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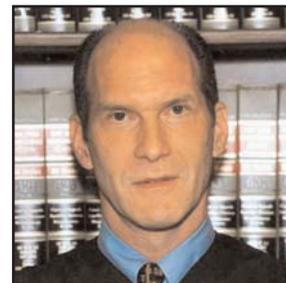
### **Janet Reno Offers Support to OATH's Center for Mediation Services**

**F**ormer United States Attorney General Janet Reno visited OATH's newly opened Center for Mediation Services on October 21, 2003. During her visit, Ms. Reno met with Roberto Velez, OATH's Chief Administrative Law Judge and Carol Robles-Roman, Deputy Mayor for Legal Affairs, as well as members of OATH's staff who have made the Center for Mediation Services a reality.

*(continued on page 10)*

### ***In Memoriam - Ray Fleischhacker***

**T**his edition of BenchNotes is dedicated to the late Ray Fleischhacker, who served, with distinction, as an Administrative Law Judge at OATH from 1979 through his retirement in May 2003. Judge Fleischhacker, who was among the first judges appointed to OATH, adjudicated over 1,000 cases during his twenty-four years here. He authored many seminal decisions, served as counsel to OATH's first chief administrative law judge and as deputy chief administrative law judge to two other chief judges. He served as editor of this publication from its inception through 2002. Judge Fleischhacker's untimely death in August 2003, so shortly after his retirement, was greeted with shock and sadness by his colleagues and the lawyers who appeared before him at OATH. We extend our deepest sympathies to Judge Fleischhacker's family.



*Deputy Chief Administrative Law Judge Charles McFaul, Deputy Mayor for Legal Affairs Carol Robles-Roman, Janet Reno, and Administrative Law Judge Raymond Kramer*

# OATH DECISIONS<sup>1</sup>

## DISCIPLINARY PROCEEDINGS

### A. Drug Testing

Public employees in law enforcement or whose job performance would be affected by drug or alcohol can be disciplined for substance abuse and illegal drug use. An order to submit to drug testing by providing a urine specimen for analysis is a search under the Fourth Amendment to the Constitution. A public employee may be ordered to submit to testing for the presence of drugs or alcohol when reasonable suspicion exists that the employee reported for duty under the influence of alcohol or was using illegal drugs. Testing for substance abuse also may be ordered pursuant to a random drug testing program. Random drug testing of public employees, such as correction officers, is permitted "where the privacy interests are minimal, the government's interest is substantial, and safeguards are provided to insure that the individual's reasonable expectation of privacy is not subjected to unregulated discretion." *Patchogue-Medford Congress of Teachers v. Bd. of Education*, 70 N.Y.2d 57, 70, 517 N.Y.S.2d 456, 462 (1987); *Seelig v. Koehler*, 76 N.Y.2d 87, 556 N.Y.S.2d 832, cert. denied, 498 U.S. 847, 111 S. Ct. 134 (1990). However, a positive drug test result that is illegally obtained (i.e., without reasonable suspicion, or pursuant to a flawed random drug testing procedure) is inadmissible at a subsequent administrative civil service disciplinary proceeding. See, e.g., *Dep't of Correction v. Gleason*, OATH Index No. 702/99 (Apr. 27, 1999); *Dep't of Correction v. Dent*, OATH Index No. 563/94 (Aug. 8, 1994).

In two recent Correction Department drug test cases, respondents sought to challenge the legality of the urine test. In one case, respondent challenged the Department's reasonable suspicion-based testing order. In the other, respondent challenged the randomness of the selection process and the integrity of the chain of custody of the test sample. In both cases, respondents failed to establish their affirmative defenses.

In *Dep't of Correction v. Flowers*, OATH Index No. 1909/02 (Apr. 7, 2003), Judge Fleischhacker con-

cluded that the Department had reasonable suspicion to test respondent. Respondent had been present in the home of his girlfriend when police executed a search warrant against the woman's son. The search turned up a significant amount of marijuana. Respondent was arrested at the scene and held in police custody for approximately five hours - much of that time in a cell. He was fingerprinted and his arrest was entered into the state computer system. However, respondent was neither arraigned nor given a desk appearance ticket, and prosecution was declined. Judge Fleischhacker found that the fact that respondent was not ultimately arraigned or prosecuted did not affect the reasonableness of the drug testing order that was issued by the Department based upon respondent's arrest. Therefore, the positive test result was not suppressed.

In *Dep't of Correction v. Gray*, OATH Index No. 930/03 (May 29, 2003), Judge Donna Merris found that respondent failed to establish affirmative defenses to a positive drug test based on a challenge to the randomness of the selection process because there was a three-month delay between the date respondent was selected for testing and the date he was informed he would be tested. Respondent argued that the delay vitiated the randomness of his selection and, therefore, the Department needed to have evidence that would give rise to reasonable suspicion of drug use in order to test him. Judge Merris found that respondent failed to establish any history or incidences of bias against him. Moreover, the evidence established that the scheduling of random drug tests depends on the needs of the facility; respondent's position as intake supervisor would necessitate finding a suitable replacement for him. Further, respondent was on vacation for most of the month of October, one of the intervening months. Judge Merris concluded that compared to ten months and six months in other cases, a three-month delay was not unduly lengthy.

In another recent drug testing case, *Dep't of Sanitation v. Hernandez*, OATH Index No. 125/03 (July 8, 2003), the significance of positive test results was successfully challenged by respondent. Petitioner sought to prove that a positive result on a drug test of petitioner's urine reflected a new usage of marijuana, separate and apart from a prior usage, reflected in a drug test seventeen days earlier, for which respondent had already been disciplined. The test results revealed an increase in marijuana metabolite in the urine between the initial drug test and the subsequent test. Judge Faye Lewis found

<sup>1</sup> This issue covers OATH decisions from March 2003 through August 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.

that respondent's expert witness successfully challenged the Department's expert's testimony that the only plausible explanation for the increase in the level of marijuana metabolite was that respondent had used marijuana again, in the interval between the two tests. Respondent's expert cited three studies showing that in chronic users, the most reliable method of distinguishing between new ingestion of marijuana and prior ingestion was to chart the level of cannabinoids in the urine, as measured against the level of creatinine in the urine, over a period of time, in order to correct for creatinine level fluctuations. He further testified that once this correction was made, the evidence demonstrated a decreasing level of cannabinoids in respondent's urine. Petitioner's expert witness did not rebut this testimony, leading Judge Lewis to find that petitioner had not met its burden of proving a subsequent ingestion of marijuana.

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## B. Condonation and Waiver

Under the doctrine of condonation and waiver, an agency may not lead an employee to believe that his conduct will not be considered a violation of a rule and then reverse its policy and seek to have the employee disciplined. *See Fahey v. Kennedy*, 230 A.D. 156, 243 N.Y.S. 396, 400 (3d Dep't 1930); *Law Dep't v. Coachman*, OATH Index No. 1370/00, at 8 (June 13, 2000), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD01-13-SA (Apr. 11, 2001); *Dep't of Parks and Recreation v. Wilson*, OATH Index No. 398/91, at 3-4 (May 3, 1991); *Dep't of Housing Preservation and Development v. Chambart*, OATH Index No. 380/84, at 15 (Feb. 22, 1985).

In *Dep't of Education v. Young*, OATH Index No. 1139/03 (Sept. 19, 2003), the employer acknowledged that, prior to March 2001, its practice had been to accept documentation of custodial expenditures no matter how late, without penalizing the custodians or warning them that penalties might be invoked later, and also admitted that no school custodian had been prosecuted for untimely submission of documentation prior to the disciplinary charges filed against respondent. Judge John Spooner held that any violations which occurred prior to March 21, 2001, the date the custodian was sent a memorandum regarding a "disciplinary conference," could not be prosecuted under the principle of condonation and waiver. However, based on evidence that the custodian was placed on verbal and written notice in the two years following, that his continuing failure to provide documents would be considered misconduct, Judge Spooner found that the custodian could be disciplined for these more recent violations.

## C. Burden of Proof - No Strict Liability for Civil Service Misconduct

In employee disciplinary proceedings brought pursuant to section 75 of the Civil Service Law, petitioner bears the burden of proving intentional misconduct (*Reisig v. Kirby*, 62 Misc.2d 632, 635, 309 N.Y.S.2d 55, 58 (Sup. Ct. Suffolk Co. 1968), *aff'd*, 31 A.D.2d 1008, 299 N.Y.S.2d (2d Dep't 1969) or carelessness or negligence (*McGinagle v. Town of Greensburgh*, 48 N.Y.2d 949, 951, 425 N.Y.S.2d 61, 62 (1979)). There is no strict liability for civil service misconduct. *Dep't of Sanitation v. Burns*, OATH Index No. 1322/01 (June 15, 2001).

### 1. Negligence

In *Dep't of Sanitation v. Mulligan*, OATH Index No. 1087/03 (May 20, 2003), Judge Rosemarie Maldonado found that the evidence, including credible testimony concerning the post-accident position of the vehicles, the driver's admission that he moved closer to the left lane as he maneuvered a large curve, and information derived from an investigator's discussion with the other driver, together with respondent's unconvincing denial of culpability, were enough to sustain a finding of misconduct.

In *Dep't of Sanitation v. White*, OATH Index No. 1127/03 (June 6, 2003), Judge Suzanne Christen found that the self-interested and conflicting testimony of the driver of an SUV did not establish that respondent failed to stop for a stop sign before proceeding across an intersection. The undisputed evidence showed that the rear of the Sanitation vehicle, a trailing flatbed, was hit by the SUV. The absence of tire skid marks showed that the SUV never slowed down before impact. The evidence also showed that the point of impact was on the far side of the intersection. No analysis of the speed of either vehicle was performed. Thus, there was no objective basis for rejecting the account of the accident offered by respondent, that the SUV approached the intersection at high speed, after the Sanitation vehicle had started through it, and too fast for respondent to get his long and slow-moving vehicle out of the way in time.

### 2. Intent

In *Dep't of Sanitation v. Banton*, OATH Index No. 1136/03 (June 18, 2003), Judge Merris held that the Department failed to show either a wilful intent to disobey or negligence, where the supervisor ending his tour failed to conduct a joint check of the facility with the

supervisor coming on to his tour. Respondent's testimony that the incoming supervisor had refused to engage in the facility check with him was uncontroverted. Judge Merris recommended dismissal of the misconduct charges that were brought against respondent after Sanitation property was found to be missing.

In *Dep't of Sanitation v. Alao*, OATH Index No. 1519/03 (Aug. 11, 2003), Judge Merris found that the Department failed to establish intentional misconduct based on respondent's failure to stay for mandated overtime. Respondent's refusal to stay was based on short notice of the overtime assignment and respondent's childcare obligations related to the medical condition of respondent's child.

In *Dep't of Correction v. Forestier*, OATH Index No. 1179/03 (Aug. 27, 2003),\* Judge Richard recommended dismissal of a misconduct charge based on respondent's failure to report for duty after a two-hour personal emergency authorization had expired. Judge Richard credited the testimony of respondent, finding that the unauthorized absence was unintentional, and the evidence demonstrated a family and medical emergency, rebutting the Department's charge of misconduct.

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#### D. Off-Duty Misconduct

An agency may discipline an employee for off-duty misconduct if there is a nexus between the misconduct and the agency's mission or the employee's position. See *Human Resources Admin. v. Ayeni*, OATH Index No. 1060/94 (July 19, 1994), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-96 (July 20, 1995). An employee may also be disciplined if the off-duty misconduct involves moral turpitude. *Furst v. New York City Transit Auth.*, 631 F. Supp. 1331 (E.D.N.Y. 1986); *Arancio v. Dep't of Sanitation*, NYC Civ. Serv. Comm'n Item No. CD 87-33 (Mar. 4, 1987).

In *Admin. for Children's Services v. Bass*, OATH Index No. 902/03 (Apr. 10, 2003), Judge Maldonado found that a clerical associate's criminal conviction for possession of a controlled substance in the fourth degree had an adverse impact on the agency and its mandate to protect children. In recommending termination, Judge Maldonado found that the circumstances of respondent's arrest, including his possession of multiple bags of cocaine, heroin, marijuana and \$4,000 in cash, meant that exposing children to him posed an unacceptable risk.

In *Triborough Bridge and Tunnel Auth. v. Ferrer*, OATH Index No. 835/03 (Apr. 22, 2003), Judge

Christen found that a bridge and tunnel officer's off-duty use of his firearm in connection with a traffic dispute, was an abuse of authority and a violation of agency regulations and training governing the use of firearms that was so at odds with respondent's law enforcement position and need to exercise responsible judgment, as to merit termination.

Judge Tynia Richard recommended dismissal of off-duty misconduct charges arising out of a romantic triangle in *Dep't of Correction v. Gittens*, OATH Index No. 1070/03 (June 4, 2003),\* where the agency relied solely on the interested testimony of a single witness with "every reason to want to punish the respondent, and a motive to testify falsely to do so." That testimony was undercut by the credible testimony of another witness who had "no discernable interest" in the case.

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#### E. Attire/Personal Grooming

Members of the uniformed services may be disciplined for failing to adhere to uniform regulations. However, in two recent cases, respondents charged with failing to comply with a dress code and a personal grooming directive were found not to have engaged in sanctionable misconduct.

In *Dep't of Correction v. Shepard*, OATH Index No. 1235/03 (Aug. 1, 2003), Judge Maldonado recommended dismissal of charges that respondent reported to the Health Management Division wearing inappropriate attire under Directive 2262R sec. G(1)(d). Respondent was charged with wearing "shorts." Judge Maldonado credited her testimony that she was wearing capri pants which ended "at the bottom of her knee," and found that because the regulations cited by the Department did not expressly prohibit wearing capri pants, merely wearing them would not constitute an automatic violation, absent a showing that respondent's complete outfit was inappropriately casual when considered in its entirety.

In *Dep't of Correction v. Shabazz*, OATH Index No. 111/03 (Aug. 21, 2003), Judge Maldonado recommended the dismissal of disciplinary charges against a correction officer for failing to obey orders to trim his beard in accordance with Directive 2270. Respondent, a Muslim, argued that his religion prohibited cutting his beard. Judge Maldonado found that respondent satisfied his prima facie case of proving religious discrimination under Title VII where he put the Department on notice that he could not cut his beard because of his faith; the Department pursued disciplinary action for his failure to comply with its regulation and respondent had a bona

fide religious belief that cutting his beard would violate the tenets of his faith. Judge Maldonado found that petitioner failed to prove that accommodating respondent would pose an undue hardship, rejecting petitioner's gas mask safety rationale in view of the fact that the Department does not ban all beards and failed to present evidence that an alternative method for wearing the gas mask would be unduly burdensome.

## PRACTICE AND PROCEDURE

### A. Privacy Rights and Medical Information

In *Housing Auth. v. "John Doe"*, OATH Index No. 1226/03, mem. dec. (Apr. 16, 2003), Judge Christen granted respondent's application to redact his identity from public databases to protect his privacy. Judge Christen found that in a disability proceeding where the outcome of the hearing was a recommendation that the employee be placed on medical leave because he suffers from a serious psychiatric condition that renders him unfit to perform the duties of his position, the employee's interest in protecting his privacy overcomes the presumption of openness that attaches to OATH proceedings. Petitioner failed to articulate any public interest to be served by identifying the employee by name.

In *Comm'n on Human Rights v. Woodycrest Realty, LLC*, OATH Index No. 779/03, mem. dec. (May 1, 2003), Judge Lewis granted, in part, respondents' motion to compel disclosure of medical records related to complainant's disability because complainant had placed her health since August 1997 in issue. Judge Lewis did not order release of records prior to that date.

### B. Motion to Vacate Default

In *Dep't of Citywide Admin. Services v. Done*, OATH Index No. 1119/02, mem. dec. (Apr. 22, 2003), Judge Spooner denied a motion to vacate a default that was based on the claim that the employee had elected to proceed pursuant to the contract grievance procedure, and, therefore, the hearing was held in error. Pursuant to OATH Rules of Practice section 1-52, any motion made after issuance of a report and recommendation by an administrative law judge "shall be addressed to the deciding authority." 48 RCNY § 1-52 (CIS CD-ROM 2003). Judge Spooner denied the motion on the grounds that OATH lacked jurisdiction to vacate the decision.

### C. Motion to Disqualify Counsel

In *Matter of 79 Warren Street Associates, LLC*, OATH Index No. 749/03, mem. dec. (Apr. 8, 2003), Judge Fleischhacker granted petitioner's motion to disqualify respondents' attorney and her law firm from representing co-respondents in a loft board proceeding, on the grounds that the attorney had a conflict of interest arising from the certainty that she would be called as a witness where she was a participant in the transaction at issue. DR 5-102(a) prohibits a lawyer from testifying in a case if the lawyer "ought" to be called as a witness on a significant issue on behalf of the client, unless it will relate solely to an uncontested issue.

### D. Motion to Preclude Testimony

In *Dep't of Transportation v. Coppola*, OATH Index Nos. 1564, 1565 and 1566/03, mem. dec. (June 13, 2003), Judge Maldonado granted that part of the Daily News' motion to quash a subpoena and preclude testimony from a photographer and reporter as it related to unpublished material, but denied it as related to published journalistic material, based on New York's Shield Law, Civil Rights Law section 79-h (McKinney CD-ROM 2003). In ruling that the published article, which formed the basis for disciplinary charges against a Department of Transportation pothole repair crew, was not protected under the Shield Law, Judge Maldonado found that the journalist and photographer could be questioned about their observations of the crew and the reliability of those observations. She disallowed questions relating to sources, the planning or preparation of news gathering or the editorial process. Neither the employees nor the agency made a "clear and specific showing" that they were entitled to unpublished material. Although "highly material" and "necessary" to the Department's case, the Department failed to establish that the information was unobtainable from any other source.

In *Dep't of Sanitation v. Kempf*, OATH Index No. 998/03, mem. dec. (July 31, 2003), Judge Christen granted a motion for a protective order to preclude cross-examination of the Department's principal witness concerning how the employee was targeted for an integrity test. Judge Christen found that despite the fact that the door to the objected-to line of inquiry may have been opened by the Department through its direct examination of the witness, a review of the record demonstrated that how the employee was chosen as a subject for integrity testing was not relevant to the determination of whether he had committed the misconduct in which he was alleged to have engaged.

# REAL PROPERTY

## A. Zoning

### 1. Home Occupation

An exception to the prohibition on commercial use of residential property under the Zoning Resolution, is a "home occupation," defined as an accessory use which is clearly incidental to the residential use. Zoning Resolution § 12-10(a)(1). On remand of *Dep't of Buildings v. Owners, Occupants and Mortgagees of 700 East 17th Street, Brooklyn*, OATH Index No. 1860/02 (Apr. 30, 2003), Judge Spooner found that the owner was operating a wig shop at the premises and that this use qualified as a "home occupation." Judge Spooner further found that the Department failed to establish a nuisance in violation of the applicable zoning ordinances through the testimony of neighborhood residents that customers and delivery people went to the wig shop and occasionally parked illegally on the block.

### 2. Prior Non-Conforming Use

Another defense to the prohibition on commercial use of residential property under the Zoning Resolution, is a prior non-conforming use, based on continuous legal commercial activity prior to and since the enactment of the Zoning Resolution that demarcated the property as residentially zoned. See Zoning Resolution § 22-00. The legal non-conforming use defense is an affirmative defense. Respondent bears the burden of establishing the continuous legal non-conforming use. See *Town of Ithaca v. Hull*, 174 A.D.2d 911, 913, 571 N.Y.S.2d 609, 610 (3d Dep't 1991); *Dep't of Buildings v. Owners, Occupants and Mortgagees of 137 Osgood Avenue*, OATH Index No. 888/93 (Sept. 23, 1993).

In *Dep't of Buildings v. Owners, Occupants and Mortgagees of 211-20 Northern Boulevard, Queens*, OATH Index No. 1225/03 (July 17, 2003), Judge Lewis found that respondents met their burden of establishing prior legal non-conforming use through the testimony of the commercial occupant's vice president that the company has been conducting business continuously from the premises since 1958 or 1959, supported by documents that included a deed showing that the plumbing supply company took title to the premises in 1959, a mortgage also dating from 1959 and a Department of Buildings docket sheet showing approval of a 1930 alteration plan for stores.

## B. Loft Law

### 1. Diminution of Services

The Loft Board generally addresses such problems as persistent roof leaks through inspections and enforcement proceedings, pursuant to the Loft Board's housing maintenance regulations. See 29 RCNY § 2-04(c), (d) (CIS CD-ROM 2003). However, in *Matter of Reginato*, OATH Index No. 750/03 (May 29, 2003), *aff'd*, Loft Bd. Order No. 2806 (June 19, 2003). Judge Spooner found that, where a building maintenance problem constitutes a reduction in services from what the tenant originally had, a tenant's diminution of services application will be granted. Here, the protected occupant sought an order directing either the owner of the condominium unit he occupied or the owner of the building, to repair the leaking roof. The undisputed evidence showed that the roof was a common area that the condominium owner of the building had sole responsibility to repair. Judge Spooner recommended granting petitioner's diminution of services application and directing the condominium owner to repair the roof.

In *Matter of Vander Heyden*, OATH Index No. 438/03 (Apr. 22, 2003), *aff'd*, Loft Bd. Order No. 2799 (May 15, 2003), Judge Fleischhacker found that an owner cannot be charged with diminution of services where it had no part in providing the space the applicant seeks to have taken from her neighbor. The evidence established that applicant and her neighbor had an informal arrangement whereby the neighbor allowed access to his unit so the applicant could maneuver large works of art to the elevator. The owner was required, as part of legalizing the building, to erect a wall where none had existed previously. Judge Fleischhacker found that an informal arrangement between tenants, negotiated without the owner's participation, could not be considered a service provided by the owner, or form the basis for a diminution of services claim.

In *Matter of Hennen*, OATH Index No. 925/03 (Apr. 23, 2003), *aff'd*, Loft Bd. Order No. 2833 (Nov. 13, 2003), another diminution of services application, loft tenants requested the restoration of 24-hour passenger and freight elevator services. After Judge Spooner concluded that the tenants' after-hours use of the elevator was not consented to by the window period landlord and was not a provided service, the Loft Board remanded the case for a finding of whether the superintendent of the building had had knowledge of and therefore acquiesced in the use of the elevator outside of business hours. Judge Spooner found that, although the building superintendent was aware of the after-hours use, his knowledge

that the tenants had operated the elevators between 1980 and June 21, 1982, could not be imputed to the owner. He further held that the superintendent's knowledge would not constitute consent to providing the tenants with 24-hour elevator service because the superintendent lacked authority to grant such consent. Judge Spooner concluded once again that the diminution of services application should be denied.

## 2. Legalization Deadline Extension Application

In *Matter of 13 East 17th Street, LLC*, OATH Index No. 1099/03 (Mar. 10, 2003), *aff'd*, Loft Bd. Order No. 2790 (Apr. 4, 2003), petitioner, an owner of an interim multiple dwelling, applied for an extension of more than one year to legalize the building under the Loft Law. Judge Richard denied the application where petitioner failed to demonstrate its own diligent efforts to achieve legalization, or that circumstances beyond its control caused the delay. The judge rejected petitioner's argument that disputes with tenants impeded its compliance because it did not show that it did anything for a four-year period and the disputes predated a stipulation resolving them.

## 3. Unreasonable Interference

In *Loft Bd. v. 24-26 Harrison Street, New York, NY*, OATH Index No. 1089/03 (June 23, 2003), *aff'd in part, modified in part*, Loft Bd. Order No. 2816 (July 24, 2003), a Loft Board-initiated unreasonable interference application, the owner and tenant had submitted competing plans with respect to four disputed legalization items. Judge Maldonado found that resolution of the issue does not depend on a determination of which plan is more appealing; the owner's plan prevails unless the tenant can show that the owner's plan is unreasonable. Judge Maldonado determined that the owner's plan for three of the items was reasonable; for the fourth item, the owner's plan, as modified by the suggestion of the tenant's architect, was also reasonable.

# LICENSING

## A. Fraud and Misrepresentation in Licensing Process

Health Code sections 5-05(e), 5-17, and 89-13, and Administrative Code section 17-317, provide that the Commissioner of the Department of Health and Mental Hygiene may suspend, revoke or deny renewal of mobile food vending licenses or permits for violations of the applicable codes, and in particular for the commission of fraud, misrepresentation or false statements in the licensing or application process.

In *Dep't of Health and Mental Hygiene v. Kearney*, OATH Index No. 246/03 (May 2, 2003), Judge Kramer recommended license and permit revocation for the perpetrator of an attempted deception on the Department at a mobile food cart inspection. A food cart that had a valid seasonal permit was presented for inspection for a full-time permit. The seasonal permit was hidden underneath a food decal. The deception was discovered by the inspector. The valid seasonal permit belonged to a third party, who Judge Kramer found had loaned it out in violation of the Health Code. Judge Kramer recommended only a 90-day suspension of the permit and license of the seasonal permit's owner, based on a lack of evidence of his complicity in the attempted inspection deception.

Judge Lewis, in *Dep't of Health and Mental Hygiene v. Dong*, OATH Index No. 1336/03 (Apr. 29, 2003), recommended that any future application for a permit to operate a food service establishment should be denied to a respondent who pleaded guilty to attempted criminal solicitation under the New York Penal Law and admitted offering money to a person whom he believed was a Department of Health sanitarian, to prevent the issuance of a notice of violation against a restaurant.

In *Dep't of Buildings v. Gabbidon*, OATH Index No. 1073/03 (Aug. 4, 2003), Judge Kramer granted a pre-trial motion to collaterally estop a master electrician from relitigating in the license revocation proceeding, issues involving violation of state labor law prevailing wage provisions previously determined by this tribunal in an unrelated matter, which led to the electrician's debarment. Judge Kramer found that the prior determination established that the electrician engaged in conduct that constituted fraudulent dealings and misrepresentations that were indicative of poor moral character, without need for a further fact finding hearing. Judge Kramer found that acts indicative of poor moral character are a basis for license revocation, although the Administrative Code only refers to good moral character as a requirement for license issuance.

A criminal conviction of a licensee may support a finding of poor moral character adversely reflecting upon an individual's fitness to hold a master plumbers license. See *Dep't of Buildings v. Troiano*, OATH Index No. 1013/97 (Apr. 14, 1997); *Dep't of Buildings v. Catapano*, OATH Index No. 1066/97 (July 17, 1997).

Judge Richard, in *Dep't of Buildings v. Lara*, OATH Index No. 1446/03 (May 6, 2003), and Judge Christen, in *Dep't of Buildings v. Giles*, OATH Index No. 1635/03 (June 27, 2003), found that federal felony convictions of master plumbers who were plumbing inspec-

tors for the Department of Buildings, for accepting money from plumbing contractors, merited revocation of the discharged employees' master plumbers licenses.

## B. Imminent Health Hazard

Under the Health Code and State Sanitary Code, the Department of Health and Mental Hygiene may revoke the license of a food service establishment if continued operation would constitute an imminent health hazard.

In *Dep't of Health and Mental Hygiene v. 966 Gujrat Restaurant, d/b/a Pak Ali Baba Restaurant*, OATH Index No. 236/04 (Sept. 17, 2003), Judge Lewis found that a history of repeated serious violations discovered upon inspections conducted following complaints of illness from individuals who had eaten at the restaurant, and a prior incident involving fecal contamination of food, merited revocation of the restaurant's permit to operate a food service establishment in compliance with the New York City Health Code and the Sanitary Code.

# 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. The CDRB's decision is a final disposition of the dispute.

In *Kiska Construction Corp. v. Dep't of Environmental Protection*, OATH Index Nos. 1009-10/03, mem. dec. (June 6, 2003), the contractor sought reimbursement for actual and reasonable costs over 125% of the estimated period for providing security guard service under its contract. The Contract Dispute Resolution Board denied the claim, finding that the contract limited payment to the unit bid price, which the contractor already had been paid. The contractor also sought costs for painting galvanized handrails. The Board denied this claim, finding that the contractor was required to paint galvanized handrails under the general and detailed specifications of the contract.

In *Kreisler Borg Florman/L.A. Wenger Contracting Co., Inc. v. Dep't of Design & Construction*, OATH Index No. 1088/03, mem. dec. (June 11, 2003), the Contract Dispute Resolution Board dismissed a claim for additional compensation as untimely. The contract required the contractor to present the claim to the Comptroller within twenty days of the agency head's determination. Although the subcontractor presented the claim to the Comptroller within the time for filing, the subcontractor lacked contractual privity with the City to file such a claim and the prime contractor filed a claim almost ten months late.

In *GVCII, Inc. v. Dep't of Transportation*, OATH Index No. 894/03, mem. dec. (July 3, 2003), the contractor sought \$1.6 million in compensation arising out of the termination of its contract with the Department of Transportation to provide transportation services for pre-kindergarten disabled students. The contract was terminated by the agency "in the best interest of the City." A majority of the Contract Dispute Resolution Board dismissed the petition because the Board lacked jurisdiction to hear the dispute. The majority found that contract terminations "in the best interest of the City" were not covered under the dispute resolution procedures, considering prior judicial precedent and reasoning and former PPB rule 7-04. The rule provided that the dispute resolution procedures would apply to all disputes arising "by virtue of a contract" between the City and a contractor, but not disputes dealt with in other sections of the PPB rules, including termination for convenience.

In *Lapeer Contracting Co., Inc. v. Dep't of Parks and Recreation*, OATH Index No. 817/03, mem. dec. (July 14, 2003), petitioner contracted with the Department of Parks and Recreation to construct a roller hockey rink in the Bronx. The asphalt rink began to rut some time after a project inspection, evidently caused by the hard wheels of inline skates. The agency ordered the contractor to fix the rutted surface. Prior to being declared in default, the contractor disputed the validity of the agency's order to correct the asphalt with agency representatives. The agency ultimately defaulted the contractor for refusal to comply with its directive. After being declared in default, the contractor requested a final determination from the Commissioner that it should not be held in default, which was never rendered. The contractor thereafter filed a petition with the Contract Dispute Resolution Board seeking compensation for its default. The Board found that the contractor was not provided with an opportunity to be heard by the Commissioner on the merits of its claim and awarded the contractor \$52,635.20 for amounts owed at the time of default.

OATH welcomes Supervising ALJ **Charles Fraser**, ALJ **Kara Miller**, Law Clerks **Arthur Bangs** and **David Leon** to its staff.

Judge Fraser, in a previous tenure at OATH, served as an administrative law judge from 1989 to 1998, and as counsel from 1991 to 1998. From 1998 to 2003, he was assistant commissioner for enforcement at the Department of Buildings. He began his career as a litigator with Breed Abbott & Morgan (1981 - 1983) and with the New York State Attorney General's office (1983 - 1989). Judge Fraser is a 1978 graduate of Harvard College, and a 1981 graduate of the Columbia University School of Law. He has served on bar association committees regarding federal legislation, government ethics, and government counsel, and has lectured on federal civil rights law, AIDS and corrections, federal civil practice and procedure, practice and procedure at OATH, and New York City's conflicts of interest law.

Judge Miller, OATH's former managing attorney, has worked as an assistant chief administrative law judge for the Taxi and Limousine Commission, an impartial hearing officer for the New York City Board of Education for special education hearings, and an administrative law judge for the Parking Violations Bureau. In addition to working as a litigation associate at a small Manhattan law firm, ALJ Miller has worked in the private sector as a client manager for a professional sports representation agency and as the assistant to the chairman/in-house counsel for a steel distribution company. She is a graduate of Union College, George Washington University's School of Law and Fordham University's Graduate School of Business Administration. ALJ Miller is an adjunct professor in the Business Law Department of Fordham University's Graduate School of Business Administration.

Mr. Bangs graduated in June 2000 from New York Law School, where he served as executive articles editor of its *Journal of International & Comparative Law*. Mr. Bangs joins OATH from the New York City Loft Board, where he served as a hearing officer and, more recently, as its director of hearings. Mr. Bangs attends Fordham University's College of Business in pursuit of his MBA.

Mr. Leon graduated *cum laude* in May 2003 from the University of Miami School of Law, where he served as executive editor of its *International & Comparative Law Review*. Mr. Leon served as an intern to the Honorable A.J. Cristol of the United States Bankruptcy Court. He also served as an intern to the Honorable R. Fred Lewis of the Florida Supreme Court.

OATH announces that **Carol Plant** and **Elaine Van Rhyn**, have been promoted.

Ms. Plant has been promoted to Chief Judge's secretary. She served as confidential secretary since April 1999, when she joined OATH.

Ms. Van Rhyn has been promoted to Calendar Unit supervisor. She served as principal administrative associate. She joined OATH in February 1997.

The Department of Information Technology and Telecommunications invited ALJ **John Spooner** to serve on the screening committee for the 2003 Innovations in Technology Awards.

Senior Law Clerk **Martin Rainbow** was honored for reaching the four-gallon blood donation mark.

OATH's technical support staff has been bolstered by the addition of student interns **Henry Onyeokeh** and **Matthew Won**.

### Practice Pointer: The use of e-mail under the OATH Rules of Practice

As the use of e-mail becomes more prevalent in the legal profession, it is fast replacing communication by fax, mail and telephone. Parties appearing before OATH may find e-mail more convenient than mailing a letter or scheduling a telephone conference. However, all parties are reminded that the rule governing ex parte communication (48 RCNY § 1-14) applies to the use of e-mail; the means of transmission of the message to the adverse party should be by similar means and simultaneous with that sent to the judge. Hence, a party may e-mail the trial judge with a request for relief, but only if all other parties are copied

on the communication by e-mail or where an e-mail address is not available, by another form of simultaneous communication, such as a fax.

When the above condition is met, e-mail can be used effectively to schedule a telephone conference with the trial judge regarding an adjournment request, present a discovery dispute or request some other form of relief covered by rule 1-34. A post-trial motion may be served by e-mail, with a legal brief or memorandum included as an attachment (rule 1-52), as long as the adverse party is served in the same manner.

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## Reno

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Chief Judge Velez described the range of services the Center will offer to City agencies and their employees and explained that the Center's goal is to provide mediation at the earliest stages of a dispute. Early introduction of mediation services is the reason the Center's Chief Mediator, Ray Kramer, coined the phrase "The Forum of First Resort" as the Center's motto.

Among the services the Center plans to offer are mediation and conflict resolution, training in dispute resolution techniques and access to other dispute resolution resources.

Ms. Reno is an advocate of "appropriate" dispute resolution, or ADR. She came to New York City to support Mediation Settlement Day, an effort by the Association of the Bar of the City of New York to promote the use of mediation to resolve disputes. Later in the day on October 21, Ms. Reno spoke at the Bar Association about the important role that ADR plays in helping people resolve their disagreements.

Ms. Reno noted that lawsuits often leave parties unsatisfied. Even though the matter is considered resolved by the verdict, the relationship between the par-



Chief Administrative Law Judge Roberto Velez, Janet Reno, Kenneth L. Andrichik, Chair, Committee on Alternative Dispute Resolution, Association of the Bar of the City of New York, and Bankruptcy Judge Elizabeth S. Stong.

ties is likely damaged or destroyed. And while one party may be compensated for some wrong, the underlying problem could remain unresolved.

In her remarks at the Bar Association, Ms. Reno stressed the need to build mediation programs carefully in order to assure quality. She praised New York's Chief Judge Judith Kaye for her leadership in bringing ADR to the state court system, and also took a moment to compliment OATH's Center for Mediation Services.

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## Citizens Budget Commission Honors OATH and RecTech as Part of its Public Service Innovation Awards Ceremony

On March 24, 2003, the Citizens Budget Commission awarded an Honorable Mention to the Rector Street Technology Committee for its innovative and collaborative approach to providing government services. OATH ALJ John Spooner, who has been RecTech's Chairperson since its inception, accepted the award on behalf of all eight agency members.

Cheryl Cohen Effron, Chair of the CBC Innovations Committee, praised RecTech for its collaborative approach to leveraging scarce resources for the mutual benefit of its member agencies, resulting in numerous successful projects.



Shown accepting the Honorable Mention Award are, from left, Joseph Gordon, TLC Director of Information Systems; Julianne Vicciardo, former OLR Director of Financial and Systems Management; ALJ John Spooner, OATH Director of Systems Technology; Commission Chair Cheryl Cohen Effron; Kenneth O'Brien, CFB Director of Systems Administration; Keilanny Meyreles, OCB/OATH LAN Administrator; and Diana Fortuna, President of the Commission.

## ALJ Rosemarie Maldonado Honored

On March 20, 2003, OATH Administrative Law Judge Rosemarie Maldonado received the Flor de Maga Award from the Puerto Rican Bar Association at Manhattan's Sky Club. The Award is given each year by the Women's Committee of the Puerto Rican Bar Association to a Latina attorney in each of three practice areas who has contributed meaningfully to the legal profession.

Judge Maldonado was selected for her contributions to government service stretching back over two decades. She began her career in the New York City Law Department as an Assistant Corporation Counsel. In that capacity, she litigated trial and appellate matters in the areas of civil rights and labor law in both state and federal courts, and defended Article 78 reviews of administrative determinations.

From that post, Judge Maldonado went to work at the Mayor's Commission on Hispanic Concerns, where she served as Deputy Executive Director and co-authored the Commission's report. At that same time, she became an adjunct legal writing professor at Brooklyn Law School. Judge Maldonado has also taught legal writing at Fordham University School of Law, and a civil litigation clinic at Hofstra University School of Law.

In 1990, Judge Maldonado became the Chief Administrative Law Judge at the New York City



ALJ Tynia Richard (left) and ALJ Donna Merris (right), celebrate with award recipient ALJ Rosemarie Maldonado and her daughter, Ileana (center).

Commission on Human Rights. In that capacity she facilitated settlements and adjudicated matters brought under the New York City Human Rights Law, while also supervising the operations of the tribunal. When the Commission on Human Rights' administrative tribunal was transferred to OATH in 1997, Judge Maldonado became an OATH ALJ.

Judge Maldonado has accomplished all of this while also raising two wonderful children with her husband, Heriberto. Her accomplishments make her an excellent role model for Latina attorneys, and indeed for all attorneys. We congratulate her for receiving this wonderful award, and for everything she has accomplished that has made her worthy of it.

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## Center for Digital Government Honors OATH and RecTech in its Best of New York Awards Ceremony

This year, the Center for Digital Government awarded the Rector Street Technology Committee, also known as RecTech, the Second Place Best Collaboration Award. The Center hosts an annual competition recognizing City and State agencies that apply innovative and collaborative approaches to providing government services.



Michael Parzych, Cisco Systems, Paul Taylor, the Chief Strategy Officer of the Center, and Roberto Velez, OATH's Chief Judge.

The Center praised RecTech for its collaborative approach to leveraging scarce resources for the mutual benefit of its member agencies, resulting in numerous successful projects.

RecTech is a working group of eight agencies that are located at 40 Rector Street. It was created for the purpose of sharing technological resources among the member agencies. ALJ John Spooner has been the RecTech chairperson since its inception. The award was presented to OATH's Chief Judge Roberto Velez, representing RecTech at a statewide conference on March 24, 2003.

The member agencies of RecTech are OATH, the Board of Standards and Appeals, the Campaign Finance Board, the Civilian Complaint Review Board, the Commission on Human Rights, the Office of Collective Bargaining, the Office of Labor Relations and the Taxi and Limousine Commission.

**MESSAGE FROM CHIEF JUDGE  
ROBERTO VELEZ**



**A New Type of Case Comes to  
OATH: Vehicle Retention Hearings**

In 2002, the United States Court of Appeals for the Second Circuit ruled in *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002), that people whose cars are seized at a DWI stop are entitled to a prompt hearing to determine whether the Police Department can keep the car until a forfeiture proceeding is held. The Second Circuit remanded the matter to US District Judge Mukasey, who recently issued a comprehensive order setting forth new procedures for retention of seized vehicles. Judge Mukasey designated OATH as the forum for retention hearings.

At the hearings, the Police Department will have to prove that probable cause existed for the warrantless arrest of the person whose car was seized, that the Police Department is likely to prevail in the eventual forfeiture action, and that the Police Department's retention of the car is necessary to make sure that the car remains available in the event that the City prevails in the forfeiture action.

These hearings will significantly increase OATH's caseload, and OATH has expanded by hiring administrative law judges, law clerks, and administrative staff. For further information on this initiative, you can visit our website.



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**Practice Pointer**  
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E-mail may also be used to docket a case at OATH. To docket a case by e-mail, attach a completed Intake Sheet along with the petition or charges and e-mail it to [oathcal@oath.nyc.gov](mailto:oathcal@oath.nyc.gov). The Intake Sheet is linked to our on-line calendar and may be downloaded from the OATH website. It is also helpful to submit a few potential dates for scheduling the hearing and/or conference. To assist in selection of potential dates, OATH's on-line calendar provides an overview of calendar availability. After the filing has been reviewed, the Calendar Unit will notify you by return e-mail of the date, time and judge assigned for the hearing or conference.