



**Message from the Chief Judge Roberto Velez**

**The Administrative Judicial Institute: On the Path to Success**

Earlier this year, by Executive Order No. 84, Mayor Bloomberg charged OATH with establishing and managing an institute that would provide training and professional development to the City’s administrative law judges. Through a collaborative effort with Deputy Mayor Robles-Roman and various tribunal heads, we are making the Administrative Judicial Institute an integral part of the City’s system of administrative justice. The Executive Order also created a new mayoral office, the Administrative Justice Coordinator, to coordinate consistent standards that will enhance the operations of administrative tribunals. Mayor Bloomberg has selected David Goldin to serve as the first Administrative Justice Coordinator. (See profile, page 2.) Welcome aboard, David!

For the Institute, we have created a mission statement that, in part, reads: *“The New York City Administrative Judicial Institute at OATH, like its state judiciary counterpart the New York State Judicial Institute, has been created as a resource center to provide training, continuing education, research and support services for the various administrative law judges and tribunals throughout New York City. The goal of the Institute is to improve the overall quality and professionalism of administrative justice in the City, enhance public access to administrative tribunals, improve the efficiency and responsiveness of such tribunals, explore alternative dispute resolution methods, and keep judges current on emerging legal trends, technology and administrative judicial reform.*

*(continued on page 16)*

**Deputy Chief ALJ Charles McFaul Receives Sloan Public Service Award**

Charles D. McFaul, the Deputy Chief Judge and Counsel at OATH, was selected as one of this year’s award recipients. Bishop Joseph M. Sullivan and Caroline Kennedy co-chairs of the Selection Panel, presented the award to Judge McFaul on March 15, 2006. A ceremony honoring all six of this year’s Sloan Public Service award recipients was held at The Cooper Union in Manhattan.



Each year, the Fund for the City of New York honors a small number of outstanding public

*(continued on page 14)*

## IN THIS ISSUE

<b>Message from Chief Judge Velez</b>	1
<b>Deputy Chief Judge McFaul Honored</b>	1
<b>David Goldin Appointed Administrative Justice Coordinator</b>	2
<b>OATH Reviews Marriage License Denials</b>	2
<b>OATH Decisions</b>	3
■ Disciplinary Proceedings	3
■ Prevailing Wage	6
■ Real Property	9
■ Licensing	11
■ Contracts	11
■ Vehicle Retention	12
<b>OATH 2006 Annual Report</b>	7
<b>BenchNEWS</b>	15

## David Goldin Appointed as Administrative Justice Coordinator

**O**n August 17, 2006, Mayor Michael R. Bloomberg announced the appointment of David B. Goldin as the City's first Administrative Justice Coordinator. The Administrative Justice Coordinator will work with City agencies to enhance the professionalism, efficiency, and accountability of administrative tribunals.

The Coordinator will work with Chief Administrative Law Judge Roberto Velez to publish and implement a code of ethics for ALJs and hearing officers, as required by the charter amendment adopted by the City's voters in November 2005. In addition, he will develop programs to promote alternative dispute resolution, advance new case management technologies, enhance the public's understanding and ability to access justice, and implement new ALJ and hearing officer recruitment and retention strategies, including training at the newly created Citywide Administrative Judicial Training Institute, housed at OATH. Among the agencies and tribunals Mr. Goldin will be working with are: Office of Administrative Trials and Hearings, Department of Consumer Affairs, Department of Health and Mental Hygiene, Environmental Control Board, Tax Commission,



Administrative Justice Coordinator David Goldin

Tax Appeals Tribunal, Parking Violations Bureau, Taxi and Limousine Commission, Board of Standards and Appeals, Loft Board, Civil Service Commission, Police Department, Department of Education, and the New York City Housing Authority.

Coordinator Goldin most recently served as Chief Litigating Deputy County Attorney in the Office of the Nassau County Attorney. Before that, he was counsel to the former New York City Board of Education, where he participated in oversight of the Office of Impartial Hearings. He has also worked as an Assistant Corporation Counsel in the New York City Law Department. A graduate of Yale College and Yale Law School, Coordinator Goldin is a native New Yorker who grew up in Manhattan. He now lives in Brooklyn with his wife and children.

## OATH to Review Marriage License Denials

**T**he City Clerk has designated OATH to conduct reviews of denials of marriage licenses and domestic partnership registrations. Applications are usually denied when there is a record of a prior unresolved marriage or domestic partnership or when there is questionable identification. Under the new rules, applicants who are denied a marriage license or domestic partnership registration may challenge the City Clerk's preliminary decision by requesting a review by an OATH administrative law judge.

The rules provide for a two-stage review at OATH. The documentation relied upon by the City

Clerk to preliminarily deny the license or registration will be forwarded to OATH along with any documents or other proof provided by the applicants. Within 15 days, an OATH ALJ will review the documentation and determine whether the evidence is sufficient to form a conclusion as to whether the license or registration was properly denied. If the evidence is sufficient, the ALJ will, within 30 days of the submission of the documentation, issue a report and recommendation to the City Clerk for a final decision. If, however, the ALJ determines that the evidence is insufficient to make a determination on the papers, a hearing will be convened at which the City Clerk and the applicants may present additional evidence, including expert witnesses. After the hearing, the ALJ will issue a report and recommendation to the City Clerk, who will make a final decision. The new rules appear as sections 3-03 and 4-03 of title 51 of the RCNY.

# OATH DECISIONS

September 2005 - February 2006

## ► Disciplinary Proceedings

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### A. Excessive Sick Leave, Medical Incompetence

Given the physically taxing and demanding nature of their jobs, members of uniformed agencies have what is often referred to as "unlimited sick leave." Nevertheless, in order to maintain staffing and control costs, some uniformed agencies have attempted to discipline members for excessive use of sick leave or medical incompetence. Two cases during the reporting period involved challenges to such actions.

In *Department of Sanitation v. DeSantis*, OATH Index No. 1494/05 (Oct. 31, 2005), ALJ Faye Lewis ruled that a sanitation worker could be disciplined for excessive use of sick leave under a new agency policy, but that the policy could not be retroactively applied to sick days taken before its effective date.

In *Department of Correction v. Van-Osten*, OATH Index No. 1793/05 (Nov. 18, 2005), a correction officer who was absent for 185 days over an eighteen-month period was found to be medically incompetent and termination was recommended. ALJ John Spooner rejected the officer's claim that she was entitled to a modified assignment in a non-jail setting as an accommodation for her medical condition under the Americans with Disabilities Act.

A past record of sick leave violations may aggravate the penalty imposed upon an officer found to have committed time and leave violations. In *Department of Sanitation v. Bello*, OATH Index No. 1238/05 (Sept. 29, 2005), ALJ Tynia Richard recommended dismissal of a sanitation worker for time and leave violations based on an extensive prior record of discipline that included 19 penalties, many of which were for abuse of the Department's sick leave policy.

In several cases employees charged with attendance violations have claimed the violations resulted from mental illness or drug or alcohol addiction and that discipline for those absences would violate the city, state and federal laws prohibiting discrimination on the basis of disability. See *McEniry v. Landi*, 84 N.Y.2d 554, 620 N.Y.S.2d 328 (1994). In one case during the reporting period such a defense was raised successfully, in the another it was rejected.

ALJ Kevin Casey recommended dismissal of AWOL disciplinary charges where the employee established that she was recovering from drug addiction and her disability caused the absences. *Admin. for Children's Services v. Solomon*, OATH Index No. 1797/05 (Sept. 27, 2005)\*.

ALJ Miller rejected a sanitation worker's claim that six time and leave violations were attributable to post traumatic stress syndrome associated with his work cleaning up the after the World Trade Center tragedy. *Department of Sanitation v. Le-Mond*, OATH Index No. 2026/05 (Sept. 14, 2005), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD06-21- SA (Feb. 10, 2006). Both doctors who examined the worker did not refer to September 11 or post traumatic stress syndrome, but instead appeared to attribute the worker's problems to a long history of admitted drug and alcohol abuse. The worker did not allege that his time and leave violations were a result of such alcohol addiction. ALJ Miller noted that even had he done so, to be an effective defense he would had to have demonstrated that he made adequate attempts to address the addiction and was in recovery. The worker failed to do so, where the record showed that he had left an alcohol detoxification program against medical advice.

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### B. Statute of Limitations

A disciplinary proceeding must be commenced within eighteen months of the date of the alleged misconduct, unless the alleged conduct would constitute a crime or a continuing violation. In *Department of Correction v. Benston*,

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\* 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.

OATH Index No. 1557/05 (Nov. 7, 2005), ALJ Casey dismissed undue familiarity charges made against a correction officer as untimely. He rejected the department's argument that the officer's failure to notify his command of the contacts constituted a continuing violation that tolled the limitation period.

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### C. Fraud

Absent strong mitigation, termination is the appropriate penalty for a civil servant found to have engaged in fraud or other acts of dishonesty. See *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 356 N.Y.S.2d 833, 839 (1974); Executive Order No. 16, ¶ 5c (July 26, 1978). In two cases during the reporting period, termination was recommended for employees found to have engaged in acts of fraud.

In *Department of Sanitation v. Maldarelli*, OATH Index No. 1495/05 (Dec. 13, 2005), ALJ Casey found that a sanitation worker who pled guilty to the crime of insurance fraud committed misconduct. The employee sought approximately \$17,000 in benefits from an insurance company by falsely claiming that he was not working, when he in fact was working for the Department of Sanitation.

In *Department of Correction v. Roman*, OATH Index Nos. 1026/05, 1296/05 (Feb. 10, 2006), ALJ Lewis found that a correction officer participated in fraud by residing in subsidized housing knowing his wife had failed to claim his income on affidavits which she submitted to the Housing Authority. The officer was also found to have submitted altered documents to the Department of Investigation and with providing misleading testimony during an official departmental interview.

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### D. Off-duty Misconduct

A public employee may be disciplined for off-duty misconduct where the conduct involves moral turpitude or where there is a nexus



between the conduct and the employee's position.

In *Department of Sanitation v. Quinones*, OATH Index No. 1974/05 (Oct. 14, 2005), ALJ Ray Kramer dismissed a charge that a sanitation worker committed off-duty misconduct, finding the Department failed to prove charges that the off-duty worker followed a supervisor in his car, confronted the supervisor and interfered with the supervisor's work performance.

In *Department of Correction v. Akua*, OATH Index No. 1435/05 (Dec. 6, 2005), ALJ Casey found that a correction officer improperly discharged his firearm during an off-duty incident outside of a night club, but he dismissed charge that officer made a false statement about the incident. A two-month suspension was recommended.

In *Department of Correction v. Flores*, OATH Index No. 1855/05 (Sept. 26, 2005), ALJ Spooner found that correction officer's carelessness resulted in his shooting himself in the hand while off-duty. The ALJ recommended a penalty of 20 days' suspension.

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### E. Drug Testing

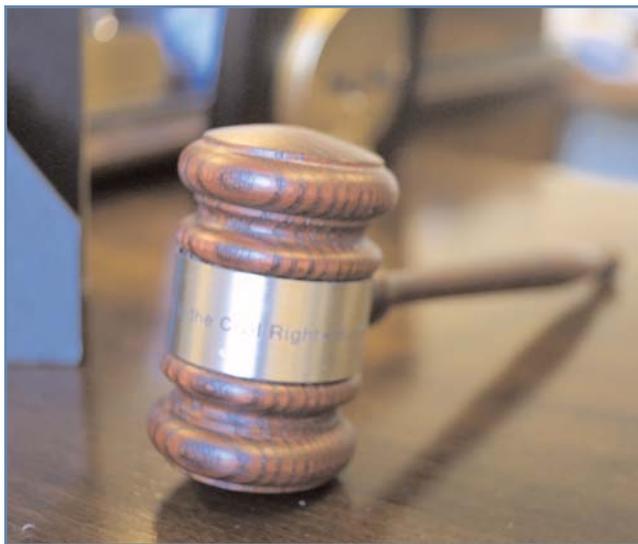
The United States Supreme Court and the New York Court of Appeals have approved of random drug testing of public employees who hold

safety sensitive positions, provided "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). In two cases during the reporting period, the Fire Department's random drug testing procedure was upheld in the face of challenges. In *Fire Department v. O'Neill*, OATH Index No. 1973/05 (Sept. 20, 2005), ALJ Joan Salzman rejected respondent's defenses that his urine specimen was collected improperly and that the Fire Department's drug testing protocol did not assure random testing. ALJ Donna Merris reached a similar conclusion in *Fire Department v. O'Sullivan*, OATH Index No. 1914/05 (Sept. 29, 2005).

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#### F. Name Clearing Hearing

Generally, a non-tenured civil servant may be terminated from employment without a hearing. However, a non-tenured employee who claims that he or she was fired for a false and stigmatizing reason, may be entitled to a name clearing hearing. ALJ Kara Miller conducted such a hearing during the reporting period. *Khan v. Police Dep't*, OATH Index No. 2025/05 (Oct. 3, 2005). The purpose of such a hearing is to give the employee an opportunity to refute the charges, and if successful, have the negative



information removed from his or her personnel file, thereby eliminating an impediment to future employment elsewhere. The employee bears the burden of proof and is not entitled to reinstatement if he or she prevails.

In *Khan*, a former probationary police officer sought to refute the stigmatizing basis for his dismissal, i.e., that he had assaulted his former girlfriend. At the hearing, the girlfriend credibly recanted the accusation. Thus, ALJ Miller found the former officer refuted the basis for his termination.

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#### G. Other Decisions

A sanitation worker was found to have used a racial slur in violation of the Department's code of conduct. ALJ Lewis rejected the employee's argument that he should not be penalized for using the term because he did so without malicious intent. A ten-day suspension was recommended. *Dep't of Sanitation v. Lugo*, OATH Index No. 1634/05 (Nov. 17, 2005).

A correction officer was found guilty of bringing a knife into a correctional facility and putting it into his locker after being asked to secure it in the arsenal. The officer was also found guilty of falsely stating to a superior that he had secured the knife in the arsenal. ALJ Richard recommended termination, finding the officer's introduction of a dangerous weapon into the facility demonstrated recklessness and indifference to his duties that the Department could not afford to tolerate. *Dep't of Correction v. Black*, OATH Index No. 1313/05 (Nov. 17, 2005).

ALJ Lewis found two correction officers inefficiently performed their duties, inadvertently contributing to an inmate escape. Suspensions of thirty and forty days were recommended. *Dep't of Correction v. Lynch*, OATH Index Nos. 1378/05, 1380/05 (Jan. 4, 2006).

Correction captain was charged with refusing to obey two orders to report to an institutional search and failing to properly supervise officers under her supervision during a mock disaster

drill. ALJ Miller found that the Department failed to prove the charges by a preponderance of the credible evidence and recommends they be dismissed. *Dep't of Correction v. Pack*, OATH Index No. 653/05 (Sept. 8, 2005)\*.

Supervisor of carpenters found to have neglected his duties regarding the administrative tasks required of his position by not completing paperwork accurately or in a timely manner and by not responding to directions from his supervisors. Absent evidence that respondent was belligerent or disruptive and absent evidence that respondent was not a competent carpenter, ALJ Merris recommended that respondent be demoted from his position. *Dep't of Education v. Moy*, OATH Index No. 1719/05 (Feb. 13, 2006)\*.

## ► Prevailing Wage

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Article eight of the Labor Law implements the state constitutional provision requiring that prevailing wages and benefits be paid on all contracts for public work. By rule, the Comptroller designated OATH to conduct hearings where private contractors have been charged with underpaying public works laborers.

One case brought during the reporting period raised a question of first impression: the applicability of the prevailing wage law to a leaseback situation, i.e., the alleged underpayment by subcontractors of workers doing renovation work on privately owned property, leased by a government agency to use for a public purpose. *Comptroller v. CDI 21st LIC*, OATH Index No. 1125/05, mem. dec. (Sept. 14, 2005). That case involved the conversion of a factory building into a public high school owned by respondent CDI. The Board of Education (BOE) authorized the School Construction Authority (SCA) to lease space for the school on its behalf. The 30-year lease provided that CDI renovate the building for use as a public high school, in accordance with SCA specifications and paid for by SCA. CDI hired a construction manager, and subcontracted with co-respondents Quedan for carpentry, ConAir for HVAC, Anthony Michael for plumb-

ing, and Fox for electrical work. The work was performed, and the high school opened in 2004.

The Comptroller brought a prevailing wage violation proceeding against all of the subcontractors as well as the building owner and the two contracting agencies, BOE and SCA. The respondents moved to dismiss, arguing that the Comptroller lacked jurisdiction over the matter because the project was not a "public work" under the prevailing wage law. ALJ Lewis denied motion, concluding that the project at issue was a public work requiring the payment of prevailing wages. ALJ Lewis granted, in part, the Comptroller's motion for summary judgment but declined to issue a "declaratory judgment" as to the applicability of the prevailing wage law to all SCA lease/renovation contracts.

The prevailing wage law also provides a mechanism for the Comptroller to set wages and benefits for City workers holding particular civil service titles where the City and the majority union are unable to negotiate the rates. During the reporting period, one such matter was heard at OATH. In *Comptroller ex rel. Local 1157 v. Office of Labor Relations*, OATH Index No. 1887/05 (Jan. 23, 2006), ALJ Casey ruled that the Comptroller correctly determined the prevailing wage and benefits rate for the title "Supervisor Highway Repairers" (SHR) was the rate paid to foremen of the Highway, Road and Street Construction Laborers Local 1010 and Sheet Asphalt Workers Local 1018 of the District Council of Pavers and Road Builders of the Laborers' International Union of North America, AFL-CIO. ALJ Casey rejected the argument made by the Office of Labor Relations that the prevailing wage rate should be reduced to reflect that SHRs function almost exclusively in a supervisory capacity, finding that the job involved field work where the supervisors "jump in" to perform manual labor when necessary to finish the job.

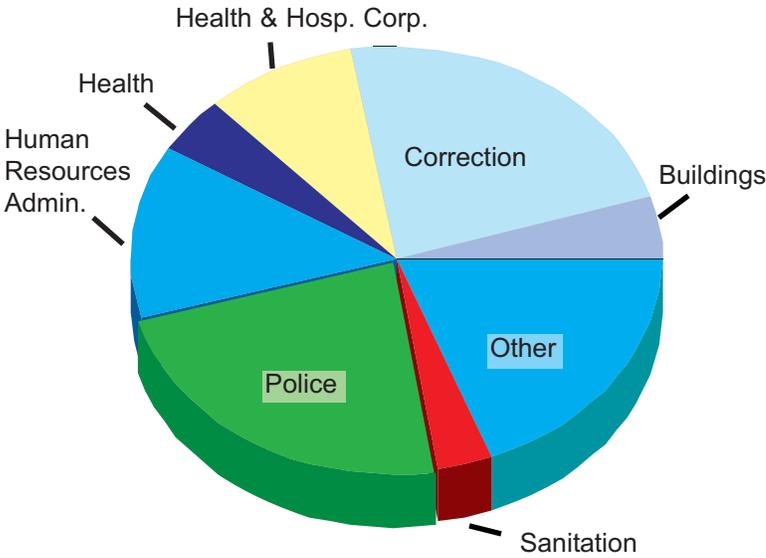
The prevailing wage law also prohibits public works laborers from being required to work more than eight hours in any calendar day except in cases of extraordinary emergency. A construction laborer charged with insubordination for

*(continued on page 9)*

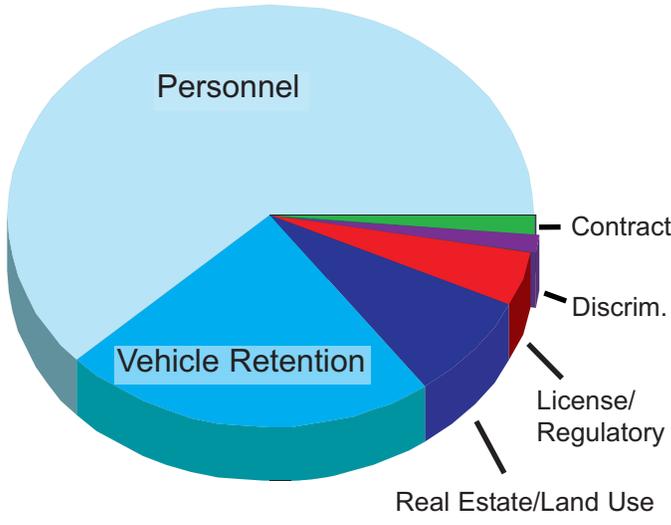
The 2006 annual report data illustrates the scope of cases heard by OATH judges. During the 2006 fiscal year, OATH docketed 2,007 cases from 28 mayoral and 7 non-mayoral agencies, including 3 state public authorities.

While the majority of this year’s case load involved personnel matters (1,223 cases), OATH also hears a substantial number of cases involving other matters, including vehicle forfeiture cases referred by the Police Department (487 cases), license and regulatory matters referred by the Department of Buildings and the Department of Health and Mental Hygiene (106 cases), landlord/tenant matters referred by the Loft Board and the Department of Housing and Development (118 cases), discrimination complaints referred by the City Commission on Human Rights (29 cases), and contract disputes involving construction and other contractors who do business with the City (39 cases).

**Case Referrals by Agency in FY 06**



**Case Referrals by Case Type in FY 06**



Agency Referrals in FY 06	No. of Cases
Department of Buildings	65
Department of Correction	522
Health and Hospitals Corp.	179
Health and Mental Hygiene	104
Human Resources Admin.	199
Police Department	488
Department of Sanitation	54
All Other Agencies	396
<b>Total Cases</b>	<b>2,007</b>

Referrals by Case Type in FY 06	No. of Cases
Personnel	1,223
Vehicle Retention	487
Real Estate / Land Use	118
License / Regulatory	106
Discrimination Complaints	29
Contract Disputes	39
Other Cases	5
<b>Total Cases</b>	<b>2,007</b>

### Case Filings By Fiscal Year

AGENCY	02	03	04	05	06
Department of Buildings	78	92	78	106	65
Administration for Children's Services	56	38	26	58	46
Department of Correction	744	501	567	498	522
Department of Environmental Protection	8	13	24	14	30
Fire Department	26	26	38	31	39
Health and Hospitals Corporation	124	180	235	200	179
Department of Health and Mental Hygiene	166	107	105	97	104
Dept. of Housing Preservation and Development	18	95	21	23	25
Human Resources Administration	243	173	261	285	199
Commission on Human Rights	21	24	35	33	29
Department of Juvenile Justice	2	6	3	16	26
Loft Board	42	73	39	55	46
Police Department	27	45	430	499	488
Department of Sanitation	66	62	68	73	54
Transit Authority	45	31	36	16	17
Department of Transportation	8	15	47	50	25
Triborough Bridge and Tunnel Authority	21	48	38	34	34
All Other Agencies	134	111	138	80	79
<b>Total</b>	<b>1,829</b>	<b>1,640</b>	<b>2,189</b>	<b>2,168</b>	<b>2,007</b>

### Fiscal Year Filings By Case Type

CASE TYPE	02	03	04	05	06
Personnel (Discipline, Disability, Financial Disclosure)	1,519	1,246	1,481	1,345	1,223
License / Regulatory (Restaurant Closure, Bldg. Code)	184	121	99	89	106
Real Estate / Land Use (Loft Bd. Apps., Padlock, SRO)	94	143	119	177	118
Contract (Prevail. Wage, Prequal. Denial Appeal, CDRB)	11	105	21	27	39
Discrimination Complaints (CCHR)	19	21	35	32	29
Vehicle Forfeiture (NYPD)	-	-	430	498	487
Other Cases	2	4	4	-	5
<b>Total</b>	<b>1,829</b>	<b>1,640</b>	<b>2,189</b>	<b>2,168</b>	<b>2,007</b>

### Center For Mediation Services at OATH

The NYC Center for Mediation Services, under the auspices of OATH, was established in fiscal year 2003 to encourage the use of mediation as a tool to resolve workplace disputes throughout City government. Participation in mediation is voluntary, confidential and a cost-free alternative or complimentary process to litigation—a more formal and costly process. Parties have the opportunity to resolve their dispute, with the assistance of a trained neutral (mediator), and come to mutual agreements that aid in respectful work relationships. In FY 06, forty-nine matters involving discipline or discrimination complaints from nine city agencies were referred to the Center. Forty of the referrals resulted in actual mediation sessions, with thirty-two of them settled by mutual voluntary resolution agreements. Eight of the forty mediations did not result in agreements or were discontinued, and nine of the forty-nine referrals were withdrawn. The average time for each mediation session was about 3.3 hours, considerably less than the average time for a formal hearing at OATH.

#### Cases Referred to the Center for Mediation Services Fiscal Year 2006

Referring Agency	No. of Cases Referred	No. of Cases Mediated	No. of Cases Resolved
Police Dep't	20	17	15
Health & Hosps. Corp.	18	16	12
Dep't of Juvenile Justice	1	1	1
Human Resources Admin.	1	1	0
Taxi & Limousine Comm'n	2	2	1
Fire Dep't	3	2	1
Parks Dep't	2	0	1
DCAS	1	1	1
Law Dep't	1	0	0
<b>Totals</b>	<b>49</b>	<b>40</b>	<b>32</b>

## OATH Decisions

(continued from page 6)

disobeying an order to work overtime on the day after Thanksgiving, argued that he could not be disciplined for non-compliance because it violated the prevailing wage law. ALJ Salzman dismissed the insubordination charge, finding the reason for the order, a staffing shortage, could have been anticipated by management and did not constitute an emergency. ALJ Salzman rejected the agency's argument that it was authorized to order overtime without a finding of emergency under Administrative Code section 12-108, holding the City law must be harmonized with the state law. On a separate charge, ALJ Salzman found the laborer was insubordinate when he disobeyed an order to work overtime on another occasion, finding a bona fide emergency existed where water had to be turned off depriving homes in the area of both water and fire protection. The ALJ recommended an eight-day suspension with credit for time served on pre-hearing suspension. *Dep't of Environmental Protection v. Mosley*, OATH Index No. 1893/05 (Feb. 28, 2006), *aff'd in part, rev'd in part, modified on penalty*, Comm'r Dec. (Apr. 5, 2006).

The Commissioner rejected so much of the decision that found the laborer not guilty of the charge relating to the failure to work overtime on the day after Thanksgiving, holding that the Department was authorized to order the overtime pursuant to section 12-108 of the Administrative Code, and therefore the laborer was required to comply with the order and file a grievance later. For the two violations, the Commissioner imposed a thirty-day suspension without pay with credit for pre-hearing suspension time served.

### ► Real Property

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#### A. Watershed Appeals

OATH has been designated by agency rule to hear appeals from property owners who were denied a variance from the watershed regulations by the Department of Environmental

Protection. Two such appeals were heard during the reporting period.

In *Cmar v. Department of Environmental Protection*, OATH Index No. 179/06 (Oct. 6, 2005), ALJ Spooner upheld the denial of a variance application sought by a Dutchess County property owner who wanted to construct a new two-bedroom house and a new sewage treatment system on land located within the watershed area, finding the property owner did not show a substantial hardship resulted from the denial of the variance.

In *Farley v. Department of Environmental Protection*, OATH Index No. 941/06 (Jan. 19, 2006), the agency had denied a request for a variance made by a property owner in the upstate watershed area who sought the variance to construct a new raised trench subsurface sewage treatment system on an area with a natural slope of 18 percent. The regulation prohibited new sewage systems on an area with a slope of greater than 15 percent. ALJ Miller denied the appeal, finding the owner failed to show a substantial hardship, where he merely implied that the property would be more costly to develop without the variance.

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#### B. Zoning

Section 26-127.2 of the New York City Administrative Code, declares commercial uses of residentially zoned premises to be a nuisance and it empowers the Department of Buildings to close the building or portion of a building, where, after an OATH hearing, it is found that the residentially zoned premise is being used for commercial purposes. In a case heard by Deputy Chief Administrative Law Judge Charles D. McFaul, the Department alleged that the cellar of a residentially zoned building was being illegally used for commercial purposes. The evidence established accessory storage of commercial goods and supplies normally carried in stock, used, or produced by a florist shop. The effect the closure order might have on residential access was not permitted as a defense based

on a prior Commissioner decision eliminating the issue from the adjudication of commercial use. ALJ McFaul recommended closure of the premises. *Dep't of Buildings v. Owners, Occupants and Mortgagees of 19 East 76th Street, N.Y. Co.*, OATH Index No. 1796/05 (Sept. 12, 2005).

In some padlock cases, the occupant of a residentially zoned premise will claim that the commercial use is a permissible home occupation. In one such case heard during the reporting period, the tenant claimed that she legally used her apartment as an “esthetics” business. *Dep't of Buildings v. Owners, Occupants, and Mortgagees of 59 East 79th Street*, OATH Index No. 1388/05 (Nov. 1, 2005), *aff'd*, Comm'r Dec. (Dec. 1, 2005). Home occupations under the Zoning Resolution “include, but are not limited to” fine arts studios, professional offices, and teaching of not more than four pupils simultaneously. The Zoning Resolution expressly prohibits certain listed home occupations, including beauty parlors and “depilatory, electrolysis, or similar offices.” It also prohibits home businesses that “produce offensive noise, vibration, smoke, dust or other particulate matter, odorous matter, heat, humidity, glare, or other objectionable effects.”

ALJ Richard credited the occupant's testimony that her business engages in skin care only, not hair care. The Department did not contend that the occupant was running a hair removal business, nor did the record furnish any evidence that she conducted such services or operated a “depilatory, electrolysis, or similar office.” Following the long held principle that statutory derogations of fundamental common law property rights, such as the Zoning Resolution, “should be strictly construed” with “any ambiguity resolved in favor of the property owner,” ALJ Richard found the commercial use to be that of an esthetics business rather than a beauty parlor and therefore in compliance with the Zoning Resolution. The Commissioner affirmed the dismissal of the petition but only due to a lack of proof that the “occupant is engaged in hair dressing or in depilatory, electrolysis or similar activities.” The Commissioner

reserved decision on the legal issue of whether an esthetics business constitutes a prohibited beauty parlor under the Zoning Resolution. The Commissioner also reserved decision on whether the “practice of esthetics would attract less traffic or exact less of an environmental cost than a beauty parlor.”

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### C. Loft Law

On remand from the Loft Board, ALJ Merris recommended that an abandonment application be granted where the original protected occupant died and a family member voluntarily surrendered possession of the premises. Subsequent occupants of the unit, who took possession pursuant to a lease, which later expired, defaulted at the hearing and did not assert an interest in the unit. *Matter of Stone*, OATH Index No. 334/06 (Dec. 7, 2005), *aff'd*, Loft Bd. Order No. 3069 (June 15, 2006).

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### D. Single Room Occupancy (SRO) Housing

Pursuant to the SRO Anti-Harassment Law, the owner of an SRO building may not file an alteration application, and thus may not renovate or convert the building, without first obtaining a certificate of no harassment from the Department of Housing Preservation and Development. The Department has designated OATH to conduct hearings pursuant to the Administrative Code to determine whether harassment occurred during a three-year look back period.





ALJ Casey recommended granting a building owner's application for a certificate of no harassment where the Department failed to establish that harassment of SRO tenants had occurred at the premises during the three-year inquiry period. *Dep't of Housing & Preservation and Development v. Havriliak*, OATH Index No. 1135/05 (Jan. 13, 2006).

In another decision, ALJ Spooner recommended that building owner's application for a certificate of no harassment be denied, finding sufficient proof that harassment of SRO tenants had occurred at the premises. *Dep't of Housing & Preservation and Development v. Hersch*, OATH Index No. 921/05 (Jan. 13, 2006).

## ► Licensing

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OATH conducts hearings for the Department of Buildings where the Department seeks to suspend or revoke a license for acts of misconduct. In *Department of Buildings v. Borrazzo*, OATH Index No. 128/06 (Oct. 28, 2005), ALJ Salzman recommended revocation for a master plumber who had pled guilty in federal court to bribing a Department of Environmental Protection inspector to induce the inspector to approve sewer work for the plumber's company.

OATH also hears cases where the Department of Health and Mental Hygiene seeks to suspend or revoke a license or permit of a food service establishment or mobile food unit for violations of the City Health Code. In *Department of Health and Mental Hygiene v. Madkour*, OATH Index No. 2237/05 (Sept. 23,

2005), ALJ Salzman recommended revocation of a mobile food vendor permit and denial of new license to vendor due to the unlawful transfer of the permit decal to a different cart.

## ► Contracts

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### A. Contract Dispute Resolution Board

Pursuant to the rules of the Procurement Policy Board, OATH judges chair the Contract Dispute Resolution Board (CDRB), which hears and determines appeals of monetary claims brought by City contractors.

In *Termon Construction, Inc. v. Department of Environmental Protection*, OATH Index No. 2015/05, mem. dec. (Oct. 19, 2005), the CDRB, chaired by ALJ Spooner, dismissed as time-barred a claim for \$1,040,471.65 in additional compensation made by a contractor who cleaned residential buildings that had been contaminated following the collapse of the World Trade Center towers in 2001.

The CDRB, chaired by ALJ Salzman, denied a claim for \$151,024.59 in additional compensation made by a supplier on a water main contract, finding the engineer's direction that the supplier employ flag persons on moving equipment did not constitute extra work under the contract. *EIC Associates, Inc. v. Dep't of Design & Construction*, OATH Index No. 2025/05, mem dec (Nov. 30, 2005).

A contractor hired to perform roof replacement and exterior rehabilitation of Brooklyn Borough Hall claimed that a directive from the agency to provide a sidewalk shed enclosure was outside of the scope of the contract and claimed \$ 22,745.90 in additional compensation. The CDRB, chaired by ALJ Kramer, dismissed the claim as time-barred because the contractor failed to file a notice of dispute with the commissioner within 30 days of the project manager's directive. *ZHN Contracting Corp. v. Dep't of Citywide Administrative Services*, OATH Index No. 2151/05, mem. dec. (Jan. 9, 2006).

A contractor sought review of the Department of Sanitation's decisions denying its requests for early payment of \$ 856,329.22 for construction material required to complete

work on new building. The CDRB, chaired by ALJ Merris, found that the Department's decisions were discretionary under the contract and dismissed the petitions. *J.H. Electric of New York, Inc. v. Dep't of Sanitation*, OATH Index Nos. 1844/05 & 1845/05, mem. dec. (Sept. 22, 2005).

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## B. Prequalified Vendor Appeals

The City Charter provides that a vendor denied prequalified status or whose prequalified status has been revoked may appeal that determination to OATH. ALJ Casey affirmed an agency's revocation of a vendor's pre-qualified status, where the vendor's president admitted that his office manager had submitted falsified Department of Buildings permits, along with invoices, to receive payments from the agency for completed work. *Norway Electric Corp. v. Dep't of Housing Preservation and Development*, OATH Index No. 203/06, mem. dec. (Nov. 28, 2005).

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## ► Vehicle Retention

Pursuant to a federal court order, OATH conducts preliminary hearings to determine whether the Police Department is entitled to retain custody of seized vehicles pending state court actions to forfeit title to the vehicles. *Krimstock v. Kelly*, 99 Civ. 12041 (MBM) second amended order and judgment (S.D.N.Y. Dec. 6, 2005).

The *Krimstock* Order sets strict time frames within which the Police Department must notify vehicle owners of their right to request a hearing at OATH. OATH ALJs have ordered release of a vehicle where the Police Department fails to comply with the notice provisions contained in the court order. In *Police Department v. Sica*, OATH Index No. 1139/06, mem. dec. (Jan. 26, 2006), ALJ Kramer ordered the release of a vehicle where the Department neither served the owner with notice of the right to request a retention hearing at the time the car was seized nor mailed the notice within five days thereafter, as required by the *Krimstock* Order.

The Department's motion to adjourn a vehicle retention hearing, made at the commencement of trial, because the car owner failed to comply with its discovery demand, was denied



by ALJ Richard because the Department had failed to move to compel production prior to trial, and had sufficient time to do so. The Department withdrew its petition and the car was ordered released. *Police Dep't v. Bullock*, OATH Index No. 793/06, mem. dec. (Dec. 1, 2005).

The Department bears the burden of proving all three prongs contained in the *Krimstock* order. In two cases the ALJ found that the Department did not meet its burden on the first prong, and ordered release of the car. In *Police Department v. Gajraj*, OATH Index No. 843/06, mem. dec. (Dec. 15, 2005), the Police Department seized a car in connection with the driver's arrest for possession of a loaded weapon. The driver was the stepson of the vehicle's owner. ALJ Richard found the Department failed to establish probable cause for the initial car stop and arrest. Similarly, in *Police Department v. Craig*, OATH Index No. 1138/06, mem. dec. (Feb. 21, 2006), Chief ALJ Roberto Velez found the Department's proof failed to establish probable cause for the arrest.

The third prong of the *Krimstock* Order requires an examination of the need to retain the vehicle where the first two prongs have been satisfied. In past cases, this prong was established where the Department proved that release of the vehicle would result in its loss or destruction before forfeiture or would pose a heightened risk to public safety. In *Police Department v. Junior*, OATH Index No. 1134/06, mem. dec. (Feb 8, 2006), Deputy Chief Judge McFaul rejected the Department's claim that the vehicle would be subject to loss or destruction if released, noting

that the Department had failed to provide an alternative to retention after the District Court barred the use of bonds until adequate procedures for obtaining them were put into place. Citing to the passage of more than a year without any alternative procedure being instituted, Judge McFaul concluded that "[t]he Department's inaction undercuts its argument that retention is necessary to protect the asset for forfeiture."

In several other cases during the reporting period, OATH judges ruled that the Police Department had established its need to retain the vehicle pending the forfeiture hearing based on proof that release of the car would present a heightened risk to public safety. In *Police Department v. Serrano*, OATH Index No. 499/06, mem. dec. (Sept. 22, 2005), Chief ALJ Velez found that a heightened risk to public safety was established by the driver's blood-alcohol level being almost three times the legal limit. In *Police Department v. Harris*, OATH Index No. 983/06, mem. dec. (Feb. 16, 2006), ALJ Merris ruled that the Police Department was entitled to retain a car seized in connection with the owner's arrest for reckless endangerment, menacing, criminal possession of a weapon and acting in a manner injurious to a child. In *Police Department v. Hines*, OATH Index No. 430/06, mem. dec. (Sept. 6, 2005), ALJ Salzman credited Police Department evidence that the arresting officer observed sale of Percocet by respondent in his car and authorized retention of the car. In *Police Department v. Zuleta*, OATH Index No. 1223/06, mem. dec. (Feb. 10, 2006), ALJ Kramer found that the Police Department was entitled to retain possession of a car seized in connection with the owner's arrest for operating a motor vehicle under the influence of drugs and criminal possession of marijuana.

A car owner may seek release of the vehicle on the basis that he or she is an innocent owner, where the owner was not driving the car at the time of the arrest and seizure of the vehicle and did not "permit or suffer" use of the car to commit a crime. The Police Department bears the burden of proving that an owner is not innocent and has done so by showing that the arrested driver is the beneficial owner of the car. In *Gajraj*, OATH 843/06, in addition to finding that the Department did not show probable cause for the stepson's arrest, ALJ Richard also found that the Department failed to prove that the stepfather

was not an innocent owner. By contrast, in *Police Department v. Bernard*, OATH Index No. 551/06, mem. dec. (Oct. 19, 2005), ALJ Richard ruled that the Police Department was entitled to retain a vehicle that was seized when the driver was arrested for possession of a loaded weapon and illegal narcotics. ALJ Richard rejected the owner's claim that she was innocent, finding that the driver was the de facto beneficial owner of the car, upon proof that the driver obtained the financing for the vehicle and made the monthly payments from his bank account. Similarly, in *Police Department v. Murray*, OATH Index No. 1144/06, mem. dec. (Jan. 31, 2006), ALJ Miller ruled that the Police Department was entitled to retain a car seized in connection with the gun possession arrest of the son of the registered owner of the car. ALJ Miller rejected the mother's claim that she was an innocent owner, finding the son to be the beneficial owner of the car.

In *Police Department v. Plaskett*, OATH Index No. 463/06, mem. dec. (Sept. 8, 2005), ALJ Spooner found that the Department failed to prove that the car owner knew or should have known that her son would use the car for criminal purposes and he ordered the release of the vehicle. The ALJ did not credit the owner's testimony that she never gave her son permission to drive her car and knew nothing about his past arrest for weapons possession in light of the fact they lived together. Nevertheless, the judge found that the son's prior arrest did not show that the mother knew or should have known that her son would use the car for illegal purposes, in the absence of any evidence linking the weapons offense to the son's use of the car.

## PRACTICE POINTER

Counsel are reminded to pre-mark all trial exhibits and exchange them with opposing counsel before the judge starts the trial, particularly in cases involving numerous exhibits. Following this procedure will make for a more fluid trial. OATH rule 1-42 also requires that counsel be prepared with copies of all exhibits for the judge, the witness and all other parties.

## Sloan Award

*(continued from page 1)*

servants with the Sloan Public Service Award, which recognizes work performance, dedication and commitment to the public that transcends not merely the ordinary but the extraordinary. Deputy Mayor Carol Robles-Roman praised Judge McFaul for his achievements in public service, saying, "Judge McFaul has dedicated himself to public service since graduation from law school. He was instrumental in establishing the Office of Administrative Trials and Hearings as the City's independent and highly regarded central administrative tribunal."

Roberto Velez, OATH's Chief Judge, stated, "Charles was among the first to see that mediation was a valuable alternative for resolving difficult and costly disputes in the public workplace. From his vision, the Center for Mediation Services is now a reality that offers mediation and other conflict resolution services to numerous city agencies."

Charles McFaul had his first experience with civil service in law school where he spent his summers working at the New York City Law Department through a program called the Urban Corps. His experience at the Law Department confirmed Charles' desire to work for the City post graduation. His first job upon graduating from Buffalo Law School was for the Law Department's Tort Division and then he was assigned to the Penalties Division, where he served as a staff attorney for Mayor Lindsay's Times Square Law Enforcement Coordinating Committee. This was a wonderful experience for a new attorney because he received extensive exposure to litigation and had the opportunity to attend weekly meetings with high level city officials, including the Mayor.

After four years at the Law Department, Charles began to work for the New York State Division of Criminal Justice Services where he evaluated and monitored innovative criminal justice projects that were federally funded. In 1976 Charles started working for the Office of Court Administration where he worked on a major undertaking to integrate court employees throughout New York into the State Unified Court System thereby allowing the state to take-over of local court costs.



Barbara J. Cohn, Vice-President of the Fund for the City of New York, presenting the Sloan Award to Charles McFaul

When OATH was created in 1979, then Chief Judge Richard C. Failla recruited Charles to be an administrative law judge. Charles excelled as an administrative law judge and served as a Deputy Chief until 1985 when Mayor Koch appointed him as OATH's second Chief Judge. During the 1988 Charter revisions, Charles recommended that OATH judges be given terms of office in order to insulate them from political pressures. These changes were accepted and OATH became a Charter agency when Chapter 45-A was added to the City Charter, granting OATH broad adjudicative authority and providing five-year terms for its judges. In 1994, then Mayor Guiliani appointed Rose Luttan Rubin as the new chief judge at OATH. Charles could have explored new opportunities within City government, but he chose to continue at OATH. His commitment to OATH throughout its existence, his expertise in administrative law and in running a city agency led Judge Rubin to offer him the position of Deputy Chief Administrative Law Judge, the position he continues to hold today.

Now under the administration of OATH Chief Judge Roberto Velez, Charles continues his excellent work. He is responsible, along with Supervising ALJ Ray Kramer, for proposing mediation as a tool to resolve workplace disputes involving City employees. His efforts contributed to the creation of OATH's Center for Mediation Services. Without Charles' guidance as the principal planner of the Center, it would not be the success it is today.

The Center now offers mediation services to 15 City agencies and hospitals and has provided conflict management training to several agencies. OATH, in partnership with the NYU Law School,

Three new law clerks joined the OATH staff while two former law clerks departed. The new law clerks are Rachel Harvey, Rachel Cordero and Eric Cohen. Ms. Harvey attended the American University, Washington College of Law. During law school she worked as a law clerk for the administrative law judges at the National Labor Relations Board and as a legal intern at the Department of Labor. Ms. Cordero is a graduate of Brooklyn Law School. She had worked at OATH as a law intern in Spring 2005. Mr. Cohen is a graduate of Cardozo Law School. During law school Mr. Cohen served as an Alexander Fellow Law Clerk to the Honorable William G. Bassler in the United States District Court in Newark, New Jersey.

David Leon left OATH to take a position as Associate Counsel at the Department

of Sanitation. Arthur Bangs decided to return to full-time study, seeking a graduate degree in old English. Best of luck to both in their new endeavors.

Karen Hamilton has returned to the calendar unit from maternity leave. Congratulations to Karen on the birth of her son. Carol Plant returns from maternity leave as assistant to the Chief Judge. Charlene Mallebranche, who worked as a liaison in the Mediation Center, has also departed.

Four law students interned at OATH during the summer of 2006. Erin Felker, Jacqueline Kahman, Amelia Ross and Vasiliy Nazarov. Mes. Felker, Kahman, and Ross attend New York Law School. Vasiliy Nazarov has completed his second year at Fordham Law School.

created the law school's first mediation clinic allowing students to co-mediate cases.

Charles has also been closely involved with OATH's electronic case management project. This innovation will increase OATH's efficiency and user friendliness. Charles also assisted in the selection, acquisition and installation of a digital recording system for all hearings at OATH.

Charles also shared in the establishment of the Citywide ALJ Institute at OATH. The Institute will enhance the services and professionalism of the City's administrative tribunals. The ALJ Institute has presented CLE accredited courses in the areas of ethics, courtroom technology, evidence, and ensuring a complete hearing record.

Charles' involvement in the legal field extends beyond OATH. He has also been involved with the non-profit foundation of the Lesbian, Gay, Bisexual and Transgender Law Association, known as LeGaL, since its inception and has been a member of its Board of Directors for the past eight years.

Through this foundation, Charles has also participated in the Hank Henry Judicial Internship – a summer program that provides a stipend for a law student to work with openly gay and lesbian judges in the New York City courts during the summer. Charles recognizes that while bias still exists, this program will encourage future gay and lesbian lawyers to strive for achieving their professional goals.

Charles also served as a charter member of the City Bar Association's Committee on Lesbian and Gay Rights, where he worked to develop educational programs for both judicial and non-judicial personnel dealing with sexual orientation issues. Charles also served as a member of the Special Committee on Alcoholism and Substance Abuse at the City Bar Association. He worked with the Bar Association to appoint a full time substance abuse counselor for lawyers and judges seeking help.

We congratulate him on this well deserved recognition.

## Chief Judge's Message

(continued from page 1)

*The Institute will develop and present a wide-ranging curriculum of theoretical and practical interest to administrative law judges throughout the calendar year.”*

I have appointed Raymond E. Kramer to lead the Administrative Judicial Institute as its Supervising Administrative Law Judge. Judge Kramer has served as an administrative law judge at OATH since 1985. I have also asked Frank Ng to serve as the Institute's Counsel. Frank has served as a law clerk to OATH judges since 2001. Together, they have been developing a curriculum that focuses on the topics most relevant to City ALJs and hearing officers: the new ALJ ethics code; technology on administrative adjudication; best practices; alternative dispute resolution methods and more. Judges, experts in the areas of administrative law and ethics, law school professors, and other City agency leaders, will conduct the courses. By the first quarter of 2007, the Institute will have its own office suite with training facilities located on the 14th floor of 40 Rector Street. Additionally, the Institute will conduct on-site trainings as necessary. If you have any suggestions or requests for training, please feel free to contact Frank Ng directly at [FNg@oath.nyc.gov](mailto:FNg@oath.nyc.gov).

In November 2005, by mandate of the voters of the City of New York, I was charged with promulgating a code of ethics for all City ALJs. The code of ethics has been a primary focus of mine since that mandate and the drafting committee is nearing completion of its work. Once the Code is completed and approved, the Institute will conduct training sessions for all City ALJs on its content and application; supplemental trainings on ethics will also be provided periodically. Administrative Justice Coordinator Goldin will join 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.

I expect that the City's ALJs will find the Administrative Judicial Institute to be an invaluable resource in their pursuit of excellence in administrative justice.



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Mayor of the City of New York

### **ROBERTO VELEZ**

Chief Administrative Law Judge

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## PRACTICE POINTER

With the recent rule revisions, parties are encouraged to make an application to the administrative law judge by email in lieu of conference call where all parties are copied on the application.

See 48 RNCY § 1-07.