



Message from the Chief Judge
Roberto Velez

**THE FIRST EVER ADMINISTRATIVE
TRIBUNAL TRAINING RETREAT AND THE
CREATION OF THE CITYWIDE ALJ TRAINING
INSTITUTE AT OATH**

On January 7, 2005, Deputy Mayor Carol Robles-Roman sponsored a day-long training retreat at Gracie Mansion for 40 supervising administrative law judges and hearing officers from nine of the City's tribunals. Deputy Mayor Robles-Roman, who has vast experience in court management, welcomed the participants by noting that the gathering was the first time in the history of the City that supervisors from the different tribunals had convened for training on best management practices by experts in the field. Never before had tribunal heads discussed ways of improving the delivering services to the public in such a coordinated manner. City tribunals throughout the City do an excellent job in providing fair and efficient hearings for our citizens, but we can always improve by learning what new best practices are in the field. The Deputy Mayor concluded by stating that this retreat was the beginning of a series of ongoing trainings that she envisions for City ALJs and hearing officers.

The retreat consisted of three sessions. Dean Robert G.M. Keating from the New York State Judicial Institute moderated the two morning sessions on new developments in technology and judicial decision writing. The technology session was facilitated by OATH ALJ John Spooner and OMB Assistant

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Standing L-R: ALJ Joan Salzman; COIB General Counsel Wayne Hawley; Supervising ALJ Charles Fraser; Deputy Chief ALJ Charles McFaul; COIB Executive Director Mark Davies; Deputy Mayor Carol Robles-Roman; Special Counsel Anthony Crowell; Sitting L-R: Frank Ng; Chief ALJ Roberto Velez

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OATH Partners with John Jay College to Promote Mediation

Over the past two years, OATH has been working with the City University of New York Dispute Resolution Consortium (CUNY DRC) and the Dispute Resolution Program at John Jay College of Criminal Justice to plan and construct an exhibit depicting mediation and other ADR programs. The exhibit, entitled "Dispute Resolvers in NYC Make Talk Work," opened for display at John Jay College.

The exhibit features eight display cases, each focusing on how conflict managers operate in the following areas: the criminal justice system; schools and youth; city, state and federal government; the international arena; family disputes; corporate and commercial transactions; community disputes; and workplace disputes. The exhibit also includes a poster-sized enlargement of a peer mediation postcard prepared by the NYC Commission on Human Rights for its peer mediation initiative.

On Tuesday, September 28, 2004, OATH staff attended a reception celebrating the exhibit's opening. The



L-R: OATH Chief Judge Roberto Velez; John Jay College President Jeremy Travis; Deputy Mayor Carol Robles-Roman; Professor Maria Volpe

reception took place at the office of Jeremy Travis, the president of John Jay College, and was attended by many prominent New York City mediators. President Travis gave opening remarks, followed by a brief speech by Deputy Mayor Carol Robles-Roman. The Deputy Mayor highlighted the achievements of OATH's Center for Mediation Services, and thanked OATH Chief Judge Roberto Velez for his work on the Center and the display windows. Chief Judge Velez and John Jay Professor Maria Volpe also spoke. This event marked the productive partnership between CUNY DRC, John Jay College, and OATH to promote mediation city-wide.

OATH Hosts NYU Law School Mediation Clinic

In conjunction with the New York University School of Law, OATH has established a mediation clinic to train second- and third-year law students in mediation theory, skills and practice. The clinic completed its first semester in Fall of 2004.

Cases Referred to the Center for Mediation Services (March 2003 – March 2005)

| Referring Agency | No. of Cases Referred | No. of Cases Mediated | No. of Cases Resolved |
|----------------------------------|-----------------------|-----------------------|-----------------------|
| Police Dep't | 30 | 16 | 13 |
| Health & Hosps. Corp. | 12 | 10 | 9 |
| Fire Dep't | 3 | 3 | 2 |
| Dep't of Envtl. Prot. | 2 | 2 | 2 |
| Dep't of Health & Mental Hygiene | 2 | 1 | 1 |
| Law Dep't | 3 | 2 | 2 |
| Dep't of Employment | 1 | 1 | 1 |
| Human Rights Comm'n | 1 | 1 | 1 |
| Totals | 54 | 36 | 31 (86%) |

During the Summer of 2004, OATH Judge Raymond Kramer was appointed to be an NYU Law adjunct faculty member. Along with Professor Sarah Burns, Judge Kramer guided a course in which students took part in an intensive 32-hour skills training session that emphasized basic mediation techniques. After the intensive training, the class met weekly for further exploration of mediation techniques, along with theoretical discussion of the role of the mediator and the place of mediation in institutional justice systems.

The students also mediated several simulated disputes, one of which was filmed for critique and review. The semester culminated in students co-mediating disputes at OATH, under the guidance of experienced OATH mediators. According to Mitchell Kent, one of the clinic students, the course was a good learning experience, and mediating an actual case at OATH made him a better mediator. "It was worth 10,000 simulations," Kent said shortly after the mediation session.

Judge Kramer looks forward to further building the clinic during the Fall 2005 semester.

OATH DECISIONS

March 2004 - February 2005

► Disciplinary Proceedings

A. Defense, mitigation

Defenses or mitigatory factors were successfully raised by employees charged with misconduct in several decisions issued during the reporting period. An employee charged with disobeying an order may argue in defense that the order was unlawful. In *Department of Environmental Protection v. Ebanks*, OATH Index No. 263/05 (Feb. 10, 2005), ALJ John B. Spooner recommended dismissal of a charge that an employee was insubordinate for refusing to attend a supervisory conference without his union representative, where the employee was entitled to union representation at the conference under section 75(2) of the Civil Service Law because he was "a potential subject of discipline."

In two cases during the reporting period, City employees raised their experiences with the September 11th attack and its aftermath as a defense or in mitigation of charges of misconduct. In *Human Resources Administration v. Royal*, OATH Index No. 1087/04 (July 2, 2004),* ALJ Spooner found that a clerical associate did not commit misconduct when she submitted timesheets on behalf of a co-worker for the week of the 9/11 disaster, where the employee acted in good faith with no expectation that her acts would benefit herself in any way.

In *Department of Sanitation v. Delio*, OATH Index No. 900/04 (Apr. 20, 2004), a sanitation worker admitted to a five-month absence without leave. The department sought to terminate the worker for the offense, but the employee argued that the penalty should be mitigated due to the psychological trauma he suffered as a result of working at "ground zero" following the attack on the World Trade Center. ALJ Spooner credited the evidence the worker had offered in mitigation and recommended a lesser penalty of 30 days' suspension. The parties subsequently settled the matter with the sanitation worker agreeing to accept a thirty-day suspension and one year of probation.

B. Sexual harassment, sexual assault

In one case during the reporting period a correction officer was found to have engaged in a single

instance of sexual harassment towards a female officer, while in another case, two officers were found to have failed to take action to prevent a sexual assault on an inmate. In *Department of Correction v. Skeete*, OATH Index No. 254/04 (June 3, 2004), ALJ Donna Merris sustained charges alleging a single instance of sexual harassment, finding that the correction officer rubbed his groin against a female officer's buttocks in violation of Department Directive 2220R. ALJ Merris credited the testimony of the complainant and two correction officer witnesses over respondent's denial of the allegation. The recommended penalty was a 45-day suspension.

In *Department of Correction v. Way*, OATH Index Nos. 913/04 & 914/04 (June 25, 2004), ALJ Suzanne Christen found two correction officers did not provide proper care, custody and control of inmates in connection with failing to prevent or detect a violent sexual assault upon an inmate. ALJ Christen recommended termination.

C. Bribe receiving

In *Department of Education v. Vecchione*, OATH Index Nos. 693/04, 708/04, 712/04 & 874/04 (Dec. 1, 2004), four custodial engineers were charged with accepting kickbacks in connection with window washing jobs at public schools. ALJ Rosemarie Maldonado found that the proof was sufficient to establish that custodians Vecchione and Cann engaged in bid rigging and accepted kickbacks, for which she recommended their termination. The judge found the proof insufficiently reliable as to establish the kickback charges against custodians Romanelli and Werbelow. The Chancellor rejected the judge's recommendation with respect to custodian Werbelow, finding he committed misconduct and imposed a two-month suspension without pay. Chancellor's Dec. (Apr. 11, 2005). The judge found custodian Romanelli failed to report his arrest as required by Departmental regulations, and a five-day suspension was recommended for that violation.

D. Failure to report for duty

In *Transit Authority v. Bonner*, OATH Index No. 767/04 (Aug. 27, 2004), ALJ Faye Lewis sustained in part charges alleging that a supervisor at the Transit Authority's security operations center reported late to work during the blackout of 2003 and failed to make an attempt to get to work until ordered to do so. Given the un rebutted testimony that such supervisors are required to make every effort to report to work during an emergency, ALJ Lewis recommended that the

* 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.

supervisor pay a \$100 fine. The Authority later imposed a five-day suspension without pay as the penalty. Auth. Dec. (Oct. 12, 2004).

E. Off-duty misconduct

It has long been held that a civil servant may be disciplined for off-duty misconduct where there is a nexus between the conduct and the employee's job or where the misconduct demonstrates moral turpitude. In *Department of Correction v. Cami*, OATH Index No. 1011/04 (Sept. 21, 2004), a correction officer was found to have placed wagers on sporting events with a bookmaker while off-duty. ALJ Merris found that, notwithstanding that respondent's conduct as a player would not likely subject to him criminal penalty, the knowing placement of wagers with a bookmaker, who might be subject to criminal penalties, was antithetical to respondent's status as a peace officer and was unbecoming conduct. Because respondent did not disassociate himself from the activity prior to petitioner's confronting him with the allegation, ALJ Merris recommended a thirty-day suspension without pay.

F. Evidence, admissibility

In a disciplinary hearing an employer may not offer an employee's prior disciplinary record into evidence if the evidence is offered to show propensity for misconduct. However, where the prior misconduct involves dishonesty, it may properly be offered to attack the employee's credibility. Evidence of past discipline is also admissible when offered to rebut an employee's claim that he or she was unaware that the alleged conduct was prohibited. In *Department of Correction v. Gomez*, OATH Index No. 217/04 (Mar. 22, 2004), ALJ Lewis considered evidence of a prior guilty plea to making a false statement in an official interview. ALJ Lewis also considered evidence of a prior disciplinary action – for failure to comply with procedures for closing cell doors – as impeachment of the officer's statement that she was unaware of the rule she was alleged to have violated.

In *Department of Correction v. Chalmers*, OATH Index No. 413/04, mem. dec. (June 23, 2004), modified on penalty, Comm'r Dec. (Oct. 5, 2004), a correction officer was accused of several acts of domestic violence, as well as failing to report related criminal arrests. In a preliminary ruling, ALJ Raymond Kramer found that a Family Court order of protection was not a sealed or confidential document such that it was unavailable as evidence in a disciplinary proceeding, but that the police 911 tape was unavailable for evidentiary use, along with all related

police reports and documents, because they were sealed by operation of law when the officer's related criminal cases were dismissed.

► Disability Proceedings

Pursuant to section 72(5) of the Civil Service Law, an agency may place an employee on immediate pre-hearing involuntary leave where "there is probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property or would severely interfere with operations." An employee placed on pre-hearing involuntary leave may challenge, in the disability hearing, both the propriety of the initial placement on pre-hearing leave and whether he or she is unfit as of the hearing date and should remain on involuntary leave. See *Barrett v. Miller*, 179 Misc. 2d 24, 682 N.Y.S.2d 552, 559 (Sup. Ct. N.Y. Co. 1998). If it is ultimately determined that pre-hearing leave was improperly imposed, an employee may be awarded restoration of lost leave time or lost pay incurred during the pre-hearing leave.

In *Department of Citywide Administrative Services v. H.M.*, OATH Index No. 1670/04 (July 26, 2004), ALJ Lewis found that the agency had probable cause to place an accounts receivable supervisor on pre-hearing involuntary leave pursuant to section 72 of the Civil Service Law. The employee had told his supervisors and the City's examining psychiatrist that he regularly heard inner voices and the doctor testified that no one could predict what voices the employee would hear in the future or what those voices would tell him to do. Absent any proof that the employee was taking medication to control the auditory hallucinations, the judge determined that he was unfit to perform his job duties due to a mental disability. Continuation of the involuntary leave of absence was recommended.

► Vehicle Forfeiture

As reported in Benchnotes volume 30, OATH began to hear vehicle forfeiture cases in February 2004. The hearings have been conducted pursuant to an order of the U.S. District Court to determine the Police Department's right to retain vehicles seized for civil forfeiture as instrumentalities of crimes pursuant to section 14-140 of the Administrative Code. Although the court's order also covered vehicles seized for use as evidence in criminal cases, that portion of the order was reversed on appeal. *Krimstock v. Kelly*,

99 Civ. 12041 (MBM), amended order and judgment (Jan. 22, 2004), *vac. in part & rem. sub. nom., Jones v. Kelly*, 378 F.3d 98 (2d Cir. 2004).

In *Police Department v. McFarland*, OATH Index No. 1124/04, mem. dec. (Feb. 24, 2004), ALJ Charles Fraser ruled that the burden is on the Police Department to show: (i) that probable cause existed for the arrest pursuant to which the vehicle was seized; (ii) that it is likely that the Department will prevail in a civil action for forfeiture of the vehicle; and (iii) that it is necessary that the vehicle remain impounded pending final judgment in the forfeiture action. Where the Department also proves a heightened risk to either public safety or risk of loss or destruction of the vehicle, such retention is unconditional. Otherwise, retention was subject to the posting of a bond, usually fixed at the estimated trade-in value of the vehicle.

For example, unconditional retention was ordered in *Police Department v. Solomon*, OATH Index No. 1783/04, mem. dec. (Apr. 22, 2004). ALJ Fraser found probable cause for the owner's arrest for driving while intoxicated, and likelihood of success in the forfeiture action, based upon a 0.126 percent blood alcohol content at the time of arrest. The heightened necessity to retain the vehicle without bond was premised on the fact that the owner was driving with a suspended license. ALJ Fraser rejected the defense that the owner was not operating his vehicle at the time of arrest, as his presence in the driver's seat of the car, with the key in the ignition and the engine running, was sufficient to support an inference that he intended to drive the car, and the owner failed to rebut such inference.

In *Police Department v. Johnson*, OATH Index No. 2211/04, mem. dec. (July 15, 2004), the Police Department seized a 2000 Jaguar, in connection with an arrest for driving while intoxicated. The arresting officer had observed the owner driving the wrong way down a one way street on two flat tires. The officer's report indicated that the owner had blood-shot eyes, alcohol on his breath and refused to submit to a breathalyzer test. ALJ Lewis found that the Department was entitled to retain the vehicle pending the forfeiture hearing; but she did not find the Department showed a heightened risk to public safety necessary to order unconditional retention. Therefore, she permitted respondent to recover the car upon posting a bond in the amount of the approximate value of the vehicle, \$20,775.

Where the Police Department fails to prove the value of the seized vehicle, a bond may still be ordered, but for a nominal amount. For instance, in *Police Department v. Hawkins*, OATH Index No. 274/05, mem. dec. (Aug. 20, 2004), ALJ Spooner held that the Police Department failed to prove that return of the vehicle would pose a heightened risk to the public safety, and, absent evidence of the value of the vehicle, Judge Spooner set the bond amount at \$1,000.

In December 2004, the District Court ordered that bonds not be required in vehicle retention cases until "a procedure for securing a bond" is put in place. *Krimstock v. Kelly*, 99 Civ. 12041 (MBM), amended order and judgment (S.D.N.Y. Jan. 22, 2004), amended (Dec. 23, 2004).

One case where release of the vehicle was ordered was *Police Department v. Williams*, OATH Index No. 1899/04, mem. dec. (May 14, 2004), where ALJ Kara Miller found that the Police Department did not show that use of the car "directly and materially" contributed to the commission of a crime. A large quantity of narcotics was found by police searching the home the vehicle owner shared with a man. The owner and the man were arrested and her car, which was parked in front of the home, was searched but no drugs were found. Nevertheless, the car was seized, based upon the allegation that it was used to transport narcotics. The only evidence that the car was so used was an unattributed five-word statement "vehicle used to transport narcotics" contained in the property voucher. Judge Miller found that, without any information regarding the source of the hearsay statement, it was insufficient to show that the car was used to transport drugs and she ordered the release of the vehicle.

Where the vehicle owner is different than the driver from whom the vehicle was seized, the owner can assert an "innocent owner" defense, which the Police Department bears the burden to disprove. See *Property Clerk, New York City Police Dept v. Pagano*, 170 A.D.2d 30, 573 N.Y.S.2d 658 (1st Dep't 1991). The innocent owner defense was successfully asserted in *Police Department v. Harris*, OATH Index No. 971/05, mem. dec. (Dec. 27, 2004), *aff'd*, Index No. 05/400677, Dec. and Order (Sup. Ct. N.Y. Co. May 9, 2005) and it was unsuccessfully raised in *Police Department v. Bloise*, OATH Index No. 2138/04, mem. dec. (June 17, 2004). In *Harris*, the Police Department seized a vehicle, which was jointly owned by a husband and wife, following the husband's arrest for criminal sale and possession of a controlled

substance. The husband had driven the car to a location where he engaged in an illegal drug sale. The wife, who was not present during the drug sale, raised an innocent owner claim. Judge Kevin Casey ruled that under *Pagano*, the burden is on the Police Department to show that the wife knew or should have known that the husband would use the car for a criminal purpose. The judge found that the Department did not meet its burden. Although the husband had a long criminal record, his most recent offense was committed in 1997 and none of the previous offenses involved the use of a car to commit a crime. ALJ Casey thus ordered the return of the vehicle.

In *Bloise*, the Police Department seized a vehicle in connection with the driver's arrest for participation in a drag race. At the hearing, the driver's father, the registered and titled owner of the vehicle, asserted an innocent owner defense by denying knowledge that his son had intended to use the vehicle for a speed competition. Although the father was the registered owner of the vehicle, ALJ Miller found that the vehicle had been modified for high speed, performance driving, and that the vehicle was primarily used by the son. Judge Miller therefore concluded that respondent knew or should have known that his son would drive the vehicle illegally.

► Contracts

During the reporting period, OATH judges sat as the Chair of several Contract Dispute Resolution Board (CDRB) panels, hearing claims brought by suppliers arising out of City contracts.

In *ADC Contracting & Construction, Inc. v. Department of Parks and Recreation*, OATH Index No. 1010/04, mem. dec. (June 24, 2004), the supplier sought compensation for work associated with soil stabilization necessary for the installation of a pavilion and decking area in a contract to reconstruct the former Gertrude B. Ederle Amphitheater site. The City moved to dismiss, arguing that the supplier waived its claim in the extension of contract time application. In the extension application, the supplier agreed to "waive and release any and all claims including, but not limited to damages for delay or any cause whatsoever which we may have against the City of New York in connection with the aforesaid contract." The supplier argued that by filing its claim with the commissioner prior to executing the waiver, the claim should be exempted from the waiver. The CDRB, chaired by Chief Judge Roberto Velez, found that waiver to be clear on its face and denied the claim.

A claim for "omitted work" was denied by the CDRB in *Kirkyla & Remeza, Inc. v. Department of Design and Construction*, OATH Index No. 1060/04, mem. dec. (June 11, 2004). The supplier sought compensation in the form of unrealized profits and overhead expended in connection with a terminated contract. The Board, chaired by ALJ Kramer, found that under the plain and clear terms of the contract, the contractor was entitled to payment solely for work done and costs actually incurred for the terminated portion of the contract, and not for unrealized profits.

In *Cal-Tran Associates, Inc. v. Department of Transportation*, OATH Index No. 1007/04, mem. dec. (July 8, 2004), the CDRB, chaired by ALJ Miller, awarded the supplier \$198,301.19 in additional compensation for patching work on the concrete substructure of the 65th Street and Bay Parkway Bridges over the Transit Authority's Sea Beach Line in Brooklyn.

In *O'Brien Kreitzberg on behalf of Ace Contracting Inc. v. Department of Design & Construction*, OATH Index No. 1210/04, mem. dec. (July 21, 2004), a plumbing subcontractor's claim for additional compensation for trenching and excavation work as part of a contract to renovate five Fire Department dispatch communications offices was denied by the Board, chaired by ALJ Spooner. The Board found that the express language of the contract placed responsibility for the disputed work on the subcontractor.

A claim by a construction management firm that sought salary increases for the firm's project manager and office engineer exceeding the contract's provision allowing for salary increases at the rate of the consumer price index was denied by the Board, chaired by ALJ Merris. *Jacobs Facilities, Inc. v. Dep't of Sanitation*, OATH Index No. 1524/04, mem. dec. (July 20, 2004).

► Procedure

A. Service of the petition

Rule 1-23(b) of OATH's Rules of Practice provides "[s]ervice of the petition shall be made pursuant to statute, rule, contract, or other provision of law applicable to the type of proceeding being initiated." Service of the petition in a civil service disciplinary proceeding is governed by section 6.4.2 of the City Personnel Director's Rules, which requires personal service of the charges on the employee where the employee is a City resident. If personal service cannot be made, or if the employee is not a City resident, ser-

vice by registered or certified mail is required. Often an agency will attempt to personally serve disciplinary charges on the employee at the work site, usually documenting service by directing the employee to sign a form acknowledging receipt of the charges. What should the person serving the charges do if the subject refuses to sign the form? The answer is leave a copy of the charges and document that the employee refused to sign the acknowledgment form.

That lesson was brought home in two rounds of litigation between the Department of Sanitation and sanitation worker Michael Yovino. The first case involved charges of misconduct, which allegedly occurred in 1995 and 1996. After a hearing at OATH conducted in 2000, Administrative Law Judge Dierdra Tompkins sustained those charges and recommended a 30-day suspension. The Commissioner, while adopting Judge Tompkins's factual determinations, rejected her penalty recommendation and terminated respondent. *Dep't of Sanitation v. Yovino*, OATH Index Nos. 890/00 & 891/00 (Oct. 27, 2000), *modified on penalty*, Comm'r Dec. (Nov. 9, 2000) (*Yovino I*). On appeal the Civil Service Commission found the service of charges defective and reinstated the employee in May 2002. *Yovino v. Dep't of Sanitation*, NYC Civ. Serv. Comm'n No. CD 02-29-R (Apr. 10, 2002). Specifically, the Civil Service Commission criticized the agency's practice of requiring employees to sign for the charges being served and, when they refused to sign, failing or refusing to provide them with copies.

During the pendency of *Yovino I* in 2000, the agency served the worker with twenty-three sets of charges concerning alleged misconduct in 1998, 1999 and 2000, which formed the basis for *Yovino II*. The Department did not go forward with the *Yovino II* charges because employee had been fired in the interim pursuant to *Yovino I*. In January 2004, after the employee was reinstated following his successful appeal in *Yovino I*, the Department calendered the *Yovino II* charges at OATH. *Dep't of Sanitation v. Yovino*, OATH Index No. 992/04, mem. dec. (Aug. 11, 2004) (*Yovino II*). The worker then challenged the validity of service of the *Yovino II* charges. ALJ Kramer held a traverse hearing where he took testimony from witnesses to determine if the charges were properly served. The Department employees who served the charges testified that when they delivered complaints to the worker, he refused to sign for them and then they left him a copy of the complaints. In contrast, the worker testified that the Department employees did not leave a copy of the complaints with him after he refused to sign for them. ALJ Kramer

credited the worker's testimony, noting that service in *Yovino II* occurred before the reversal on appeal in *Yovino I*, therefore it was likely that the Department had followed the same defective service practice in *Yovino II* that it had in *Yovino I*. Judge Kramer found however, that as to 18 charges properly re-served on the employee four years later, those charges were not time-barred, and the worker's motion to dismiss those charges was denied.

B. Amendment of pleadings

Absent a showing of undue prejudice, amendment of pleadings is freely permitted in administrative practice. Under section 1-25 of OATH's Rules of Practice, a party may amend pleadings as of right if the amendment is made more than twenty-five days prior to the trial date. If amendment is sought closer to the trial date, it must be made on application to the trial judge.

In *Commission on Human Rights ex rel. Thomas v. Space Hunters, Inc.*, OATH Index No. 997/04, mem. dec. (June 22, 2004), ALJ Kramer granted the Commission's request for leave to amend the complaint to correct the date of alleged discriminatory conduct from on or about November 16, 2002, to on or about November 6, 2002. The employer objected to the motion but failed to show significant prejudice. The Commission also requested sanctions against the employer for spoliation of evidence, a surveillance videotape. As no discovery disputes had been presented nor any orders compelling compliance with discovery requests been made, ALJ Kramer found no basis for imposing sanctions upon the employer.

C. Subpoena practice

A party may seek a subpoena for a witness and/or documents from a non-party by making an application to the trial judge, on twenty-four hours notice to other parties. 48 RCNY § 1-43. If a party opposes the subpoena, the party should promptly make an application to the trial judge to quash or modify the subpoena.

In *Commission on Human Rights ex rel. De La Rosa v. Manhattan and Bronx Surface Transit Operating Authority*, OATH Index No. 1141/04, mem. dec. (July 9, 2004), the Commission brought a discrimination proceeding on behalf of two disabled complainants who alleged that they were denied access to a bus. The bus company sought to show that complainants were "professional litigants" who fabri-

cated their complaint by requesting subpoenas for complainants' Social Security income records to ascertain whether prior settlement payments had been reported. ALJ Lewis refused to issue the subpoenas finding that the accuracy of complainants' income reports was a collateral issue which would not establish whether the allegations in complaint were true.

► Real Property

A. Loft Law

The Loft Law permits a loft building owner to pass some of the costs to legalize the building along to the tenants. When the tenants dispute a final rent adjustment application, they usually do so on four grounds: (1) the owner did not do the work claimed to have been done; (2) the owner did the work the owner claims to have done, but it cost much less than the owner claims that it did; (3) the owner did the work and got the price right, but the work was not required to legalize the building, so the tenants should not have to pay for it; or (4) the owner did the work, got the price right, and the work was required for legalization, but it should be divided between both the residential and commercial tenants or somehow divided up in a way other than how it was divided.

In a final rent adjustment case decided by ALJ Fraser, *Matter of Moskowitz*, OATH Index No. 1841/04 (June 10, 2004), *aff'd*, Loft Bd. Order No. 2873 (July 22, 2004), the issues included how the owner calculated the costs of the sprinkler system and whether the cost of installing a bulkhead may be attributed solely to the residential tenants or to the commercial tenants as well. ALJ Fraser held that since the bulkhead only benefitted the residential tenants, its costs would only be apportioned to them and not the commercial tenants, and that the owner improperly calculated how much of the sprinkler system cost could be passed along to the tenants.

B. Zoning

OATH conducts hearings pursuant to the City Padlock Law where the Department of Buildings seeks to close a residentially zoned premises which is being used, in whole or in part, for commercial purposes. In *Department of Buildings v. Owners, Occupants and Mortgagees of 1819 East 13th Street, Kings County*, OATH Index No. 1946/04 (June 30, 2004), ALJ Miller recommended closure of a residentially zoned premises where uncontroverted evidence established

that a radio station was present on the second floor of the subject premises.

In *Department of Buildings v. Owners, Occupants and Mortgagees of 333 East 52nd Street, New York County*, OATH Index No. 400/05 (Feb. 2, 2005), ALJ Kramer found that a psychic consulting business run out of an apartment building located in a residential zone constituted an illegal commercial use of the premises in violation of the Zoning Resolution insofar as the occupants advertised the business through the use of three exterior signs. In the absence of such signs, the psychic consulting business otherwise met the requirements for a home occupation accessory use. A closure order was recommended in the event that the occupants failed to immediately remove the exterior signs.

C. Mitchell-Lama

OATH was designated to conduct a hearing to determine whether a Mitchell Lama project's Board of Directors should be removed for misconduct. In *Department of Housing Preservation and Development v. ATA Housing Corp.*, OATH Index No. 2099/04 (June 8, 2004) ALJ Fraser found that the owner of the Mitchell-Lama project known as Atlantic Plaza Towers failed to pay its Con Edison bill, placing its tenants at risk of electrical power shut-off, and failed to enter into a repayment agreement for more than \$1 million in unapproved spending. ALJ Fraser held that these failures constituted violations of the owner's mortgage agreement with the Department. The ALJ recommended removal of the board of directors.

D. Watershed

OATH has been designated to hear appeals from denials by the Department of Environmental Protection of requests for a variance from the requirements for subsurface sewage treatment systems. In *Primavera v. Department of Environmental Protection*, OATH Index No. 1017/05 (Jan. 31, 2005), a developer, who owns two undeveloped adjacent lots in the watershed area north of New York City, sought a variance of the rules governing modification of existing sewage systems on the property to permit it to build two four-bedroom houses. ALJ Casey found respondent's denial of the variance application was not an abuse of discretion. Denial of the variance did not cause petitioner substantial hardship because without the variance, petitioner could build one house and sell it for a smaller profit.

► Licensing

During the reporting period OATH conducted license revocation proceedings for the Department of Buildings and the Department of Health and Mental Hygiene. An enforcement proceeding may impact upon building safety or sanitary conditions at a restaurant. One such case involved past criminal conduct by a site safety manager and the other concerned obstruction of an inspection by a restaurant owner.

In *Department of Buildings v. Mineo*, OATH Index No. 1283/04 (June 7, 2004), a site safety manager had pled guilty to criminal charges of attempted bribe receiving. ALJ Kramer found that site safety managers are entrusted with protecting public safety, and that accepting bribes compromises the good moral character necessary for such a license. Because of the severity of the violation and the need for deterrence, ALJ recommended license revocation.

In *Department of Health and Mental Hygiene v. Orb, Inc.*, OATH Index No. 349/04 (Aug. 3, 2004), the principal of the corporate owner of a restaurant was found to have obstructed and interfered with a Department of Health inspector's performance of his official duties during the course of a random unannounced sanitary inspection. The owner called police to the scene and made accusations without reasonable basis and in bad faith, which prevented the inspector from completing his inspection, and led to his arrest and temporary detention. The fact that the Department also scheduled a hearing at its internal administrative tribunal for the same allegations was not an election of remedies preempting this proceeding. ALJ Kramer recommended a three-month suspension of the restaurant's food service permit, while also suggesting that a voluntarily agreed upon monetary fine might be a better resolution.

► Human Rights

OATH hears discrimination claims brought by the City Commission on Human Rights based on violations of the City Human Rights Law. One case during the reporting period involved an employee's claim that he was discriminated against due to his religious practice, and one case involved a tenant's claim that she was discriminated against due to her disability.

In *Jaggi v. Police Department*, OATH Index No. 1498/03 (Apr. 28, 2004), ALJ Merris found that the Police Department violated an employee's rights

by refusing to allow him to wear a turban while working as a Traffic Enforcement Agent. ALJ Merris determined that the employee, a Sikh, established a *prima facie* case of religious discrimination by showing that he has a *bona fide* religious belief that wearing a turban is required by the Sikh religion, that he informed the Department of his belief, and that the Department disciplined him for wearing a turban. ALJ Merris rejected the Department's arguments that granting the petition would cause an undue hardship on the Department, would compromise employee safety, would diminish the esprit de corps that derives from traffic enforcement agents wearing uniforms, or would violate the Establishment Clause of the United States Constitution. ALJ Merris recommended that the employee be reinstated to his former position as a Traffic Enforcement Agent and be allowed to wear a turban while on duty.

In *Commission on Human Rights ex. rel. Martin v. Hudson Overlook, LLC*, OATH Index No. 2094/04 (Jan. 20, 2005), ALJ Miller found a building owner and officer failed to provide a reasonable accommodation for a disabled tenant and recommended that the owner and officer be required to reconfigure the exterior stairs at the front entrance of the building, install a suitable ramp, and replace or reconfigure the front entrance doors with accessible doors. Judge Miller further recommended \$10,000 in compensatory damages and a \$5,000 a civil penalty.

► Labor Law

Pursuant to section 220 of the Labor Law, OATH hears claims brought by the Comptroller on behalf of workers who claim that they have not been paid prevailing wages and benefits for work on public works projects. During the reporting period, ALJ Fraser heard a prevailing wage claim relating to City-employed carpenters and supervisor carpenters pursuant to section 220(8) and (8-d) of the Labor Law. *Comptroller v. Office of Labor Relations*, OATH Index No. 254/05 (Feb. 28, 2005). ALJ Fraser upheld the Comptroller's determination of prevailing rates of wages and prevailing practices for benefits over objections by the Office of Labor Relations and the City employees' union. After ALJ Fraser issued his report and recommendation, the parties executed a settlement where they agreed upon a compromised basic rate of wages and supplemental benefits.

Administrative Law

- Challenges to Agency Rules -

First in a Series

This article is derived from a CLE program entitled "Administrative Law: The Basics for New York State and New York City" that was presented in October 2004 at the Association of the Bar of the City of New York by Deputy Chief Administrative Law Judge Charles D. McFaul, Anthony Crowell, Special Counsel to the Mayor, and Natalie Gomez-Velez, Assistant Professor, CUNY School of Law. The course materials were prepared by Martin Rainbow, Senior Law Clerk at OATH. BenchNotes will carry excerpts from the course materials in future issues. The first article is on Challenges to Agency Rules.

Four preliminary considerations are raised with respect to judicial review of an agency rule:

1. Standing

Was the party harmed by the regulation and whether the interest the party seeks to protect is within the "zone of interests" protected by the statute? "The zone of interests test, tying the in-fact injury asserted to the governmental act challenged, circumscribes the universe of persons who may challenge administrative action. Simply stated, a party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted (citations omitted)." *Society of Plastics Industry, Inc. v. County of Suffolk*, 77 N.Y.2d 761, 772, 570 N.Y.S.2d 778, 785 (1991); *Mahoney v. Pataki*, 98 N.Y.2d 45, 745 N.Y.S.2d 760 (2002). New York courts have consistently allowed organizations to sue on behalf of their members. *Dental Society of New York v. Carey*, 61 N.Y.2d 330, 474 N.Y.S.2d 262 (1984).

2. Timeliness

The four-month limitations period of CPLR 217 has been applied to challenges to agency regulations, that is, four months from when the rule takes effect. Early cases barred pre-enforcement challenges to an agency regulation, but that prohibition no longer applies. *New York City Health & Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 616 N.Y.S.2d 1 (1994) (four-month limitation period applied to challenges to the validity of a rule and period began to run when

party received a letter from the agency advising it of the new rule).

3. Procedure

Article 78 of the CPLR is the procedural mechanism for judicially challenging a state agency rule. There are three grounds for challenging a rule: procedural error, error of pure law, or the rule is arbitrary and capricious. "The challenger must establish that a regulation 'is so lacking in reason for its promulgation that it is essentially arbitrary.'" (citations omitted)." *New York State Ass'n of Counties v. Axelrod*, 78 N.Y.2d 158, 166, 573 N.Y.S.2d 25, 29 (1991) (invalidating agency rule reducing Medicaid reimbursement rate percentage as lacking a rational basis). To survive a judicial challenge to an agency rule, the courts have required substantial compliance with the procedures of the State Administrative Procedure Act (SAPA), except for the time frames of SAPA procedures, which have been strictly applied. SAPA § 202(8); P. Borchers & D. Markell, *New York State Administrative Procedure and Practice* § 10.18. The substantial compliance standard of the statute "specifically relates to the form of notices . . . and not to time periods." *Desmond-America v. Jorling*, 153 A.D.2d 4, 9, 550 N.Y.S.2d 94, 98 (3d Dep't 1989) (filing of notice one day late was not substantial compliance under SAPA and rendered DEP regulation ineffective); see *People v. Harris Corp.*, 104 A.D.2d 130, 483 N.Y.S.2d 442 (3d Dep't 1984) (dismissing criminal charges based on agency regulation that was held to be ineffective due to failure to comply with SAPA rulemaking time periods).

4. Standard of Review

The courts give agencies deference in areas within the agency's technical expertise, but not in areas beyond the agency's special competence, such as compliance with the procedures of SAPA. P. Borchers & D. Markell, *New York State Administrative Procedure and Practice* § 10.17. "The statute [SAPA] outlines uniform administrative procedures that State agencies must follow in their rule making, adjudicatory and licensing processes and that courts review in their usual de novo adjudicative fashion." *Industrial Liaison Committee of the Niagara Falls Area Chamber of Commerce v. Williams*, 72 N.Y.2d 137,

(continued on next page)

144, 531 N.Y.S.2d 791, 794 (1988). A court's role in reviewing agency rulemaking "is not to determine if agency action was correct or to substitute its judgment for that of the agency, but rather to determine if the action taken by the agency was reasonable." *Chemical Specialties Manufacturers Ass'n v. Jorling*, 85 N.Y.2d 382, 396, 626 N.Y.S.2d 1 (1995) (finding DEC did not act arbitrarily when it adopted a rule which added high concentration DEET to list of restricted-use pesticides).

Separation of Powers Doctrine

The separation of powers doctrine provides that the legislature enacts laws, the executive, through administrative agencies, enforces the laws and the judiciary interprets the law. Agency action is *ultra vires* and violates the separation of powers doctrine if it crosses the line "between administrative rule-making and legislative policy making." The power to make rules and regulations is "administrative, not legislative." *Acorn Employment Service v. Moss*, 292 N.Y. 147, 153 (1944). "[A]n agency head may make rules to carry out the express function of his agency as conferred by statute, but he may not, even to promote the public good and welfare, create policy and encroach on legislative function." *Edenwald Contracting Co. v. City of New York*, 86 Misc. 2d 711, 715, 384 N.Y.S.2d 338, 341 (Sup. Ct. N.Y. Co. 1974), *aff'd*, 47 A.D.2d 610, 366 N.Y.S.2d 363 (1st Dep't 1975).

In *Boreali v. Axelrod*, 71 N.Y.2d 1, 11, 523 N.Y.S.2d 464, 469 (1987), the court held that the Public Health Council exceeded its authority under its enabling statute when it promulgated comprehensive regulations governing tobacco smoking in areas open to the public. Although the court found that the broad enabling statute did not unconstitutionally delegate legislative authority to the Health Council, it nevertheless found that "the agency stretched that statute beyond its constitutionally valid reach when it used the statute as a basis for drafting a code embodying its own assessment of what public policy should be." 71 N.Y.2d at 9, 523 N.Y.S.2d at 468.

By contrast, in *Medical Society of the State of New York v. Serio*, 100 N.Y.2d 854, 864, 768 N.Y.S.2d 423, 429 (2003), the court held that the Superintendent of Insurance did not "exceed the scope" of his "constitutionally conferred mandate by using it as a basis for engaging in inherently legislative activities" where the agency promulgated a regulation shortening time frames for filing claims.

Delegation of Rulemaking Authority

An administrative agency possesses only those powers expressly delegated to it, together with those powers required by necessary implication. *Beer Garden, Inc. v. New York State Liquor Auth.*, 79 N.Y.2d 266, 276, 582 N.Y.S.2d 65, 69 (1992). Improper delegation occurs when the legislature fails to provide sufficient standards for the executive or administrative agency to act when promulgating rules. When the legislature grants standardless discretion to the executive or administrative agency to exercise rulemaking authority there has been an improper delegation of legislative power. The Court of Appeals has held:

[T]here is no constitutional prohibition against the delegation of power [by the legislature], with reasonable safeguards and standards, to an agency or commission to administer the law as enacted by the Legislature. The Legislature may constitutionally confer discretion upon an administrative agency only if it limits the field in which that discretion is to operate and provides standards to govern its exercise. This does not mean, however, that a precise or specific formula must be furnished in a field where flexibility and adaptation of the legislative policy to infinitely varying conditions constitute the essence of the program.

Levine v. Whalen, 39 N.Y.2d 510, 515, 384 N.Y.S.2d 721, 723 (1976) (citations omitted).

In *Medical Society of State of New York v. Serio*, 100 N.Y.2d at 865, 768 N.Y.S.2d at 430, the Court of Appeals noted that the legislature "may declare its will" and after "fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation." There the court found that agency regulation shortening time frames for filing no fault automobile insurance claims and submitting proof of loss was a detail properly left by the legislature to the agency charged with enforcing the no-fault auto insurance law.

Broad delegations of power by the legislature have been upheld by the Court of Appeals. *Boreali*, 71 N.Y.2d at 10-11, 523 N.Y.S.2d at 469, citing *Levine v. Whalen*, 39 N.Y.2d 510, 384 N.Y.S.2d 721 ("protection and promotion of the health of the inhabitants of the State"; "fit and adequate" facilities); *Sullivan County*

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Harness Racing Assn. v. Glasser, 30 N.Y.2d 269, 332 N.Y.S.2d 622 ("public interest, convenience or necessity"; "best interests of racing generally"); *Martin v. State Liquor Auth.*, 15 N.Y.2d 707, 256 N.Y.S.2d 336 ("public convenience and advantage"); see *Chemical Specialities Manufacturers Ass'n v. Jorling*, 85 N.Y.2d 382, 389-90, 626 N.Y.S.2d 1 (1995) (broad but express delegation contained in enabling statute gives the DEC Commissioner the authority, through rule-making, to ban outright dangerous pesticides).

Ultra Vires Rulemaking

When an executive or administrative body exercises rulemaking authority in an area where it has not been granted authority by the legislature, then the executive or administrative agency has taken *ultra vires* action. See *Boreali v. Axelrod*, 71 N.Y.2d 1, 11, 523 N.Y.S.2d 464, 469 (1987); *Under 21 v. City of New York*, 65 N.Y.2d 344, 492 N.Y.S.2d 522 (1985); *Beer Garden, Inc. v. New York State Liquor Auth.*, 79 N.Y.2d 266, 276, 582 N.Y.S.2d 65, 69 (1992); *McNulty v. New York State Tax Comm'n*, 70 N.Y.2d 788, 791, 522 N.Y.S.2d 103, 104 (1987); *State Division of Human Rights v. Genesee Hospital*, 50 N.Y.2d 113, 118, 428 N.Y.S.2d 210, 211 (1980); *Finger Lakes Racing Ass'n, Inc. v. New York State Racing & Wagering Bd.*, 45 N.Y.2d 471, 480, 410 N.Y.S.2d 268, 273 (1978).

In *Beer Garden*, 79 N.Y.2d 266, 582 N.Y.S.2d 65, the court struck down a State Liquor Authority (SLA) regulation as *ultra vires* because it was inconsistent with the authorizing legislation. The SLA applied the regulation to sanction licensees whenever disorderly conduct occurred on a licensed premises. The authorizing legislation gave the SLA the power to sanction licensees for on-premises disorderly conduct only when the licensee "suffer[ed] or permit[ted]" the conduct. As applied by the SLA, the rule imposed strict liability upon licensees whenever the premises became the focal point of police attention, regardless of the licensees' culpability. Licensees challenged the application of the rule as inconsistent with section 106(6) of the Alcohol Beverage Control Law, which imposed a "suffer or permit," or awareness element, for licensee liability for disorderly conduct on premises. In striking down the rule as inconsistent with the "specific and particular" legislative provision governing disorderly conduct, the court rejected the SLA's argument that the rule could be validated by other, more general provisions of the enabling statute. 79 N.Y.2d at 277, 582 N.Y.S.2d at 69.

CENTER APPOINTS FIRST DIRECTOR



In March 2005, Justo A. Sanchez was appointed as the Director of Mediation Services at the OATH Mediation Center. Mr. Sanchez brings to the Center expertise

in mediation practice, education and program development. Immediately prior to joining OATH, Mr. Sanchez worked as a full time mediator in the Child Permanency Mediation Program run by the New York Society for the Prevention of Cruelty to Children in collaboration with the Office of Court Administration. He was responsible for convening and co-mediating child protective proceedings pending before the New York City Family Court. Mr. Sanchez has also mediated small claims matters in Civil Court; pre- and post-petition landlord/tenant proceedings in Housing Court; family matters involving juvenile intervention cases, parole re-entry cases, and pre-petition PINS cases; in addition to an array of cases at various community mediation centers in New York City.

Mr. Sanchez has also conducted mediation and conflict management training at various organizations, including the City Human Rights Commission, the Harlem Community Justice Center, Westchester County BOCES, the City Department of Housing Preservation and Development, and OATH.

Mr. Sanchez began his career in the field of mediation in 1997, during an internship with the Victim Services (currently Safe Horizon) Mediation Program. He later worked for the Center for Court Innovation at the Harlem Community Justice Center, as its Mediation Coordinator. In conjunction with his service in the military, Mr. Sanchez received his Bachelor of Arts degree from the City University of New York, Hunter College. He can be contacted at 212-442-4920 or jsanchez@oath.nyc.gov.

Twenty Years' Service Marked

Martin Rainbow, OATH's Senior Law Clerk, recently celebrated a major milestone in his legal career: 20 years of service at OATH. Martin is one of the fine people at OATH whose hard work and high standards contribute to OATH's reputation for excellence. When he was first appointed in 1985, he worked as OATH's sole law clerk, assisting five judges. As the number of judges has grown, additional law clerks were hired and Martin now supervises three full time clerks.



OATH's Legal Unit in 1987: Martin and Howard Cohen

From handling simple inquiries from *pro se* litigants and practitioners, to assisting OATH's judges with complex legal issues, Martin has been an invaluable resource. Moreover, he played an important role at various key points in OATH's history, for example, by helping with



Martin Rainbow celebrates 20 years' service

the transition to new offices in 1995, by preparing research materials to assist the judges and legal staff each time OATH's jurisdiction expanded to new legal areas, and by assisting in the orderly functioning of the tribunal during our temporary relocation following the 9/11 attacks on the World Trade Center.

All of the judges value Martin's extensive knowledge of the substantive law that OATH jurisdiction encompasses. They know they can rely on him to quickly and competently respond to unusual legal issues. Throughout his tenure, Martin has served OATH and its constituents with diligence, quiet professionalism and patient good humor. Everyone at OATH congratulates Martin on his career achievement and thanks him for his dedication and professionalism.



Now: OATH's Legal Unit headed by Martin; (L-R) Frank Ng, Martin, David Leon, and Arthur Bangs

Two new Administrative Law Judges and a calendar unit associate have begun work at OATH, and two judges and a law clerk have left us. We would like to recognize the hard work and professionalism of those who moved on to pursue worthwhile professional opportunities and we look forward to working with three talented newcomers.



Kevin Casey

Kevin F. Casey was appointed to the position of Administrative Law Judge in November 2004. He was previously a supervising attorney with the Criminal Appeals Bureau of The Legal Aid Society in New York. For

several years he was also a volunteer with the Equal Justice Initiative, an organization that provides legal representation to indigent defendants in Alabama. He is a graduate of Brooklyn Law School and Fordham University's College of Business Administration. Prior to becoming a lawyer, he was a CPA at a large accounting firm and he was a forensic accountant in the Rackets Bureau of the Kings County District Attorney's Office.



Joan Salzman

Joan R. Salzman was appointed as an Administrative Law Judge in December 2004. Prior to her appointment, she was the Deputy Executive Director and Chief of Enforcement at the New York City Conflicts of

Interest Board.

Before entering City government service, she clerked for the Hon. José A.

Cabranes, then a U.S. District Judge for the District of Connecticut (now a Circuit Judge of the Second Circuit Court of Appeals), and was in private practice as a litigator with Hughes Hubbard & Reed. She is a graduate of Yale College and Harvard Law School. Judge Salzman has written and lectured extensively on enforcement of ethics laws, administrative law, and conflicts of interest. She has served previously as Chair of the Government Ethics Committee of the Association of the Bar of the City of New York (ABCNY), and as Secretary of the ABCNY Municipal Affairs Committee. She is currently a member of the ABCNY Litigation Committee.



Karen Hamilton

Karen Hamilton has joined OATH as a calendar unit associate. She previously worked at the Department of Citywide Administrative Services, where she served as the Administrative Assistant to the Press Secretary.



Charles Fraser

Supervising Administrative Law Judge Charles Fraser resigned from OATH to become Deputy Commissioner for Legal Affairs at the Taxi and Limousine Commission.

Judge Fraser was instrumental in developing the vehicle retention hearing program at OATH. His knowledge and experience will be missed.

Administrative Law Judge Rosemarie Maldonado left OATH to accept a position as



Rosemarie Maldonado

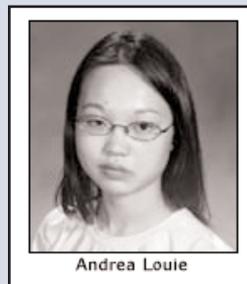
General Counsel at John Jay College. Judge Maldonado worked as an ALJ at OATH since 1997, when she joined our staff as part of the consolidation of the Commission of Human Rights' Adjudication

Unit into OATH. Best of luck to her in her new position.



Robert Gatto

Robert Gatto, Esq., a law clerk at OATH from August 2001 to December 2004, took a position as a Court Attorney for the Supreme Court, New York County. Good luck, Bob.



Andrea Louie

OATH continued to employ student interns during the school semester and the summer. Three interns worked at OATH during the Spring 2005 semester: D. Hardison Wood, a third year student at Cardozo Law School, Rachel Cordero, a second year student at Brooklyn Law School, and Suzanne Joblonski Philip, an undergraduate student at LaGuardia Community College.



Zhanna Ziering

Three law students worked for OATH during the summer of 2005: Andrea Louie and

Zhanna Ziering, both of whom have completed their second year at New York Law School, and Justin Waytowich, who has completed his second year at Syracuse Law School.



Justin Waytowich

Mariya Gurevich, a second year student at New York Law School, worked as a law intern at OATH during the Fall 2004 semester.



Mariya Gurevich

Proposed OATH Rule Changes

Chief Judge Roberto Velez announced proposed amendments to OATH's rules of practice in July 2005. A public hearing on the proposed rule amendments was scheduled for August 12, 2005. The proposed amendments to the main body of the rules is the first change since the last general rule revision in 1998. During the ensuing years, OATH's general counsel has reviewed the rules toward improving the process. To foster practices consistent with the text of the rules, the proposed changes are intended to clarify existing rules and to promote principles of good administrative trial practice. Among other things, the proposed rule amendments provide for electronic filing of papers, provide procedures for requesting reasonable accommodation for people with disabilities, and provide sanctions for non-compliance with the standards of conduct.

Chief Judge's Message

(continued from page 1)

Director Roy Mogilanski. The judicial decision writing session was facilitated by NYS Supreme Court Justice Rosalyn Richter and Gabriel Taussig, Chief of the Law Department's Administrative Law Division. In the afternoon, Diana Zalph, Director of the Consumer Affairs Adjudication Division, moderated the judicial ethics session and facilitated an interesting discussion with Mark Davies, COIB Executive Director, and Gerald Stern, Special Counsel to New York State Judicial Institute. The ethics panelists discussed the applicability of the City ethics law and judicial conduct rules to City ALJs and hearing officers.

The retreat received an overwhelmingly favorable response. To further her vision, Deputy Mayor Robles-Roman decided to create three committees -- technology, ethics and training -- to continue the good work started at the retreat. Based on the work of these committees, I am working with Special Counsel to the Mayor Anthony Crowell to create a training institute housed at OATH. The goal of the training institute is to work with the chief judges of all the City tribunals to determine the needs of ALJs and hearing officers and create a training program that meets those needs. I am committed to establishing this institute and making available training suited to needs of each tribunal.



L-R: COIB Executive Director Mark Davies; OATH Deputy Chief ALJ Charles McFaul; ECB Managing Attorney Helaine Balsam; COIB General Counsel Wayne Hawley; Consumer Affairs Adjudication Director Diana Zalph; OATH Supervising ALJ Charles Fraser



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PRACTICE POINTERS

Appear at trial at the scheduled time, ready to proceed. Make sure that your client and your witnesses appear on time, and that they are prepped, in advance of the trial start time. 48 RCNY § 1-45.

At trial, bring legible copies of the documents that you intend to introduce into evidence for the administrative law judge, the witnesses, and the other parties. 48 RCNY § 1-42.