

OATH

BenchNOTES

VOLUME 25

FALL 2001



## Message from Chief Judge Rose Luttan Rubin

Maybe because I am a couch potato, the 32nd running of the New York City Marathon on November 3, 2001, left me, and surely millions of other Americans, full of pride and hope.

On the eve of the election of a new mayor, we observed 30,000 runners from different nations and American states doing what they wanted to do because they have the freedom to do it. Only seven weeks after the horror and fear of September 11<sup>th</sup>, our great city was prepared for the marathon. Our diverse citizenry and our mayor gave the participants a warm New York welcome. The runners and the observers lining the streets brought back

New York's *joie de vivre*, which had been dimmed for seven weeks. Over 90% of the runners finished the twenty-six mile race, touching each of the five boroughs. Tavern-on-The-Green gave its traditional night-before pasta party. This year's first place winners were from Ethiopia and Kenya. That afternoon everyone who ran, who watched and who cheered was a winner. The outpouring painted a powerful image of New York City moving forward, joined by all the world.

Our City's thrust to regain normalcy is inspiring, albeit tough. Instantly, tens of thousands of us become rescue workers, affirming our humanity. We are all inspired and grateful for the remarkable commitment of our police, firefighters and many, many other emergency workers. Led by Mayor Giuliani, the entire city, energized by his resolve and confidence, strained to operate at his tempo, 24 hours a day, seven days a week. We reached out, we comforted, we united. From far and near, countless new friends we did not know before arrived to join in the rescue work. We talked the talk and walked the walk.

Only eight weeks after the barbaric terrorist bombing of New York City and Washington, D.C., the citizens of New York City have taken other steps towards normalcy. We cheered the World Series. Then we elected a new mayor,  
*(continued on page 16)*

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## ANNUAL REPORT

This twenty-fifth issue of BenchNOTES incorporates OATH's annual report to the Mayor, which begins at page 7. Previously, OATH's annual report to the Mayor was filed as a separate document.

Apart from the economy, we hope our readers enjoy the additional information.

# OATH DECISIONS<sup>1</sup>

## DISCIPLINARY PROCEEDINGS

### A. Sexual Harassment

*Department of Correction v. Reed*, OATH Index No. 2517/00 (Apr. 5, 2001) involved a Correction captain charged with violating the agency's EEO and Sexual Harassment Policies as a result of his alleged conduct toward a female correction officer under his command. It was claimed that the captain made repeated sexually charged statements and body gestures toward the officer, and placed his arms around her. The officer first reported the captain's conduct after they had a work-related argument about her smoking in the office. She claimed that she did not report the captain's behavior earlier because she feared for her job and her assignment.

ALJ Ray Fleischhacker recommended dismissal of the charges after the evidence revealed that the officer held inordinate power in the facility in which she and the captain worked, so that she had no real fear concerning the security of her job. Indeed, the captain was transferred out of the facility the day after the smoking incident. The evidence established that several of the agency witnesses, including the complainant, bore grudges against the captain, and that the officer filed her EEO complaint only after the captain had charged her with misconduct as a result of their argument. An investigator, who had a friendly relationship with the officer's sister, was first assigned to conduct the EEO investigation, and the witnesses in the EEO case collaborated on their testimony. Finding no misconduct on the part of the captain, ALJ Fleischhacker recommended that an investigation be conducted regarding the governance of the facility and possible interference with the administration of justice.

Dismissal of sexual harassment charges was also recommended in *Department of Sanitation v. Soto*, OATH Index No. 227/01 (June 29, 2001).<sup>\*</sup> In *Soto*, an assistant borough superintendent was charged with sexually harassing two Work Experience Program ("WEP") employees by continually making inappropriate personal comments, physically touching one and exposing himself to the other. The workers filed intra-agency EEO complaints. The supervisor denied any untoward behavior, claiming that the allegations were in retaliation for his criticism of the employees' work habits and abilities, his transfer of one, and his refusal to change the work hours of the other. A number of employees in the office at which all three worked testified that while the mood in the office was relaxed, they had never witnessed the supervisor act other than professionally. While recognizing that a lack of eyewitnesses is not unusual in a sexual harassment case, ALJ Rosemarie Maldonado found that the complainants' gross exaggerations, and inconsistencies between their testimony and their prior statements, rendered the Department's proof insufficient.

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### B. Racial Remarks

*Department of Homeless Services v. Dudzik*, OATH Index No. 556/01 (Mar. 1, 2001) involved, inter alia, charges against a special officer that he had been discourteous to a shelter resident. During a dispute as to where the resident should be seated in a shelter van, the resident stated, "Don't worry. Our blackness won't rub off on you." The officer retorted, "You sure about that?" ALJ John Spooner found that the employee's response to the racially charged sarcasm and implicit accusation of bigotry, which the resident injected into the conversation, although caustic and insensitive, did not amount to misconduct.

ALJ Spooner reached a different result in *Police Department v. Pinsent*, OATH Index No. 2093/01 (Aug. 22, 2001).<sup>\*</sup> Police Officer Pinsent,

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<sup>1</sup> This issue covers OATH decisions from March 2001 through August 2001. Although OATH findings are primarily recommendations, all findings cited in BenchNotes have been adopted by the agency head involved unless otherwise noted. An asterisk following a citation indicates that the agency has not yet taken final action on the case.

in the course of issuing a parking summons, remarked to the driver/complainant that he could not understand how a black man could own an Acura automobile. The complainant readily admitted that he deserved the summons and that he had already paid the fine by the time of the hearing. ALJ Spooner found his credibility was further enhanced by the fact that he had no civil actions pending against the City or the officer. ALJ Spooner sustained the charge and recommended that the officer forfeit ten vacation days.

See also *Department of Sanitation v. Singh*, OATH Index No. 1438/01 (July 27, 2001), in which ALJ Fleischhacker found that an employee's reference to his supervisors' behavior as "Mafia-like," in letters which he disseminated to City officials, did not constitute ethnic slurs.

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### C. Obey Now, Grieve Later

*Department of Correction v. Jones*, OATH Index No. 1142/01 (May 17, 2001) involved a correction officer who was ordered to appear at the agency's EEO office for an interview after his tour of duty. The notice indicated clearly that persons called to appear at EEO were to wear class "A" uniforms, as required by a Department Teletype Order. On the date in question, the employee appeared in black denim pants, black sneakers and a collarless crew neck T-shirt, explaining that he did not appear in the appropriate uniform because he was reluctant to travel on the subway in uniform without his personal firearm, which he had not brought to work that day. Credible proof at the hearing suggested that uniformed members felt some apprehension riding public transportation in uniform, but without a weapon, because correction officers could be mistaken as police officers, would be unable, if necessary, to fulfill their duties as peace officers, or could be targeted by former inmates.

ALJ Christopher Kerr, citing to *Ferreri v. New York State Thruway Authority*, 62 N.Y.2d 855, 477 N.Y.S.2d 616 (1984) and several OATH cases, held that, generally, an employee must obey

a supervisor's order first and later grieve the order pursuant to the procedures set forth in the applicable collective bargaining agreement. Compliance may not be required where it would present an unusual threat to the health and safety of the employee. *Ferreri*, 62 N.Y.2d at 856-57, 477 N.Y.S.2d at 617. However, the burden of proof is upon the employee to demonstrate by a preponderance of the credible evidence that the health and safety exception applies to him. *Health and Hospitals Corp. v. Gelfand*, OATH Index No. 1165/99, report and recommendation at 8 (Feb. 16, 1999). Moreover, a subjective evaluation of the danger will not, by itself, suffice. The tribunal must assess whether the employee was objectively reasonable in believing that an imminent and serious threat existed that warranted his disobedience of the order. *Department of Sanitation v. James*, OATH Index No. 2186/99 (Oct. 5, 1999); *Human Resources Administration v. Chery*, OATH Index No. 444/98 (Dec. 12, 1997); *Department of Parks and Recreation v. Kotch*, OATH Index No. 101/87 (Mar. 20, 1987).

ALJ Kerr stated that although he did not question the sincerity of the officer, the officer's generalized fear did not constitute an "unusual threat" to his health and safety. The ALJ recommended a suspension without pay for three days.

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### D. Strict Liability

In *Department of Sanitation v. Burns*, OATH Index No. 1322/01 (June 15, 2001), a Sanitation supervisor was charged with a variety of rule violations, including failure to obey orders and failure to promptly and properly perform his assigned duties. On the date in question, a Sanitation truck picked up a full load of recyclables. The recyclables supervisor of that shift reported that there was an estimated three tons of recyclables remaining to be picked up. On the following day, a full 6.94 ton load of recyclables was again picked up, which was unusual, given the prior day's three ton estimate. Respondent was the regular collection supervisor on the first day and the garage supervisor the next day.

Finding that the uncollected recyclables had been underestimated, ALJ Kerr recommended dismissal of the charges. He held that it was well established that a standard of strict liability may not be applied in a disciplinary context. *Department of Correction v. Gordon*, OATH Index No. 275/81 (Feb. 3, 1982). It must be shown by a preponderance of the evidence that an employee had actual knowledge of the circumstances, or could have learned them through the exercise of reasonable diligence. *Fire Department v. Maxwell*, OATH Index No. 490/79 (Jan. 25, 1980). In a case alleging negligence, the petitioner must show some omission or failure on the part of the employee; to do otherwise would impermissibly shift the burden of proof. *Police Department v. Wenz*, OATH Index No. 132/89 (May 12, 1989). Here, there was no proof that the respondent misgauged the uncollected recyclables or that such a mistake could be made only through misconduct or negligence.

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### E. Incompetence

In *Human Resources Administration v. Younger*, OATH Index No. 1112/01 (July 25, 2001), it was alleged that over a period of months, the employee, an eligibility specialist, failed to take the actions required for issuance of back rent checks to a client's landlord. Facing eviction, the client committed suicide. ALJ Suzanne Christen found that, among other errors, the employee had issued the checks to the wrong payee, causing them to be returned, but had failed to ensure that the checks were reissued in a timely fashion. Further, she failed to treat the imminent eviction of the client as an emergency. Upon the death of the client, the employee's files were audited and it was found that 131 of her 175 cases had not been processed properly. ALJ Christen found that the employee's failure to take action in other cases had resulted in clients not receiving benefits to which they were entitled. The ALJ rejected the employee's defense that she was overworked and plagued by an inefficient computer system. Despite the employee's lack of a prior disciplinary history,

ALJ Christen recommended that, as a result of her shockingly indifferent attitude, the employee be terminated from her position.

In *Department of Correction v. Bomani*, OATH Index No. 1383/01 (July 20, 2001), ALJ Donna Merris found that a correction officer had engaged in chronic and excessive absenteeism by absenting herself for 121 days over a ten-month period. ALJ Merris held that, unlike misconduct, incompetence does not require a showing by the agency of fault on the part of the employee. Thus, the fact that an employee may have had valid reasons for absences is irrelevant to the ultimate issue of whether his unavailability, and its disruptive and burdensome effect on the employer, rendered him incompetent to continue his employment. ALJ Merris recommended termination from employment as the penalty.

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### F. Other Cases of Interest

In *Department of Correction v. Conde*, OATH Index No. 1784/01 (Aug. 27, 2001), a correction officer was charged with off-duty misconduct for sexually abusing a young girl. Prior to the commencement of the hearing, the officer was criminally convicted of sexual abuse in the third degree and endangering the welfare of the young girl, both misdemeanors. An appeal of the convictions was pending and the officer had obtained a stay of his judgment of conviction *via a habeas corpus* petition. The agency filed a motion before this tribunal, seeking a determination that the criminal convictions violated the officer's oath of office and, therefore, warranted his summary dismissal under Public Officers Law section 30(1)(e).

Under Public Officers Law section 30(1)(e), a public office holder, which includes a correction officer, forfeits his position if convicted of a felony or a misdemeanor involving a violation of his oath of office. Accordingly, a disciplinary hearing is not required. In determining whether a misdemeanor violates an employee's oath of office, the Court of Appeals, in *Duffy v. Ward*, 81 N.Y.2d 127, 596 N.Y.S.2d 746 (1993), held that

such a violation occurs only when it is apparent from the Penal Law's definition of the crime that the crime must arise from knowing and intentional conduct indicative of a lack of moral integrity. "For a crime to be one demonstrating a lack of moral integrity, it must be one involving willful deceit or a calculated disregard for honest dealings. More than intent or a criminal *mens rea* is needed for summary dismissal; there must be an intentional dishonesty or corruption of purpose inherent in the act prohibited by the Penal Law." *Duffy*, 81 N.Y.2d at 135, 596 N.Y.S.2d at 750.

ALJ Raymond Kramer found that the crimes in this case, which involved a child victim, arose from conduct probative of a lack of moral integrity and, thus, violated a correction officer's oath of office. Finding that the crimes were beyond acceptable societal norms, morally repugnant, and in violation of the fundamental trust that children repose in adults, ALJ Kramer determined that the officer had eroded the public confidence in his position such that, as per Public Officers Law section 30(1)(e), no hearing was required to terminate him from employment. Therefore, the ALJ granted the agency's motion.

## DISABILITY PROCEEDINGS

### A. Fitness Despite Disability

Section 72 of the Civil Service Law permits an agency to place an employee on a leave of absence when "an employee is unable to perform the duties of his or her position by reason of a disability." *Commission on Human Rights v. Henderson*, OATH Index No. 704/01 (June 12, 2001)\* involved a human rights specialist whom the agency alleged had accused co-workers of spying on her with cameras and listening devices and of reporting her to the Department of Investigation, which then began investigating her behavior. The employee had a confirmed lateness problem and was described by others as "quiet" and "isolated." The director of the office to which the employee was assigned stated that she did an

adequate job in day-to-day functioning, but he was disappointed that, with her breadth of experience, he could not assign her to certain tasks because of her reticent behavior. Anticipating that the employee suffered from a disability, the Commission had her examined by a psychiatrist under the provisions of section 72. The doctor concluded that the employee suffered from a mental disability and he opined that she was not currently fit to perform the duties of her position.

While accepting the psychiatrist's diagnosis, ALJ Faye Lewis found that the employee's condition did not render her unable to perform her job satisfactorily. Some of the complained of conduct, such as latenesses, could not be attributed to the employee's mental condition and might more properly be dealt with as misconduct or incompetence. Accordingly, ALJ Lewis dismissed the section 72 petition.

### B. Relationship to Disciplinary Proceedings

In *Human Resources Administration v. Barton*, OATH Index No. 2203/00 (Mar. 15, 2001), an eligibility specialist was charged with failing to properly service clients, failing to timely complete case work assignments, insubordination, threats toward supervisors, and other acts of misconduct. ALJ Kramer found that the agency had proven most of the charges. The employee had worked for the agency for thirteen years and had had findings made against him of similar misconduct twice before. The employee attributed his problems to flack from being a self-styled union activist, but ALJ Kramer found him to be a troubled individual who might well be suffering from mental stress or disability. The employee was a Vietnam-era veteran who was being seen regularly at a VA hospital for depression. Also, he had been prescribed an antidepressant, but had discontinued taking it. At the time of trial, he was homeless, having been evicted from his apartment.

Finding that the employee showed no signs of reforming his behavior, the ALJ recommended termination of employment. However, given the distinct possibility of mental unfitness, although

unproven, ALJ Kramer suggested that the agency consider reaching an agreement with the employee, which would involve terminating the employee under section 73 of the Civil Service Law. This would have accomplished the goal of freeing the position, while still according the employee the right to reinstatement if he were able to demonstrate renewed fitness to hold the position. The agency head adopted the ALJ's findings of fact, and terminated the employee under section 75.

In *Triborough Bridge and Tunnel Authority v. Davi*, OATH Index No. 339/01 (June 18, 2001), the employee, a bridge and tunnel officer, was charged with excessive absences, a two-month continuous absence, and a series of toll collection shortages. The employee did not contest the charges but rather presented documentation to prove that he suffered from a mental disability and should be placed on a section 72 leave of absence. Two doctors found that the employee was unable to work as of November-December 2000. ALJ Merris found that the employee never raised the issue of his mental condition until disciplinary charges were filed, and that the medical reports did not cover the employee's mental condition at the time the absences occurred. Therefore, no causal connection between the employee's mental state and his conduct was shown. Further, in 1998, while the employee was serving an agreed upon year's probation in order to settle similar disciplinary charges, he had been able to curb his time and leave abuses. Accordingly, ALJ Merris found no cause to convert the disciplinary proceeding to a disability proceeding, and recommended termination of employment.

## PRACTICE AND PROCEDURE

### A. Amendment of Charges

*Department of Correction v. Wilder*, OATH Index No. 1636/00 (June 20, 2001) involved a correction officer charged with deliberately making several false and deceptive statements under oath during an investigatory inter-

view. The investigation had been spurred by the officer's questionable report of having been the victim of a gunpoint robbery. In investigating that incident, Department investigators became privy to allegations that the employee was involved in undue familiarity with inmates. Although ALJ Kramer found that the correction officer had engaged in making false statements, he did not allow the Department, at the outset of the hearing, to amend its charges to include allegations that the employee had engaged in undue familiarity with inmates, which was alleged to have occurred over four years earlier.

ALJ Kramer held that the conduct was not such that it would constitute a crime and avoid the section 75 eighteen-month statute of limitations. Neither did it "relate back" to the original charges. CPLR § 203(f) (McKinney CD-ROM 2001). Nor was the conduct in the proposed amended charges unknown or actively concealed during the limitations period.

### B. Review of Personnel Records

Following the hearing and closing of the record in a disciplinary proceeding, the employee made application for a complete copy of the material provided to the Administrative Law Judge from the employee's personnel file, and a hearing with respect to the "past documentation" contained in the file.

ALJ Merris in *Triborough Bridge and Tunnel Authority v. Mondello*, OATH Index No. 1563/01, memorandum decision (June 28, 2001), denied the application. The ALJ stated that it is well established that in civil service disciplinary proceedings, once it has been determined that the employee has committed misconduct, the appointing authority is entitled to consider material contained in the employee's personnel file when determining an appropriate penalty. *Bigelow v. Board of Trustees*, 63 N.Y.2d 470, 474, 483 N.Y.S.2d 173, 174 (1984). The *Bigelow* court held that "fundamental fairness" requires that the employee be given notice of the adverse material contained

(continued on page 11)

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**THE GROWTH OF OATH: 1994-2001**

**D**uring the past eight years, OATH's caseload increased by more than 100%. Overall, case filings more than doubled, from 1018 in fiscal year 1993, to 2301 in fiscal year 2001. A chronology of the expansion of OATH's jurisdiction accounts for most of the increase.

In 1994, the Health and Hospitals Corporation gave up its own intra-agency hearings in favor of referring them to OATH. During fiscal year 2001, 191 HHC cases were filed at OATH.

In 1995, the Loft Board began sending hearings to OATH. Within approximately two years, OATH helped to eliminate a backlog of more than 500 cases and continues to hear the Board's current cases. In fiscal year 2001, 125 Loft Board matters were filed for dispositions. In 1995 also the Department of Sanitation closed its internal hearing unit, referring all of its disciplinary hearings to OATH. In fiscal year 2001, the Department filed 79 cases with OATH.

In 1996, the Department of Health designated OATH to conduct enforcement proceedings and due process hearings involving restaurants, mobile food vendors and dangerous dogs. Between 1994 and 2001, the number of cases referred by DOH to OATH grew by over 600% to 94.

In 1997, the Commission on Human Rights eliminated its hearing unit and OATH was granted jurisdiction to hear all human rights complaints, which generate lengthy and complex hearings. In fiscal year 2001, HRC referred 14 cases to OATH.

*(continued on page 9)*



THE CITY OF NEW YORK  
OFFICE OF THE MAYOR  
NEW YORK, N.Y. 10007

Fall 2001

Dear Friends:

I am delighted to extend my warmest greetings to the Office of Administrative Trials and Hearings as you commemorate this special publication of your 25th semi-annual yearbook, BenchNotes, which includes your Annual Report.

At this time we reflect on the recent tragedies that have befallen our City and Nation, and recognize the citizens of New York City for the courage and strength they have shown during these trying times. As we will never forget the attacks of September 11, we also resolve to carry on, and I am proud of the Office of Administrative Trials and Hearings for its perseverance and determination in dealing with the aftermath of the World Trade Center tragedy.

We also celebrate the return of the Office of Administrative Trials and Hearings to its offices at 40 Rector Street. OATH remains vitally important to the City's commitment to improving administrative adjudication, and I look forward to the many innovations and contributions OATH will contribute to the New York City legal community.

Please accept my best wishes for continued success.

Sincerely,

Rudolph W. Giuliani  
Mayor

New Cases Filed - Fiscal Year 2001	1	2	3	4
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**Mayoral Agencies**

Admin. for Children's Services	53	34	16	3
Dept. for The Aging	1	1	-	-
Buildings	95	38	52	5
Citywide Admin. Services	6	5	-	1
Civilian Complaint Review Bd.	4	4	-	-
Correction	785	721	25	39
Design and Construction	11	8	2	1
Employees' Retirement System	1	1	-	-
Environmental Protection	17	9	5	3
Finance	6	5	1	-
Financial Info. Services Agcy.	1	1	-	-
Fire	50	28	8	14
Health	94	17	77	-
Homeless Services	57	16	40	1
Housing Authority	3	1	1	1
Housing Preservation and Devel.	30	23	4	3
Human Resources Admin.	384	341	36	7
Comm. on Human Rights	14	6	3	5
Law Department	1	1	-	-
Loft Board	125	60	35	30
Parks and Recreation	15	11	4	-
Police	58	33	23	2
Sanitation	101	50	34	17
Taxi and Limousine Comm.	14	8	5	1
Transportation	14	9	5	-
Youth Services	2	2	-	-

**Other Agencies**

Comptroller	9	4	4	1
Conflicts of Interest Board	5	4	1	-
Board of Education	23	14	5	4
Health and Hospitals Corp.	176	138	30	8
Transit Authority	50	39	9	2
Triborough Bridge & Tunnel Auth.	34	28	5	1

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<b>Total</b>	<b>2,239</b>	<b>1,660</b>	<b>430</b>	<b>149</b>
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Key to Columns:

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

3 = Cases Decided After Trial  
 4 = Cases Pending as of 8/29/2001

## New Cases Filed and Disposition By Case Type -

Fiscal Year 2001

Filings

Dispositions

### Personnel

Discipline	1,877	1,977
Disability	20	19
Financial Disclosure/Other Chapter 68	5	22

### License

Expedited, Other License Cases (DOB)	19	16
Restaurant Closures (DOH)	73	73
Taxi Owner/Operator Violations (TLC)	6	6

### Regulatory

Limited Supervisory Check, Other Building Code (DOB)	6	4
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### Real Estate/Land Use

Loft Board Applications	125	94
Zoning Violations (Padlock Closures - DOB)	58	58
Single Room Occupancy Harassment (HPD)	8	4

### Contracting

Prevailing Wage (COM)	3	6
Contractor Debarment (DEP)	1	1
Prequalification Denial Appeal (HPD)	1	1
Contract Dispute Resolution Board Appeals (5 agencies)	22	7

### Discrimination

Discrimination Complaints (CCHR)	12	8
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### Other Cases

Other Cases (DEP, DOC, POL)	3	5
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**Total**

**2,239**

**2,301**

### The Growth of OATH *(continued from page 7)*

In fiscal year 1999, the Chief Administrative Law Judge was named as the administrator and chair of a reconstituted Contract Dispute Resolution Board ("CDRB"). In fiscal year 2001, 23 CDRB cases were docketed. Also in 1999, the Department of Housing Preservation and Development designated OATH to conduct all of its Single Room Occupancy harassment hearings. In fiscal year 2001, 8 SRO cases were filed.

And, in 2001, OATH was designated to hear all disciplinary cases generated by the Civilian Complaint Review Board. As OATH

only heard a portion of those cases prior thereto, the change, it is estimated, will result in the referral of 150 additional cases per year for hearing.

Finally, the innovative creation of initiative days for the Department of Correction, the Triborough Bridge and Tunnel Authority and the Human Resources Administration, in which all or a portion of a judge's day is spent in conducting pre-hearing conferences of cases in an effort to settle them in lieu of trial, has resulted in increased referral and disposition of cases from those three agencies.

Case Dispositions - Fiscal Year 2001	1	2	3
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**Mayoral Agencies**

Admin. for Children's Services	56	35	21
Dept. for The Aging	-	-	-
Buildings	91	37	54
Citywide Admin. Services	5	5	-
Civilian Complaint Review Bd.	4	4	-
Correction	818	789	29
Design and Construction	10	10	-
Employees' Retirement System	1	1	-
Environmental Protection	15	10	5
Finance	4	3	1
Financial Info. Services Agcy.	1	1	-
Fire	35	28	7
Health	91	78	13
Homeless Services	51	36	15
Housing Authority	2	2	-
Housing Preservation and Devel.	20	15	5
Human Resources Admin.	420	382	38
Comm. on Human Rights	9	8	1
Law Department	1	1	-
Loft Board	95	66	29
Parks and Recreation	18	13	5
Police	113	37	76
Sanitation	79	32	47
Taxi and Limousine Comm.	14	10	4
Transportation	12	8	4
Youth Services	3	3	-

**Other Agencies**

Comptroller	12	7	5
Conflicts of Interest Board	22	18	4
Board of Education	22	18	4
Health and Hospitals Corp.	191	146	45
Transit Authority	54	42	12
Triborough Bridge & Tunnel Auth.	32	27	5

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<b>Total</b>	<b>2,301</b>	<b>1,872</b>	<b>429</b>
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Key to Columns:

1 = Cases Calendared

2 = Cases Settled or Withdrawn Without Trial

3 = Cases Decided After Trial

in his personnel file prior to the final penalty determination and at a time sufficient to permit the employee to comment on the material. It was improper, according to the *Bigelow* court, for the final decision maker, but not for the hearing officer, to review the employee's employment history *ex parte*, for the purpose of determining the penalty.

ALJ Merris found that in conformance with the fundamental fairness standard required by *Bigelow*, this tribunal's rules of practice codify its procedures for considering materials, such as personnel records, that may have a bearing on the formulation of a penalty recommendation. OATH's rules provide that, in a disciplinary case, once the administrative law judge determines that the charges have been sustained in whole or in part, the judge requests the employee's personnel file from the agency without further notice to the employee. Pursuant to the rule, petitioner "shall forward only the requested file or record, without accompanying material" and such file shall include only the material which is available "for inspection by the respondent as of right." 48 RCNY § 1-47(b) (Lenz & Riecker CD-ROM 2001). Also, the rule provides that the administrative law judge will identify in the report and recommendation any material from the personnel record that was relied upon in formulating the penalty recommendation.

The employee's right to inspect the personnel file provides the opportunity to correct mistakes in those materials before they are requested by the administrative law judge. Moreover, the information considered by the judge in assessing a penalty recommendation is set forth in the report and recommendation. This affords the employee the opportunity to comment and submit any mitigating material to the agency head prior to the taking of final action on the particular matter. *Fogel v. Board of Education*, 48 A.D.2d 925, 369 N.Y.S.2d 517 (2d Dep't 1975). Thus, OATH's procedures, coupled with the employee's right to comment on the administrative law judge's report and recommendation, satisfy the requirements of *Bigelow*. See *Department of Sanitation v. Joyce*, OATH

Index Nos. 888-89/00, memorandum decision at 3 (May 8, 2000).

For another report discussing review of personnel files, see *Board of Education v. Fuccio*, OATH Index No. 924/01 (June 21, 2001) (memoranda in personnel file that showed acts of disrespect similar to charged conduct was considered by ALJ Fleischhacker in recommending termination).

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### C. Statute of Limitations

In *Police Department v. Salas*, OATH Index No. 1090/01 (Aug. 21, 2001),\* ALJ Fleischhacker considered whether the section 75 18-month statute of limitations applies to disciplinary proceedings against police officers, in light of the decision of the Court of Appeals in *Montella v. Bratton*, 93 N.Y.2d 424, 691 N.Y.S.2d 372 (1999). In *Montella*, the Court held that police disciplinary proceedings are governed by N.Y.C. Administrative Code section 14-115 and not by section 75 of the Civil Service Law.

According to ALJ Fleischhacker, it followed that section 75's statute of limitations did not apply. Further, it is beyond the purview of a non-legislative branch to engraft a statute of limitations upon a statute. *O'Keefe v. Murphy*, 38 N.Y.2d 563, 569, 381 N.Y.S.2d 821, 824 (1976). The ALJ held that police cases were governed by the four-pronged test set forth in *Cortlandt Nursing Home v. Axelrod*, 66 N.Y.2d 169, 495 N.Y.S.2d 927 (1985), which is used to determine whether the delay in bringing or prosecuting administrative proceedings is unreasonable. In essence, success requires a showing of actual prejudice. The implications for police disciplinary hearings is that the Department will be able to prosecute older cases unless the employee demonstrates that he was prejudiced by any delay in the service or the prosecution of the charges. *Salas* was followed by ALJ Merris in *Police Department v. Medina*, OATH Index Nos. 862 & 1284/01 (Aug. 23, 2001);\* see also ALJ Lewis's report in *Police Department v. Smith*, OATH Index Nos. 345 & 346/01 (May 23, 2001).\*

## D. Negative Inferences - Witnesses

In *Human Resources Administration v. Small*, OATH Index No. 241/01 (May 10, 2001), *modified on penalty*, Comm'r Dec. (June 11, 2001) the agency established that the employee, an eligibility specialist, engaged in shouting matches with clients in the waiting room, disrupting agency functions, and made statements denigrating clients.

ALJ Maldonado drew an unfavorable inference against the employee for failing to testify and thereby refute material proof presented against her. *See, e.g., Police Department v. Ayala*, OATH Index No. 401/88 (Aug. 11, 1989), *aff'd sub nom., Ayala v. Ward*, 170 A.D.2d 235, 565 N.Y.S.2d 114 (1st Dep't 1991). The case also discusses whether or not the employee engaged in constitutionally protected speech.

*Police Department v. Smith*, OATH Index Nos. 345 & 346/01 (May 23, 2001) involved excessive force charges brought against two police officers. The complainant, who had a civil proceeding pending against the City and the officers, did not appear at the hearing. OATH was advised that the civil trial was upcoming. In lieu of the complainant's testimony, sworn deposition testimony that he gave in the civil action was introduced. ALJ Lewis held that a missing witness inference was not appropriate in this case because the Department and not the complainant was a party, and because the strategic decision of the complainant's attorney, not to permit his client to testify, diminished any control the Department could have exercised over the complainant as a witness. Further, the tactical decision did not allow any inference that the complainant had withdrawn, recanted or modified his complaint.

In *Police Department v. Pinsent*, OATH Index No. 2093/01 (Aug. 22, 2001),\* a police officer charged with having made a racially offensive remark to a civilian, sought a missing witness inference because the complainant's grandson, who had been present during the incident, failed to appear as a witness despite having been subpoenaed to testify.

ALJ Spooner cited to *Noce v. Kaufman*, 2 N.Y.2d 347, 353, 161 N.Y.S.2d 1, 5 (1957), which declares that "where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inferences may be drawn against him which the opposing evidence in the record permits." However, the ALJ found that a negative inference would not be appropriate in this case. As in *Smith*, supra, it was the Department and not the witness who was a party to the proceeding. Further, the complainant had credibly testified that the child was in summer camp and that his mother preferred that he avoid testifying at the hearing. Thus, the child was not within the Department's control and his absence was not unexplained.

## Human Rights

### Sexual Orientation

*S. v. Gitto*, OATH Index No. 263/01 (Aug. 3, 2001)\* involved a human rights complaint brought by a gay, HIV-positive, former tenant of a Queens rooming house which catered to Brazilian immigrants. The tenant, Mr. S., claimed that the operator of the rooming house and her son, who were the lessees of the premises, discriminated against him on the basis of sexual orientation and disability when they allegedly engaged in sexually related name-calling, assaults, a break-in into his room and other acts intended to encourage him to vacate the premises.

ALJ Fleischhacker, however, dismissed the complaint, finding that the complainant was not credible and that any animosity between the parties was caused by the tenant's failure to pay rent for the majority of his tenancy. Additionally, the ALJ found that the rooming house operator had other homosexual tenants against whom she did not discriminate and that she equally treated tenants who failed to pay rent.

## LICENSING HEARINGS

### A. Master Electrician License

*Department of Buildings v. Sarabella*, OATH Index Nos. 2258-59/00 (July 2, 2001)\* was a master electrician license revocation proceeding brought against two master electricians who had allegedly submitted false information to the Department of Buildings to further the application of one of them for a license. As a preliminary matter, ALJ Lewis denied a motion to dismiss the case based upon prejudicial delay. Although the purportedly false statements were made in 1989, and the Department had discovered their falsity as early as 1993, the respondents failed to show any actual substantial prejudice to their ability to defend the charges.

With regard to the charges, the case rested on statements made by the electricians between 1989 and 1998. Neither was called as a witness during the agency's case, and both elected not to testify. Deeming it a close case, ALJ Lewis found that the Department had not proved that respondent Sarabella had falsely represented on his application that he had worked as a journeyman electrician for a company for ten years, when, in fact, he had performed administrative duties for the company. The second master electrician, Noto, the former president of the company, had submitted a notarized letter to the License Board which allegedly falsely confirmed the journeyman electrician status of respondent Sarabella for the same ten-year period.

This misconduct too was not proven by a preponderance of the credible evidence. There was no proof that the testimony at trial, *i.e.*, that respondent Sarabella worked in the field most of the day and then returned to the office to perform administrative duties, was untrue. Therefore, the license revocation proceedings against both master electricians were dismissed.

### B. Food Establishment Permit

In *Department of Health v. Ruby Reel, Inc., d/b/a Crown Fried Chicken*, OATH Index No. 263/02 (Aug. 10, 2001), Deputy Chief ALJ Charles McFaul conducted a hearing to determine whether a food service establishment permit should be granted by the Department of Health. The permit applicant was the daughter of a former permittee who had amassed unpaid fines for violations of the Health Code, including operating without a permit. The father had sold the business to his daughter, who then applied for the permit. Finding that there was insufficient evidence to indicate that the sale from father to daughter had been at arm's length, and that the sale of the business appeared to be a device to avoid payment of outstanding fines, ALJ McFaul recommended denial of the permit.

## LOFT LAW

### Extension Application

In *Matter of 111 Mercer Street*, OATH Index No. 1676/01 (June 20, 2001), *aff'd*, Loft Bd. Order No. 2664 (July 24, 2001), the applicant/owner sought a fifteen-month extension of the time to obtain an alteration permit in order to complete work in compliance with the legalization timetables as set forth in Article 7-C of the Multiple Dwelling Law. The owner's declared objective was to enable him to bring the building into compliance with the Loft Law and to protect his right to collect rent.

The record established that the owner took virtually no steps toward legalization until he retained an architect in November 1999. The architect did not file an application with the Building Department for an alteration permit until October 4, 2000, nor did the applicant demonstrate circumstances beyond his control, which would explain why it took eleven months to file the application. Thereafter, the owner pursued legalization diligently. Loft Board precedent permits granting

an extension application in part and denying it in part where pre-deadline inactivity by the owner was followed by subsequent good faith efforts towards legalization, as here.

Chief Administrative Law Judge Rose L. Rubin denied the extension application for the period prior to the time the owner acted to legalize and granted it thereafter.

## SINGLE ROOM OCCUPANCY LAW

### Anti-Harassment Ordinance

*Department of Housing Preservation and Development v. Serradilla*, OATH Index No. 1802/01 (July 18, 2001)\* was a case brought under Local Law 19 of 1983, the Single Room Occupancy ("SRO") anti-harassment ordinance. The law provides that the owner of an SRO building must obtain a Certificate of No Harassment from HPD before it can obtain a building alteration permit from the Department of Buildings. Where the owner files for a certificate and HPD finds that there is reasonable cause to believe harassment occurred during the 36 months preceding the filing, a hearing on the finding is held at OATH. Where harassment is found after a hearing, the owner is barred for 36 months thereafter from submitting an alteration application to the Department of Buildings. Admin. Code § 27-198(b)(1)(b)(Lenz & Riecker CD-ROM 2001).

In *Serradilla*, HPD had issued a vacate order requiring the relocation of tenants if the owner did not remedy certain conditions that rendered the building uninhabitable. The owner did not make the necessary repairs and the tenants were removed. At the OATH hearing, the building owner argued that Local Law 19 did not apply because the tenants were not lawful occupants. Credible proof was offered that most of the tenants paid little or no rent, engaged in illegal activities and had a part in bringing the building into its current state of serious disrepair. However, ALJ Merris found that a tenant, for purposes of the

ordinance, need only to have resided at the premises for thirty days after the owner or its agent agreed to rent the premises, which was demonstrated. Further, eviction is the remedy against a tenant who is engaging in an illegal or destructive activity, which was never attempted here.

Although the ALJ found that the elderly former owner and her caretaker had not intended to harass the tenants, the real estate corporation, which briefly owned the property before its sale to the current owner, engaged in harassment by failing to make any efforts to remedy the building conditions following receipt of the vacate order. The statute does not make exceptions for innocent subsequent owners, such as the current owner of the building. Therefore, the ALJ denied the application for a Certificate of No Harassment.

In another SRO proceeding, *Department of Housing Preservation and Development v. Coradin*, OATH Index No. 1803/01 (Aug. 14, 2001),\* Deputy Chief ALJ McFaul also found that the legal residents had been subjected to harassment during the thirty-six month period preceding the application for the certificate. Here, as in *Serradilla*, the ownership of the building changed hands during the thirty-six month inquiry period, but the current innocent owner was, nevertheless, held responsible for the acts of her predecessor for purposes of issuance of a certificate. The single elderly tenant's description of the conditions of the building was corroborated by a Housing Court consent order in which the former owner agreed to correct five hazardous conditions. While the owner had had three floors of the building demolished, he lacked a permit to do the work. Intermittently, water supply and gas service had been interrupted, among other things. Accordingly, ALJ McFaul denied the application for a Certificate of No Harassment.

In both *Serradilla* and *Coradin*, the presiding ALJ noted the harsh results which befell the innocent purchasers of buildings from owners who had sought to quickly turn over the buildings

**O**ATH has added three law clerks to assist the ALJs and Chief Law Clerk, Martin Rainbow. They are: **Matthew Forman**, **Robert Gatto** and **Frank Ng**.

Mr. Forman graduated *cum laude* in June 2001 from the Benjamin N. Cardozo School of Law, where he received a J.D. with a concentration in Constitutional Law and Rights. He served as an intern to the Honorable William G. Bassler of the United States District Court in Newark, New Jersey. Mr. Forman holds a B.A. in history from Amherst College.

Mr. Gatto graduated *cum laude* from Indiana University School of Law - Bloomington in May 2001, after attending the College of William and Mary, where he majored in Spanish. He interned with the Honorable Denis R. Hurley, a Judge of the United States District Court, for the Eastern District of New York.

Mr. Ng is a former law clerk to the Honorable Robert A. Coogan of the New

Jersey Superior Court. He also served as an intern to the Honorable Frederic S. Berman of the New York Supreme Court. Mr. Ng holds a J.D. from New York Law School, where he served as president of the Student Bar Association, and a B.A. in forensic psychology from John Jay College of Criminal Justice. While in law school, he spent a summer at OATH as a law intern.

Additionally, OATH recently added college students to its staff as temporary Administrative Interns. **Eraina Holland**, a student at the University of Maryland - College Park, served a three-month internship through August 2001. **Erik Parks**, whose three-month internship commenced in July, is a third-year student at Rutgers University.

OATH's technical support staff has been bolstered by the addition of **Jingliang Wang** and **Yuan Pan**, candidates for Master of Science degrees at Pace University.

after ridding them of their tenants. However, because of the dwindling stock of single room occupancy multiple dwellings, the law setting forth the special rights of SRO tenants provides for no alternative to denial of a Certificate of No Harassment, and, thereby, a ban on any alteration or change in use, once harassment within the preceding thirty-six months has been established. Administrative Code § 27-2093 (Lenz & Riecker CD-ROM 2001).

## APPEALS

### Contract Dispute Resolution Board

Since the Contract Dispute Resolution Board ("CDRB") was reconstituted, effective September 1, 1999, to appoint the Chief Administrative Law Judge of OATH as the admin-

istrator of the Board and to provide that the Chief Administrative Law Judge, or her designee, an OATH Administrative Law Judge, chair each three-member panel, 34 cases have been filed by contractors. *Parsons Coach Limited v. Department of Transportation*, OATH Index No. 203/01 (May 16, 2001), and *Ajet Construction Corp. v. Department of Parks & Recreation*, OATH Index No. 1418/01 (June 29, 2001) were two CDRB cases decided between March and August 2001.

In *Parsons*, a panel chaired by ALJ Fleischhacker awarded a school transportation contractor approximately \$116,000 because the bid specifications contained an error attributable to the contracting agency, namely, the number of hours per day during which school classes were to be held. The error necessitated the contractor's unanticipated employment of two additional buses

to transport the students. Distinguishing this situation from those where changed circumstances during the performance of a contract may have to be borne by the contractor, the CDRB, with one dissent, granted the appeal for additional compensation, but unanimously denied recovery of any lost profits.

In *Ajet*, the panel, chaired by ALJ Christen, denied a claim for additional compensation in the amount of approximately \$60,000, sought because of substitution of a more expensive type of lumber on a project to reconstruct a fire damaged boardwalk. The CDRB found that the appeal was untimely because the contractor had failed to appeal to the agency head, as required by the contract, after the chief engineer denied the claim because the Mayor's Office of Construction withheld its approval. Although the appellant contractor argued that certain agency correspondence had created an ambiguity as to whether the agency decision had been final, the Board, with one member dissenting, found no such ambiguity.



40 Rector Street  
New York, NY 10006  
(212) 442-4900  
Fax (212) 442-4910  
TDD (212) 442-4939  
OATH@oath.nyc.gov  
www.nyc.gov/oath

**RUDOLPH W. GIULIANI**  
Mayor of the City of New York

**ROSE LUTTAN RUBIN**  
Chief Administrative Law Judge

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**CONTRIBUTORS**  
ALJ Ray Fleischhacker  
Martin Rainbow, Esq.  
John Stulgaitis  
Frank Ng  
Robert Gatto

## Chief Judge Rubin's Message

*(continued from page 1)*

Michael R. Bloomberg, by three percentage points, a margin of victory which signifies that more unites us than divides us. The people of New York City, its institutions and agencies of governance, are ready to support the new leadership and together to dedicate ourselves to maintaining New York at the same level, or better, than it was before the terror. All of us, as individuals or through our institutions, have a moral obligation and a part to play to affirm the greatness of our diverse culture and to remain firm in our resolve that the terrorists will not succeed in their goal to destroy our values and our moral vision.

Our country's value system, founded upon the rule of law, was sorely challenged on September 11<sup>th</sup>. The unity, strength and patriotism which the attack elicited gave proof that America's values will not yield to terrorist acts of lawlessness.

High among the legal institutions nurtured by Mayor Giuliani over his eight years of leadership is OATH. An evaluation of his administration will note the encouragement given by the Mayor and his deputies to the development of OATH, until today OATH is at the cutting edge of the newest advancements in administrative law in the United States. We at OATH are grateful for the opportunity to direct and implement this growth. New York City and its municipal workforce have benefitted from the ability to resolve issues of governance before a central or independent, stable administrative tribunal, whose Administrative Law Judges are seasoned professionals, with fixed terms of office.

We welcome Michael R. Bloomberg, our new mayor-elect. Soon, we are confident, his enthusiasm for OATH will match ours.