OATH Office of Administrative Trials and Hearings

BenchNOTES

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Message from the Chief Judge
Roberto Velez

Citywide ALJ Ethics Rules

On February 13, 2007, by mandate of the voters of the City of New York, the new ethics rules for City ALJs and hearing officers became effective. The text of the rules, Rules of Conduct for Administrative Law Judges and Hearing Officers of the City of New York, 48 RCNY, Appendix A, can be found on OATH's website, www.nyc.gov/oath.

In addition to the text of the Rules, under the banner of the Administrative Judicial Institute, OATH's website provides relevant information in FAQ format on how the complaint process works and how ALJs may obtain advisory opinions.

Now that the code has been promulgated, the Administrative Judicial Institute will conduct training sessions for all City ALJs on its content

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City Bar ALJ Ethics Presentation: First Department Associate Justice George Marlow, Chair of the New York State Advisory Committee on Judicial Ethics.

Pursuit of Excellence in Administrative Justice: The New Rules of ALJ Conduct

*by Erin Felker**

The new "Rules of Conduct for City Administrative Law Judges and Hearing Officers," spearheaded by Deputy Mayor Carol Robles-Roman, took effect on February 13, 2007. Testifying before the City Charter Revision Commission, the Deputy Mayor emphasized that the impetus for creating a code of conduct did not stem from allegations of unethical behavior against City's ALJs or hearing officers. Rather, there was a general consensus that the administrative justice system could benefit from this reform so that ethical standards would be clear, consistent, and uniform despite the somewhat fragmented nature of

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Chief Judge Roberto Velez Receives Distinguished Alumni Service Award From NYU Law School

Chief Judge Velez, a graduate of NYU Law School, received a "distinguished alumni" award from the school's Black, Latino, Asian Pacific American Alumni Association ("BLAPA"). BLAPA presented this award to Chief Judge Velez at its annual dinner on April 13, 2007. Chief Judge Velez received this honor for his years of distinguished public service in City government and specifically for his leadership in creating the NYU Law School – OATH mediation clinic.

Judge Velez partnered with Rickie Revesz, the NYU Law School Dean, to create the first clinic designed to train students on mediation and other alternative dispute resolution skills at the law school. OATH Supervising ALJ Ray Kramer, the adjunct professor for the clinic, trains students on how to mediate cases involving City employees. Chief Judge Velez proudly noted that NYU Law students are now mediating disputes involving City employees for free and thus improving work conditions for numerous City employees.

(L to R) Chief Judge Velez; Richard Revesz, NYU Law School Dean; Professor Natalie Gomez-Velez, wife of Chief Judge Velez and alumnus of NYU Law School.

Deputy Chief Judge Charles McFaul Appointed to Board of Trustees of Lawyer Assistance Trust

Charles D. McFaul, the Deputy Chief Judge and Counsel at OATH, was appointed by Chief Judge Kaye to the Board of Trustees of the New York State Lawyer Assistance Trust.

The formation of the Lawyer Assistance Trust was announced in 2001, by Chief Judge Judith S. Kaye and Chief Administrative Judge Jonathan Lippman, as a permanent entity that brings statewide resources and awareness to the prevention and treatment of alcohol and substance abuse among lawyers, judges and law students.

Organized under the direction of a twenty-one member Board of Trustees, the Lawyer Assistance Trust is responsible for promoting education and early intervention, funding local lawyer assistance programs, creating special educational programs designed specifically for law students, practicing lawyers and judges, and recommending modifications to existing court rules and procedures to facilitate early detection, intervention and referral. The legal profession, through a portion of the current biennial attorney registration fee, finances the Trust.

Unique to the Trust is its Grant Program. Bar Associations, law schools, and lawyer assistance committees in New York State may apply for funding for such diverse purposes as educational materials; enhancing professionalism; treatment related expenses; and to support existing and new substance abuse prevention programs.

We wish Judge McFaul success with his volunteer service on the Trust.

OATH DECISIONS

March 2006 - February 2007

➤ Human Rights Law

During the reporting period OATH heard two noteworthy cases involving allegations of employment discrimination brought by the City Commission on Human Rights. ALJ Tynia Richard found that a health care provider discriminated against one of its employees on the basis of her disability in violation of the City Human Rights Law. The provider's professed reason for terminating the complainant - substandard sales performance - was a deemed pretext for unlawful discrimination. ALJ Richard ruled that the employer was legally required to discuss with the employee possible accommodations for her disability, including light duty, but refused to do so, firing the employee instead. The ALJ took an adverse inference against the employer due to the employer's negligent failure to preserve certain key evidence - sales reports and a recent performance evaluation - relating to the complainant's job performance. ALJ Richard recommended a damage award of $33,333 for lost income and $10,000 for mental anguish. *Comm'n on Human Rights ex rel. Manning v. HealthFirst, LLC*, OATH Index No. 462/05 (Mar. 15, 2006).

ALJ Kevin Casey recommended dismissal of multiple claims brought by the Commission on behalf of an employee alleging discrimination based upon his perceived sexual orientation, finding the complainant's workplace difficulties were not caused by discrimination. The failure to promote was for legitimate non-discriminatory reasons, comments directed towards complainant were not so severe or pervasive as to constitute a hostile work environment under the City's Human Rights Law, and the retaliation claim failed because testimony from management's witnesses that the complainant never complained of discriminatory treatment to management or human resources was more credible than the complainant's testimony to the contrary. *Comm'n on Human Rights ex rel. Bryan v. Memorial Sloan-Kettering Cancer Center*, OATH Index No. 183/06 (July 25, 2006).

The City Human Rights Law protects those who complain about unlawful discrimination from retaliation. ALJ John Spooner recommended a civil penalty of $25,000 after finding that a landlord's attempts to evict a tenant within five months of the tenant's filing of a human rights complaint constituted unlawful retaliation under the City's Human Rights Law. *Comm'n on Human Rights ex rel. Martin v. Hudson Overlook, LLC*, OATH Index No. 137/06 (Aug. 30, 2006).

➤ Contracts

A. Prequalified vendor appeals

As an exception to the general rule that City contracts be awarded to the lowest responsible bidder on the basis of competitive sealed bidding, City agencies are authorized by the City Charter to maintain a list of prequalified vendors to provide goods or services where competitive bidding is not practicable. A vendor who is denied prequalification or whose prequalified status has been revoked may appeal that decision to the agency head. An agency head's determination may be appealed to OATH for final action. City Charter § 324 (b).

OATH rules for prequalified vendor appeals contemplate a review of the record below, not a full evidentiary hearing, although, the administrative law judge may direct further written submissions, oral argument, or an evidentiary hearing, if "necessary to the decision of the appeal." 48 RCNY § 2-04. *Mazzocchi Wrecking, Inc. v. Dep't of Housing Preservation & Development*, OATH Index No. 1296/06, mem. dec. (Mar. 27, 2006), involved an appeal by a demolition company of the revocation of its prequalified vendor status. The status was revoked based upon vendor's alleged failure to disclose in its VENDEX questionaire: its affiliation with another firm; that it was the subject of an investigation; and its history of prior violations.

The vendor made a preliminary motion to remand to the agency head for a more definite statement of the reasons for revoking the vendor's prequalified status, and to depose the Agency Chief Contracting Officer (ACCO) and the agency head. ALJ Spooner denied the motion, finding the reasons stated in the Commissioner's decision were sufficiently clear under the applicable Procurement

* 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.

Policy Board rule. The judge also denied the vendor's motion to depose the ACCO and the agency head, finding an insufficient showing that the appeal could not be decided on the papers presented.

In the subsequent decision on the merits, ALJ Spooner found that the admitted inaccuracies form a rational basis for the agency's action and the petitioner failed to meet its burden of proving that the respondent's decision was arbitrary and capricious. *Mazzocchi Wrecking, Inc. v. Dep't of Housing Preservation & Development*, OATH Index No. 1296/06 (May 8, 2006).

B. Contract Dispute Resolution Board

A Procurement Policy Board rule designates OATH to administer the Contract Dispute Resolution Board (CDRB). The CDRB is a three-person panel, chaired by an OATH ALJ, and containing a representative of the Mayor's Office of Contracts and a panelist selected from a roster of qualified persons unaffiliated with the City. CDRB panels hear appeals of claims made by City contractors. 9 RCNY § 4-09.

Board panels heard several interesting appeals during the reporting period. In *ECCO III Enterprises, Inc. v. Department of Environmental Protection*, OATH Index No. 1044/06, mem. dec. (Apr. 21, 2006), the contractor sought review of agency's denial of its request to hire a specific contractor. The CDRB, chaired by ALJ Kara Miller, dismissed the appeal, finding it to be beyond the CDRB's authority.

Suppliers filed claims seeking compensation for increased cost of materials, and extra work or loses. The CDRB, chaired by ALJ Alessandra Zorgniotti, denied a contractor's claim for $155,654 in additional compensation for increased cost of gas absorption chillers, finding there was nothing in the contract that entitled the contractor to extra money despite contractor's claim that it was a sole source procurement. *Dart Mechanical Corp. v. Dep't of Sanitation*, OATH Index No. 1815/07, mem. dec. (Nov. 9, 2006), appeal pending.

Suppliers who entered into a three-year contract with the City to supply chemicals to treat waste water sought additional compensation because the contract contained a provision for a price adjustment which was keyed to a Department of Labor (DOL) index which was discontinued during the course of the contract. The CDRB, chaired by ALJ Miller, found that the "reasonable price" provision in section 2-305 of the Uniform Commercial Code was not triggered by the discontinuation of the DOL index because DOL selected a superceding index to set the price of the product and there was never a time that the price was not fixed. *SNF Holding Co. v. Dep't of Citywide Administrative Services*, OATH Index No. 1612/06, mem. dec. (Sept. 14, 2006).

In *L & L Painting Co., Inc. v. Department of Transportation*, OATH Index No. 1045/06, mem. dec. (May 4, 2006), a contractor, who entered into a bid contract for the removal of lead-based paint from the Queensboro Bridge, sought additional compensation for a significant increase in the price of fuel necessary to power heavy equipment. The City argued this was not permissible under the contract and that the contractor could have included an escalation clause for the cost of fuel in its bid. The CDRB, chaired by ALJ Tynia Richard, denied the contractor's claim. The CDRB found no basis in the contract for awarding additional compensation, finding also that the doctrine of impossibility of performance was not applicable and that the CDRB is not vested with the authority to grant equitable relief.

In a second case arising out of the same contract, L & L Painting Corp. disputed the elevation at which a scaffolding platform was to be constructed

and sought additional compensation to complete the work. The CDRB, chaired by ALJ Richard, denied the contractor's claim, holding that the contractor was responsible for clarifying any ambiguity in the contract prior to the bid. While there was some indication that clarification of the dimensions was sought at the pre-bid meetings, it was unclear whether petitioner specifically sought clarification of the platform clearance. *L & L Painting Co., Inc. v. Dep't of Transportation*, OATH Index No. 1152/06, mem. dec. (July 27, 2006), appeal pending.

The CDRB, chaired by ALJ Miller, denied a contractor's claim for additional compensation because of an unforeseen subsurface condition, the location of an existing sewer. The bid documents stated that the exact location of the sewer was unknown and that the contractor should conduct a pre-bid inspection to ascertain its location. The Board found that the location of the sewer could have been determined if the contractor had exercised due diligence. *JRCruz v. Dep't of Design and Construction*, OATH Index No. 123/07, mem. dec. (Dec. 20, 2006).

WDF, Inc. v. Department of Environmental Protection, OATH Index No. 1078/06, mem. dec. (Apr. 26, 2006), involved an appeal arising out of a contract to perform HVAC work at a sewage treatment plant in Flushing. When the work was approximately 85% complete it was damaged by a flood. The CDRB, chaired by ALJ Joan Salzman, denied the contractor's claim for compensation for the cost of ongoing replacement and repair work, finding the contractor was responsible for the loss under the terms of the contract. The contractor's remedies, if any, are a separate tort and contract suit.

The City's potential liability for a contractor's losses was also at issue in *TAP Electrical Contracting Service, Inc. v. Department of Environmental Protection*, OATH Index No. 1046/06, mem. dec. (May 10, 2006), in which a contractor sought compensation for items lost due to several burglaries occurring at a construction site. The CDRB, chaired by ALJ Casey, granted the contractor's claim for those losses that occurred after the agency was on notice that there was an ongoing problem with security. The contractor was awarded $6,079.56.

The City may move to dismiss a petition on the ground that it is time-barred. The City's motion to dismiss was granted in *Samson Construction Co. v. Department of Parks and Recreation*, OATH Index No. 1327/06, mem. dec. (Aug. 7, 2006). There, the CDRB, chaired by ALJ Faye Lewis, dismissed the contractor's delay claims as beyond the scope of the Board's jurisdiction and dismissed the non-delay claims because they were not timely filed. The contractor admitted the claims were untimely filed but argued that the City waived the timeliness requirement. The CDRB rejected this contention because the purported waiver of the deadline was made by an employee who lacked authority to do so and a subsequent letter from the same employee cured the error, yet the contractor failed to file its claim for more than three months after the second letter.

The CDRB, chaired by ALJ Charles McFaul, denied a landscaper's claim for $73,400 of additional compensation because the notice of dispute was not filed with the agency head within thirty days of the disputed determination. *Dell Tech Enterprises, Inc. v. Dep't of Environmental Protection*, OATH Index No. 427/07, mem. dec. (Nov. 22, 2006). *See also, Nationwide Court Services, Inc. v. Dep't of Health & Mental Hygiene*, OATH Index No. 2042/06, mem. dec. (Nov. 3, 2006) (the CDRB, chaired by ALJ Donna Merris dismissed as time-barred a contractor's challenge to the termination for cause of its contract for legal support services).

In contrast, in *Kreisler Borg Florman General Construction Co. on behalf of A & F Fire Protection Co., Inc. v. Department of Design & Construction*, OATH Index No. 800-03/06 & 1154/06, mem. dec. (Apr. 12, 2006), the CDRB, chaired by ALJ Spooner, denied the City's motion to dismiss as untimely claims brought by sprinkler subcontractor, which had been remanded for resolution by the Supreme Court. The CDRB held that the remanded claims were not governed by the deadlines set in the Procurement Policy Board rules. Since none of the claims had been considered on the merits by either the agency or the Comptroller, the CDRB remanded the claims to the agency for a determination.

Finally, on remand from the Supreme Court, the CDRB, chaired by ALJ Casey, increased the amount due to a contractor challenging funds deducted and retained by the City because it failed to demonstrate entitlement to $102,947 it retained from payments to the contractor. The City also could not provide a basis for failing to reimburse the contractor for $506,461.13 of retainage. *Classic Electric, Inc. v. Dep't of Citywide Admin. Services*, OATH Index No. 214/03, mem. dec. (Aug. 17, 2006).

➤ Prevailing Wage

Pursuant to the prevailing wage law public works contractors must pay laborers prevailing wages and benefits and are responsible for underpayments by their subcontractors. Labor Law § 220.

In one case heard during the reporting period, a subcontractor failed to pay an employee prevailing wages and supplemental benefits for work performed as a bricklayer. ALJ Merris further found that the underpayments were willful and that respondent falsified payroll records. A civil penalty of ten percent of the total violation and a debarment from all governmental contracts within New York State for five years was the recommended disposition. *Comptroller v. Viva Victoria Enterprise, Ltd.*, OATH Index Nos. 1043/06 & 1042/06 (May 18, 2006).

➤ Practice and Procedure

A. Pretrial motions

ALJ Richard granted a motion to disqualify counsel granted pursuant to DR 5-102, which prohibits an attorney from representation when it is obvious that he may be called as a witness on a significant issue; here, the adverse party intended to use at trial an affirmation made by counsel which contained statements adverse to his client. *Dep't of Finance v. Jones*, OATH Index No. 1127/06, mem. dec. (Mar. 9, 2006).

The owner of an SRO building challenging the suspension of a previously issued certificate of no harassment, moved for recusal of the presiding ALJ, asserting bias. ALJ Richard denied the motion, finding that because the ALJ is not a party, has not been counsel to a party, and has no interest in or any relations to a party to the proceeding, there is no basis for mandatory recusal under section 14 of the Judiciary Law. The rulings and conduct that respondent attributes to bias reflect the discretion inherent in the tribunal, and the attempt to conduct proceedings in a fair, balanced, and efficient manner. *Dep't of Housing Preservation and Development v. 331 W 22nd Street, LLC*, OATH Index No. 912/06, mem. dec. (May 15, 2006).

PRACTICE POINTER

Pretrial motions may be made orally, including by telephone, by electronic means, or in writing. Motions should be consolidated and made sufficiently in advance of trial to permit a timely decision to be made. Motion papers should state the grounds upon which the motion is made, the relief sought and shall include affidavits and other documents in support. Motion papers shall include notice to all other parties of the time to answer, and proof of service shall be filed with the papers. 48 RCNY § 1-34.

ALJ Merris denied respondent's pretrial motion to dismiss disciplinary charges on the ground that the Department failed to comply with its command discipline directive. Where no substantial right protecting a party from prejudice is violated by an agency's failure to comply with its own rule, such non-compliance constitutes harmless error. Mere delay in commencing the command discipline process, in which the officer ultimately participated in and rejected the recommendation, cannot be said to have affected a substantial right, particularly where a full evidentiary hearing remains available to respondent. *Dep't of Correction v. Pack*, OATH Index No. 1553/06, mem. dec. (June 14, 2006).

B. Official notice

An Administrative Law Judge may take official notice of any fact which may be judicially noticed by the courts of New York State. The parties shall be given the opportunity to refute the official noticed matters by evidence or by presentation of authority. Official notice may be taken, without notice of the parties, of Rules published in the rules of the City of New York, or the City Record. 48 RCNY § 1-48.

ALJ Richard took official notice of symptoms of a disease listed on the website for National Institutes of Health. *Dep't of Correction v. Rodriguez*, OATH Index No. 277/06 (Mar. 27, 2006).

ALJ Salzman took official notice of driving distances between points as calculated on the internet website, www.mapquest.com. *Human Resources Admin. v. Allen*, OATH Index No. 212/06 (June 20, 2006).

C. Sanctions

Pursuant to the recently amended OATH rules of practice, an attorney may be sanctioned for failure to comply with the standards of conduct set forth in the rules. 48 RCNY § 1-13.

In a consolidated Loft Board proceeding involving tenant complaints of harassment and diminution of services, ALJ Salzman imposed a $1,000 fine on the tenant's attorney under OATH rule 1-13(e) for willful disobedience of the tribunal's orders setting trial dates and requiring proper pleading of the acts of harassment alleged. *Dawe v. 20 Beaver Street, LLC*, OATH Index No. 237/06 and 335/06, mem. dec. (Oct 20, 2006), *reversed on other grounds*, Loft Bd. Order No. 3161 (Feb. 15, 2007).

In addition, sanctions may be imposed pursuant to section 1-33(e) of the OATH rules for failure to comply with a discovery order. ALJ Spooner ruled that preclusion of an agency's requested witness is the proper remedy for agency's repeated failure to identify the witness during numerous pretrial communications establishing the agency's witness list. *Dep't of Housing Preservation and Development v. Porres*, OATH Index No. 627/06 (June 16, 2006).

D. Use of hearsay evidence

Hearsay evidence is not only admissible in administrative hearings, but, it may form the sole basis for findings of fact. *Gray v. Adduci*, 73 N.Y.2d 741, 536 N.Y.S.2d 40 (1988); *Triple A Auto Driving School, Inc. v. Foschio*, 65 N.Y.2d 755, 492 N.Y.S.2d 24 (1985). Reliance upon hearsay evidence is not without limitations. The weight given to hearsay statements depends on several factors - whether the declarant was known, had personal knowledge of the facts and whether the declarations were detailed and corroborated by other evidence. *Calhoun v. Bailar*, 626 F.2d 145, 149 (9th Cir. 1980), *cert. denied*, 452 U.S. 906 (1985).

Those factors were applied in Department of Environmental *Protection v. Cortese*, OATH Index No. 1613/06 (Sept. 12, 2006). There, ALJ Salzman determined that the agency failed to prove sleeping on duty charges after a civilian complaining witness twice failed to appear at trial. Petitioner relied instead on a memorandum summarizing an interview of the complainant, conducted three months after the complaint was made. ALJ Salzman found the unsworn, unsigned and uncorroborated hearsay declarations were insufficient to prove the charge.

➤ Real Property

A. Loft law

ALJ Spooner recommended that the Loft Board grant a building owner's application to terminate a finding of harassment, which had been made against a previous owner in 1986. Since purchasing the building in 1996, the new owner had acted conscientiously to legalize the building, obtaining a certificate of occupancy in 2004. *Matter of Rokosz*, OATH Index No. 1970/05 (Mar. 27, 2006), *adopted*, Loft Bd. Order No. 3054 (May 18, 2006).

ALJ Lewis granted a tenant's motion for summary judgment in a consolidated coverage and rent overcharge application. The judge rejected the owner's argument that the tenant had waived Loft Law coverage by a provision in the lease that "recognized" she was not a covered tenant. ALJ Lewis also rejected the owner's argument that the unit had been deregulated by an abandonment because such a finding is prospective only and can not be used as a defense to an overcharge application where no prior abandonment finding had been made by the Loft Board. *Thornley v. Al-Farah*, OATH Index Nos. 1819/06, 1935/06 (Aug. 11, 2006).

ALJ Casey denied an IMD owner's application seeking abandonment findings against seven residential units. The owner testified that the units were currently unoccupied and that the Loft Board had not made any harassment findings. However, no evidence was offered to show the circumstances under which any of the units had been vacated and the owner had not conducted a diligent search to locate the former occupants. *Matter of Windsor Construction Assoc.*, OATH Index. No. 310/07 (Dec. 12, 2006).

B. SRO anti-harassment law

In two SRO harassment proceedings, HPD's reliance solely on hearsay evidence resulted findings that the owners were entitled to certificates of no harassment.

In *Department of Housing Preservation & Development v. Pascal*, OATH Index No. 626/06 (Apr. 5, 2006), ALJ Casey noted that all but one of the Building Code violations had been resolved long before the start of the inquiry period. The Department did not rebut the owner's evidence that the SRO tenants voluntarily relocated to upgraded apartments.

In the other case, ALJ Merris recommended issuance of a certificate of no harassment. Judge Merris found the agency's hearsay evidence insufficient to establish the presence of lawful tenants in the premises during the inquiry period and when a vacate order was issued. The ALJ drew a negative inference from petitioner's failure to offer testimony from the inspector who compiled the report and was still employed by the agency. *Dep't of Housing Preservation and Development v. Blanchard*, OATH Index No. 553/06 (Aug. 9, 2006).

Two proceedings were brought by HPD to rescind a previously issued certificate of no harassment. In one, the property owner moved to dismiss the case because petitioner had failed to hold a hearing within 30 days of issuing the notice of rescission. ALJ Zorgniotti denied the motion because respondent had consented to the delay while trying to reach a settlement with the tenants. Even if respondent had not consented, the 30-day limit is directory, not mandatory, because the statute does not explicitly state that non-compliance with the 30-day deadline will invalidate the proceeding or terminate jurisdiction, particularly where, as here, the statute is intended for the benefit of the public. *Dep't of Housing Preservation and Development v. Tauber*, OATH Index No. 675/07, mem. dec. (Dec. 18, 2006).

In *Department of Housing Preservation and Development v. 331 West 22nd Street LLC*, OATH

Index No. 912/06 (Dec. 29, 2006), an SRO owner was issued a certificate of no harassment in August 2004. In November 2005, HPD found reasonable cause to believe harassment occurred at the premises after the certificate had been issued, and it suspended the certificate. Six days after the suspension was issued the SRO building owner brought an Article 78 proceeding in Supreme Court seeking to invalidate the suspension. One week later HPD served a notice of hearing for a hearing at OATH to determine whether the certificate should be rescinded.

The owner filed a pre-hearing omnibus motion seeking to stay the rescission hearing, as well as requesting summary disposition of the case and other relief, which ALJ Richard denied in its entirety. She ruled that the hearing need not be stayed pending resolution of the Article 78 proceeding, because the Article 78 proceeding was prematurely filed before the owner exhausted his administrative remedies in this forum. ALJ Richard rejected the owner's contention that HPD could not suspend the certificate prior to conducting a hearing, because section 27-2093(f) of the Administrative Code and section 10-08(b) of HPD's rules permit the imposition of a pre-hearing suspension, as long as a post-suspension hearing is held "as soon as reasonably possible", but not later than 30 days after the suspension. Respondent would get a full and fair opportunity at the OATH hearing to challenge HPD's contention that the certificate should be rescinded. ALJ Richard also ruled that the owner was not entitled to summary disposition based upon a prior stipulation between the owner and the tenants, as the agreement did not address all of the harassment claims and did not affect claims arising after the stipulation. Finally, she ruled that the death of the sole remaining tenant did not mandate dismissal of the proceeding because the tenant was not the petitioner. After a full hearing on the merits, ALJ Richard ruled for the owner. She recommended HPD should not rescind the certificate of no harassment, finding HPD did not prove that harassment occurred after the certificate had been issued. *Dep't of Housing Preservation and Development v. 331 West 22nd Street LLC*, OATH Index No. 912/06 (Dec. 29, 2006).

C. Padlock law

ALJ Miller recommended closure of a building located in a residential zone because the evidence established the premises was being occupied as a business office. The ALJ found that the owner failed to establish a pre-existing legal non-conforming use because it did not meet its burden of showing that the building was used commercially, without an interruption of two or more years, since 1961. *Dep't of Buildings v. Owners, Occupants and Mortgagees of 148 East 63rd Street, New York Co.*, OATH Index No. 994/06 (June 29, 2006).

➤ Vehicle Retention

Pursuant to a federal court order, OATH conducts preliminary hearings to determine whether the Police Department is entitled to retain custody of vehicles seized as an instrumentality of a crime, pending state court actions to forfeit title to the vehicles. The owner of the vehicle, or the driver of the vehicle at the time of the arrest, may demand this hearing and seek the release of the vehicle. *Krimstock v. Kelly*, 99 Civ. 12041 (MBM) second amended order and judgment (S.D.N.Y. Dec. 6, 2005). The *Krimstock* Order establishes strict time frames within which the Police Department must notify vehicle owners of their right to request a retention hearing at OATH. The Order also requires the Department to schedule a retention hearing within ten business days of receiving the demand. OATH ALJs have ordered that vehicles be released to their owners where the Department failed to comply with these notice or scheduling provisions.

In *Police Department v. Montes*, OATH Index No. 1372/06, mem. dec. (Mar. 14, 2006), ALJ Salzman granted the vehicle owner's motion to dis-

miss and ordered her vehicle be returned where she was not properly served with the notice of the right to request a retention hearing, either at the time of the seizure or by mail within five business days. *See also, Police Dep't v. House*, OATH Index No. 587/07, mem. dec. (Sept. 27, 2006)

ALJ Lewis granted the vehicle owner's motion to dismiss in *Police Department v. Caban*, OATH Index No. 107/07, mem. dec. (July 14, 2006), because the Department failed to provide notice of the right to a hearing in accordance with the terms of the *Krimstock* Order. The Department conceded there was no proof that the owner had been served with notice at the time the vehicle was seized, but argued that its non-compliance was cured by the timely mailing of notice to the owner's address of record. The owner testified that he had not received the notice because he had recently changed his address. ALJ Lewis granted the owner's motion to dismiss, finding the mailing did not cure the failure to provide notice at the time of seizure where the Department did not prove that the owner actually received the notice in a timely fashion.

In *Police Department v. Murray*, OATH Index No. 1631/06, mem. dec. (Apr. 25, 2006), the vehicle owner's son-in-law was driving the vehicle when he was arrested and the vehicle seized. The owner did not receive notice of his right to a hearing until five months later. ALJ Miller ordered the vehicle be released because the *Krimstock* Order requires the Department to serve the registered owner by mail within five business days of the seizure, where, as here, the registered owner was not present at the time of the arrest and seizure.

However, the Department's failure to prove that it served the notice of the right to a hearing in accordance with the Order has been excused where it is shown that the claimant nevertheless received actual, timely, notice. In *Police Department v. Adams*, OATH Index No. 1997/06, mem. dec. (June 30, 2006), ALJ Zorgniotti denied the owner's motion to dismiss, finding that his signature admitting to service of the required notice at the time of arrest was sufficient to prove actual notice of his right to a hearing, despite the Department's failure to subsequently mail him notice.

During the reporting period, there were two cases dealing with the proper scheduling of reten-

tion hearings. In the first, *Police Department v. Cardona*, OATH Index No. 1476/06, mem. dec. (Mar. 29, 2006), the vehicle owner moved to dismiss because petitioner did not mail him notice of his right to request a hearing within five business days of the seizure and because the Department failed to schedule the hearing within 10 business days of receiving the demand, as required by the Order. ALJ Salzman found that the owner was properly served because he admitted he was given notice of his right to request a hearing at the time the car was seized. She also found that the delay in scheduling the hearing was caused by the owner's attorney submitting a hearing request form that did not contain all of the information needed. The Department scheduled the hearing as soon as the owner's attorney provided the missing information. *See also, Police Dep't v. Cortorreal*, OATH Index No. 1479/06, mem. dec. (Mar. 29, 2006) (ALJ McFaul denied the vehicle owner's motion to dismiss for failure to schedule the hearing within ten business days of the demand where the owner submitted an incomplete hearing demand form. The strict scheduling time frames of the Order are not triggered until the Department has received the prescribed form containing the necessary information).

To prevail at the hearing, the Police Department bears the burden of proving three elements contained in the Order: that probable cause existed for the arrest, that the Department is likely to prevail in the civil forfeiture action, and that it is necessary to retain the vehicle pending a final judgment in the forfeiture action.

ALJ Richard ordered the release of the vehicle in *Police Department v. Shelton*, OATH Index No.

1684/06, mem. dec. (May 2, 2006), finding the Department failed to show that probable cause existed for the arrest pursuant to which the vehicle was seized because the evidence did not establish the reasonable suspicion that led the officers to approach the vehicle and conduct the search. Although the arrest report stated that the owner had committed a traffic infraction while driving, this infraction was not described in the complaint report, arrest report, or criminal complaint. The ALJ credited the owner's testimony that he had not committed a traffic infraction but that the officers had been following him while he was driving and stopped his car when he was parking in front of his home.

ALJ Zorgniotti ordered the release of a vehicle finding the evidence insufficient to establish probable cause for respondent's arrest and a likelihood of success at the civil forfeiture action. *Police Dep't v. Rodriguez*, OATH Index No. 722/07, mem. dec. (Oct. 20, 2006). Petitioner's evidence showed that respondent was observed double parking his vehicle when another individual entered the car. The arresting officer "observed the recovery of a kilo of cocaine and another bag of cocaine from [the other passenger]." Judge Zorgniotti found that petitioner's evidence lacked any showing of the reasonable suspicion that led the officer to conduct a search of the vehicle, or its occupants, based on a traffic violation alone.

Chief ALJ Roberto Velez ordered the release of a seized vehicle because the Department's evidence failed to establish that the arrestee drove the vehicle that was seized, as opposed to another car. *Police Dep't v. Mercedes*, OATH Index No. 330/07, mem. dec. (Sept. 18, 2006). The vehicle seizure occurred at the arrestee's home, three days after a police officer observed the arrestee engaged in a drug sale for which he was arrested. Chief Judge Velez found that there was no nexus between the seized car and the charged crimes.

ALJ Julio Rodriguez found that the Police Department was not entitled to retain a seized vehicle where it failed to demonstrate the likelihood of success in the civil forfeiture action. Although the driver of the vehicle was arrested for armed robbery, he credibly testified that he was driving two men to a friend's house, was unaware that they intended to commit a robbery, and drove away from the robbery because one of the men threatened him with a firearm. The District Attorney's Office had indicated it was not indicting the driver and the two passengers in the vehicle had made written statements that the driver was not involved in the robbery. *Police Dep't v. Peluso*, OATH Index No. 991/07, mem. dec. (Dec. 5, 2006).

This tribunal has repeatedly held that a guilty plea in the underlying criminal case establishes the first two prongs of the *Krimstock* Order. Accordingly, in *Police Department v. Cruz*, OATH Index No. 1643/06, mem. dec. (Apr. 25, 2006), Chief ALJ Velez ruled that the Police Department was entitled to retain a vehicle seized in connection with the owner's arrest for criminal possession of a weapon. Although the owner claimed that the vehicle had been searched illegally, this claim was extinguished by his conviction on the underlying criminal charges. The Chief ALJ concluded that retention of the vehicle was necessary to avoid a risk to public safety. *See also, Police Dep't v. Balseca*, OATH Index No. 103/07, mem. dec. (July 25, 2006) (ALJ McFaul ruled that the Police Department was entitled to retain a vehicle seized where owner pled of guilty to the weapons possession charge).

However, the holding is limited to a guilty plea to a crime, not a plea to a violation. ALJ Casey ruled that the Police Department was not entitled to retain a vehicle in *Police Department v. Arnold*, OATH Index No. 377/07, mem. dec. (Aug. 22, 2006), because the Department failed to establish the second prong of the Order, that it was likely to succeed in the civil forfeiture action. To establish a likelihood of success in the forfeiture action, the Department bears the burden of showing that the

vehicle was used in furtherance, or as an instrumentality, of a crime. Although the owner of the vehicle was arrested for criminal possession of a weapon in the fourth degree, he pled guilty to disorderly conduct, a violation, and the Department was unable to establish more serious criminal conduct at the hearing. ALJ Casey concluded that the Department was unlikely to be able to prove the vehicle was used in furtherance of a crime as disorderly conduct is a violation, not a misdemeanor or a felony, and ordered the vehicle be released.

Vehicle owners may seek release of the vehicle on the basis that they are an innocent owner, where they were not driving the car at the time of the arrest and seizure of the vehicle and did not "permit or suffer" the illegal use. The Police Department bears the burden of proving that an owner is not an innocent owner and has done so by showing that the arrested driver is the beneficial owner of the car. Beneficial ownership refers to a situation in which the vehicle's actual user is distinct from the nominal owner and may be established by showing that the alleged beneficial owner exercises dominion and control over the vehicle.

In *Police Department v. Kinchen*, OATH Index No. 810/07, mem. dec. (Nov. 6, 2006), ALJ Zorgnioti rejected an innocent owner claim and ruled that the Police Department was entitled to retain a car seized in connection with the driver's arrest for possession of a loaded firearm and possession of marijuana. The woman claiming to be an innocent owner was a passenger in the car at the time of the driver's arrest under circumstances suggesting she knowingly permitted the car be used as an instrumentality of a crime.

Chief ALJ Velez ordered the release of two vehicles during the reporting period finding the car owner did not have reason to know that another person would use the car to commit a crime. In *Police Department v. Torres*, OATH Index No. 1412/06, mem. dec. (Mar. 31, 2006), the arrested driver was the nephew of the vehicle's owner. The owner credibly testified that she did not give her nephew permission to drive her car on the night of his arrest. The Department also failed to establish that the nephew was the vehicle's beneficial owner, as the non-driver owner had purchased the car, registered the vehicle in her name, and testified that she was the primary user. *See also, Police Department v. Gonzalez*, OATH Index No. 1929/06, mem. dec. (June 13, 2006) (Chief ALJ Velez found that the Department failed to establish that the owner knew or should have known his half-brother would engage in illegal activity, where he knew the half-brother had been arrested once before but never charged with a crime).

To establish the third prong of the *Krimstock* Order, the Department must show a heightened risk to public safety if the vehicle is returned. In *Police Department v. Saban*, OATH Index No. 273/07, mem. dec. (Aug. 16, 2006), the Department established this heightened risk where the owner of the vehicle was arrested for driving while intoxicated for the second time within a year. From the police reports, it was unclear if the owner had knowingly refused a breathalyzer test or whether a language barrier prevented him from taking the test. Chief ALJ Velez, however, reasoned that respondent had shown proficiency in English on the witness stand and therefore found he had refused to take the test.

Relying on a public safety risk, ALJ Spooner ordered the retention of respondent's vehicle pending the outcome of a civil forfeiture action. Respondent's DWI conviction established the first two prongs of the *Krimstock* Order. ALJ Spooner found that the respondent's significantly high blood alcohol level, his involvement in a traffic accident and a prior DWI conviction in 2004 demonstrated a heightened risk to public safety warranting retention of the vehicle. *Police Dep't v. Lopez*, OATH Index No. 549/07, mem. dec. (Sept. 19, 2006).

The *Krimstock* Order grants standing to either the registered owner of the vehicle or the person from whom the vehicle is seized. In *Police Department v. Rodriguez*, OATH Index No. 146/07, mem. dec. (Aug. 25, 2006), the wife of the registered owner moved to vacate his default at an earlier hearing. Chief ALJ Velez denied the motion, finding that because the husband was the registered and titled owner of the vehicle, and was the person from whom it had been seized, his wife lacked standing in the proceeding.

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Commission on Human Rights ex rel. Cherry v. Stars Model Management

ALJ Ray Kramer

In *Commission on Human Rights ex rel. Cherry v. Stars Model Management*, OATH Index No. 1464/05 (Mar. 7, 2006), respondent, a model consulting and job placement service, was charged with discrimination based upon a young woman's claim that the service refused to consider her for a modeling opportunity because of her race.

The complainant, a twenty-three year old African-American woman, testified that she had no previous modeling experience but she was interested in breaking into the business. She found an advertisement for respondent's service seeking models for a fashion runway show to be broadcast nationally on the E cable television network. Noting that ad did not mention that previous experience was required, the complainant decided to call. When she did so, a man answered the phone and said "models." The complainant said "hello" respondent said "you're a black girl" and hung up. The complainant called back, asking the respondent if he had hung up on her. Respondent asked her what is her ethnicity, the complainant said she was black, and the owner said he was not interested in hiring blacks, and hung up.

The complainant called her aunt and told her what transpired. The complainant called respondent back, with her aunt listening in on the three way call. The complainant told respondent she was interested in working on the E fashion show. Respondent asked the complainant about her ethnicity. The complainant said she is black. Respondent replied "blacks are not welcome" and he hung up. The complainant called a fourth time with the same results.

The complainant's aunt then called respondent, at the complainant's request. Respondent asked her what her ethnicity was and the aunt said that she was white. He asked where she lived, and the complainant's aunt said she lived on Long Island. Respondent seemed interested until the aunt said that she was 6 foot, two inches tall and 150 pounds.

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FEATURED CASES

Department of Housing Preservation & Development v. Schwartz

ALJ John Spooner

The owner of a single room occupancy (SRO) building must obtain a certificate of no harassment from Department of Housing Preservation and Development (HPD) before altering or demolishing the building. OATH conducts hearings to determine whether harassment has occurred within the past three years. Admin. Code § 27-2093. The law defines harassment to include "the interruption or discontinuance of essential services" that "causes or is intended to cause" lawful occupant(s) "to vacate such unit or to surrender or waive any rights in relation to such occupancy." Admin. Code § 27-2093(a)(2). The law contains a provision that any acts or omissions which cause an interruption or discontinuance of essential services at an SRO building "be presumed [to have been committed] ... with the intent to cause [lawful occupants] to vacate such unit or to surrender or waive a right [to occupancy]." Admin. Code § 27-2093. OATH has held that the presumption of intent is rebuttable. *See Dep't of Housing Preservation and Development v. McClarty*, OATH Index No. 1602/00, at 2-3 (Dec. 7, 2000).

Whether an owner may be found to have harassed tenants while the SRO building was in 7A administration was an issue of first impression in *Department of Housing Preservation & Development v. Schwartz*, OATH Index No. 788/06 (Apr. 7, 2006). Respondent, the former owner of an SRO building filed an application for a certificate of no harassment on January 31, 2005. At issue, therefore, was whether harassment occurred at the building during the inquiry period, i.e., from February 3, 2002 to February 3, 2005. To prove harassment occurred during that time, HPD relied exclusively on records of violations and a Housing Court proceeding appointing a 7A administrator. The 7A administrator was appointed to manage the building in September 2001, four months prior to the start of the inquiry period, and he managed the

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Respondent said that was too skinny and he hung up.

The complainant later asked a friend to call. Respondent asked the friend what her ethnicity was. The friend said she was Dominican. Respondent said he would meet the friend on Monday (the call was placed on Saturday). Respondent did not ask the friend if she had prior modeling experience.

The complainant called respondent three more times, and each time respondent asked the complainant about her ethnicity and then hung up after the complainant said she is African-American. On the final call, the complainant asked respondent why African Americans were excluded from the show. Respondent replied "we don't take niggers here, its that simple" and he hung up.

The complainant testified that she taped her phone conversations with respondent, as it is her practice to tape all business calls. The Commission did not produce the tapes for the hearing. The complainant brought the tapes to a local television station and played them for a reporter. The Commission produced a videotape of a news segment that was aired on the local television station. The news cast included tape recordings of two of the conversations between the complainant and respondent, which corroborated the complainant's testimony.

. . . each time respondent asked the complainant about her ethnicity and then hung up after the complainant said she is African-American.

Respondent testified that his company does not discriminate on the basis of race, color or creed. He insisted that he does not run an employment agency, he runs a model management agency. Respondent testified that the complainant was very aggressive on the telephone. He was looking for women who are sweet, innocent, feminine, not aggressive like the complainant.

Respondent testified that the complainant barraged him with between 90 to 160 calls over the next 90 to 100 minutes, and that her tone escalated from aggressive to vicious. He admitted that he referred to the complainant as a nigger but claimed he did so only because she kept calling despite being told she had been rejected. Respondent accused the reporter of arranging to meet him under false pretenses. Respondent claimed the reporter told him she was casting for a reality show, but then she confronted respondent with the audio tape of his conversations with the complainant. Respondent did not deny the contents of the taped conversations, but he noted that the complaint kept calling him after he tried to turn her away.

ALJ Ray Kramer found respondent discriminated against the complainant on the basis of race. He found the complainant's testimony, corroborated by the video tape, telephone records and her aunt's testimony, more credible than respondent's.

Respondent argued that the complaint should be dismissed because his business is not an "employment agency" under the Human Rights Law, and therefore he is beyond the Commission's jurisdiction. "The term 'employment agency' includes any person undertaking to procure employees or opportunities to work" NYC Admin. Code § 8-102(2). ALJ Kramer cited to *Comm'n on Human Rights v. Boll*, 1974 WL 2796 (Sup. Ct. N.Y. Co. 1974), where the court upheld the Commission's finding that respondent Boll, a private individual, functioned as an employment agency under the Human Rights Law. The respondent in *Boll* provided counseling and guidance to recent Harvard Business School graduates, as well as a collection of job leads and executive employment opportunities. In so holding, the *Boll* court noted that the Human Rights Law "shall be construed liberally for the accomplishment of the purposes thereof." *See*, Admin. Code § 8-130. ALJ Kramer found respondent's business, like the business in *Boll,* provides advice, counseling and employment opportunities. Citing testimony from the owner that the essence of his business can be summed up in "three words . . . make a match. Match a particular talent with particular wants and needs of a client," ALJ Kramer found that the service was an "employment agency" as defined in NYC Administrative Code section 8-102(2). He found the service discriminated on the basis of race and recommended a damage award, including $10,000 in mental anguish damages for the complainant, a civil penalty of $15,000 and other affirmative relief. The Commission adopted the recommendation and the Commission's decision was subsequently affirmed on appeal. Comm'n Decision and Order (Apr. 13, 2006), *aff'd sub nom, Secor v. NYC Comm'n on Human Rights*, 13 Misc. 3d 1220A, 831 N.Y.S.2d 350 (Sup. Ct. N.Y. Co. 2006).

➤ Licensing

OATH conducts license and permit revocation proceedings involving mobile food vendors and restaurants brought by the Department of Health and Mental Hygiene.

In *Department of Health & Mental Hygiene v. GF's Inc., d/b/a Jobee's Orient*, ALJ Miller found that the respondents' operation of a food service establishment constituted an imminent health hazard and recommended that respondents' license be suspended. OATH Index No. 429/07 (Oct. 4, 2006). ALJ Miller rejected respondents' argument that a re-inspection of the premises was premature because they were told that it would occur at a later date. The State Sanitary Code vests the permit issuing official with the discretion and authority to close a food service establishment if it is determined that continued operation poses an imminent health hazard to the public. Judge Miller found that violations issued to a food service establishment need not fall within the listed conditions in the State Sanitary Code for them to constitute an imminent health hazard.

ALJ Richard recommended a two-year suspension of a mobile food vendor's license after the vendor purchased a permit from a permit holder in violation of regulations which bar the sale or purchase of permits. ALJ Richard found that the vendor made the purchase in order to circumvent the Department's lottery system for awarding permits. *Dep't of Health and Mental Hygiene v. Azmi*, OATH Index No. 1244/05 (Sept. 12, 2006).

OATH also conducts various license revocation proceedings for the Department of Buildings. One such case was brought against a master plumber. The plumber, who also works for the Department of Sanitation, made a pretrial motion to suppress statements he made to the Department of Investigation on the ground that the investigators failed to inform him of his right to representation under section 75 of the Civil Service Law. ALJ Kramer denied the motion, finding section 75 inapplicable in the license revocation proceeding. *Dep't of Buildings v. Grande*, OATH Index No. 794/06, mem. dec. (Mar. 9, 2006).

➤ Disciplinary Proceedings

A. Drug testing

Random drug testing of public employees who hold safety sensitive positions is permitted if "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 Educ.*, 70 N.Y.2d 57, 70, 517 N.Y.S.2d 456, 462 (1987). The Fire Department's strong interest in preventing its employees from using drugs has also been recognized. N*ocera v. New York City Fire Comm'r*, 921 F. Supp. 192 (S.D.N.Y. 1996).

In several disciplinary cases, employees challenged the Fire Department's drug testing policy. In *Fire Department v. Kirk*, OATH Index No. 441/06 (Apr. 26, 2006), a firefighter, who tested positive for cocaine, challenged the legality of the Department's random drug testing policy, claiming it was not based on a need to protect public safety. ALJ Merris found the testing policy to be constitutional as applied and recommended that the firefighter be terminated for illegal drug use.

In *Fire Department v. Kelly*, OATH Index No. 804/06 (June 9, 2006), a firefighter admittedly tested positive for cocaine use but challenged the randomness of the selection process and argued that his limited drug use was a result of post-traumatic stress disorder (PTSD), incurred in the line of duty. ALJ Casey found the Fire Department proved respondent was selected randomly, tested positive for drug use, and, although he suffered from chronic and severe PTSD, the drug use was a voluntary act of misconduct. A ten-day suspension without pay, the maximum penalty short of termination under the Administrative Code provision governing

the discipline of firefighters, was recommended due to the extraordinary mitigation of respondent's mental disability. The Fire Commissioner imposed a penalty of termination, noting the Department's zero tolerance policy for drug use, " I cannot understate the importance of maintaining a fire service made up of emergency responders free from the influence of . . . illegal substances." Comm'r Dec. at 9 (Jan. 2, 2007).

In *Fire Department v. Benson*, OATH Index No. 1638/06 (Sept. 5, 2006), an off-duty firefighter, who was arrested for DWI and found in possession of cocaine and marijuana, tested positive for both drugs. ALJ Spooner recommended termination of employment, but also noted that it would be fairer to hold the penalty in abeyance to allow the firefighter to retire, due to substantial mitigating circumstances, including Post-Traumatic Stress Disorder syndrome after working for six months at the World Trade Center.

Termination was recommended in *Fire Department v. Milano*, OATH Index No. 2029/05 (July 3, 2006) after a firefighter allegedly tested positive for cocaine in a random drug test. ALJ Salzman found that the Department proved that respondent tested positive for cocaine and rejected respondent's defenses that the random drug testing policy was unconstitutional, that expert statistical evidence and other factors rendered the policy invalid, and that respondent innocently drank cocaine placed in his drink by unknown strangers at a wedding.

B. Sexual harassment; sexual abuse

In *Human Resources Administration. v. Allen*, OATH Index No. 212/06 (June 28, 2006), termination was recommended for a security supervisor found guilty of sexually harassing three women under his supervision. ALJ Salzman also found the respondent guilty of misusing a City-issued van for personal travel and conducting non-agency activity during working hours, falsifying related documentation on the use of the van, failing to submit daily route sheets for three weeks, and being insubordinate to supervisors.

In *Department of Juvenile Justice v. James*, OATH Index No. 847/06 (July 28, 2006), ALJ

Miller recommended termination of a juvenile counselor who had been charged with sexually abusing a juvenile resident by rubbing the resident's foot against respondent's genitals. ALJ Miller found that the hearsay statements of three juvenile witnesses were sufficiently reliable because the witnesses had detailed, personal knowledge of the events in question, they had no opportunity to speak to the resident after the incident took place, there was no evidence of bias, and the hearsay corroborated all the circumstances of the events.

C. Excessive force

This tribunal hears cases brought by law enforcement agencies alleging that employees used gratuitous or excessive force while performing their duties. In *Department of Correction v. Angrum*, OATH Index Nos. 933/05, 934/05 (July 13, 2006), a correction officer and a captain were charged with violations of the use of force directive and with making false statements to investigators. ALJ Kramer credited respondents' version of the incident, finding that the Department's proof was insufficient to establish a premeditated retaliatory attack on the inmate or to sustain the charges of reporting violations. However, the acknowledged degree of force used by the officer in response to the inmate's aggression was excessive and violated Directive 5006. ALJ Kramer dismissed the charges against the captain and recommended a twenty-day suspension for the officer.

D. Attendance, time and leave

Since regular attendance is an essential function of any job, City agencies frequently bring

charges against employees for violation of time and leave rules. On the other hand, the New York State Human Rights Law prohibits an employer from terminating an employee who suffers from a disability which caused the behavior for which the individual was terminated for, unless the employer can show the disability prevented the employee from performing the duties of the job in a reasonable manner or that the employee's termination was motivated by a legitimate nondiscriminatory reason. *McEniry v. Landy*, 84 N.Y.2d 554, 560, 620 N.Y.S.2d 328, 331 (1994).

ALJ Richard recommended dismissal of AWOL charges after finding bipolar disorder to be a "disability" within the context of the Human Rights Law. *Health & Hospitals Corp. (Harlem Hospital Center) v. Sealey*, OATH Index No. 1738/06 (Sept. 25, 2006). Relying on *McEniry*, Judge Richard found that a causal connection between respondent's disability and her inability to go to work. The hospital was unable to satisfy its burden to prove that respondent's disability rendered her incapable of presently performing her job.

However, an employer is not required to retain an employee who cannot perform the essential duties of the position with reasonable accommodation. A service aide was charged with being absent without approved leave for nearly two years. ALJ Spooner found that even if drug addition was the cause of the absence, it would not be discriminatory to discipline respondent since he had not shown that he was rehabilitated and fully able to work at the time of the hearing. Termination recommended. *Health and Hospitals Corp. (Jacobi Medical Center) v. Osborne*, OATH Index No. 809/06 (May 17, 2006).

Because of the physically demanding nature of their jobs, members of uniformed agencies have what is often referred to as "unlimited sick leave." In *Department of Sanitation v. Lucas*, OATH Index No. 1637/06 (June 30, 2006), ALJ Richard recommended dismissal of a charge that a sanitation worker was out of his residence while on sick leave in violation of the Department's regulations. The Department failed to establish that respondent was not at home when visited by an investigator. The investigator asked respondent's twelve-year old brother if "Mr. Lucas" was home and the boy answered that he was not. ALJ Richard credited the youngster's testimony that he believed the investigator was asking if the boy's father, rather than his brother, was home.

In *Department of Sanitation v. Uryevick*, OATH Index No. 777/06 (Aug. 11, 2006), a sanitation worker was charged with abusing sick leave and incompetence after being absent for 151 days out of a total of 267 scheduled work days. The Department did not contest that respondent was legitimately ill. ALJ Salzman recommended that the charges be dismissed because the Department did not provide notice that the use of some, as yet undefined, "excessive" amount of properly documented medical leave taken for legitimate, chronic illness constitutes misconduct.

E. Statute of limitations

The Civil Service Law requires disciplinary proceedings to be commenced within eighteen months of the date of the alleged misconduct. Charges may be brought after this period if the alleged misconduct would constitute a crime or a continuing violation. In *Department of Education v. Fleischmann*, OATH Index No. 1528/05 (July 26, 2006), a school custodial engineer was charged with the crimes of falsifying official business records, offering a false instrument for filing, acting in concert with a former school custodian to submit fake competitive bids for window cleaning services, and presenting those fake bids to investigators in response to an investigatory subpoena. ALJ Kramer dismissed the charges as time barred, finding that the crimes exception to the limitation period was inapplicable because the Department's proof was insufficient to show that respondent had the requisite knowledge or intent necessary to establish his conduct as criminal.

F. Criminal conduct

Criminal conduct may form the basis for disciplinary action, even if it is committed off-duty and off agency premises, if the conduct has a nexus with the employee's duties or involves a crime of moral turpitude.

ALJ Zorgniotti recommended an emergency medical technician be terminated after pleading guilty to attempted dissemination of indecent

materials to minors and attempted obscenity. Pursuant to Mayoral Executive Order 105, an employee convicted of a crime involving moral turpitude shall be terminated, absent compelling mitigating circumstances, which were not present here. *Fire Dep't v. Catucci*, OATH Index No. 1832/06 (Aug. 3, 2006). *See also, Dep't of Education v. Negron*, OATH Index No. 806/07 (Nov. 30, 2006) (ALJ Zorgniotti recommended termination of a custodian engineer who was convicted of attempted murder in the second degree, and other crimes).

Respondent, motor vehicle operator assigned to driving staff and children, was found to be driving with a suspended license when he was arrested for possession of stolen license plates. He was also convicted of multiple moving violations over a two-year period. ALJ Merris found that respondent's failure to abide by the driving rules seriously impairs his ability to safely transport children and adults and she recommended that his employment be terminated. *Admin. for Children's Services v. Rios*, OATH Index Nos. 1687/06 & 1985/06 (Nov. 1, 2006).

ALJ Zorgniotti recommended termination of a water use inspector following his conviction for a crime relating to his position. The agency also proved that the inspector solicited bribes from three customers. *Dep't of Environmental Protection v. Barnwell*, OATH Index No. 177/07 (Sept. 18, 2006).

Termination of employment was recommended for a sanitation worker who accepted gratuities from an undercover operative on three separate occasions. *Dep't of Sanitation v. Davenport*, OATH Index No. 1501/06, mem. dec. (Oct. 17, 2006). Petitioner charged respondent with violating rules prohibiting criminal activity on duty. Petitioner had to prove all the elements of a crime, as defined in the Penal Law, by a preponderance of the evidence. ALJ Lewis concluded that petitioner met its burden by proving that respondent engaged in the misdemeanors of receiving unlawful gratuities (Penal Law § 200.35) and official misconduct (Penal Law § 195.00).

G. Defenses

ALJ Miller recommended dismissal of charges that sanitation supervisor disobeyed an order, finding a health and safety exception to the "work now, grieve later" rule based on evidence showing the supervisor was unable to comply with the order because he was ill. *Dep't of Sanitation v. Keyes*, OATH Index No. 1872/06 (Nov. 16, 2006).

H. Other cases

As the internet has become freely available in public and private sector workplaces, employers have become concerned about whether employees are surfing the net for non-business purposes while on work time. In *Department of Education v. Choudhri*, OATH Index No. 722/06 (Mar. 9, 2006), a human resources analyst was charged with using the internet for non-business purposes and, after being ordered to cease the practice, continuing to do so. The employee admitted that he used the internet for personal reasons in violation of his supervisor's direction not to do so, but he indicated that he only did so after completing his work and he never neglected a work assignment. ALJ Spooner found the employee was insubordinate when he disobeyed the order to stop using the internet for non-business purposes. He dismissed charges that respondent was excessively absent, excessively late, and left early. He recommended a reprimand because of the employee's prior good record and a lack of proof that respondent was ever criticized for low productivity or not completing specific assignments. The Chancellor terminated the employee, finding that the Department had proven all the charges. The Chancellor ruled that the excessive absences, late arrivals and early departures were not three separate phenomena which must be analyzed separately. *Cf.*,

Department Rules and Regulations Governing Non-Pedagogical Administrative Employees, rule 9.6.3 (defining excessive lateness as 60 latenesses during a year running from May 1 to April 30). In less than a year and half, there were 105 days where Respondent missed either the entire workday or part of the workday (33 absences, 49 latenesses and 23 early departures). The Chancellor rejected the ALJ's contention that respondent's internet use resulted in "only the most minor of adverse consequences" and noted that the Department's policy limits personal internet use to incidental use during free time. Chancellor's Decision, at 3 (May 5, 2006).

Termination was recommended for a firefighter charged with engaging in consensual sex with a woman inside the firehouse, allowing the woman into the firehouse without authorization, and giving false testimony during a Mayor's Executive Order 16 interview. ALJ Lewis sustained all charges except for the charge of engaging in sexual acts with a female on the premises because of the unreliability of hearsay evidence presented. *Fire Dep't v. Loscuito*, OATH Index No. 509/06 (June 14, 2006).

ALJ Casey cleared a correction officer of charges that she was disrespectful to a superior, was in an unauthorized area or improperly out of uniform. *Dep't of Correction v. Fulmore*, OATH Index No. 757/06 (Mar. 27, 2006).

A clerical worker was found to have re-entered agency offices after hours in an intoxicated condition with another man. The two men consumed beer on premises and then engaged in a fight in which the clerical worker was injured and agency property was damaged. Respondent left the man, who had passed out, in the agency's offices where he was discovered the next day. Termination recommended was by ALJ Salzman. *Admin. for Children's Services v. Rosario*, OATH Index No. 1059/06 (Apr. 11, 2006).

A sewage treatment worker was charged with failing to take federally mandated wastewater samples at the proscribed times, falsifying entries concerning these samples, giving false and misleading statements about them, yelling profanities at his supervisors, absenting himself for duty without authorization, and urinating on an official vehicle. ALJ Zorgniotti sustained the charges and recommended termination. *Dep't of Environmental Protection v. Martinez*, OATH Index Nos. 734/06, 1486/06 (May 24, 2006).

An emergency medical technician was charged with making improper entries on reports and on a log. ALJ Spooner found the errors to be minor and isolated mistakes, not cognizable misconduct, and dismissed the charges. *Fire Dep't v. Hodge*, OATH Index No. 574/06 (May 18, 2006).

ALJ Kramer recommended a tax auditor be suspended for 30 days for improper performance of her duties. *Dep't of Finance v. Zindel*, OATH Index. Nos. 168/06 & 223/06 (Oct. 3, 2006). The auditor was found to have mailed out and obtained a closing agreement from a taxpayer without having submitted the agreement for prior supervisory review. She also failed to provide information necessary to complete an audit as her supervisor ordered her to do and she improperly backdated an audit form. The employee was also found to have been discourteous and uncivil toward a taxpayer when she accused the taxpayer and her supervisor of colluding against her.

ALJ Merris recommended that disciplinary charges be dismissed against two sanitation workers who had allegedly disobeyed an order and sabotaged agency equipment. Based on the credibility of the witnesses and documentary evidence recording when the trucks in question returned to the garage, the ALJ found that the sanitation workers had not disobeyed an order to take the trucks to the dump. The evidence also did not support the charge that each worker had purposefully caused a flat tire. ALJ Merris did not admit into evidence pictures of the damaged tires because a proper chain of custody was not established. *Dep't of Sanitation v. Seletti*, OATH Index Nos. 1617/06, 1618/06 (Dec. 6, 2006).

ALJ Zorgnitti recommended a suspension of 35 days for a sanitation supervisor who asked a sanitation worker to collect trash from his home and who failed to account for EZ Passes. The ALJ found that asking a sanitation worker to deviate from his designated route to make a pick-up at the supervisor's home was especially inappropriate because the employee he asked was a probationary employee. *Dep't of Sanitation v. Banton*, OATH Index No. 336/07 (Dec. 1, 2006).

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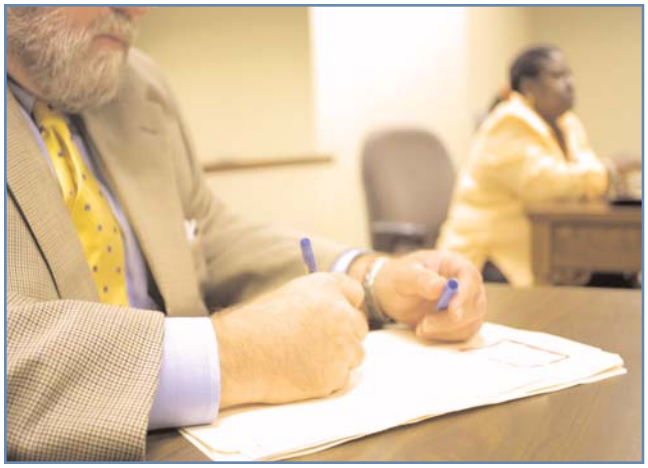
building until May 2004. ALJ John Spooner found the violations records inadequate to prove that the tenants were deprived of essential services during the inquiry period. The judge noted that many repairs, including the connection of a new water main, the installation of a new hot water heater and window replacement, were completed prior to the commencement of the inquiry period. He also ruled that even if HPD proved that essential services had been disrupted and hence invoked the presumption that the landlord's actions constituted deliberate harassment, the presumption would have been rebutted by the presence of the 7A administrator. ALJ Spooner rejected HPD's argument that the disruption of services during the administrator's term could be imputed to the owner because the administrator was the owner's agent. The Housing Court decision appointing the administrator indicated that the administrator reports only to HPD and not the owner and the owner and his managing agent were expressly enjoined from interfering with the administrator's management, operation and control of the building.

HPD Commissioner Donovan issued the certificate of no harassment, deferring to the ALJ's finding that HPD's evidence failed to show that the tenants had been deprived of essential services during the inquiry period. The Commissioner, however, rejected the ALJ's legal analysis relating to the presumption and found that the appointment of an administrator during the inquiry period establishes that there was a lack of essential services in the building. The Commissioner held the owner is responsible for fixing serious building code viola-



tions, notwithstanding the appointment of an administrator. *Dep't of Preservation & Development v. Schwartz*, OATH Index No. 788/06, Comm'r Decision (July 18, 2006), relying on *Lawrence v. Martin*, 131 Misc. 2d 256, 499 N.Y.S.2d 835, 838 (N.Y. Co. Civ. Ct. 1986), and *Chand v. City of New York*, 6 Misc. 3d 1025, 800 N.Y.S.2d 344 (Sup. Ct. Queens Co. 2005).

ALJ Spooner had given *Lawrence* and *Chand* more limited reading in his report and recommendation. He noted that *Lawrence* arose in the context of a nonpayment proceeding brought by a 7A administrator against tenants who raised the breach of the warranty of habitability as a defense. The owner sought to avoid liability due to the presence of the administrator. The court held that even under 7A administration, the owner held "a valuable asset in the building" and "should be responsible for the correction of the serious condition at the property." Thus, the court granted the administrator's motion to join the owner as a party to "allow the court to determine, after trial, the ultimate allocation of responsibility for the conditions giving rise to the tenant's complaints." *Chand* involved a worker who sued the owner of a 7A building for damages after falling off a scaffold. The court denied the owner's motion for summary judgment, holding that the 7A order did not deprive the owner of all ownership rights and that the owner could make repairs so long as he did not interfere with the administrator's operation of the building. ALJ Spooner found *Lawrence* and *Chand* stood for the general proposition that the owner of a 7A building may be held responsible for paying for some repairs but not that the owner is responsible for all service problems occurring while the building is under 7A administration.

New ALJ Rules

(continued from page 1)

the city's administrative adjudicative process. Through the collaborative efforts of Deputy Mayor Robles-Roman, Administrative Justice Coordinator David Goldin, OATH Chief Judge Roberto Velez, and other ethics professionals, the new rules of conduct for the City's ALJs and hearing officers were drafted and put into effect, improving the administrative adjudication process for all involved.

Presently, there are approximately 500 City ALJs and hearing officers serving in administrative tribunals. The City's administrative tribunals deal with different substantive issues, use varied adjudicative procedures, have their own internal rules regarding tribunal process, and have varied technological capabilities and resources. Municipal Election Ballot Proposal #3, mandating the Rules, was developed, in part, to address some of these issues. The other mandate passed under Proposal #3 was the creation of the Administrative Justice Coordinator (AJC) position to be part of the Mayor's Office. Mayor Bloomberg appointed David B. Goldin to be the first AJC in the summer of 2006. As Administrative Justice Coordinator, Mr. Goldin works with the City's tribunals to improve their efficiency, to enhance the professionalism of the ALJs and hearing officers, and to maintain accountability. In regard to the Rules, Mr. Goldin plays two roles: he is responsible for jointly issuing ethics advisory opinions with the Chief Judge at OATH, Roberto Velez; and serving, along with the Chief Judge and the various tribunal heads, as an official designee to field complaints of misconduct under the Rules.

Prior to the promulgation of the Rules, the City's administrative law judges and hearing officers were subject only to individual tribunal regulations and the City's general conflicts of interest law applicable to all city employees contained in Chapter 68 of the New York City Charter. The preamble to the new ethics code establishes the continuing applicability of the regulations already in place. To the extent that there is any conflict among these various rules, the more restrictive of the applicable provisions would generally apply. (See Section 101). As an example, the ALJs for OATH have been subject to the Code of Judicial Conduct for the New York State pursuant to an executive order since OATH's inception, and as a result, OATH judges remain bound by those rules. For OATH judges, those more restrictive rules are consistent with the fulltime nature of their positions on a central tribunal, in which role they share substantially more similarities (regarding the adjudication process, judicial independence and employment terms) with the state court judges.

The new code is comprised of a preamble, defined terminology, and seven sections, numbered 101 to 107. The Rules are based on the Code of Judicial Conduct for the New York State Unified Court System (22 NYCRR §100 et seq.). The preamble sets the tone of the Rules and recognizes the diverse group of professionals it will govern. The definition of a "City Administrative Law Judge" subject to code provisions is broad and includes all ALJs, hearing examiners, hearing officers and any other person who conducts or participates in the decision making of adjudicative proceedings within a City tribunal. (See Section 100(B)). This broad definition ensures that those appearing at a city administrative justice proceeding will be adjudicated by a professional subject to this code, regardless of the specific tribunal.

Notably, an innovative provision of the code is found within Section 103, adherence to the "Access to Justice" philosophy. Overall, the section mandates that a City administrative law judge perform his or her judicial duties impartially and diligently. Section 103(A)(8), a sub-part of the subsection addressing adjudicative responsibilities, designates certain treatment of self-represented litigants. Using "appropriate steps" the ALJ has a duty to ensure that any self-represented litigant appearing before the tribunal is given the opportunity to have his or her case fully heard. (See Section 103(A)(8)). The provision contains two smaller subparts: the first is a non-exhaustive list of "appropriate steps" that ALJs might take to ensure that self-represented litigants have a meaningful opportunity to be heard and the second is the requirement that those "appropriate steps" taken by the ALJ be reflected in the record of the proceeding.

This "Access to Justice" provision reflects awareness of the significant number of litigants who appear in administrative tribunals without legal representation. While some City tribunals have relationships with volunteering entities to assist self-represented litigants in developing their case,

prior to this enforcement of this code, an ALJ was without clear directives on how to conduct a hearing involving self-represented litigant(s). Some argued against including this provision in the code because of the potential that an ALJ unintentionally go beyond "appropriate" conduct in order to avoid possible discipline for code violation only to be charged with violating Section 103's overall mandate of impartial duty. Few, if any, judicial codes around the country contain this type of provision. However, many commentators and advocates for indigent litigants support this provision as part of the solution to the shortage of legal representation for those unable to afford it. It is clear though that this provision raises systemic issues as well as individual obligations. The tribunals, as a result, will be called upon to provide the support and resources to ALJs so that they may properly fulfill this mandate. For example, an ALJ may be required to make interpreters available when a self-represented litigant is otherwise unable to develop his record due to his or her lack of English proficiency. All in all, the provision demonstrates the City's commitment to fair hearings by establishing standard conduct that all ALJs and hearing officers will perform where self-represented litigants appear.

Section 106 addresses the handling of complaints of misconduct under the Rules. In accordance with the City Charter Revision Commission's stated purpose, this new code is meant to be helpful and not punitive. Section 106(A) makes clear that discipline is an option and not an absolute consequence of this code. The Rules leaves unchanged the existing procedures within each tribunal for disciplining ALJs and hearing officers; final determination of whether the ALJ violated the code is made within that ALJ's tribunal. Under Section 106(B), complaints of code violations can be made by the public as well as by any person within the City's administrative justice system. All relevant websites state clearly to the public that complaints must deal with a violation of this code and not a general grievance regarding the hearing. The Administrative Justice Coordinator and the Chief Judge of OATH will review complaints and where a clear statement of violation exists, the complaint will be forwarded to the tribunal head for processing. A record of all complaints will be kept at the office of the Administrative Justice Coordinator and will be kept confidential pursuant to Section 106(F). Once the

tribunal head has processed the complaint, the tribunal head will report its disposition to the AJC and Chief Judge of OATH.

The final section of the code describes the Advisory Committee to the Code and its power to create advisory opinions. The most important element to remember from Section 107 is that each ALJ and hearing officer can and is encouraged to ask questions about the code and seek guidance in dealing with an individual situation. Email is the preferred form of communication; Supervising ALJ of the Administrative Judicial Institute, Ray Kramer, will handle phone requests. The Advisory Committee has not been formed, but the AJC and Chief Judge of OATH are fielding all inquiries. Should the flow of inquiries become large enough, an advisory committee will be formed officially and the administrative justice community will be informed of that development. Advisory opinions will address only future conduct of ALJs. Any ALJ who reasonably relies on an advisory opinion will not be subject to discipline if later found to be in violation of the code. The Administrative Judicial Institute, a newly created resource within OATH, will maintain a database of opinions with all necessary deletions made to protect the involved parties' identities.

The first year of the code's implementation is expected to be a year of learning for both the ALJs and their supervisors. In particular, AJC Goldin and Chief Judge Velez anticipate a significant num-

Frank Ng, formerly Counsel to the Administrative Judicial Institute, has been promoted by Chief Judge Roberto Velez to serve as the Institute's first Director. As Counsel to the Institute, Mr. Ng was instrumental in designing and delivering courses for the administrative law judges and hearing officers throughout the City. As Director, he will structure the Institute as a best practices resource center for the City's ALJs. We wish him much success in his new role.

OATH welcomes three new staff members – Julio Rodriguez III, Shaniqua Carr and Jason Pinheiro.

Julio Rodriguez III has been appointed by Chief Justice Roberto Velez to serve as an OATH Administrative Law Judge. Judge Rodriguez comes to OATH from the Department of Investigation where he served as an Inspector General for the Department of Juvenile Justice and a Deputy Inspector General for the Department of Probation. Between 1998 and 2002, Judge Rodriguez was an Assistant District Attorney in the New York County District Attorney's Office where he handled both felony and misdemeanor cases and served in the Domestic Violence Bureau. He is a graduate of the Temple University School of Law. Judge Rodriguez received his B.S. in Legal Studies from the John Jay College of Criminal Justice.

Ms. Carr was appointed Confidential Secretary for Judges Miller, Lewis, Merris and Zorgniotti. She graduated with a Bachelor of Arts degree in Psychology from The College of New Rochelle and had previously worked at the City's Law Department.

Mr. Pinheiro was appointed as a mediation assistant with the Center for Mediation Services. He holds a Bachelor of Arts degree from Trinity College and a Juris Doctor degree from Brooklyn Law School.

OATH also bids farewell to two staff members – Carol Plant and Eric Cohen. Ms. Plant ably served OATH for several years as a Confidential Secretary and last served as the secretary to the Chief Judge. She left the office to spend more time with her three young children. Mr. Cohen resigned from his law clerk position at OATH to become a staff attorney with Paul, Weiss, Rifkind, Wharton & Garrison.

ALJ Kara Miller is teaching classes in business law at Fordham University's Graduate School of Business.

ALJ Kevin Casey is serving as an Adjunct Associate Professor of Law at Brooklyn Law School, where he teaches Appellate Advocacy.

Three students will be working at OATH as interns during this summer: Jayne Ricco will intern for the tribunal; Alicia Surdyk will intern for the Center for Mediation Services; and Tina Ma will intern for the Administrative Judicial Institute. Mses. Ricco and Surdyk attend New York Law School. Ms. Ma attends Brooklyn Law School.

ber of requests for advisory opinions as ALJs become more familiar with the Rules. As of the publication of this article, there have been several informal requests for information based upon the code, including one formal request for an opinion since the code took effect, a positive sign that the City's ALJs want to be in compliance.

The Administrative Judicial Institute at OATH will provide training for all affected ALJs on the Rules. The training effort commenced with a kick-off overview presentation of the new code at the City Bar Association on February 22, 2007. Of the 250 attendees at this session, 150 were City ALJs and hearing officers. The new code, a professionally derived response to the November 2005 ballot initiative, mandates an empowering atmosphere for both the public and the City's administrative judicial system. With commitment from every level of the City administrative justice system striving toward this uniform standard for administrative adjudication, the path is paved for fair and efficient justice.

**Erin Felker interned with the Administrative Judicial Institute at OATH in the summer of 2006, and is entering her third year at New York Law School.*

Chief Judge's Message

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OATH ALJ Joan Salzman speaking on interplay between new ALJ Rules and City Conflicts of Interest Law at City Bar ALJ Ethics Presentation.

and application. The first of these training sessions was presented at the City Bar Association on February 22, 2007. The two-hour CLE accredited presentation was jointly sponsored by the Office of the Deputy Mayor for Legal Affairs, the Office of the Administrative Justice Coordinator, the Administrative Judicial Institute, in addition to the Administrative Law, Government Ethics and Litigation Committees of the City Bar. The presentation provided a basic overview of the code and its purpose, highlighted key provisions and important obligations, and allowed time for questions and answers. A distinguished panel of judges and lawyers covered key provisions in the new rules. The audience, numbering in excess of 250, comprised mostly of city ALJs and hearing officers.

After the initial ethics training, the Institute, in collaboration with the Administrative Justice Coordinator and the tribunals, will develop and deliver a wide-range of theoretical and practical classes. The classes will be presented by ALJs who have distinguished themselves as the finest in their tribunals, as well as, experts in the field of evidence, procedure, courtroom management, and judicial training.

The code of ethics has been a primary focus of mine since the November 2005 mandate. Administrative Justice Coordinator Goldin joins our effort in this judicial reform. Together with the code of ethics and the Institute's corresponding training, we will help to improve the "face of justice" for New York City.

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PRACTICE POINTER

Approved adjournments, other than adjournments granted on the record, shall be promptly confirmed in writing by the applicant, to all parties and to the administrative law judge.

48 RCNY § 1-32(e).