Department certified payroll records and daily sign-in sheets corroborated the employees' claims. Finding the company's conduct willful, ALJ Kramer assessed a civil penalty of 25% of the underpayments. By law, the company was debarred from bidding on public works contracts for five years.

However, in *Office of the Comptroller v. Stivan Plumbing & Heating, Inc.*, OATH Index No. 1980/01 (June 28, 2002), ALJ Kramer found that the Comptroller failed to establish that the contractor had underpaid its workers. He did not find discrepancies between project engineer logs, which are brief journals of work on a site, that are not intended to carefully track contractor's employees' work hours, and the contractor's payroll records, provided adequate proof of intentional falsification of the payroll records. Accordingly, ALJ Kramer recommended that the Labor Law proceeding be dismissed.

APPEALS

Contract Dispute Resolution Board

In *Fischbach & Moore, Inc. v. Department of Environmental Protection*, OATH Index Nos. 1808/01 and 141/02, mem. dec. (June 25, 2002), a panel chaired by ALJ Christen considered two petitions of an electrical contractor seeking over \$1 million in additional compensation for what it claimed was extra work not encompassed within a contract to complete an instrumentation and control system at a water pollution control plant. Two prior contractors, after disputes with the City, had failed to complete the work. The panel rejected this contractor's claim of approximately \$830,000, which was based upon lost profits due to an "underrun," a substantial difference between the conduits and cables estimated to be required by the bid, and the lesser amount actually needed. The Board rejected this claim because the contract set forth that quantities of items in the bid were only estimates that could not give rise to claims for damages or for loss of profits.

As to the second claim of approximately \$215,000, the contractor claimed that its identifying and correcting tags on existing cables and wires that had been installed incorrectly by the

BenchNEWS

This summer, OATH was home to two Columbia Law School students, **Julie Calderon** and **Stela Chincisan**, who held the position of law intern and who assisted the law clerks and judges in research and writing. Thank you for a job well done, Julie and Stela.

The recent retirement incentive program was found tempting by three OATH employees. Two longtime staff members, **Marilyn Ginsberg** and **Joan Costello** retired, as did **ALJ Christopher D. Kerr**. ALJ Kerr had a distinguished career at the Department of Consumer Affairs before joining OATH in March 2001, serving for many years as an Administrative Law Judge and as the Deputy Director and Acting Director of Adjudication.

Summertime saw the departure of OATH's long-time student interns, **Jingliang Wang** and **Yuan Pan**, candidates for Master of

Science degrees at Pace University. Thanks for sharing your computer expertise and good luck. Our new interns, **Xianjin Lei** and **YunHang Zhao**, are also graduate students at Pace University.

Welcome to **Charlene Mallebranche**, who will work with OATH's administrative support staff. Ms. Mallebranche previously worked as a clerical associate at the Health Department.

Four staff members were honored on October 16, 2002, at the Seventh Annual Employee Recognition Ceremony sponsored by the Labor-Management Quality of Work Life Committee. **ALJ Charles McFaul** was honored for perfect attendance. **ALJ Rosemarie Maldonado** was honored for twenty years of City service. **ALJ John Spooner** was honored for fifteen years of City service. **Carol Plant** was honored for ten years of City service.

earlier contractors went beyond its understanding that it was only responsible for such work on materials it installed. The Board also rejected this claim, finding that the contract explicitly contained separate paragraphs covering both kinds of work.

In *Action Electrical Contracting Co. v. Department of Environmental Protection*, OATH Index No. 1987/01, mem. dec. (May 27, 2002), a panel chaired by ALJ Kerr considered an electrical contractor's claim for \$193,000 in additional compensation. A dispute arose early in the performance of the contract, which was for renovation of City pumping systems, when Action claimed that certain work was required to be per-

formed by a general contractor on a related contract and not by it. Indeed, the contract contained seemingly conflicting provisions about which contractor was responsible for the disputed work.

In denying the claim, the Board cited the principle of "patent ambiguity," which had been incorporated into the contract. The principle provides, as did the contract, that a bidder has a duty to seek clarification of such ambiguities before it submits a bid. The principle is an exception to the rule that ambiguities in a contract are to be resolved against the party who drafted it. Having failed to seek any clarification, the contractor could not now assert a claim based on the ambiguities in the contract.

FORMER OATH CHIEF JUDGES HONORED

On Wednesday, August 21, 2002, Chief Judge Roberto Velez and OATH hosted a breakfast ceremony honoring OATH's three prior Chief Judges. At the ceremony, framed photographic portraits of each of the chief judges were unveiled. The portraits will be permanently installed in OATH's formal conference room.

Pat Love, former OATH Office Manager, warmly remembered founding Chief Judge Richard Failla, as a soft-spoken, intelligent, dedicated jurist who had a vision for a centralized administrative tribunal for the City of New York and who helped to bring it to life. Mayor Koch signed the executive order creating OATH in 1979. Judge Failla, who served as chief judge from 1979 to 1985, began OATH with a small staff of four judges who presided almost exclusively over employee disciplinary and disability proceedings referred by City agencies. Having served as a State Supreme Court Justice since 1985, Judge Failla passed away in 1993.

Judge Ray Kramer next paid tribute to current Deputy Chief Judge Charles McFaul, who served as OATH's chief judge from 1985 through 1993. Judge Kramer noted that if Judge Failla was OATH's "architect," then Judge McFaul was its builder, the person who worked tirelessly to enhance OATH's status and reputation as a central administrative tribunal. Among his many



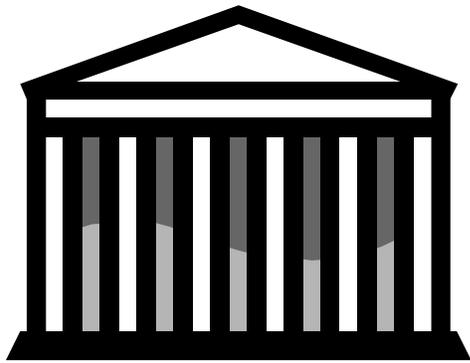
Chief Judge Roberto Velez, Former Chief Judge Rose Rubin, and Deputy Chief Judge Charles McFaul at unveiling ceremony.

accomplishments, Judge McFaul was instrumental in getting OATH established under the City Charter as a permanent, independent adjudicatory tribunal, with terms of office for the judges and formalized rules and standards of practice. Also Judge McFaul expanded OATH's staff, caseload and jurisdiction to encompass a wide range of administrative hearings and proceedings that have a significant impact on the quality of life and work in New York City.

Finally, Judge McFaul honored former Chief Judge Rose Luttan Rubin, a former State Supreme Court Justice who headed OATH from 1994 until January 2002. Judge Rubin appeared at the ceremony with her husband, Herbert Rubin. Judge McFaul noted Judge Rubin's role in overseeing the agency's move to its current modern offices and professional courtrooms at 40 Rector Street, and her role in further enhancing OATH's jurisdiction, professionalism and reputation within City government.



Deputy Chief Judge McFaul speaking at unveiling ceremony. Seated at table from left: Herbert Rubin, former Chief Judge Rose Rubin, and Stacey Cumberbatch, Chief of Staff to Deputy Mayor Robles-Roman.



OATH'S ONLINE CALENDAR

OATH is pleased to announce an exciting new addition to our website. We have now included an on-line calendar to assist parties in selecting trial dates. The color-coded calendar displays three months of OATH's trial calendar. Yellow colored days indicate available dates and red colored days indicate closed out dates.

The on-line calendar is a useful tool in docketing cases at OATH. It provides an array of available dates at a glance. The on-line calendar eliminates the need to spend pre-docketing time contacting the Calendar Unit to determine if a particular date is available on OATH's calendar. Not only does the on-line calendar indicate which days are available, it will reduce the number of phone calls required to coordinate dates with adversaries. Now, both parties may review the calendar to identify an available date for trial.

Please keep in mind that this calendar should only be used as a tool for docketing standard cases. If you have a priority case, please call (212-442-4900), fax (212-442-4910) or e-mail (OATH@OATH.NYC.GOV) your priority request to the Calendar Unit. If your request for a calendar preference is granted, OATH will make every effort to provide the earliest date possible. We reserve some space on our calendar each week to accommodate priority requests. Since this is not reflect-

ed on the on-line calendar, it is important that you call, fax, or e-mail the Calendar Unit to request a calendar preference.

Finally, the on-line calendar does not reflect available case conference dates. OATH encourages parties to try to resolve cases through settlement. In order to facilitate the settlement process, we try to provide dates for case conferences as early as possible on our calendar. Since conferences are generally scheduled for the afternoon, it is possible to schedule a conference even for a day that has already been marked red or closed out on the on-line calendar. Please call, fax or e-mail the Calendar Unit for information on available conference dates.

HELPFUL REMINDERS

The full text of OATH decisions can be found online at the Center for New York City Law website:
www.citylaw.org

OATH Annotated Rules may be found online at the OATH website:
www.nyc.gov/oath

Please e-mail OATH (OATH@OATH.NYC.GOV) when there are changes in personnel, addresses or telephone numbers. We need to keep our address book up to date so that we can reach you when necessary.

DoITT Awards

(continued from page 1)

- Joseph Hughes, MIS Director (CCRB)
- Sarah Ho, LAN Administrator (CCRB)
- Dan Tymus, MIS Director (CCHR)
- Peter Gilvarry, Director of Administration (OCB)
- Keilanny Meyreles, LAN Administrator (OCB)
- Beth Kushner, Deputy Director for Pretax Benefits Administration (OLR)
- Joe Gordon, MIS Director (TLC)

In his remarks, Commissioner Menchini recognized that RecTech has reduced costs while increasing services. The RecTech agencies have implemented a joint e-mail gateway and have created an easily accessible CD-ROM law library that is equivalent to a traditional paper library of over 5,000 volumes. RecTech has also installed a joint Y2K-compatible security system and is studying the implementation of a joint document management and electronic filing system.

Commissioner Menchini stated that RecTech's "willingness to streamline operations, have a common strategy and share limited resources, has allowed them to realize benefits they could not have achieved as individual organizations."



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Mayor of the City of New York

ROBERTO VELEZ
Chief Administrative Law Judge

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Judge John Spooner, TLC Commissioner/Chair Matthew Daus, DoITT Commissioner Gino Menchini, Chief Judge Roberto Velez, Deputy Chief Judge Charles McFaul, and TLC MIS Director Joe Gordon at DoITT awards presentation.