



## OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

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## BenchNOTES

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#### **Employees' Off-Duty Internet Use to be Focus of City Bar Program**

ALJ Alessandra Zogniotti will serve as a presenter on a program titled "Off-duty Internet Use Protections and Restrictions" on February 28, 2008 at the City Bar Association. The two-hour CLE accredited program, sponsored by the City Bar's Labor & Employment Committee, will review issues arising from employees' off-duty internet use from both private employers' and private employees' perspectives.

ALJ Zogniotti's presentation will focus on how public employees' First Amendment right to speak on matters of public concern is balanced against public employers' right to limit expressive activities which are disruptive to the work place. She will also address what insights from the public sector might have applicability in the private sector.

#### **Appellate Review of Agency Actions**

Typically, proceedings at OATH take the form of a traditional trial, with the ALJ serving as the trier of fact. In some cases, however, such as watershed appeals, contract dispute appeals, and prequalified vendor appeals, the proceedings are more akin to an appellate process. That is, the case is decided on the basis of the existing record, and the parties do not submit new evidence except with the approval of the ALJ or, in the case of contract disputes, the three-member Contract Dispute Resolution Board (CDRB) panel.

In a recent watershed case, which is summarized in this issue of BenchNotes, a Sullivan County landowner was appealing the denial of a variance by the Department of Environmental Protection (DEP) to build a new home with an underground septic system. If a variance is denied by DEP, the

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landowner may either appeal to OATH or bring an Article 78 proceeding in state court. Since OATH functions as an appellate tribunal in these matters, the only issue before the ALJ is whether the DEP abused its discretion in denying the variance application. 15 RCNY § 18-28(d)(3).

DEP denied the variance on the ground that the landowner did not demonstrate that compliance with the rules would create a substantial hardship, a required element under the rules. In his appeal, the landowner argued for the first time that his inability to complete a sale of the subdivision while waiting for a variance, and his outlay for engineering and surveying expenses constituted substantial hardship. ALJ Alessandra Zorigniotti did not allow the landowner to supplement the record with new documents and factual arguments since, according to the regulations, an appeal from a denial of a variance "shall be decided on the record before the Department in its review of the application and any other written submissions allowed by the ALJ." 15 RCNY § 18-28(f)(1).

Judge Zorigniotti also noted that even if she had exercised her discretion and considered the new argument, the landowner would still not be able to demonstrate substantial hardship, which requires more than a showing of potential economic harm. Instead, an applicant seeking a variance on the basis of substantial hardship is required "to describe those physical conditions on the subject parcel that make compliance with a particular regulation difficult - or impossible - and thereby explain the perceived need for a variance." *Nilsson v. Dep't of Environmental Protection of City of New York*, 8 N.Y.3d 398, 404, 834 N.Y.S.2d 688, 691 (2007).

OATH also hears appeals from vendors who are denied prequalification or whose prequalified status has been revoked. The vendor may appeal that decision to the agency head. An agency head's determination may be appealed to OATH for final action. As with watershed appeals, prequalified vendor appeals are usually determined on the papers, without a full evidentiary hearing or oral argument. The standard of review is whether the agency's action was arbitrary or capricious. 48 RCNY § 2-06; *Rod Knox Architect v. Dep't of General Services*, OATH Index No. 304/93, mem. dec. (Dec. 10, 1992).

In appeals to the CDRB, a three-person panel is convened and chaired by an OATH ALJ to render a final decision on a City contractor's claims. In cases before the CDRB, neither party "may support its case with any documentation or other material" that was not considered below, by the Comptroller. The CDRB does have the discretion, however, to seek expert or technical advice, or additional material from a party as it deems appropriate. 9 RCNY § 4-09(g)(3).

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## Last Month's OATH Decisions

### Personnel

### Misleading statements and an erroneous discharge of an inmate merited sixty-day

## suspension.

In a disciplinary proceeding, a correction officer was found guilty of erroneously discharging an inmate, submitting a false report, and giving false testimony about the incident. The evidence established that the respondent failed to notify officers of a new warrant issued for an inmate who was released in his own recognizance following an appearance in Brooklyn Criminal Court. ALJ Alessandra Zorgniotti recommended a sixty-day suspension because of the respondent's dishonesty and attempts to shift the blame to another officer. *Dep't of Correction v. Woodford*, OATH Index No. 2188/07 (Dec. 21, 2007).

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## Licensing

### **Hack license revocation recommended for assaulting, harassing a passenger and reckless driving.**

In a license revocation proceeding, ALJ Kevin Casey recommended revocation and a \$375 dollar fine for a taxi driver who assaulted and harassed a passenger, drove in an unreasonable manner which endangered her safety, and did not make the correct change. The incident arose from a minor fare dispute. The ALJ decided the case on the basis of the clear and detailed testimony of the passenger. Her testimony was persuasive in part because she admitted that she was the first to raise her voice. In contrast, the driver's testimony was inconsistent and illogical. *Taxi & Limousine Comm'n v. Jean-Baptiste*, OATH Index No. 761/08 (Dec. 26, 2007).

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## Vehicle Retention

### **Titled/registered owner has standing to request a Krimstock hearing even when another person makes the monthly finance and insurance payments.**

ALJ Julio Rodriguez rejected the Police Department's argument that the titled/registered owner of a car did not have standing to request a *Krimstock* hearing because the car was a gift and his mother made the monthly finance and insurance payments. The ALJ held that the Department failed to show that the mother had a possessory interest in the car sufficient to overcome the presumption of ownership given by the certificate of title. ALJ Rodriguez then directed the Police Department to release the vehicle because it failed to demonstrate that the respondent was not an innocent owner. *Police Dep't v. Rodriguez*, OATH Index No. 1075/08, mem. dec. (Dec. 18, 2007).

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## Prevailing Wage Law

### **Debarment and civil penalty recommended for contractor who willfully failed to pay prevailing wages on a public works contract and deliberately falsified payroll records.**

ALJ Casey found a contractor liable for underpayment and interest after it failed to pay prevailing wages and benefits to employees who installed sprinklers and renovated air conditioning systems at City-owned Bellevue Hospital. The ALJ also recommended a 25% civil penalty and five-year debarment because of the willful nature of the underpayment and deliberate falsification of payroll records. *Office of the Comptroller v. Kelly's Sheet Metal, Inc.*, OATH Index No. 266/08 (Dec. 28, 2007).

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## Padlock Law

### **Closure recommended for garage and yard used as automobile repair shop.**

In padlock proceeding, the testimony of a Department inspector established that the detached garage and yard of a single family residence were being used as an automobile repair shop and for storage of unlicensed vehicles. ALJ Rodriguez found that these were impermissible commercial uses in violation of the Zoning Resolution and recommended closure. Single family residences in respondents' zoning district are limited to a maximum of three off-street parking spaces. *Dep't of Buildings v. Owners, Occupants and Mortgagees of 147-16 130th Avenue, Queens Co.*, OATH Index No. 659/08 (Dec. 19, 2007).

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## Watershed Appeal

### **Denial of variance upheld where the land owner did not show compliance with watershed regulations would impose a substantial hardship.**

The Department of Environmental Protection denied a variance to a landowner who wished to install an underground septic system on a subdivision of his property within the New York City Watershed. The landowner did not demonstrate that compliance with the rules would create a substantial hardship in his application to the Department. On appeal, ALJ Zorngiotti found that the Department's denial of the variance was not an abuse of discretion and upheld its determination. *Smith v. Dep't of Environmental Protection*, OATH Index No. 673/08 (Dec. 28, 2007).

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