OATH Office of Administrative Trials and Hearings

BenchNOTES

VOLUME 32 SPRING 2006

Message from the Chief Judge
Roberto Velez

ALJ Ethics Code Improves the "Face of City Justice"

In March 2005, the Mayor directed the Charter Revision Commission to consider reforms to the City's administrative justice system in order to assure the highest standards of adjudicatory practice. The Commission held public hearings during which tribunal heads, experts on administrative justice, and litigants testified about the ways to improve City tribunals. The Commission reviewed the comments and proposals and noted, within its final report, that City tribunals are often the only forums where New Yorkers have any significant interaction with City government. And for the public, these tribunals represent the face of City justice. The Commission concluded that the face of City justice would be enhanced by requiring all ALJs and hearing officers to follow a set of conduct rules that are fair and uniform. The Commission placed on the November 2005 ballot a provision

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ALJ Institute panelists for December 2005 evidence presentation: Environmental Control Board Managing Attorney Helaine Balsam; CUNY Law School Professor Beryl Blaustone; Tax Appeals Tribunal/Tax Commission President Glenn Newman

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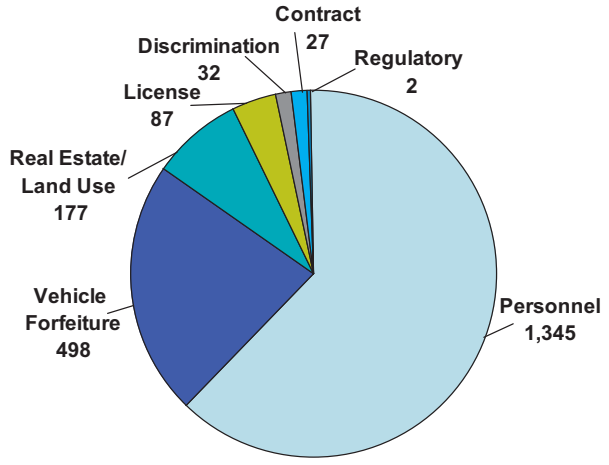
ANNUAL REPORT

CASES RECEIVED FISCAL 2005



This thirty-second issue of *BenchNOTES* incorporates OATH's FY05 annual report to the Mayor, which begins at page 7.

OATH Revises Practice Rules

Effective November 18, 2005, OATH amended its Rules of Practice. These rules govern administrative hearings conducted at OATH and are published as title 48 of the RCNY. The amended rules now provide for service of motion papers by "electronic means," i.e., by e-mail or facsimile transmission (§§ 1-01, 1-07, 1-26, 1-34). A new rule relating to access to facilities by persons with disabilities (§ 1-08) was added. In addition, the rule governing the conduct of attorneys and representatives appearing at OATH (§ 1-13) was revised.

Referral to Mediation

As amended, rule 1-30 now provides that the administrative law judge may propose mediation and, where the parties consent, refer the parties to the Center for Mediation Services or other qualified mediators.

Service of Motion Papers

Amendments to several rules encourage parties to docket cases at OATH by electronic means (§ 1-26). The amended rules also permit service by electronic means of pre-trial motion papers, discovery demands and responses to the same (§ 1-34). If pre-trial motion papers are personally served on the trial judge or served on the judge by electronic means, then the papers must be served on all other parties by an equivalent method (§ 1-07 (c)). Parties must maintain proof of service of all papers served at OATH, and proof of service shall be filed with pre-trial motion papers (§§ 1-07, 1-34). Proof of service for papers served electronically may be in the form of a record confirming delivery or acknowledging receipt of the electronic transmission. Electronic service is treated like personal service when calculating response time under OATH rules. Unless otherwise directed by the judge, when papers are personally or electronically served, the opposition gets eight days from the date of service to answer; when service is by regular mail, the opposition gets thir-

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Obtaining and Serving Trial Subpoenas

The Application

Pursuant to section 1-43 of OATH's Rules of Practice, a party seeking to subpoena witnesses or documents for a hearing must first make an application to the assigned trial judge, on notice to his or her adversary. The application may be submitted by email or facsimile with the requestor setting forth a short reply period for the adversary. If the judge signs the subpoena, the requestor should call the judge's secretary to arrange for the signed subpoena to be picked up at OATH or sent to the requestor by e-mail. Proper subpoena forms are available on OATH's website at:
http://nyc.gov/html/oath/html/forms.html.

Service of the Subpoena

It is the requestor's responsibility to serve the subpoena on the non-party witness or custodian of the documents sought. Service of the subpoena is made in the manner provided by section 2303 of the CPLR, which tracks the provisions of CPLR section 308. Generally, service is achieved by personal delivery to the non-party witness or substitute delivery to a person of suitable age and discretion followed by a mailing, etc. Proof of service should be maintained.

Witness Attendance Fees

The party serving the subpoena is responsible for the witness fee ($15 per day). If the witness lives outside of New York City, the requestor is also responsible for a mileage fee of 23 cents a mile. CPLR § 8001. The fee shall be tendered when the subpoena is served.

If the witness is friendly to the party, the party may ask the witness to voluntarily appear without being served with a subpoena or if the witness is willing to accept service of the subpoena by mail or facsimile. A friendly witness may elect to waive appearance and mileage fees or accept reimbursement for round trip public transportation costs in lieu of mileage fees.

OATH DECISIONS

March 2005 - August 2005

➤ Disciplinary Proceedings

A. Drug or alcohol related offenses

There were several cases involving drug or alcohol related offenses during the reporting period. In *Fire Department v. St. Cloud*, OATH Index No. 128/05 (Apr. 7, 2005), ALJ Faye Lewis found that the firefighter had tested positive on multiple occasions for the presence of illegal anabolic steroids and recommended that he be terminated.

In *Fire Department v. Persico*, OATH Index No. 2207/04 (July 25, 2005), in which a paramedic tested positive for use of depressants, ALJ Kevin Casey rejected the employee's claim that he was unaware that an appetite suppressant, given to him a few days before the test, contained a controlled substance. Termination was recommended.

A charge that an employee disobeyed a drug test order will be dismissed if the agency can not establish a proper basis for the order. In *Department of Sanitation v. Ponzio*, OATH Index No. 265/05 (Mar. 22, 2005), *modified on penalty*, Comm'r Dec. (Apr. 11 2005), a sanitation supervisor was ordered to submit to alcohol and drug tests after two nearly empty beer bottles were found in his proximity at a sanitation garage. ALJ Donna Merris ruled that the supervisor's refusal to submit to the tests was not misconduct because the order to take the drug test in addition to alcohol test was illegal in the absence of any indicia of impairment.

A correction officer who tested positive for cocaine was able to establish the defense of unknowing ingestion. In *Department of Correction v. Caamano*, OATH Index No. 326/05 (June 16, 2005), ALJ Merris credited the officer's claim of unknowing ingestion of cocaine-laced tea, where the officer took immediate action upon learning of the positive test result to identify the source. Two experts agreed that the levels of cocaine found in the officer's urine samples could have been caused by ingestion of the tea.

In another case, ALJ Raymond Kramer found that the agency failed to prove that a correction officer bought marijuana from a known drug dealer while off-duty. *Department of Correction v. Hawkins*, OATH Index No. 407/04 (Mar. 22, 2005).* The officer did, however, violate a rule against associating with former inmates and a twenty-day suspension was recommended.

B. Misconduct resulting in serious injury or death

Disciplinary cases heard at OATH range from relatively minor charges to those where intentional or negligent employee acts or omissions result in serious injury or death. *Fire Department v. Silvestri*, OATH Index No. 613/05 (May 5, 2005) involved a firefighter charged with possessing alcohol on duty and seriously assaulting a fellow firefighter with a metal chair on New Year's Eve. ALJ John Spooner rejected the firefighter's defense of lacking any intent to injure the victim due to post-traumatic stress disorder. Despite numerous mitigating factors, including possible post-traumatic stress, service during the weeks following 9/11, and an unblemished record, termination was recommended.

In *Department of Correction v. Hall*, OATH Index Nos. 155/05 & 156/05 (Aug. 11, 2005), two correction officers were charged with failing to supervise a housing area where two separate inmate altercations occurred, one of which resulted in life threatening injuries to an inmate and the other in a fatality. ALJ Kara Miller recommended that the officer involved with one of the incidents be suspended for 45 days, and the officer who was involved with both incidents be terminated.

In *Administration for Children's Services v. Gold*, OATH Index No. 585/05 (Apr. 13, 2005), ALJ Tynia Richard found that a supervising child welfare specialist failed to follow agency procedures for reporting an adolescent's two-week unauthorized absence from a group home. This failure resulted in the adolescent, who was killed by a train, remaining unidentified in the morgue for two weeks. The recommended penalty was termination.

C. Falsification offenses

As City employees are obligated to give a truthful account about City business to their employer, a

* 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.

charge that an employee made a false statement or false report is a serious matter. This tribunal has held that "writing a report that is merely susceptible of a reading that would be inaccurate is not misconduct; to be guilty of misconduct, [the employee] must have been guilty of some fault, not mere inadvertence or poor drafting .... Where, as here, the inference of fault is to be drawn from the face of the report itself, careful scrutiny of the report is warranted, to distinguish unschooled drafting or inadvertent error from intentional deception or at least unconcern for truth." *Department of Correction v. Galarza*, OATH Index No. 348/90, at 23-24 (June 1, 1990)

In two falsification cases decided during the reporting period, OATH judges found the evidence insufficient to prove that the employees intentionally made false statements, reports or filings. In *Department of Correction v. Cancel*, OATH Index Nos. 1085/05 & 1087/05 (Aug. 11, 2005), ALJ Lewis found that the Department failed to meet its burden of proving that two correction officers intentionally provided false reports and made false statements at investigatory interviews concerning an incident in which a captain had sprayed an inmate with a chemical agent.

Department of Transportation v. Garzone, OATH Index No. 1728/04 (Mar. 9, 2005) involved a workers' compensation claim filed by a Staten Island ferry deck hand who was assaulted by an acquaintance at the start of his shift. The Department alleged that the deck hand omitted a material fact - that he knew his assailant from outside of work, which would render his injury non-work related - when he reported the injury to the agency's personnel office. The deck hand had named the attacker when he filed a complaint with the police, but did not do so when reporting his injury to the personnel office because the personnel officer, who filled out the form, did not ask him for the identity of the assailant. ALJ Merris found that since the deck hand did not personally fill out or review the information provided in the workers' compensation packet and was not asked if he knew the identity of the attacker, the Department failed to prove that the deck hand intentionally omitted the name of the attacker.

D. Insubordination; neglect of duty

Under the recognized labor law rule of "comply now, grieve later," a public employee must, with limited exceptions, follow an order when given and then file a grievance, or risk disciplinary action for disobeying the order. One exception to the rule is if the order is illegal or "clearly beyond the power of management." *See Ferreri v. New York State Thruway Auth.*, 62 N. Y. 2d 855, 477 N. Y. S. 2d 616 (1984). The illegal order exception was successfully invoked by a custodian charged with insubordination for refusing to comply with an order to terminate two subordinates. *Department of Education v. Radef*, OATH Index No. 1116/05 (July 12, 2005). Finding the order improper because it violated an established protocol for such actions, ALJ Spooner recommended dismissal of the charges.

The Human Resources Administrative has adopted protocols to ensure that applicants for public assistance are seen promptly to determine eligibility for benefits. In separate hearings, eligibility specialists were charged with improperly refusing to meet with clients seeking relief. In *Human Resources Administration v. Oommen*, OATH Index No. 1267/05 (July 29, 2005),* ALJ Joan Salzman found the agency's proof inadequate to show that the eligibility specialist improperly refused to set a late-day appointment for a purported food stamps applicant.

In *Human Resources Administration v. Caban,* OATH Index No. 1449/05 (June 23, 2005),* ALJ Casey found that the agency did not prove that a job opportunity specialist wrongfully failed to interview a client.

E. Name-clearing hearing

Non-tenured public employees may be terminated without a hearing, but where such an employee has been stigmatized in the course of the termination, the employee may be entitled to a name-clearing hearing. *See Codd v. Velger*, 429 U. S. 624, 97 S. Ct. 882 (1977). The sole purpose of such a hearing is to give the former employee an opportunity to clear his or her name. During the reporting period OATH conducted two name-clearing hearings. *Hinton v. Department of Correction*, OATH Index No. 1893/04 (Mar. 25, 2005) involved a probationary correction officer who was terminated for

making false statements during an investigatory interview. ALJ Miller found that the discharged employee, who bore the burden of proof, failed to refute the basis for her termination by a preponderance of the credible evidence.

Likewise, in *Rhodes v. Department of Correction*, OATH Index No. 227/05 (July 14, 2005), ALJ Kramer found that a former probationary correction officer failed to show that his dismissal was based on a false accusation of striking an inmate without cause. Judge Kramer found that the captain who investigated the incident conducted a thorough investigation and reasonably rejected, as unsupported by any other evidence, the officer's claim that he used only necessary force to defend himself against a sudden, unexpected attack by the inmate.

➤ Vehicle Forfeiture

As reported in the last two volumes of *BenchNOTES*, OATH began to hear vehicle retention cases pursuant to federal court order in February 2004. *Krimstock v. Kelly*, 99 Civ. 12041 (MBM), amended order and judgment (S.D.N.Y. Jan. 22, 2004), as amended December 6, 2005. These cases arise when the Police Department seizes a car as an instrumentality of a crime during the course of an arrest with the intent to subsequently bring a forfeiture action against the car owner. Pending the forfeiture action, the car owner, or the driver at the time of the arrest, can demand a hearing at OATH to seek return of the car. To retain the car pending final judgment in the forfeiture action, the burden is on the Police Department to prove three elements at the hearing: that probable cause existed for the arrest; that it is likely to prevail in the forfeiture action; and that it is necessary to retain the car pending final judgment in the forfeiture action. Where the Police Department meets its burden on all three elements, it is entitled to retain custody of the seized car pending final judgment in the forfeiture action.

A. Three elements

In *Police Department v. Castro*, OATH Index No. 2211/05, mem. dec. (July 13, 2005), Chief Administrative Law Judge Roberto Velez ruled that the Police Department was entitled to retain a car by demonstrating a risk to public safety. Chief Judge Velez held that by showing that a driver-owner struck a pedestrian with his vehicle, left the scene of the accident and had a blood alcohol level of .11 percent, the Police Department satisfied the third element, the necessity to retain the vehicle pending final judgment, by demonstrating a risk to public safety.

Likewise, in *Police Department v. Williamson*, OATH Index No. 1371/05, mem. dec. (Mar. 8, 2005), ALJ Joan Salzman ruled that the Police Department was entitled to retain a car seized following the owner's arrest for driving while intoxicated during the early morning hours on New Year's day. ALJ Salzman rejected the owner's claim that ingestion of asthma medication caused a false positive breathalyzer reading, in the absence of any expert testimony to support his claim that the medication could cause a false positive test result or any corroboration of his testimony that he had actually taken the medication earlier that day.

When the Police Department fails to meet its burden on any of the elements the car must be returned. Precedent has developed that a claimant may challenge the legality of the initial car stop and the search of the car as part of a challenge to whether the Police Department had probable cause for the arrest. *See Police Dep't v. Burnett*, OATH Index No. 1363/04, mem. dec. (Mar. 11, 2004), *aff'd sub. nom. Property Clerk v. Burnett*, Index No. 04/400955 (N. Y. Sup. Ct. July 18, 2004) (Schulman, J.), *aff'd*, 22 A.D.3d 201, 801 N.Y.S.2d 592 (1st Dep't 2005). In *Police Department v. Shoemaker*, OATH Index No. 1856/05, mem. dec. (May 19, 2005), a car was seized in connection with the arrest of the driver for possession of drugs and weapons. The Department conceded that it presented no evidence regarding the initial stop and search of the car, but argued that the car must have been stopped because the weapons were in plain view. ALJ Kevin Casey rejected the argument, finding it to be pure speculation. He ordered that the vehicle be returned because the Department failed to prove that the initial stop and search were lawful.

In three cases during the reporting period, where a car was seized in connection with an arrest for driving while intoxicated, the car owners argued that the Department failed to prove probable cause for the arrest or likelihood of success in the forfeiture action because it lacked proof that the car had been operated at the time of the arrest.

In *Police Department v. Watt,* OATH Index No. 1764/05, mem. dec. (Apr. 28, 2005), the Department relied upon a written report by the arresting officer stating that he had observed the car owner, referred to as the "motorist," at the scene of the accident. The report indicated that the keys were in the ignition of the car and the motor was running. The officer detected "a heavy odor of alcohol" on the owner and observed him "fle[e] the scene of the accident on foot." The owner testified that he was a passenger, and the not the driver, at the time of the accident. ALJ Tynia Richard found that the Department failed to prove that the owner was the driver at the time of the accident. The bare reference in the arrest report that the owner was the "motorist," in the absence of anything else in the record that placed the owner behind the wheel of the car or revealed the factors supporting the arresting officer's claim, was outweighed by the owner's credible testimony.

In contrast, ALJ Salzman rejected an owner's claim that he was not driving the vehicle when arrested for driving while intoxicated. In *Police Department v. Cornejo*, OATH Index No. 2270/05, mem. dec. (June 28, 2005), the arresting officer's report indicated that he stopped the car because he had observed the driver operating it without a seatbelt. During the stop he detected a strong odor of alcohol on the driver's breath and the subsequent intoxilyzer test registered a reading of .186 percent. In *Cornejo*, unlike in *Watt*, the owner did not appear at the hearing to offer testimony. His attorney argued, however, that the owner could not have been driving the car because only minutes before the arrest, he had received a summons for public urination a few blocks away. Judge Salzman credited the arresting officer's report over the owner's argument.

The car owner in *Police Department v. Rios,* OATH Index No. 146/06, mem dec. (July 21, 2005), also argued that the Department had not proven that he had operated the car while intoxicated shortly before his arrest. In *Rios*, however, the owner produced witnesses who corroborated his testimony that he had not consumed alcohol until after he drove home from a softball game and parked his car. He then turned on the car radio and drank a few beers, before the police approached and he was arrested. ALJ Kara Miller ordered the Police Department to release the car after finding that the Department failed to prove the owner had operated the vehicle while intoxicated.

B. Innocent owners

As noted in the last issue of *BenchNOTES*, even where the Police Department proves the required elements, owners may raise an "innocent owner" defense, which the Department must disprove. *See Police Dep't v. Harris,* OATH Index No. 971/05, mem. dec. (Dec. 27, 2004), *aff'd*, 2005 NY Slip Op 50848U, 7 Misc. 3d 1032A (Sup. Ct. N.Y. Co. 2005). In *Police Department v. Janis,* OATH Index No. 2078/05, mem. dec. (June 21, 2005), the car was seized in connection with a drug arrest of the former boyfriend of the car's owner. ALJ Faye Lewis ordered return of the car, finding the Department did not meet its burden of showing that the owner "knew or should have known" that her former boyfriend would use the car in an illegal activity. In *Police Department v. Shoemaker*, OATH Index No. 1856/05, mem. dec. (May 19, 2005), where the driver co-owned the car with his mother, ALJ Casey found that the Department failed to disprove that the driver's mother was an innocent owner. The Department offered no evidence showing that the mother knew or should have known that her son was likely to use the car for criminal activity.

By comparison, in *Police Department v. Ojeda-Burgos,* OATH Index No. 1959/05, mem. dec. (June 9, 2005), ALJ Charles McFaul rejected the car owner's "innocent owner" defense and ruled that the Police Department was entitled to retain custody of the vehicle. ALJ McFaul found that the mother, who was a co-owner of the car, knew or should have known that her son's use of an unregistered and uninsured car was a crime.

Likewise, in *Police Department v. Shim*, OATH Index No. 145/06, mem. dec. (Aug. 5, 2005), ALJ Salzman ruled that the Police Department was entitled to retain a vehicle seized following the owner's arrest for driving while intoxicated and aggravated unlicensed operation of a motor vehicle, where the evidence showed that the mother was aware of her son's prior offense of driving while impaired using the very same car. Even where the mother was deemed an actual owner of the car based on common law, despite assurances that she would be the sole driver, ALJ Salzman found that return of the car to the son, who lived with his mother, would pose a heightened risk to public safety and a risk of loss, sale or destruction of the vehicle pending the forfeiture action.

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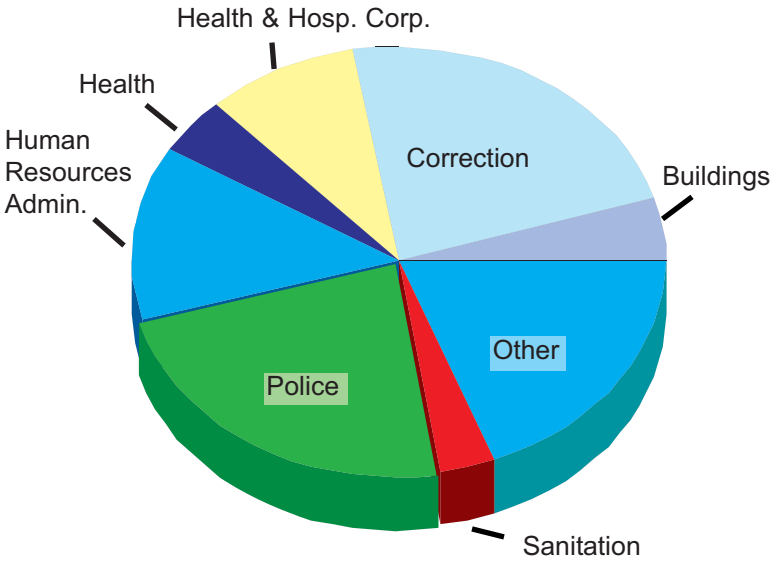
The annual report data illustrates the scope of OATH's adjudicatory authority and the array of different City agencies, boards and commissions for whom we hear cases. During Fiscal Year 2005, OATH docketed 2,168 cases emanating from 26 mayoral agencies and 4 non-mayoral agencies, including 2 state public authorities.

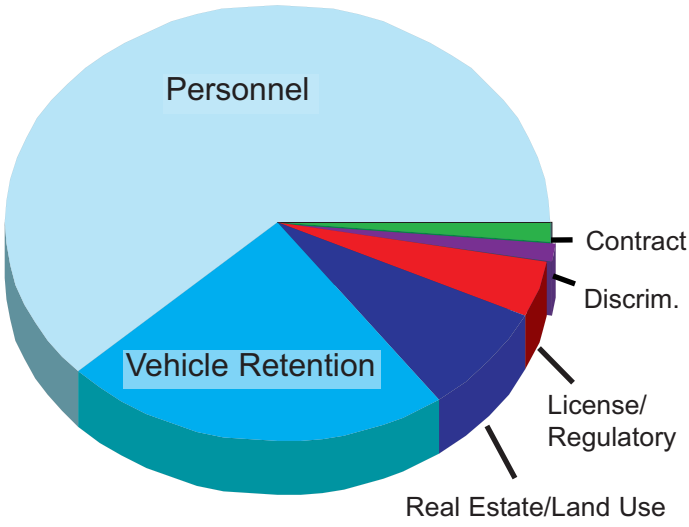
While the major portion of OATH's caseload has historically involved personnel cases, we also hear a substantial number of cases involving other areas of law, including vehicle forfeiture cases referred by the Police Department, license and regulatory matters referred by the Department of Buildings and the Department of Health and Mental Hygiene, landlord and tenant matters referred by the Loft Board and the Department of Housing Preservation and Development, zoning cases referred by the Department of Buildings, discrimination complaints referred by the City Commission on Human Rights and contract claims filed by contractors.

Case Referrals by Agency in FY 05



Agency Referrals in FY 05	No. of Cases
Department of Buildings	106
Department of Correction	498
Health and Hospitals Corp.	200
Health and Mental Hygiene	97
Human Resources Admin.	285
Police Department	499
Department of Sanitation	73
All Other Agencies	410
Total Cases	2,168

Case Referrals by Case Type in FY 05



Referrals by Case Type in FY 05	No. of Cases
Personnel	1,345
Vehicle Retention	498
Real Estate / Land Use	177
License / Regulatory	89
Discrimination Complaints	32
Contract Disputes	27
Total Cases	2,168

Case Filings By Fiscal Year

AGENCY	01	02	03	04	05
Department of Buildings	95	78	92	78	106
Administration for Children's Services	53	56	38	26	58
Department of Correction	785	744	501	567	498
Fire Department	50	26	26	38	31
Health and Hospitals Corporation	176	124	180	235	200
Department of Health and Mental Hygiene	94	166	107	105	97
Department of Homeless Services	57	46	22	23	14
Dept. of Housing Preservation and Development	30	18	95	21	23
Human Resources Administration	384	243	173	261	285
Commission on Human Rights	14	21	24	35	33
Loft Board	125	42	73	39	55
Police Department	58	27	45	430	499
Department of Sanitation	101	66	62	68	73
Transit Authority	50	45	31	36	16
Department of Transportation	14	8	15	47	50
Triborough Bridge and Tunnel Authority	34	21	48	38	34
All Other Agencies	119	98	108	142	96
Total	**2,239**	**1,829**	**1,640**	**2,189**	**2,168**

Fiscal Year Filings By Case Type

CASE TYPE	01	02	03	04	05
Personnel (Discipline, Disability, Financial Disclosure)	1,902	1,519	1,246	1,481	1,345
License / Regulatory (Restaurant Closure, Bldg. Code)	104	184	121	99	89
Real Estate / Land Use (Loft Bd. Apps., Padlock, SRO)	191	94	143	119	177
Contract (Prevail. Wage, Prequal. Denial Appeal, CDRB)	27	11	105	21	27
Discrimination Complaints (CCHR)	12	19	21	35	32
Vehicle Forfeiture (NYPD)	-	-	-	430	498
Other Cases	3	2	4	4	-
Total	**2,239**	**1,829**	**1,640**	**2,189**	**2,168**

Center For Mediation Services at OATH

The Center for Mediation Services was initiated in FY 2003 to promote the use of mediation to resolve disputes in the workplace without resorting to more formal and costlier litigation. Participation is voluntary and all parties must agree to abide by the terms of the resolution agreement. In FY 05, 27 matters involving discipline or discrimination complaints from seven agencies were referred for mediation. Sixteen of the matters were settled by mutual agreement, two were not resolved and eight were withdrawn or discontinued. The average time for each mediation session was about 3.3 hours, considerably less than the average time for a formal hearing at OATH.

Cases Referred to the Center for Mediation Services
Fiscal Year 2005

Referring Agency	No. of Cases Referred	No. of Cases Mediated	No. of Cases Resolved
Police Dep't	10	4	3
Health & Hosps. Corp.	10	9	9
Fire Dep't	1	1	0
Dep't of Envtl. Prot.	1	1	1
Law Dep't	2	1	1
Parks Dep't	1	1	1
Human Rights Comm'n	2	1	1
Totals	27	18	16

Administrative Law
- Rulemaking Under CAPA -
Second 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 City Bar Association 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.

Rulemaking Under CAPA

CAPA, the City Administrative Procedure Act, is contained in Chapter 45 of the New York City Charter, sections 1041-1047. It was approved by New York City voters in the general election of 1988, as part of a major Charter revision. CAPA revised procedures for agency rulemaking and set minimum requirements for agency adjudication. It required, for the first time, that the Corporation Counsel publish a compilation of agency rules (Charter § 1045). Prior to the enactment of CAPA, it was difficult to obtain copies of official agency rules, which were often available only by visiting the agency office. Now the official version of the rules, published in the Rules of the City of New York (RCNY) are readily available to members of the public and those persons and entities regulated by agency rules at libraries and on the internet, promoting transparency in local government.

Definition of Rule

A rule is defined in CAPA as "the whole or part of any statement or communication of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency including an amendment, suspension or repeal of any such statement or communication." Charter § 1041(5).

"'Rule' shall include but not be limited to, any statement or communication which prescribes (i) standards which, if violated, may result in a sanction or penalty; (ii) a fee to be charged by or required to be paid to an agency; (iii) standards for the issuance, suspension or revocation of a license or permit..." Charter § 1041(5)(a). Things excluded from the definition are set forth in subsection (b) and include "any (i) statement or communication which relates only to the internal management or personnel of an agency which does not materially affect the rights of or procedures available to the public; (ii) form, instruction, or statement or communication of general policy, which in itself has no legal effect but is merely explanatory..." Charter § 1041(5)(b)(i), (ii).

Failure to Comply with Rulemaking Procedures

A rule has the binding effect of law. To be effective a rule must be promulgated in accordance with the notice and comment procedures of CAPA. Courts have refused to give effect to policies or directives issued by agencies where the agency has failed to comply with the rule-making procedures. *Udodenko v. City of New York*, 5 Misc. 3d 207, 780 N.Y.S.2d 869 (Sup. Ct. N.Y. Co. 2004)(unwritten policy requiring drivers take drug test in the year between drivers' designated biennial license renewal constituted rule under CAPA); *Singh v. Taxi & Limousine Comm'n*, 282 A.D.2d 368, 723 N.Y.S.2d 476 (1st Dep't 2001) (policy shortening grace period for license renewal was a "rule" under CAPA); *Edenwald Contracting Co. v. City of New York*, 86 Misc. 2d 711, 721, 384 N.Y.S.2d 338, 344-45 (Sup. Ct. N.Y. Co. 1974), *aff'd*, 47 A.D.2d 610, 366 N.Y.S.2d 363 (1st Dep't 1975) ("directive" restricting hours of operation of asphalt plants was a rule under Charter); *Taxi and Limousine Commission v. Falese*, OATH Index No. 169/98 (Dec. 8,

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1997), *modified on penalty*, Comm'n Decision (Jan. 14, 1998) (booklet issued without compliance with CAPA rulemaking procedures was not binding).

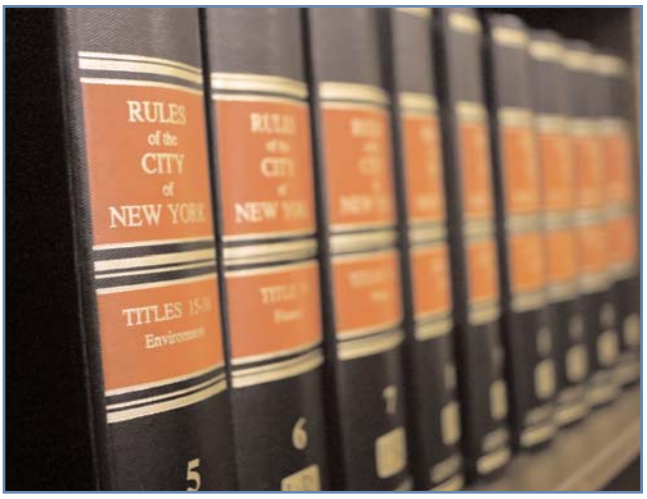
Exemption from Rulemaking Procedures

Interpretive rules and statements of policy are exempt from the definition of a "rule" under CAPA. Charter § 1041 (5)(b)(ii) ("'Rule' shall not include any ... form, instruction, or statement or communication of general policy, which in itself has no legal effect but is merely explanatory"). Therefore, compliance with the notice and comment procedures of SAPA is not required for such documents.

When Courts Find Rulemaking Required

In *Edenwald*, 86 Misc. 2d at 721, 384 N.Y.S.2d at 344-45, the court did not give effect to an agency "directive" which prohibited the operation of asphalt plants between the hours of 9 p.m. and 6 a.m. unless the plant was located in an M-3 zone, where the directive was not published in the City Record and plaintiff, the only business affected by the directive, was not given an opportunity to be heard regarding the directive. The court rejected, as "semantic sophistry," the argument that the "directive" was not a "rule or regulation" and therefore the Charter's notice and comment procedure did not apply. "Whether it be called a 'directive' or given any other name, they are regulations which have been and will continue to be (*sic*) binding effect in the issuance of all night asphalt contracts unless held otherwise by this court." 86 Misc. 2d at 721, 384 N.Y.S.2d at 344-45.

In *Udodenko,* 5 Misc. 3d 207, 780 N.Y.S.2d 869, the court held that an unwritten policy change by the Taxi and Limousine Commission requiring drivers to undergo drug tests prior to license renewal in the years between their designated biennial renewal year amounted to the adoption of a new "rule" under CAPA; insofar as the policy change was not



adopted in accordance with the rulemaking procedures of CAPA, the suspension of petitioner's license pursuant to that policy was arbitrary and capricious.

In *Falese*, OATH Index No. 169/98, at 18-19, respondent, a non-attorney representative who practiced before the Taxi and Limousine Commission's tribunal, was charged with using business cards and stationary which did not expressly state that he is not an attorney. The Commission adopted a regulation that required representatives to clearly and conspicuously state on "all advertising" that he or she is not an attorney. The regulation did not refer to business cards or stationary, nor was the term "advertising" defined in the regulation.

The Commission relied on an agency booklet entitled "Code of Conduct for Industry Representatives" where the term "advertising" was defined to include, among other things, business cards and stationary. The OATH Administrative Law Judge ruled that the booklet was not binding on industry representatives, as the Code of Conduct was issued without complying with the notice, comment and publication provisions of CAPA's rulemaking procedures. Instead the ALJ found the booklet fell within the non-binding policy statement exemption to the rulemaking requirements of CAPA (Charter § 1041(5)(b)(ii)) and therefore could not form the basis for sanctioning respondent.

(continued on next page)

Rulemaking Procedure

Regular Rules

Prior to the adoption of CAPA, the procedure for adoption and publication of agency rules was set forth in section 1105 of the Charter, which was contained in Chapter 49 of the Charter, captioned Officers and Employees. Under section 1105, an agency had to publish a proposed rule at least twice in the City Record, the first publication not less than twenty days and the second publication not more than ten days before the deadline for any interested party to submit written comments regarding the proposed rule. Section 1105 did not provide for a public hearing where interested persons could make comments on the record regarding the proposed rule, nor did it contain an express provision requiring the agency to consider the written comments before promulgating the final rule.

CAPA revised the notice and comment procedure for agency rulemaking by replacing section 1105 of the Charter with section 1043 and moving the rulemaking section from Chapter 49 to a more logical location in the new Chapter 45. Under CAPA, an agency must publish the full text of a proposed rule in the City Record at least thirty days before the public hearing to be held regarding the proposed rule, or the final date for receipt of written comments regarding the proposed rule, whichever is earlier. The published notice shall include a draft statement of the basis and purpose of the proposed rule, the statutory authority, the time and place of the public hearing, if one is to be held, or if a public hearing is not to be held, the reason why it will not be held and the final date for receipt of written comments. Charter § 1043 (b)(1).

Copies of the proposed rule shall also be transmitted to the City Council, the Corporation Counsel, the chairs of all community boards, news media and civic organizations. Charter § 1043 (b)(2), (3). The Corporation Counsel shall review the proposed rule to determine if it is within the authority delegated to the agency by law.

Comments submitted to the agency on the proposed rule, both written and those given at the public hearing shall be placed in a public record and made readily available to the public. After consideration of the comments, the agency may adopt the final rule. Charter § 1043 (d).

A rule becomes final thirty days after publication in the City Record of the rule and its statement of basis and purpose; provided that the rule has been filed with the Corporation Counsel for publication in the rules compilation and has been transmitted with its statement of basis and purpose to the City Council. Charter § 1043 (e).

Emergency Rules

CAPA also authorizes an agency to adopt a rule prior to the notice and comment procedure otherwise required "if the immediate effectiveness of such rule is necessary to address an imminent threat to health, safety, property or a necessary service." Charter § 1043(h)(1). A finding of such imminent threat and the specific reasons for the finding must be made in writing by the agency adopting the rule and approved by the mayor before such rule may be made effective. The rule and the accompanying finding shall be published in the City Record as soon as practicable. An emergency rule adopted without notice and comment shall not remain in effect for more than sixty days unless the agency has initiated notice and comment within the sixty-day period and publishes with such notice a statement that an extension of the rule on an emergency basis is necessary for sixty additional days to afford an opportunity for notice and comment. *See Presidents' Council of Trade Waste Ass'n, Inc. v. City of New York,* 143 Misc. 2d 607, 539 N.Y.S.2d 266 (Sup. Ct. N.Y. Co. 1989) (agency's use of CAPA's emergency rule making procedure to implement a minor rate adjustment was improper).

(continued from page 6)

C. Mandatory time frames

As the need for a prompt post-seizure hearing is of constitutional dimension, *see Krimstock v. Kelly*, 306 F.3d 40, 69-70 (2d Cir. 2002), *cert. den.*, 539 U. S. 969, 123 S. Ct. 2640 (2003), the time frames set forth in the federal court order for scheduling hearings have been strictly applied where the applicant follows the procedure for demanding a hearing. In *Police Department v. Singletary,* OATH Index No. 342/06, mem. dec. (Aug. 24, 2005), ALJ Ray Kramer granted an owner's motion to dismiss the petition and ordered the Police Department to return the seized car where the Department failed to timely schedule the hearing within ten business days of receipt of the owner's initial demand for a hearing, as required by the federal court order.

➤ Procedure

Pre- and post- trial motions to withdraw from representation and to reopen the record to submit new evidence were filed in a disciplinary case involving a clerical employee charged with attendance violations.

Pursuant to section 1-12 of the OATH Rules of Practice, an attorney who has filed a notice of appearance shall not withdraw from representation without permission of the ALJ. Withdrawals shall not be granted absent consent of the client or when other cause exists as delineated in the applicable provisions of the Code of Professional Responsibility.

To succeed on a motion to reopen the record to submit new evidence, the movant must demonstrate that the new evidence or evidence unavailable at hearing might reasonably alter the outcome of the case (as to the merits or as to penalty), and that the opposing party will not be prejudiced by grant of the motion.

A. Motion to withdraw from representation

In *Health & Hospitals Corp. (Harlem Hospital Center) v. Norwood,* OATH Index No. 143/05 (Jan. 25, 2005), the employee failed to appear at the start of the hearing. Her attorney moved to withdraw from representation, which was denied by ALJ Charles Fraser. ALJ Fraser had dismissed all charges of excessive lateness, excessive absence, and AWOL, against the clerical employee because the evidence showed that the time and leave violations were due to the employee's disability of depression.

After ALJ Fraser issued his report and recommendation, counsel for the employee moved for reconsideration of the denial of his pre-trial motion, arguing that he should have been permitted to withdraw because he was instructed to do so by the union whenever the employee failed to appear. Counsel argued that the union, and not the employee, was his client. ALJ Fraser denied the motion for reconsideration, ruling that the employee was the client and that the attorney's motion to withdraw from the hearing was governed by OATH's Rules of Practice and the lawyer's Code of Professional Responsibility, not federal, state or local labor law, and that counsel failed to provide cause for withdrawal under the applicable rules. *Health & Hospitals Corp. (Harlem Hospitals Center) v. Norwood*, OATH Index No. 143/05, mem. dec. (Mar. 7, 2005).

B. Motion to reopen

The Hospital subsequently filed an application to reopen the record to submit new evidence, a medical officer's report finding that the employee was currently fit for duty -- as a basis for finding the employee's time and leave violations should be treated as misconduct. ALJ Charles McFaul denied the motion, finding the new evidence would not change the recommended disposition. *Health & Hospitals Corp. (Harlem Hospital Center) v. Norwood,* OATH Index No. 143/05, mem. dec. (June 20, 2005). ALJ McFaul found that the report did not contradict ALJ Fraser's conclusions that the employee suffered from depression at the time of the attendance violations. The medical officer's report was based largely on the employee's current condition, which was in remission due to treatment and medication.

➤ Real Property

A. Application for certificate of no harassment

By law, a single room occupancy (SRO) building owner must obtain a certificate of no harassment

from the Department of Housing Preservation and Development prior to obtaining an alteration permit from the Department of Buildings. Where HPD finds harassment occurred within the past 36 months, the agency initiates a hearing at OATH at which the building owner may challenge that finding. In one such hearing, ALJ Joan Salzman found that the owner of an SRO building failed to make minimum necessary repairs to maintain the premises in a habitable condition, including failure to control a vermin problem and prolonged periods without heat, electricity and water. Based on the findings of harassment, the ALJ recommended that the Department not issue a certificate of no harassment. *Department of Housing Preservation & Development v. Bonaparte*, OATH Index No. 930/05 (July 13, 2005).

In another SRO harassment case, HPD sought to rescind a previously issued certificate of no harassment. ALJ Faye Lewis found that the Department failed to prove that harassment occurred at the building after the certificate had been issued, and she recommended that the application to rescind the certificate be denied. *Department of Housing Preservation & Development v. Rice,* OATH Index No. 1838/04 (Mar. 23, 2005).

B. Watershed appeals

As reported in the past two issues of *BenchNOTES*, OATH hears appeals from denials by the Department of Environmental Protection of requests for a variance from the requirements for subsurface sewage treatment systems (SSTS). In *Carreras v. Department of Environmental Protection*, OATH Index No. 1529/05 (June 2, 2005),* property owners, who sought to expand their residence from three to four bedrooms and to add a swimming pool, applied for a variance from the requirements of the watershed regulations to reduce the setback from the watercourse from 100 feet to 80 feet and to reduce the property line setback from ten feet to zero feet to accommodate a new SSTS. ALJ Joan Salzman ruled that the denial of the variance application was not an abuse of discretion, finding the property owners failed to prove that the variance was the minimum necessary to afford relief, that they had proposed adequate mitigation measures to protect the water supply, and that denial of the variance would impose a substantial hardship upon them.

C. Loft Law

1. Harassment

In *Matter of Byrne*, OATH Index No. 223/04 (June 20, 2005),* ALJ Tynia Richard recommended that tenants' harassment application be granted in part and denied in part. She found the owner harassed the tenants by sending repeated improper access notices to perform legalization work; rendering the tenants' unit uninhabitable for 19 days; failing to give advance notice that the bathroom would be unavailable for two days; and leaving the tenants' toilet sitting in their bathtub. ALJ Richard recommended that the owner be fined $5,000 for the proven acts of harassment.

In *Matter of Tenants of 13 E. 17th Street*, OATH Index Nos. 1343/03, 1354/03 & 1357/03 (Aug. 17, 2005),* ALJ Richard found that an IMD owner committed two separate acts of harassment and recommended that the owner be fined $2,000. The owner had failed to repair the roof and exterior walls, resulting in pervasive leaks throughout the building. Water leaks into the elevator shaft caused repeated breakdowns of elevator service, some of which endangered the tenants.

2. Unreasonable interference

In *Matter of 545 Broadway Tenants Association*, OATH Index No. 1090/03 (Aug. 3, 2005),* ALJ Raymond Kramer found that an IMD owner's plan to legalize the building by lowering bedroom walls in two loft units to meet light and air requirements unreasonably interfered with the tenants' use, and recommended adoption of the tenants' alternate plans for skylight installation.

➤ Human Rights

A disabled elderly tenant had filed a complaint with the City Commission on Human Rights claiming that her landlord discriminated against her by refusing to erect a ramp. After a hearing, the Commission initially found discrimination, but did not direct the owner to build a ramp because the tenant was confined to a nursing home. C*omm'n on Human Rights (Orlic) v. T. K. Management, Inc.,* OATH Index No. 1291/03 (Oct. 27, 2003), *rev'd on law, dismissed as moot*, Comm'n Dec. and Order (May 3, 2004). On remand by the New York Supreme Court, ALJ John Spooner found that the complainant was able to return to his residence,

despite lengthy stays in the nursing home. Therefore, the requested relief of an order directing the owner to erect a ramp was not moot. *Commission on Human Rights (Orlic) v. T. K. Management, Inc.*, OATH Index No. 721/05 (Apr. 14, 2005).

➤ Licensing

In two separate hearings, ALJ Kevin Casey recommended that the licenses of father and son master plumbers be revoked based upon their guilty pleas to enterprise corruption. *Department of Buildings v. Figliolia*, OATH Index No. 1520/05 (Apr. 6, 2005); *Department of Buildings v. Figliolia*, OATH Index No. 1522/05 (June 6, 2005). In OATH 1520/05, ALJ Casey found the evidence established that the master plumber's misconduct directly related to his business or trade, involved fraudulent dealings, and reflected a poor moral character.

In OATH 1522/05, ALJ Casey held that the master plumber's attempt to surrender his license, which was rejected by the Department, did not divest OATH of jurisdiction to conduct the license revocation proceeding.

➤ Contracts

OATH judges chaired several Contract Dispute Resolution Board (CDRB) panels during the reporting period.

In *G.V.C. II, Inc. v. Department of Transportation,* OATH Index No. 1077/05, mem. dec. (May 20, 2005), on remand, the CDRB, chaired by ALJ Faye Lewis, determined that the contractor was not entitled to additional compensation following termination of a contract to provide transportation services for disabled pre-kindergarten students.

In *Gateway Demolition Corp. v. Department of Housing Preservation and Development*, OATH Index No. 1093/05, mem. dec. (June 9, 2005), the CDRB chaired by Chief ALJ Roberto Velez, granted, in part, a petition seeking additional compensation under a demolition contract, awarding the contractor $87,444.

In *Oly Bus Corp. v. Department of Transportation,* OATH Index No. 486/04, mem. dec. (July 5, 2005), on remand, a bus company sought $80,477 in additional compensation for provision of transportation services to school children. The CDRB, chaired by ALJ Donna Merris, found that the contractor was entitled to $13,873 in additional compensation, but denied any pre-award interest.

In *Alta Indelman, Architect/Builders Group, LLC v. Department of Sanitation,* OATH Index No. 1092/05, mem. dec. (June 16, 2005), the CDRB, chaired by ALJ Kara Miller, dismissed as untimely a petition seeking review of the agency's decision to deny a request for a change order.

PRACTICE POINTERS

Although OATH rules provide an administrative law judge with the discretion to accept as an interpreter a "friend or relative of a party or witness, or any other person who can provide acceptable translation," the preferred standard is use of an interpreter from an offical registry of interpreters. *See* 48 RCNY § 1-44.

With the recent rule revisions, discovery demands and objections to discovery may be communicated by email to one's adversary. Motions may now be served by email and notices of hearing may be sent by email if the email address is accurate. *See* 48 RNCY § 1-07.

In the discretion of the administrative law judge, and whether or not a case has been on the conference calendar, conferences may be scheduled on application of either party or *sua sponte*. 48 RCNY § 1-29.

Alessandra F. Zorgniotti has been appointed by Chief Judge Roberto Velez to serve as an OATH Administrative Law Judge.

Judge Zorgniotti comes to OATH from the New York City Office of Collective Bargaining where she was the Deputy General Counsel since 2001. Prior to that, she was an Assistant Corporation Counsel at the Law Department from 1996 to 2001. She graduated from the School of Law at SUNY Buffalo and clerked at the Appellate Division, Fourth Department in Rochester, N.Y. from 1994 to 1996. Before she went to law school, Judge Zorgniotti worked as a performance manager at the Metropolitan Opera Association and as a personal assistant to opera singer Marilyn Horne. Judge Zorgniotti is an active member on the Labor and Employment Law Committee of the New York City Bar Association. Judge Zorgniotti was in the Arts Administration Masters Program at Columbia University, and received her B.A. in English and Foreign Literature from Lewis and Clark College.


Alessandra Zorgniotti

OATH welcomes Ivette Santos and Jae Ko. Ivette, Assistant to the Chief Judge, is covering for Carol Plant during her maternity leave. She received her B.A. in English Literature from Baruch College. Jae is an intern for the Center for Mediation Services. He is an undergradate student at John Jay College.

Three staff members celebrated City service anniversaries in 2005. ALJ Ray Kramer celebrated 20 years of service; Cherron Howard Williams celebrated 25 years of service; and Mirielle Laporte celebrated 10 years of service.

In July 2005, Frank Ng, OATH Law Clerk, graduated from the Management Academy, a Department of Citywide Administrative Services Executive Development program.

PRACTICE RULES

(continued from page 2)

teen days from the date of service to answer (§ 1-34 (d)).

Access to Facilities

New rule 1-08 announces OATH's commitment to provide equal access to its facilities and programs to people with disabilities and to make reasonable accommodations upon request by persons with disabilities. Requests for accommodation, for purposes of participating in a hearing or attending a proceeding as a member of the public, should be made in advance to OATH's Office Manager, Cherron Howard-Williams.

Standards of Conduct

The amended rule 1-13 now provides that individuals appearing before OATH shall be familiar with and comply with OATH's Rules of Practice, as well as any other applicable rules, and all representatives are expected to comply with the orders and directions of the administrative law judge. The rule expressly requires attorneys appearing before OATH to conduct themselves in accordance with the canons, ethical considerations and disciplinary rules set forth in the Code of Professional Responsibility in their representation of their clients, their dealings with other parties, attorneys and representatives, and with OATH judges and staff. Wilful failure to abide by the standards of conduct may be cause for sanctions, including formal admonishment, assessment of costs or the imposition of a fine, exclusion of the offending person from the proceedings, and other sanctions as the administrative law judge deems appropriate. The imposition of sanctions may be made after a reasonable opportunity to be heard. The form and extent of the hearing shall depend upon the nature of the conduct and the circumstances of the case.

Chief Judge's Message

(continued from page 1)

that would require the creation of a code of ethics for all City ALJs and hearing officers. Some 79% of New Yorkers who came to the polling booths voted for the adoption of the ethics code. This overwhelming support demonstrates the public's demand for integrity and professionalism within the City's administrative tribunals.

The approved Charter provision requires that the Mayor and myself, as OATH Chief Judge, jointly issue rules establishing a code of ethics for ALJs and hearing officers in consultation with the Conflicts of Interest Board, DOI and all affected agency and tribunal heads. I am in the process of working with the Mayor's Office in developing this code.

This mandate is in line with the ALJ Institute's goal of providing ethics and skills training to City ALJs and hearing officers in order to professionalize and enhance the administration of justice within City tribunals. The Institute's mission is similar to the one set by the State court system when it created the NYS Judicial Institute to provide ongoing training to all state court judges. The state's Chief Judge found that ongoing training increases the skills of jurists, which improves the efficiency of the state court system. We wish to strive for the same result -- the improved efficiency and consistency of the City tribunal system. I strongly believe that the new ethics code coupled with the work of the ALJ Institute will improve the face of justice for City residents.

CUNY Law Professor Beryl Blaustone discusses rules of evidence at an ALJ Institute presentation for City ALJs and hearing officers.

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PRACTICE POINTERS

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