

OATH

## BenchNOTES

VOLUME 28

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**MESSAGE FROM CHIEF JUDGE**  
**ROBERTO VELEZ**

*The OATH Mediation Center:  
 The Forum of First Resort*

When Mayor Bloomberg appointed me Chief Judge of OATH, he asked me to use creative approaches to improve the way OATH performs its Charter mandate of adjudicating cases. Historically, OATH has fulfilled its mandate in an exemplary manner and has earned a reputation for being one of the premier central administrative tribunals in the country. Since OATH is successfully meeting its mandate, I looked at other ways to enhance the services provided by OATH in order to assist the city in resolving conflict.



Deputy Commissioner Neldra M. Zeigler of the Police Department's Office of Equal Employment Opportunity (left) and Chief Judge Roberto Velez are working on the NYPD Early Redress Mediation Program.

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When I asked OATH staff for their ideas, Deputy Chief Judge Charles McFaul and Judge Raymond Kramer suggested mediation as an effective tool for resolving workplace conflict. Judges McFaul and Kramer explained that valuable city resources were being used to investigate and then litigate disputes between city employees. Mediation, if offered early in the process, before positions harden, could promptly resolve workplace conflict, while improving communi-

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**MEDIATION ISSUE**

This twenty-eighth issue of BenchNOTES incorporates the OATH Center For Mediation Services supplement, which begins at page 7. We hope that this information proves interesting and useful to our readers.

# OATH DECISIONS<sup>1</sup>

## DISCIPLINARY PROCEEDINGS

### A. Failure to Meet Burden of Proof - Intent, False Statements

The standard of proof applicable in proceedings before the Office of Administrative Trials and Hearings is the civil standard of a fair preponderance of the credible evidence. By contrast, the standard of judicial review of administrative determinations, made after a hearing, is limited to whether the determination is supported by "substantial evidence." *Shekhem El Bey v. New York City Dep't of Correction*, 294 A.D.2d 164, 742 N.Y.S.2d 30 (1st Dep't 2002).

Preponderance has been defined as "the burden of persuading the triers of fact that the existence of a fact is more probable than its non-existence." Prince, Richardson on Evidence § 3-206 (11th ed. 1995), quoting *In re Winship*, 397 U.S. 358, 371, 90 S.Ct. 1068, 1876 (1970) (concurring opinion); *Dep't of Correction v. McNeely*, OATH Index No. 119/92 (Sept. 13, 1991), *aff'd*, 193 A.D.2d 422, 598 N.Y.S.2d 946 (1st Dep't 1993).

In *Department of Correction v. Ditripani*, OATH Index No. 725/02 (Sept. 18, 2002), ALJ Suzanne Christen found that the Department failed to establish that a correction officer intended to obtain a fraudulent parking permit and also failed to establish that he made false statements about how he obtained the permit. The Department's chief witness acknowledged that the correction officer had informed investigators where and how he had obtained the permit and that he believed that it was genuine at the time he obtained it. The Department's chief witness also acknowledged that respondent was entitled to a parking permit, and that he was using it in connection with his assigned duties at the time it was observed in his car. Moreover, the Department failed to establish the existence of a formal procedure for obtaining a permit or the existence of reliable recordkeeping about the

distribution of permits. Under these circumstances, the ALJ concluded that the Department failed to establish either fraudulent intent or knowing improper use by a preponderance of the credible evidence, and recommended that the charges of misconduct against the officer be dismissed.

In *Department of Correction v. Mendoza*, OATH Index No. 1050/02 (Sept. 25, 2002), ALJ Ray Fleischhacker recommended that charges that a correction officer had not notified two inmates of infraction hearings be dismissed because the Department had failed to establish that it was more probable than not that the officer had failed to notify the inmates. The Department's investigator concluded that respondent's statements about the incident were contradicted by a videotape of respondent passing the inmates' cells. ALJ Fleischhacker found that the videotape and statements were "susceptible to entirely different interpretations than those reached by the investigator."

In *Human Resources Administration v. Green*, OATH Index No. 1794/02 (Dec. 6, 2002), ALJ John Spooner found that mere inaccuracy of an employee's statements to her supervisor, that she did not have any overdue cases, was not sufficient to constitute misconduct. The fact that two cases were overdue at the time the statement was made did not establish that the employee intentionally gave a false statement.

In denying any dishonesty, the employee gave plausible and un rebutted testimony that she had forgotten about the two overdue cases when she first gave the statement, and that, as soon as she realized her error, she corrected it. Based upon this proof, ALJ Spooner found that the employer failed to establish that the employee's initial inaccuracy was knowing and intentional.

### B. Affirmative Defenses - Condonation and Waiver

One defense that an employee can assert against a charge of misconduct is that of condonation and waiver. In simple terms, the employee is claiming that the employer knew of the employee's conduct, which the employer now takes exception to. However, by either affirmatively or tacitly approving

<sup>1</sup> This issue covers OATH decisions from September 2002 through February 2003. 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.

the behavior, the employer condoned it, and waived any right to complain about such conduct engaged in before the employee was made aware that the behavior was no longer acceptable. Thus, an agency cannot lead an employee into believing that his or her conduct will not be considered a rule violation and then reverse its policy and seek to have the employee disciplined.

In *Health & Hospitals Corporation (Woodhull Medical and Mental Health Center) v. Perez*, OATH Index No. 1498/02 (Sept. 26, 2002), ALJ Rosemarie Maldonado found an employee not guilty of falsifying time sheets and other time-and-leave violations, even though the employee had failed, as required, to fill out leave slips and to note her absences when she attended an eight-week course during work hours. The ALJ found that the employee acted on her supervisor's instructions to take her one-hour lunch and one-hour compensatory time to make up the missed time at work and not to note her extended lunches on her time sheet or to file a leave slip. Because the supervisor had the authority to require the employee to fill out leave slips and note her absences, but did not do so, his conduct condoned the actions of the employee.

ALJ Fleischhacker ruled that the affirmative defense of condonation and waiver had not been established in *Transit Authority v. Chen*, OATH Index No. 379/03 (Jan. 8, 2003). There, an employee charged with leaving his workplace after he signed in, in order to find a legal spot for his double-parked car, claimed that other employees at his facility did the same thing with management's knowledge and tacit assent. While it appeared that other employees moved their cars during the work day, there was no showing that management explicitly knew of or accepted the practice. Accordingly, the ALJ upheld a charge of absence from the workplace.

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### C. Freedom of Speech - Limits

In *Fire Department v. Patterson*, OATH Index No. 1069/02 (Sept. 20, 2002), a lieutenant, on a questionnaire for a department-sponsored FEMA course, wrote "F[\*]CK OFF" in the space which requested voluntary information as to race, national origin and ancestral history. Applying the balancing test first set forth in *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968), ALJ Christopher Kerr stat-

ed that the employee's statement of his political views, which could have been expressed appropriately, were outweighed by his use of profanity on a document sent to the Federal government, which possibly reflected discredit upon the Department. The ALJ also found that a nexus existed between the employee's job and this off-duty misconduct, because the employee had identified himself as a representative of the Fire Department on the document he submitted.

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### D. Off-Duty and Off-Premises Altercations

It is well-established that an employee may be disciplined for certain off-duty misconduct, or conduct that occurs away from the workplace. *Villanueva v. Simpson*, 69 N.Y.2d 1034, 517 N.Y.S.2d 916 (1987); *Cromwell v. Bates*, 105 A.D.2d 699, 481 N.Y.S.2d 137 (2d Dep't 1984); *Zazycki v. City of Albany*, 94 A.D.2d 925, 463 N.Y.S.2d 614 (3d Dep't 1983); *Dep't of Environmental Protection v. Tosado*, OATH Index No. 311/83 (Sept. 2, 1983). In order to pursue disciplinary charges for off-duty conduct, however, the agency must establish a nexus between the conduct sought to be sanctioned, the agency's mission, and the employee's position. See *Human Resources Admin. v. Ayeni*, OATH Index No. 1060/94 (July 18, 1994), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 95-65 (July 20, 1995), *citing Furst v. New York City Transit Auth.*, 631 F.Supp. 1331, 1338 (E.D.N.Y. 1986).

In *Health and Hospitals Corporation (Kings County Hospital Center) v. Content*, OATH Index No. 856/03 (Feb. 28, 2003),\* ALJ Maldonado found that where the off-duty conduct complained of, in this case being disrespectful and using profanity when addressing a hospital manager, occurred at the employee's work location, the required relationship between employee's conduct and his job was established.

An agency may also discipline for certain off-premises conduct. In *Transit Authority v. Chen*, OATH Index No. 379/03 (Jan. 8, 2003), ALJ Fleischhacker found that charges that a supervisor intentionally struck a co-worker's car, employed racial slurs, and used profanity and physical violence against the co-worker, in front of the facility where they both worked, and was observed doing so by other facility employees, would, if proved, be actionable.

However, the Authority failed to prove that these acts took place. ALJ Fleischhacker declined to find misconduct based merely on the supervisor's boorish off-premises behavior during a parking dispute.

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### E. Whistleblower Defense - Section 75-b

In *Department of Health and Mental Hygiene v. Henderson*, OATH Index No. 1797/02 (Oct. 17, 2002), *modified on penalty*, Comm'n Dec. (Oct. 31, 2002), ALJ Faye Lewis rejected a whistle-blower defense asserted under Civil Service Law section 75-b. The law, *inter alia*, bars a public employer from taking disciplinary action against an employee because the employee made disclosure to a governmental body of certain serious violations of a law, rules or regulations or of information which the employee "reasonably believes to be true and reasonably believes constitutes an improper governmental action." Successful assertion of a section 75-b claim, i.e., that the employer's action was based solely on a 75-b violation, will result in dismissal of the charges, and may, in an appropriate case, lead to reinstatement and a back pay award. However, as set forth in section 75-b(4), the law does not bar disciplinary action which would have been taken regardless of any disclosure of information.

ALJ Lewis found that the charges were not a pretext to retaliate for the employee's disclosure of governmental misconduct, but were independently based on his refusal to sign a tasks and standards form and the incident that ensued, in which the employee directed abusive language towards his supervisor, and engaged in threatening and intimidating conduct. Further, ALJ Lewis found that the employee did not establish that the activities he complained of, directing non-AIDS-related calls to the AIDS hotline after September 11, 2001, resulted in a violation "which created and presented a substantial and specific danger to the public health or safety" (§ 75-b(2)). Indeed, in a grievance the employee had filed and other actions he had taken, the employee revealed that his concern was that he was performing out-of-title work.

For another case in which the whistleblower defense was raised, *see Department of Correction v. Brown*, OATH Index No. 1826/02 (Feb. 26, 2003).\*

### F. Statute of Limitations

In *Department of Education v. Nwabuoko*, OATH Index No. 1645/02 (Oct. 30, 2002),\* ALJ Spooner dismissed three charges against a food service manager, based on the agency's failure to serve charges within eighteen months of the occurrence of the complained of conduct. The three dismissed charges concerned faulty recordkeeping that allegedly took place between October 1998 and June 1999. The irregularities were discovered in December 1999, and the charges were first served in February 2001. In order to avoid the limitations defense, the agency claimed that the employee "concealed" her misconduct. ALJ Spooner ruled that the concealment exception required proof of active concealment and that the employee's failure to report her own misconduct did not constitute concealment. The judge found that the remaining charges, which included theft of money and food, and neglect of duties, should be sustained, and recommended that the manager be dismissed.

A statute of limitations defense raised in a pre-trial motion was rejected as premature in *Department of Correction v. Walker*, OATH Index No. 1779/02, mem. dec. (Nov. 12, 2002). ALJ Fleischhacker decided that certain facts needed to be established at a hearing before a determination could be made. The ALJ invited renewal of the motion at the conclusion of the hearing, which, in fact, occurred. In the report and recommendation (Dec. 13, 2002), ALJ Fleischhacker found that the continuing violation exception was applicable because the misconduct, undue familiarity of an officer with an inmate, was not and could not reasonably have been discovered more than eighteen months before the charges were served.

In *Department of Correction v. Battle*, OATH Index No. 1052/02 (Nov. 12, 2002), ALJ Raymond Kramer rejected the assertion of a wrongful concealment or continuing violation exception in an undue familiarity case, finding that the officer practiced no deception, and that the Department learned of the relationship more than eighteen months before the charges were brought. "September 11, 2001" and "investigative" exceptions were rejected as well. However, other related charges (false statements at official investigatory interview; submission of a false report; and unauthorized use of a computer) survived

the statute of limitations defense because they alleged criminal conduct.

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### **G. Failure to Report to Work After 9/11/01 Redux**

In the last issue of BenchNotes (Vol. 27), we reported on disciplinary proceedings in which an employee, who had refused to return to her work site after the World Trade Center tragedy, was terminated from employment. *Dep't of Youth & Community Development v. Hollins*, OATH Index No. 1287/02 (June 17, 2002).

During this reporting period, in *Human Resources Administration v. Dottin*, OATH Index No. 1260/02 (Oct. 22, 2002), ALJ Kerr reached a different result in the case of an employee who had refused, for five months, to report to her workplace in the vicinity of the Trade Center. She participated in the hearing via speaker phone. Early in her absence, the employee had provided a note from her doctor stating that her allergies, asthma and coronary artery disease were exacerbated by smoke and dust. At the time that her office was moving back to its space, after being housed temporarily uptown, the employee submitted a request for a transfer, and while the agency agreed to reasonably accommodate her, no transfer had yet been granted. Approximately one month after her first day of absence, the employee provided a psychiatrist's note which indicated that she had developed a phobia about working in the downtown area.

ALJ Kerr found that the employee had been objectively reasonable in believing that an imminent and serious threat existed which warranted her disobedience. Therefore, a health and safety exception to the obey-now, grieve-later doctrine had been established, and the ALJ recommended that the charges be dismissed. The ALJ noted that this case differed from *Hollis* because here the employee participated in the hearing, asserting the health and safety exception, and was able to furnish medical documentation concerning the danger to her health.

## **DISABILITY PROCEEDINGS**

*Human Resources Administration v. Farber*, OATH Index No. 944/02 (Sept. 19, 2002) presented a

case of a physical disability, migraine headache syndrome. The city's examining psychiatrist and the employee's treating physician, a neurologist and expert in migraine headaches, disagreed about the employee's fitness to perform her duties. ALJ Kramer first found that testimony about the employee's work performance was insufficient to establish her unfitness. However, her excessive absences and late arrivals at work (despite the latter having been accommodated by a flexible arrival time), which were primarily related to the disability, were sufficient to establish current unfitness. ALJ Kramer held that the Family and Medical Leave Act (FMLA) (29 U.S.C.A. § 2611 et. seq.) did not preclude the agency from requiring the employee to take a period of leave as opposed to accommodating her sporadic and unpredictable absences.

## **PRACTICE AND PROCEDURE**

### **A. Motion to Dismiss - Laches**

In *Commission on Human Rights v. Wilson*, OATH Index No. 1453/02, mem. dec. (Dec. 16, 2002), ALJ Maldonado rejected a motion to dismiss a thirteen-year-old employment discrimination complaint upon the ground of laches, because the respondent former employer failed to show that it suffered substantial prejudice because of the delay. Part of the movant's burden is to set forth the efforts it made to safeguard necessary evidence, i.e., the preservation of records and testimony, and particularly those within the party's control. The movant failed to do so here.

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### **B. Motion to Call Settlement Judge as Witness**

In *Department of Buildings v. Goldberg*, OATH Index No. 652/03, mem. dec. (Jan. 9, 2003), motion to reargue denied (Jan 24, 2003), ALJ Donna Merris denied petitioner's application to call the conference judge to testify about an event which occurred during a settlement conference, citing to section 1-31(b) of the OATH Rules of Practice ("Administrative law judges shall not be called to testify in any proceeding concerning statements made at a settlement conference"). Moreover, Judge Merris noted that the conference judge was not a necessary witness, as sev-

eral other persons under petitioner's control were present in the conference room when the event allegedly occurred.

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### C. CPLR 5519 Stay

In *Matter of Connors*, OATH Index No. 442/03, mem. dec. (Jan. 21, 2003), a remanded Loft Board non-compliance proceeding, ALJ Charles McFaul stayed the application pending the city's appeal of a prior court decision directly bearing on issues in the application. The prior judicial decision in an Article 78 proceeding declared the building's certificate of occupancy null and void, reversing a decision of the Board of Standards and Appeals. The city then appealed the Article 78 decision. CPLR section 5519(a)(1) provides an automatic stay of all enforcement proceedings of judicial orders where government agencies serve their adverse party with a notice of appeal. Here, the building owner provided proof of the city's service on the tenants, the adverse parties in the Article 78 proceeding. This non-compliance application was an enforcement proceeding where the tenants sought findings that the owner was not in compliance with the Loft Law, making the owner subject to fines and other penalties. ALJ McFaul reasoned that a stay was also appropriate in the interests of judicial economy.

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### D. Motion to Reopen Denied

On a motion to reopen the record after the conclusion of a hearing, the burden is on the moving party to demonstrate that the material sought to be introduced constitutes newly discovered evidence, that it could alter the outcome of the hearing, and that it does not prejudice the other party. See *Health and Hospitals Corp. (Seaview Hospital Rehabilitation Center) v. Rayside*, OATH Index No. 972/99, mem. dec. (Apr. 15, 1999); *Bd. of Education v. Roman*, OATH Index No. 1555/97 (Sept. 30, 1997).

In *Department of Homeless Services v. Ferguson*, OATH Index No. 1611/02 (Jan. 22, 2003), petitioner submitted three documents that had not been introduced into evidence at the hearing. ALJ Maldonado, construing petitioner's submission as a motion to reopen the record, denied the motion. Petitioner failed to establish that the documents which were offered to support the agency's conclusion that

certain vehicle mileage reports were accurate, were newly discovered evidence, that they could alter the outcome of the hearing, and that they did not prejudice respondent.

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### E. Service On Incarcerated Employee

*Department of Sanitation v. Mejia*, OATH Index No. 317/03 (Oct. 4, 2002) was a default AWOL proceeding against a sanitation worker who was incarcerated pre-trial on Rikers Island. He had been incarcerated and, thus, absent from work, for six months. ALJ Kramer found service by certified and first class mail, to the facility in which the respondent was being held, was reasonably calculated to provide notice of the nature and pendency of the proceeding. The ALJ recommended termination of employment, not because the respondent was being held accountable for the reasonable consequences of his acts, as there had been no criminal adjudication, but because the respondent was incapacitated from performing his duties, a determination which required no finding of fault.

## REAL PROPERTY

### A. Zoning

ALJ Kramer found that a zoning violation and public nuisance had been established in *Department of Buildings v. Owners, Occupants and Mortgagees of Block 11356, Lot 10, Blake Avenue, Queens*, OATH Index Nos. 1897/02 & 1926/02 (Feb. 19, 2003). The Department petitioned for padlocking of two lots in a residentially zoned area. Respondent argued that horses stabled on the lots were kept for private use and, as such, were exempt from the zoning regulations. ALJ Kramer rejected respondent's argument and recommended closure of the two lots, consistent with the safety and welfare of the horses, finding that the Buildings Department's interpretation of the term "stable" to include any facility or premises used for maintaining horses, regardless of the number of horses or the purpose for which they are kept, should be given deference. ALJ Kramer found that the prior Environmental Control Board (ECB) decision, finding

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**"THE FORUM OF FIRST RESORT"**

The Center For Mediation Services is open for business at OATH. This special supplement presents the Center's mission statement, answers frequently asked questions, and describes a typical mediation process.

**CENTER FOR MEDIATION SERVICES' MISSION**

The Center for Mediation Services was established to provide free mediation services to city agencies and their employees in the early stages of a dispute, before positions have hardened. The Center can perform this function because it, like OATH, is an independent and neutral organization. The Center's mediators can resolve disputes in an atmosphere that is private, confidential and non-intimidating. The Center will apply "best practices" in the field of media-

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tion and will regularly evaluate its mediators to ensure the quality and integrity of the program.

**NEED FOR MEDIATION SERVICES**

City government and municipal unions spend hundreds of thousands of dollars each year to resolve a vast array of disputes by administrative adjudication or court litigation.

*(continued on next page)*

**Deputy Chief Administrative Law Judge Charles D. McFaul: Chief Architect of the Mediation Center**



Judge McFaul is serving as the principal planner and developer of the OATH Mediation Center. With more than 20 years of city government experience, Judge McFaul is uniquely qualified to build a Center that is responsive to the needs of the parties, while ensuring mediations

will be conducted in an efficient and cost-effective manner.

Several years ago Judge McFaul attempted to establish a mediation program at OATH, but found little interest in the concept at that time. Times have changed, as there is now a strong interest in mediation.

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**Administrative Law Judge Raymond E. Kramer: Chief Mediator**



Judge Kramer is serving as the Center's Chief Mediator. Judge Kramer has served as an administrative law judge at OATH for over 17 years. During that time, he has adjudicated hundreds of cases in the areas of employment discrimination, employee discipline, contracts, disability, and sexual harassment.

As one of OATH's principal settlement judges, he has been instrumental in helping to settle hundreds more, ranging from simple workplace disagreements to complex, multi-party, multi-issue disputes. In the process, Judge Kramer has developed a

*(continued on page M8)*

Many of those disputes do not require litigation and could be resolved cooperatively, constructively and cost effectively for the city and its unions, by the early use of mediation or other facilitated dispute resolution procedures.

While mediation is currently available in a variety of contexts, through programs that are generally privately funded or aimed at relatively narrow audiences, the city offers almost no mediation services to its employees to resolve disputes that arise within agencies. Indeed, there is no mediation program in the country that is entirely municipal-based and targeted specifically toward municipal government and its employees.

OATH proposes to fill that void. With over 78 agencies and a workforce of some 280,000 employees, city government presents a virtually unlimited source of potentially resolvable disputes. In many instances, city agencies and their employees have no organized, viable means of directly resolving their disputes in a cooperative, non-adversarial manner and, thus, are forced to appeal to higher management, file grievances, go to the media or outside groups, or retain attorneys and litigate. In the creation of a citywide Center for Mediation Services as a "Forum of First Resort," OATH seeks to identify and divert as many of these cases from litigation or administrative adjudication as possible.

#### **MEDIATION AT OATH**

OATH is the natural location for such a Mediation Center. OATH is well-established as a central, independent administrative tribunal that conducts a wide range of administrative hearings for the city, including adjudications involving municipal employees and their interactions with the public. Indeed, OATH has long served as a model central administrative tribunal at the municipal level. It is only logical, therefore, that OATH offer, as a complementary component, a model citywide Mediation Center. OATH has a demonstrated reputation for quality, independence, professionalism and neutrality, and the expertise and physical location for the establish-

ment of such a Center. Providing such services also advances Mayor Bloomberg's stated goal of using alternative means to resolve disputes to reduce conflict and litigation and their attendant costs -- which extend beyond financial costs -- to the city and its citizens.

In 2003, the Center will focus on mediating pre-investigation Equal Employment Opportunity (EEO) disputes that often consume a disproportionate amount of EEO staff time and attention. Mediation can foster better communication between the parties and ultimately resolve the EEO complaint at an earlier stage, before positions become fixed. EEO officers can better allocate their resources by focusing on the most complex cases. However, the Center is available to mediate complex cases should all parties find mediation to be an effective mechanism for resolving the dispute.

#### **PROJECT ELEMENTS**

The key components of the mediation program will include 1) case assessment, 2) mediation services, 3) research and evaluation, and 4) training and professional development.

1. Case Assessment. Case assessment will play an important role in the mediation program to identify cases or disputes that are appropriate for mediation. The Center staff is developing an assessment instrument that will assist city agencies in identifying such cases. Case assessment may include, among other factors, consideration of the parties' stated goals and intentions, the subject matter of the dispute, the timing of offering mediation, and the associated cost and risks of litigation. In order to determine whether a dispute is ready for mediation, the Center's mediation staff, along with various user representatives, may initiate informal contact with the parties and provide them with information about the mediation process and the Mediation Guidelines, which are intended to focus the issues in dispute.

2. Mediation Services. The Center for Mediation Services will be a "Forum of First

Resort" for disputes involving city agencies and employees. At the mediation, a neutral mediator will guide the interaction of the participants to reach a mutually acceptable resolution of the dispute. Mediation will be fast, free, confidential and provided by trained mediators under professional supervision.

3. Research and Evaluation. The Center will utilize up-front and ongoing research and evaluation to ensure a quality mediation program and to sustain and increase support for the program. The information to be collected will include usage data, time savings, cost avoidance, and measures of customer satisfaction. The Center plans to incorporate improvements in the mediation program based on this evaluative research and will incorporate best practices into the program.

4. Training and Professional Development. The Center for Mediation Services will employ only trained mediators, both compensated and volunteer, and will require that they be current in mediation styles and trends by attending professional development programs. The Center will work towards creating a mediator training academy, but Center resources and planning will be focused on the first three components of the plan.

#### **PROJECT STATUS**

In April 2003, the Police Department's Office of Equal Employment Opportunity (OEEO) implemented its Early Redress Mediation Program, which is designed to mediate pre-investigation EEO disputes at the Center. By September 2003, when the Center will have successfully mediated a number of EEO cases, the Center staff and the OEEO will conduct an evaluation of the mediations to determine whether they have been performed in a professional, efficient and cost-effective manner. Once the Center staff is comfortable that the most effective mediation process is in place, the Center will expand the program to other city agencies. While working in the EEO area, the Center staff will also

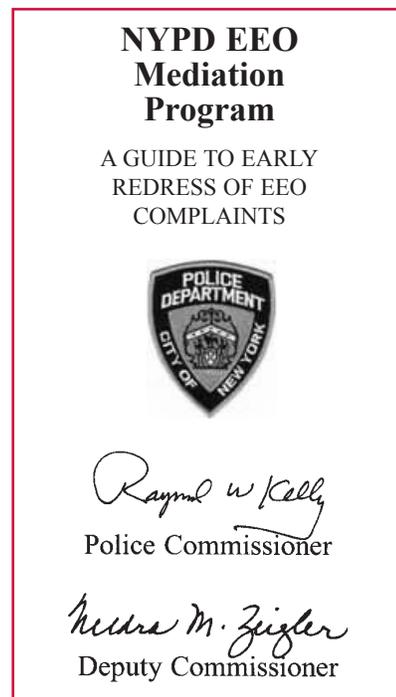
seek to identify other areas that are appropriate for mediation.

#### **FUTURE PLANS**

After the Center has been fully established to mediate disputes within city government, the Center intends to provide mediation services to civic organizations and citizens who have disputes with city government. During this phase, the Center will mediate additional disputes, including land use disputes, siting disputes, and contract disputes.

#### **CONCLUSION**

In a time of fiscal austerity and ever increasing expectations that agencies must do more with less, the Center for Mediation Services offers a creative solution for dispute resolution that will resolve work place disputes quickly, efficiently and fairly, and at a substantial cost savings for the city.



Cover of NYPD Pamphlet for the Early Redress Mediation Program. Copies of the pamphlet are available on OATH's website or by calling the Center for Mediation Services at (212) 442-4903.

## Frequently Asked Questions

To address inquiries regarding the appropriateness of mediation for various situations, the Center for Mediation Services ("CMS") has compiled the following answers to frequently asked questions involving EEO cases. Please feel free to direct any unanswered questions to CMS staff.

### ***What is mediation?***

Mediation is a voluntary, confidential meeting that is held with a neutral mediator, the disputing parties and their representatives. A mediation can take place anytime during a dispute to assist the parties with finding a mutually acceptable resolution.

### ***How does mediation work?***

During the mediation, each party has the opportunity to present his or her side of the story in a congenial yet structured format. The mediator uses his or her skills to assist the parties with reaching an agreement and resolving the conflict once and for all. During this process, the mediator may caucus privately with each of the parties. If the parties reach an agreement, the mediator and/or party representatives will create a resolution agreement for all parties to sign. Signed resolution agreements are binding between the parties. If the parties do not resolve their dispute in mediation, the mediator returns the matter to the referring agency's EEO office.

### ***When should mediation be offered?***

Mediation can take place at any stage in the complaint process. However, CMS strongly encourages that mediation take place early in the dispute, before positions have hardened. Generally, the mediator does not evaluate or judge the parties' positions, but rather encourages the parties to reveal and clarify their interests, with the ultimate goal of having the parties themselves develop a resolution. If a mediation is unsuccessful, the dispute is referred back to the EEO office for processing.

### ***How is a mediation structured?***

A mediation session is generally conducted in five steps, although these steps may vary based on the needs of the parties or the nature of the issues. The five steps are:

#### Step 1: Introduction

The mediator explains the Mediation Guidelines that set the ground rules for the mediation. The parties are then asked to sign the Agreement to Mediate.

#### Step 2: Presentation of Facts

The mediator will ask each party to describe the dispute as well as their concerns and interests that have a bearing on the dispute. More importantly, the mediator asks the parties for their proposals on how to resolve the dispute.

#### Step 3: Collaboration

The mediator will promote discussions between the parties relating to their concerns and interests and facilitate a dialogue between the parties. Through this facilitated dialogue, the parties will better understand each other's concerns and interests.

#### Step 4: Caucusing

If necessary, the mediator may meet individually with each party to further clarify their concerns and interests.

#### Step 5: Resolution

Once the parties have reached an agreement, the mediator will put the terms in writing for the parties to sign. If the parties do not come to a resolution, the complainant may continue the processing of his/her complaint.

### ***Why would parties want to mediate?***

Mediating cases through the Mediation Center provides the parties with an efficient mechanism for resolving disputes quickly. It saves time, minimizes tension between parties and provides the potential for finding a solution. The parties control the outcome, so they are not left to the judgment of a third party to determine what they must do. Complainants get a quick opportunity to be heard in a less formal environment than might otherwise be available. Since the parties reach an agreement themselves, they are more likely to be satisfied with the outcome and to comply with the terms. Mediation is confidential and less

## Frequently Asked Questions

accessible to the public than administrative hearings or court proceedings. Mediation offers an opportunity for parties to resolve their dispute and move on with their lives.

### ***When is mediation effective?***

Mediation is particularly helpful when the parties have an ongoing relationship, such as in the workplace. Workplace conflicts are ideal for mediation because the parties often have regular contact with one another. An early resolution can reduce tensions before relationships become irreparably damaged. Sometimes, simply providing a neutral forum in which parties can state their concerns may be sufficient to alleviate the dispute. The insights gained from the mediation process can lead to a workable solution that addresses some or perhaps all of the parties' interests.

### ***How are cases selected for mediation?***

EEO staff will review and identify complaints that they believe would be appropriate to refer for mediation. This will occur at an early stage of the complaint review process.

### ***Where will mediation take place?***

The mediation will take place at the Center's offices in lower Manhattan and be conducted in a conference room setting, not in a courtroom.

### ***How long does the mediation process take?***

The Mediation Center is committed to performing mediation efficiently. The length of the mediation depends on the parties and how quickly they are able to work together to reach a resolution. It is expected that the parties will reach a resolution in one session.

### ***What is an example of a problem that can be mediated?***

An example of an EEO case that can be mediated is a complaint triggered by a worker's criticism about "that kind of music" being played by the complainant. The complainant perceived the co-worker's remark about "that kind of music" as directed at her race because she plays Rap music. During the mediation

session, it may be revealed that the real issue has nothing to do with the type of music but rather the volume or when it is played. It could also be revealed that some prior perceived slight is behind the complaint about the music. These issues would not likely have surfaced during an investigation into the perceived racial slur.

### ***Is mediation confidential?***

Mediation is confidential. The parties must agree up front and in writing that they will not reveal the issues discussed during the mediation session to others. In addition, the mediator will maintain the confidentiality of the mediation. The reason mediation is to be kept confidential is to provide a framework within which the parties are free to reveal their true concerns and to guard against misuse of the process by making it clear that resolution of the dispute is the only thing to be gained from the mediation.

### ***Who is the mediator?***

The mediator is a neutral, which means that he or she has no connection with the parties or their agency. All mediators at the Center have substantial experience in dispute resolution and have received comprehensive training in mediation techniques.

### ***Who is present at the mediation?***

The only participants are the parties, their representatives, if any, and the mediator. No witnesses or other individuals are allowed to participate in the mediation, unless everyone consents.

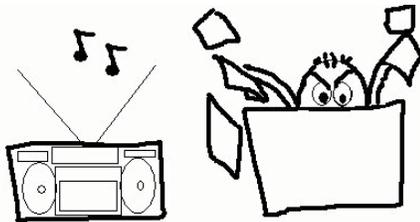
### ***What is contained in a Resolution Agreement?***

Resolutions will be reduced to writing and will be binding on both sides. The Resolution Agreement contains a confidentiality provision. Cases that are not settled will be returned to the referring EEO office or to the agency for further processing.

For additional copies of the CMS Mediation Supplement, visit OATH's website or call (212) 442-4903.

## The Mediation Process: How it Begins and When the Mediation and Resolution Agreements are Introduced

**Typical Scenario:** To explain the mediation process and illustrate the use of the agreements to mediate and resolve, let us assume the following set of facts. Two city employees - - Mr. Smith and Ms. Jones - - share a small office in a large city agency. A dispute arises when Mr. Smith, who is in the process of completing an important project, complains that Ms. Jones is playing her radio loudly. He says that he is tired of "that kind of music" and abruptly asks her to reduce the volume. Ms. Jones is offended by Mr. Smith's comment and responds that he is a racist. Ms. Jones demands an apology, but Mr. Smith refuses. Ms. Jones then increases the volume. At that point, Mr. Smith calls for a supervisor to resolve the problem. The supervisor tells them to work it out. Ms. Jones ultimately files a complaint with the agency's EEO Office. Mr. Smith and Ms. Jones are not speaking to one another.



At the office ...

**How Does the Process Get Started?** If either Mr. Smith or Ms. Jones wishes to participate in mediation, they must first contact their EEO office to determine if the agency has agreed to participate in the Mediation Program. If the agency is a participating agency, they must consult with the agency's EEO Officer to determine if the claim is appropriate for mediation. Not all claims are appropriate for mediation. For Police Department Personnel who are interested in mediating, they must first contact the Police Department Office of Equal Employment Opportunity. In the case of Mr. Smith and Ms. Jones, their agency is participating in the Mediation Program and Mr. Smith contacts the EEO Officer and asks for the case to be mediated. The EEO Officer determines that this is an appropriate case for mediation and informs both parties that the case is being

referred to the Mediation Center. The mediator will contact Mr. Smith and Ms. Jones and ask if they want to participate in this voluntary program. Both parties agree and the mediator then schedules the mediation to occur at OATH's offices at 40 Rector Street, 6th Floor. Generally, the scheduling occurs within a week or two of the contact.

**The Introduction to the Mediation and the Signing of the Agreement to Mediate:** Once the mediation is scheduled and the parties arrive at OATH's offices, the mediator will escort them to a conference room. The mediator will remind the parties that the process is informal and totally voluntary. The mediator will ask Mr. Smith and Ms. Jones to review the Mediation Guidelines and sign the Agreement to Mediate, which is an understanding that both parties agree voluntarily to abide by basic ground rules that relate to communication, respect, and confidentiality. The Agreement to Mediate incorporates the Mediation Guidelines that set the basic groundrules:

- to address each other in a civil and courteous manner;
- to be prepared to discuss the facts of the complaint;
- to consider the other side's concerns and interests;
- to consider options for the resolution of the complaint;
- to be open to any and all solutions to the complaint; and
- to speak directly to each other and to use counsel as little as possible. A party may bring an attorney or representative to the mediation, but no one else may attend without the permission of the parties and the consent of the mediator;
- to recognize that the mediator has the discretion to terminate mediation at any time if the mediator believes that the case is inappropriate for mediation or that a deadlock has been reached or that either party is just gathering information for a future claim;

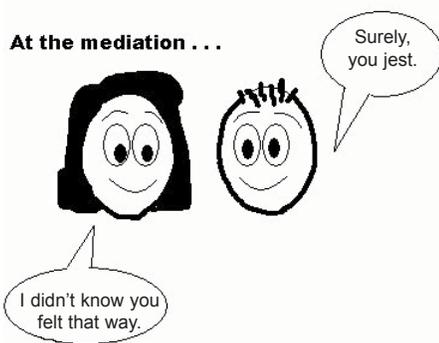
## The Mediation Process: How it Begins and When the Mediation and Resolution Agreements are Introduced

- to attend the mediation with a good faith intent to settle this dispute during the mediation session;
- to recognize that the mediation is a confidential process and agree to abide by the confidentiality provisions that prohibit revealing any of the matters discussed during the mediation.

Once Mr. Smith and Ms. Jones sign the Agreement to Mediate, the mediation can begin. They may bring their attorneys or representatives. However, it is important to note that the attorneys and representatives must also sign the agreement and keep the mediation confidential. It is highly recommended that the parties speak directly to one another as much as possible and try to limit their reliance on their attorneys or representatives. While recognizing the importance of private counsel and their participation in the process, based upon experience, it is more useful if the parties communicate directly to one another. This direct and unfiltered communication helps the parties in understanding their concerns and ultimately improves the parties' relationships. The mediator's role as the neutral is to facilitate this discussion and ensure that one party does not dominate the mediation.

It is important to remember that, after the mediation ends and the representatives go back to their offices, the parties must learn how to interact with each other on a daily basis. The mediation helps with this process of rebuilding relationships.

**The Actual Mediation:** During the mediation, it was discovered that Ms. Jones is under a great deal of pressure to meet more stringent deadlines set by her new supervisor. She plays the music loudly to assist her concentration. In contrast, when



Mr. Smith is under a great deal of pressure, he needs a quiet room to complete his work. Both Mr. Smith and Ms. Jones were surprised by this information.

When he asked Ms. Jones to lower the volume on her radio, Mr. Smith never intended to comment on Ms. Jones' race or her preference in music. In fact, he enjoys the same music that she enjoys, but the volume was too high. Ms. Jones revealed to Mr. Smith that she perceived Mr. Smith's remark as discriminatory because she thought it was directed at her race. During the mediation session, the mediator was able to facilitate discussion between the parties and with minimal attorney participation, it was revealed that the increased work load had placed a great deal of pressure on both Mr. Smith and Ms. Jones. Mr. Smith agreed to apologize for his remark. Ms. Jones in turn agreed to apologize for her comment and to listen to her music over headphones. It was also agreed that Ms. Jones could listen to her music without headphones, after 4 p.m., when Mr. Smith leaves for the day.

**Resolution Agreement:** Once Mr. Smith and Ms. Jones come to a mutually acceptable resolution, they sign an Agreement to Resolve, which is simply an understanding between the parties to either perform an act or not to perform an act. In this case, Mr. Smith's and Ms. Jones' apologies would be included as well as Ms. Jones' agreement to listen to her music over headphones. Besides agreeing to these acts, the parties also voluntarily agree to withdraw any claims related to the incident and agree not to file any future claims and to keep the incident and the terms of the settlement confidential. In a Resolution Agreement, the parties agree:

- to withdraw any EEO claims filed with the EEO Office and to withdraw any other claims and law suits involving this set of facts;
- to keep the mediation and the contents of the agreement confidential and not to disclose any information concerning the agreement, except to the parties' attorneys or representatives. The mediator and the parties'

## Mediation Process

*(continued from page M7)*

attorneys and representatives also agree to keep the agreement confidential, when they sign the agreement;

- to represent that the agreement is a complete and full settlement of the claims and that they will not seek any other remedy



before any other agency, arising out of this claim;

- to represent that the agreement constitutes the entire agreement by the parties, and may not be modified, altered or changed except upon the written consent of the parties; and

- not to introduce it in any proceeding other than one seeking to enforce the terms of the agreement.

After signing the Resolution Agreement, the claim is resolved and it is now closed out at the EEO Office.

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## Judge McFaul

*(continued from page M1)*

Judge McFaul has served as an OATH judge since 1979, and he was Chief Judge from 1985 to 1993. He is currently serving as OATH's Deputy Chief Judge. During his tenure, Judge McFaul has settled hundreds of cases and has developed a reputation for fairness, neutrality and creativity in fashioning settlements. In addition to his ability to settle cases, Judge McFaul's knowledge of the law is vast due to the fact that he adjudicated over 600 cases throughout his career. He has a great deal of experience in the areas of human rights, employment discrimination, sexual harassment and disabilities law.

Judge McFaul served on a Task Force for Public Dispute Resolution, which was focused on encouraging city agencies to employ facilitated dispute resolution processes. He regularly lectures on sexual orientation discrimination at training sessions for the citywide EEO program. He is also a member of the ABA's National Conference of Administrative Law Judges and the City Bar Association's Committee on Lesbian and Gay Rights, in addition to the Lesbian and Gay Bar Association of New York. Judge McFaul has a law degree from the State University of New York at Buffalo and a Bachelor of Arts degree from Hofstra University.

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## Judge Kramer

*(continued from page M1)*

reputation for fairness, impartiality, and for "thinking outside the box." Judge Kramer is well regarded for his ability to inspire trust and confidence in the parties that appear before him and to handle particularly difficult or sensitive matters or defuse tense situations through patience, persistence and good humor. Judge Kramer has been active in launching OATH's New Mediation Center and is currently working with established mediation experts to develop a mediation training program for OATH judges.

Prior to his appointment, Judge Kramer was an attorney for the Juvenile Rights Division of the Legal Aid Society. He also served as a member of the clinical faculty at the New York University School of Law. Judge Kramer was trained and served for several years as a parent-child mediator and has also supervised law students engaged in parent-child mediation. He is a member of the Association of the Bar of the City of New York, and has served as a member of the Children's Law Committee and the Administrative Law Committee. He received his bachelor of arts degree from the University of Virginia and his law degree from Harvard Law School.



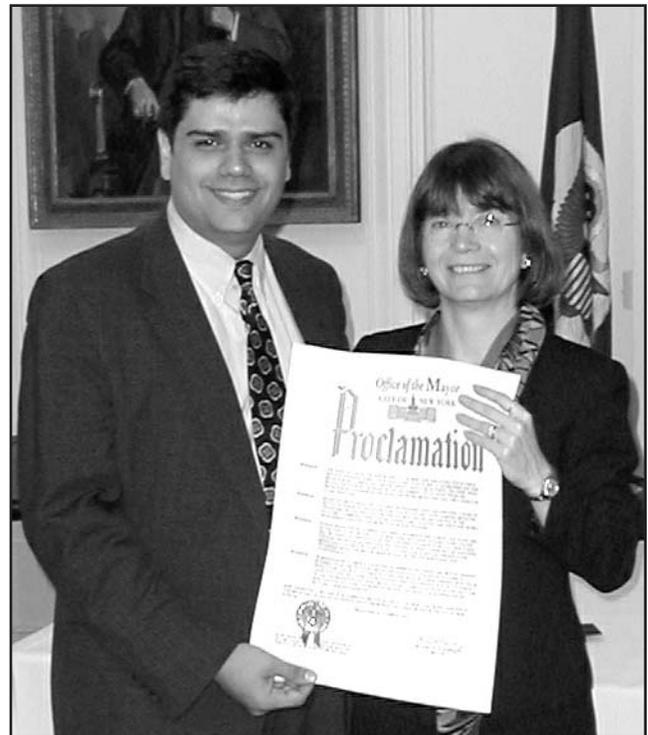
*Participants of Mediation Settlement Day held at the Association of the Bar of the City of New York*

## Mediation Settlement Day

On October 28, 2002, Chief Judge Velez was a speaker at the Association of the Bar for the City of New York's opening breakfast for the Second Annual Mediation Settlement Week. Judge Velez proclaimed the day Mediation Settlement Day on behalf of Mayor Bloomberg and thanked the event organizers for putting together an impressive array of programs to increase the public's appreciation of mediation. Mediation Settlement Day promoted mediation as an effective and inexpensive problem-solving tool for legal disputes. In addition, Judge Velez announced the creation of OATH's Center for Mediation Services. Several mediation experts attending the breakfast expressed their support for the center. Various private and public organizations involved in mediation hosted seminars on Mediation Settlement Day to educate litigants and the public about the benefits of mediation.

On October 30, 2002, Chief Judge Velez, Judge Kramer, and Robert Gatto attended a special Mediation Settlement Day meeting of the CUNY Dispute Resolution Consortium, a group of mediation professionals and experts that meet on a regular basis

with the goal of expanding the use of mediation in the city. Judge Velez spoke about his vision of creating OATH's Mediation Center to mediate a wide variety of disputes within the city. The response from the meeting attendees was extremely favorable.



*Chief Judge Velez and Elizabeth Stong with the Mayor's Mediation Settlement Day Proclamation.*

## OATH Decisions

(continued from page 6)

no zoning violation based on respondent owner's keeping of horses on the premises, did not control.

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### B. Loft Law

#### 1. Diminution of Services - Elevator

Loft Board rules provide that landlords shall not diminish legal freight or passenger elevator service and that owners shall continue to provide services specified in rental agreements in effect during a statutorily designated period or actually provided to tenants as of June 21, 1982. See *Matter of Moskowitz*, Loft Bd. Order No. 357, 3 Loft Bd. Rptr. 118 (Jan. 29, 1986), *aff'd*, *Lipkis v. NYC Loft Board*, Index No. 13249/86 (Sup. Ct. N.Y. Co. Nov. 28, 1986); *Matter of Myers*, Loft Bd. Order No. 1336, 13 Loft Bd. Rptr. 369, 376 (June 25, 1992).

ALJ Maldonado dismissed a Loft Board initiated diminution of passenger elevator service charge against a building owner in *Loft Board v. Rudd Realty Management*, OATH Index No. 289/03, mem. dec. (Dec. 11, 2002). The Loft Board charged that the owner diminished elevator services to a fourth floor tenant by sealing off the elevator shaftway with sheetrock on the second and third floors of the building. Petitioner failed to prove that passenger elevator services were provided to any of the tenants on June 21, 1982, or that elevator use by tenants was condoned by the owner, or that leases in effect during the applicable, statutorily designated period permitted elevator use by the tenants.

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#### 2. Sale of Fixtures - Right Does Not Pass to Tenant's Estate

Multiple Dwelling Law section 286(6) and Loft Board rule 2-07 provide that an outgoing residential tenant qualified for protection under the Loft Law may sell improvements to the incoming tenant, subject to the owner's right of first refusal. However, neither the law nor the regulations extend such right to the estate of a deceased tenant. In this case, the protected occupant died. ALJ Lewis found that the deceased tenant's estate was not entitled to the value of the loft improvements in *Matter of 595 Broadway*

*Associates*, OATH Index No. 1083/02 (Nov. 7, 2002), *aff'd*, Loft Bd. Order No. 2770 (Jan. 9, 2003).

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### 3. Harassment

In *Matter of Neal*, OATH Index Nos. 352/02, 672/03 (Feb. 4, 2003), *aff'd*, Loft Bd. Order No. 2787 (Mar. 7, 2003), ALJ Lewis dismissed a tenant's harassment application, finding that reference to the probable demolition of the building did not in and of itself rise to the level of harassment. The building owner's engineer recommended demolition and rebuilding of the building's top floors, including tenant's unit, to repair serious structural damage. The tenant alleged harassment based on a conversation with the building owner regarding the proposed demolition. ALJ Lewis found that the owner could not be deemed to have acted in bad faith in relying on the engineer's report. The definition of harassment in the Loft Board regulations (29 RCNY § 2-02(b)) specifically excludes good faith acts taken by the owner to repair the building.

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### 4. Rent Guidelines Board Increases

Pursuant to 29 RCNY § 2-01(i)((1)(i)), an owner becomes eligible for a Rent Guidelines Board increase upon issuance of a certificate of occupancy, but the first RGB increase does not commence until the owner makes demand on the tenant and notice of that demand is served on the Loft Board. In *Matter of Trengove*, OATH Index No. 439/03 (Feb. 25, 2003), *aff'd*, Loft Bd. Order No. 2789 (Apr. 4, 2003), ALJ Christen rejected a building owner's attempt to impose aggregated Rent Guideline Board increases (RGB). The building owner sought RGB increases beginning in October 1995, when it obtained the certificate of occupancy. ALJ Christen held that the RGB increase did not begin until April 2002, because the owner did not demand it from the tenant and did not file the notice with the Loft Board until March 11, 2002. The ALJ also held that the regulatory scheme does not allow an owner to aggregate all the RGB increases that it might have obtained if it had made demand when it first had been eligible to do so.

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### 5. Unreasonable Interference

In a recent "unreasonable interference" application, the tenant alleged that the owner's proposed

building-wide sprinkler system, the installation of a bathroom vent duct on her ceiling, and the installation of a baseboard heating and hot water system in her unit, would unreasonably interfere with her use and occupancy of the space. The tenant, an environmental artist, argued that the installations would cause her to lose headroom that is vital to her ability to construct and display her artistic installations. ALJ Merris found that the proposed sprinkler system and installations would not interfere with the tenant's use and occupancy because the owner's plan was a rational and reasonable one that provided for building-wide safety. The reduction in headroom caused by the installation of the sprinkler system and the bathroom duct would not affect the tenant's use of her space because the sprinkler system would be installed in the center of the ceiling and the bathroom duct would be installed along the wall at the ceiling joint without interfering with headroom or storage space. Installation of baseboard heating would have negligible or no effect on the tenant's use as the baseboard unit would be installed in an area that would not interfere with her ability to place objects against the wall. The tenant's alternate plan, that a corridor be constructed that would reduce the size of one occupied unit on the third floor of the building by almost twenty percent, was not reasonable. In addition, the tenant could not show that her proposal to reconstruct a front fire escape was viable. *Matter of Beaumont*, OATH Index No. 2104/01 (Jan. 30, 2003), *aff'd*, Loft Bd. Order No. 2785 (Mar. 7, 2003).

## LABOR LAW § 220 PREVAILING WAGE PROCEEDINGS

OATH hears cases referred by the Comptroller in which civil penalties and debarment of contractors are sought because of alleged willful Labor Law violations on public works projects. The violation frequently involves the contractor's or a subcontractor's failure to pay prevailing wages to its employees for work performed on city contracts, combined with submission of false certified payroll records. Prevailing wages, i.e., wages comparable to those paid for similar jobs to unionized workers in private industry, are determined and published each year by the Office of the Comptroller.

In *Office of the Comptroller v. Superior Jamestown Corp.*, OATH Index No. 1504/02 (Feb. 11, 2003), ALJ Christen rejected various unsupported constitutional challenges to the prevailing wage law and claims of preemption by various federal statutes. The ALJ found that a settlement agreement entered into by respondent Superior Jamestown Corporation, in which it stipulated that it owed \$94,623 in underpayments plus interest to two laborers, precluded assertion of the defense that complainant employees did not perform work that required being paid prevailing wages, or that the complaints were unfounded or false. Moreover, the corporation's failure to cooperate with petitioner's investigation, and its filing of a lawsuit for defamation against workers who filed complaints that the corporation later acknowledged were justified, evidenced its awareness of its improper actions. False certified payroll reports also revealed that underpayments were intentional and deliberate. Finding the company's conduct willful, ALJ Christen assessed a penalty of 25% of the underpayments. By law, the company was debarred from bidding on public works contracts for five years.

## OTHER DECISIONS OF INTEREST

### Name-Clearing Hearings

The right of certain fired employees to receive name-clearing hearings was first articulated in *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S.Ct. 2701, 2707 (1972), where the Supreme Court stated that, "[W]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." The sole purpose of the hearing is to give the petitioner an opportunity to clear his name. *Roth*, 408 U.S. at 573, n.12, 92 S.Ct. at 2707, n.12. Due to the proceeding's limited purpose, the hearing tribunal lacks authority to recommend that an employee be reinstated. Further, the burden of proof is on the person seeking to refute the charges made against him, and the sole issue remains whether termination of employment was for an improper reason or made in bad faith. In other words, the question, upon which the employee has the burden of proof, is whether the stated grounds were real or only a pretext.

In most instances, a name-clearing hearing is ordered by a court in a former employee's legal action which arose out of the termination of his employment, (see *Matter of Johnson*, OATH Index No. 409/84 (Feb. 25, 1985)), and frequently the petitioner is a probationary employee who was terminated from his position without resort to a hearing.

This reporting period saw two name-clearing hearings referred to OATH. Both petitioners had been probationary police officers. In *Matter of Napoleoni*, OATH Index No. 1520/02 (Nov. 8, 2002),\* ALJ Maldonado found that the former employee sustained his burden of proving that he did not make a false statement at an official interview, which was the reason given for the termination of his employment. Again, the determination did not affect the employee's employment status, although it would affect the reasons for termination which the Department could give to prospective employers.

In *Baumann v. Police Department*, OATH Index No. 227/03 (Nov. 12, 2002),\* ALJ Christen found that the former officer failed to refute the allegation in his personnel file that he had driven a vehicle while intoxicated (and had been involved in an accident). After refusing to take a sobriety test, the officer had been arrested, although the charges were eventually dismissed. The ALJ rejected a claim of patient-physician privilege, allowing the testimony of a Department physician who had spoken with the employee at the hospital. The doctor testified that the employee had some of the physical indicia of alcohol consumption and had admitted he had been drinking and driving.

## CONTRACT DISPUTE RESOLUTION BOARD DECISIONS

Disputes between the city and its vendors may be referred to an alternate dispute resolution forum, the Contract Dispute Resolution Board ("CDRB"), pursuant to section 4-09(f) of the Procurement Policy Board Rules. Each three-member CDRB panel is

chaired by an OATH judge and includes a person with appropriate expertise who is not an employee of the city, and either the city's chief contracting officer or chief construction officer or an appropriate designee.

In *Expert Electric, Inc. v. Department of Design & Construction*, OATH Index No. 1879/02, mem. dec. (Oct 10, 2002), a motion to dismiss a contractor's petition was granted by panel chair ALJ Maldonado, finding that the additional monies requested actually represented damages due to the city's delay in moving a project forward. Such damages may not be asserted or recovered in a CDRB proceeding.

In *Tower Technology, Inc. v. New York City Employees' Retirement System*, OATH Index No. 1544/02, mem. dec. (Oct. 11, 2002), a provider of software licenses to NYCERS sought recovery in excess of \$450,000 for the agency's cancellation of a purchase order to purchase 160 licenses in addition to those ordered in an earlier contract. The Board, ALJ Lewis presiding, found that the purchase order was invalid because it exceeded the \$100,000 small purchase limit for information technology. Therefore, the claim was denied.

In *Access Construction Corporation v. Dep't of Design & Construction*, OATH Index Nos. 340-41/03, mem. dec. (Dec. 11, 2002), a contractor sought approximately \$147,000 of funds being withheld for work already performed on two contracts. The funds were withheld because the president of the contractor, while the contracts were still being performed, attempted to bribe the site manager on one of the projects to secure additional work. The Board, chaired by ALJ Fleischhacker, determined that the agency had the right to default the contractor on all existing contracts, and to seek to have it debarred from future contracts, but did not have the right to refuse to pay for work performed prior to commission of the illegal act. The petition was granted for the amount requested.

### HELPFUL REMINDER

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

## Chief Judge's Message

*(continued from page 1)*

cation among city employees. In fact, some ten years ago, Judge McFaul attempted to promote this very same idea in conjunction with former Assistant Corporation Counsel Michael D. Young. Unfortunately the idea did not take hold, because mediation was still a relatively new approach to conflict resolution. But the benefits of mediation are now better understood and more organizations, both private and public, are turning to mediation to resolve disputes. Throughout the country, courts and administrative tribunals are using mediation to resolve a wide range of disputes, including workplace and EEO complaints, in an efficient and cost effective manner.

It is important to stress that mediation can save time and money for city employees and their agencies because it resolves disputes early in the process and avoids the expense of investigation and litigation. Quite simply, mediation is an effective cost-avoidance mechanism and, when

successful, it can minimize the time and costs associated with litigation. As the Mayor has stated many times, each agency must identify ways to reduce costs and make government more efficient. Introducing mediation on a citywide level is fully compatible with the Mayor's expectation.

After concluding that mediation would be an invaluable service to offer city employees, we shared our concept of a citywide mediation initiative with experts in the field, including Maria Volpe of John Jay College, Prof. Lawrence Grosberg of New York Law School, and James Kornbluh, formerly with the Center for Court Innovation. With their guidance, we developed our concept of how mediation would be implemented in the city and began to identify types of cases for which mediation would be most appropriate. With their further assistance, we established the Center for Mediation Services.

The Center's ultimate goal is to provide a wide range of facilitated dispute resolution services within municipal government. Its more

*(continued on next page)*

## BenchNEWS

**O**n January 6, 2003, Tynia Richard began her tenure as an OATH Administrative Law Judge. ALJ Richard comes to OATH after serving for five years as an Assistant New York State Attorney General in the Civil Rights and Charity Bureaus. She is a graduate of Harvard Law School, class of 1990.

Administrative Law Judge Ray Fleischhacker retired at the end of May 2003, after serving as an OATH judge for twenty-four years. ALJ Fleischhacker was the founding editor of BenchNotes, which was introduced in 1989, and he oversaw Volumes 1-27. He also

served terms as the agency's counsel (1981-91) and its Deputy Chief (1985-94). ALJ Fleischhacker intends to arbitrate and mediate disputes, in addition to engaging in leisurely pursuits, including writing poetry.

OATH's website, [www.nyc.gov/oath](http://www.nyc.gov/oath), has been expanded to include Judge profiles and Center For Mediation Services pages.

Xianjin Lei, one of our Pace University computer wizards, recently left for employment as a Database Manager at a non-profit organization in Westchester.

## Chief Judge's Message

*(continued from page 19)*

immediate goal is to offer neutral facilitated mediation to city employees who are embroiled in various work-related disputes. By using mediation, which is a voluntary and self-empowering process, parties will be given the opportunity to design a resolution that suits their needs.

An equally important goal of the Center is to intervene in these disputes early in the process before positions solidify and resolution becomes unattainable. Every mediation expert to whom we spoke stressed the importance of early intervention. This has now become the cornerstone of our vision. In fact, our lead mediator, Ray Kramer, coined the phrase, "The Forum of First Resort," to emphasize the notion that if workplace disputes arise, we want them referred to the Mediation Center as soon as possible, before working relationships are damaged.

With the support of Deputy Mayor Carol Robles-Roman, the Center staff in 2003 will focus on mediating EEO disputes. Our first set of cases will come from the Police Department's Office of Equal Employment Opportunity ("OEEO"), headed by Deputy Commissioner Neldra Zeigler. The Police Department has implemented an Early Redress Mediation Program that is designed to provide free mediation services to Department personnel in the early stages of an EEO dispute. Deputy Commissioner Zeigler has explained to Police personnel that mediation, which is a voluntary process, will be made available to resolve EEO complaints quickly, efficiently and without the need for a formal investigation. Center staff has met with Police EEO liaisons, union officials, and representatives of various fraternal organizations to explain the mediation process. Thus far, the response has been favorable. We began mediating select Police EEO cases in April 2003, and we hope to have mediated a significant number by the end of this year.



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Previous issues of BenchNOTES  
are available online, visit OATH's  
website at [www.nyc.gov/oath](http://www.nyc.gov/oath).

I strongly believe that the time and conditions are right for the Mediation Center to grow. People now have a better sense of what mediation is and what it can offer. While it is not the panacea for all conflicts in the city, we strongly believe that mediation can resolve many disputes quickly, efficiently and cost-effectively. Look for future supplements in BenchNotes, where we will be reporting to you as our Mediation Center grows.