SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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MICHAEL A. CUNNINGHAM,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF LABOR,

Respondent.

For Judgment Pursuant to Article 78 Of the Civil Practice Law and Rules

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Index No. _____

MEMORANDUM OF LAW IN SUPPORT OF PETITION

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* Not yet admitted; admission pending pursuant to Third Department student practice plan, Judiciary Law §§ 478, 484, and the Rules of the Appellate Division, NYCRR 805.5.

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INTRODUCTION

This case seeks to enforce New Yorkers' right, established by the Court of Appeals in *People v. Weaver*, 12 N.Y.3d 433 (2009), to be free from government surveillance by Global Position Service (GPS) devices. In this case, Petitioner Michael A. Cunningham's constitutional rights were violated when his government employer, the New York State Department of Labor (DOL), placed a GPS device on his personal, family car and tracked the movement and location of him and his family continuously for more than a month. DOL obtained no warrant, provided no notice and obtained no consent for such a search. Although the purpose of this surveillance was to investigate allegations that Mr. Cunningham was not where he should have been during working hours, the GPS device tracked the family twenty-four hours a day, after business hours, over weekends, and during a week-long family vacation during a period of leave that had been approved in advance by DOL. Records of the family's daily movements, activities and habits obtained from this search were then introduced in an administrative hearing and used to justify Mr. Cunningham's termination from his position at DOL.

Despite the Court of Appeals' clear statement in *Weaver* that such intrusive GPS surveillance violates the New York State Constitution, the DOL Hearing Officer presiding over the administrative proceeding considered the evidence obtained from the GPS device and relied primarily on it to authorize the termination of Mr. Cunningham. DOL's termination decision thus rests on two faulty legal conclusions: first, that notwithstanding *Weaver*, the GPS search of Mr. Cunningham was constitutional as a permissible search conducted by the government as employer; and, second, that even if the search was unconstitutional, the exclusionary rule, by which such constitutional rights are vindicated, does not apply to employment-related administrative hearings.

Both of these conclusions are wrong. Although *Weaver* did not arise in the context of a search of a government employee, the test for evaluating the constitutionality of such searches requires that their scope be reasonable relative to the government's legitimate need to investigate workplace misconduct. The Court of Appeals' discussion in *Weaver* of the intrusiveness of GPS surveillance — as well as the fact that, in this case, DOL searched its employee's private family car; provided no notice of the possibility of such searches as a condition of employment; tracked the family during non-business hours, on weekends and during a holiday about which it had advance notice; and did so continuously for more than one month — means that, regardless of what cause DOL had for this search, its scope renders it unconstitutional. The government should not be permitted to invade the privacy of its employees and their families in this manner in order to investigate allegations of workplace misconduct.

Likewise, it has long been established that the exclusionary rule applies not only to criminal prosecutions but to administrative hearings adjudicating the rights of New Yorkers. As the primary — indeed, in practice, the exclusive — means by which the right to be free from unconstitutional searches is vindicated, the exclusionary rule must be applied here to effectuate its purpose of deterring government actors from engaging in unconstitutional acts.

As a result, Petitioner respectfully requests that the Court vacate DOL's decision to terminate him, because it rested primarily on unconstitutionally obtained evidence.

FACTS

The following uncontested facts are drawn from the record presented to the Hearing Officer in the proceeding challenged herein. At approximately 10 a.m. on June 3, 2008, investigators from the Office of the State Inspector General (OSIG) placed a GPS tracking device to the personal, family car of Petitioner Michael Cunningham. (Hearing Officer

Determination on Motion Regarding Admissibility of Evidence (March 3, 2010) (hereinafter "HO Determination") at 3 (citing DOL Exhibit 25 at 7) (attached to Stoughton Affidavit as Ex. A)). The device remained on his car until July 8, 2008. (HO Determination at 3 (citing DOL Ex. 25 at 18).) It collected information about the whereabouts of the Cunningham car every day throughout that period, noting how long the car was stopped at each location. (DOL Ex. 25; DOL Ex. 30.) The device recorded the location of the car outside of normal business hours and on weekends. (*See, e.g.,* DOL Ex. 30 at 5, 11) (recording the location of the car, *inter alia*, at 6:29 p.m. on Wednesday, June 11, at 12:41 p.m. on Sunday, June 15, and at 7:36 a.m. on Monday, June 23). OSIG's report indicated that Mr. Cunningham was on annual leave for the week of June 30. (DOL Ex. 25 at 44); *see also* DOL Ex. 20 at 50, 52 (showing annual leave taken for June 30, July 1, July 2 and July 3). The GPS device showed Mr. Cunningham out of state during that week. (DOL Ex. 30 at 14, 15.) No notice was provided to Mr. Cunningham about this search specifically or about the possibility that DOL employees could be subject to such surveillance. (Respondent's Brief Regarding Admissibility of GPS Evidence at 2.)

The Department of Labor then sought to terminate Mr. Cunningham from his position as Director of the Staff and Organizational Development, a position he held for more than 20 years. (Hearing Officer Findings and Recommendation (August 16, 2010) (hereinafter "HO Findings") at 1–8 (attached to Stoughton Aff. as Ex. B).) A hearing was held in front of Hearing Officer Jeffery M. Selchick, who was designated by Commissioner of Labor M. Patricia Smith and Deputy Commissioner for Administration Martin Dunbar. (HO Findings at 1.) Mr. Cunningham objected to the use of the GPS evidence as the products of an unlawful search under Article I, Section 12 of the New York State Constitution. (HO Determination at 2.) The Hearing Officer heard arguments and ruled that the evidence should not be excluded because the exclusionary

rule did not apply in a work-related administrative hearing. (HO Determination at 13.) The Hearing Officer also questioned whether, notwithstanding *Weaver*, GPS tracking constitutes a search but ultimately did not rule on the question. (Evidentiary Ruling at 10.) ("[T]he Hearing Officer finds that the question of whether the OSIG's use of GPS devices amounted to an illegal search and/or seizure under the New York State Constitution is a question more appropriate for a New York court of competent jurisdiction.")

After a hearing on the merits of the case, the Hearing Officer found that DOL had met its burden in 11 of the 13 charges before him, and accordingly found that termination, the penalty sought by the state, was an appropriate penalty. (HO Finding at 57–59.) In all but 2 of the 11 charges where DOL was found to have met its burden, the Hearing Officer relied on evidence obtained from the GPS tracking device. (HO Opinion at 35–55.)

ARGUMENT

In *People v. Weaver*, 12, N.Y. 2d 433 (2009), the New York Court of Appeals held that GPS tracking is a search requiring a warrant pursuant to the New York State Constitution. Because DOL did not obtain a warrant to monitor the Cunningham family's personal car using GPS technology, the surveillance at issue here can only be justified if it meets the narrow exception to the warrant requirement for searches of government employees established in *Caruso v. Ward*, 72 N.Y.2d 432 (1988). This search, which tracked the daily movements of a family's personal car without notice for more than a month, including evenings, weekends and even a week of personal vacation, is excessive in scope relative to DOL's interest in uncovering purported workplace misconduct.

Because the GPS search of the Cunningham family car was unconstitutional, the evidence obtained from it should have been excluded from consideration by the Hearing Officer.

It has long been the case in New York that the exclusionary rule applies equally in administrative proceedings as in criminal proceedings because purpose to deter unconstitutional acts by government agents remains the same in both contexts. To carve out an exception to the exclusionary rule for such proceedings not only contradicts this well-established precedent but would ensure that violations of government employees' constitutional rights go undeterred and unpunished.

I. GPS TRACKING OF THE PRIVATE CAR OF A GOVERNMENT EMPLOYEE IS A SEARCH PROHIBITED BY ARTICLE I, SECTION 12 OF THE NEW YORK STATE CONSTITUTION AND CANNOT BE JUSTIFIED UNDER ANY EXCEPTION TO THE WARRANT REQUIREMENT.

Although it relied overwhelmingly on evidence obtained from the GPS device to justify the dismissal of Mr. Cunningham, the Hearing Officer below declined to rule on the question of whether such evidence was obtained unconstitutionally, finding the question better suited for "a New York Court of competent jurisdiction." (HO Determination at 10.) There is no question, however, that the Court of Appeals' holding in *People v. Weaver*, 12 N.Y.3d 433 (2009), requires this Court to find that the GPS search of the Cunningham family car was unconstitutional.

Weaver held that, no matter the context, government tracking of a person using GPS technology is a search that must meet constitutional standards of reasonableness. 12 N.Y.3d at 444-45. In so holding, the Court of Appeals concluded that there is a reasonable expectation of privacy in the extensive information about a person's movements, locations, activities, and habits revealed by GPS tracking of a personal motor vehicle, triggering the protections against unlawful

searches under the New York State Constitution, Article I, Section 12.[1] 12 N.Y.3d at 439. As the Court noted, modern GPS technology allows for "any person or object, such as a car, [to] be tracked with uncanny accuracy to virtually any interior or exterior location, at any time and regardless of atmospheric conditions," revealing "the whole of a person's progress through the world, into both public and private spatial spheres." *Id.* at 436. This "massive invasion of privacy entailed by the prolonged use of the GPS device [is] inconsistent with even the slightest reasonable expectation of privacy." *Id.* As such, like any other search, GPS tracking must be justified by a warrant, or an exception to the warrant requirement, neither of which was present in *Weaver*. *Id.* at 444-45.

The same is true here. DOL continuously tracked the progress of the Cunningham family through the world, into both public and private spheres, for a prolonged period of more than five weeks, using the uncannily accurate technology of a GPS device. DOL did not obtain a warrant for this search.

The question presented in this case — one of the first to interpret the legality of a GPS search since *Weaver* — is whether an invasive GPS search can be justified under the narrow exception to the warrant requirement applicable to searches performed by the government as employer. In *Caruso v. Ward*, 72 N.Y.2d 432 (1988), the Court of Appeals established the test for measuring the constitutionality of such searches, adopting the United States Supreme Court's approach in *O'Connor v. Ortega*, 480 U.S. 709 (1987). This approach acknowledges that the constitutional standard applicable to government-as-employer is reduced, but nonetheless

[1] The New York State Constitution provision banning unreasonable searches and seizures mirrors that of the U.S. Constitution: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." New York State Constitution, Art. I, Section 12.

requires that they be justified both "at inception" and "in scope." *Caruso*, 72 N.Y.2d at 437; *O'Connor*, 480 U.S. at 726. The burden is on the government to justify a search under this test. *See Delaraba v. Nassau County Police Dep't*, 83 N.Y.2d 367, 374 (1994). Both the Court of Appeals' description of the extensive scope of GPS tracking in *Weaver* and the particularly intrusive circumstances of this case mean that DOL cannot meet its burden to justify the scope of this search.[2]

A warrantless search of a government employee will be permissible in its scope "when the measures adopted are reasonably related to the objectives of the search and *not excessively intrusive*." *Ortega*, 480 U.S. at 726 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)) (emphasis added). As *Weaver* makes clear, GPS tracking is extraordinarily intrusive because of the breadth and specific content of what is revealed: "What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations — political, religious, amicable and amorous, to name only a few — and of the pattern of our professional and avocational pursuits." 12 N.Y.3d at 442. In finding GPS searches unconstitutional under the Fourth Amendment, the D.C. Circuit similarly noted:

> Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one's not visiting any of these places over the course of a month. The sequence of a person's movements can reveal still more; a single trip to a gynecologist's office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story. A person who knows all of another's travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving

[2] For the purposes of this action, Petitioner does not dispute that DOL had sufficient cause to justify the "inception" of the search. Rather, as the above discussion makes clear, no matter what cause DOL had for suspecting Mr. Cunningham of workplace misconduct, the GPS tracking of his private family car cannot be justified in scope under the narrow exception to the warrant requirement for certain searches of government employees.

> medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts.

United States v. Maynard, 615 F.3d 544, 562 (D.C. Cir. 2010). A GPS tracking device can reveal information that an employee would naturally want to keep, and has every legitimate expectation of keeping, private from his employer, such as trips to job interviews or medical professionals.

These intrusive aspects of the technology are amplified and illustrated in this case. Here, the GPS device placed on the Cunningham family car tracked the family's movements and activities 24 hours a day, 7 days a week, in the evenings, on weekends, and during a one-week period when DOL was well aware that the family was on vacation.[3] In all, more than 75% of the time the GPS device was attached to Mr. Cunningham's car was purely private, family time not during working hours and thus wholly irrelevant to DOL's purported need to monitor Mr. Cunningham's whereabouts during the workday. Because of this overbroad temporal scope, DOL's GPS tracking device revealed information about where Mr. Cunningham and his family

[3] In the hearing below, DOL claimed that it only considered the movements of the car during work hours in preparing its Notice of Discipline. (HO Determination at 9.) Such a claim would add little comfort even if it were true, since it is undisputed that the GPS device recorded the car's movements continuously and thus exposed the family's private activities to the government. But in fact, as the record demonstrates, DOL did consider and submit to the Hearing Officer information about the location of Mr. Cunningham's car outside of normal business hours. (*See, e.g.* DOL Ex. 25 at 10, 14 (disclosing location and movements of car on weekends, including weekend of June 7-8 and weekend of June 14-15); DOL Ex. 30 at 11, 13 (same, including Saturday June 21, and weekend of June 27-28); DOL Ex. 25. at 19 (disclosing location and movements of car while traveling out of state during annual leave from June 30 through July 3); DOL Ex. 30 at 14-15 (same); DOL Ex. 25 at 10, 14, 15 (disclosing location of Mr. Cunningham's personal car on weekdays outside business hours at 5:22 p.m. on June 4; at 5:58 p.m. and 6:08 p.m. on June 5, at 5:30pm on June 6, at 6:25pm and 6:29pm on June 11, at 5:54pm and 6:04pm on June 12, at 5:30 and 5:56 on June 16, and at 6:19 and 6:25 on June 18); DOL Ex. 30 at 11, 12-13 (same, at 7:36 am, 7:38am. 7:42am, 7:45am, 8:20am, 8:22am, and 8:24am on June 23, at 6:27pm and 6:29pm on June 26).) It is equally clear that the Hearing Officer relied on such information, including the fact that Mr. Cunningham's car was parked in one place for 19 consecutive hours, a time period that obviously spans more than one workday. (HO Findings at 16 (discussing night of June 8, 2008, introduced into evidentiary record in DOL Ex. 25 at 11 and DOL Ex. 30 at 3).)

went after work and on weekends, what restaurants they ate at, what places they visited, where they vacationed, and how fast they drove. (*See generally* DOL 30.) It created the potential for revealing exactly the type of information — such as religious and political affiliations, medical treatments, or after-hours job interviews — that the courts in *Weaver* and *Maynard* specifically condemned.

The fact that DOL searched the Cunningham family's private car — as opposed to a government-issued vehicle — also makes this search unconstitutional. An intrusion into such a wholly private sphere cannot be lightly justified as legitimate workplace search, especially given the inherent possibility of tracking information about members of a government employee's family whose expectations of privacy cannot be said to have been diminished in any way by their relative's government employment. Through GPS technology, the State obtained a detailed picture of the Cunningham family's day-to-day life.

Many of the cases establishing the exception to the warrant requirement for workplace searches arise out of searches of the workplace itself, suggesting, by way of contrast, that courts should be more protective when the exception is applied outside of the physical workspace. *O'Connor*, for example, involved a search of an employee's office and critical to the Court's decision to uphold that search was its observation that "[g]overnment offices are provided to employees for the sole purpose of facilitating the work of an agency. The employee may avoid exposing personal belongings at work by simply leaving them at home." 480 U.S. at 725 (noting also that "the privacy interests of government employees in their place of work which, while not insubstantial, are far less than those found at home or in some other contexts."). Similarly, in the recent decision of *City of Ontario v. Quon*, -- U.S. ---, 130 S. Ct. 2619 (2010), the Supreme Court upheld a search of an employee's work-issued pager messages only because such a search

of government property "was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap of his home phone line," *id.* at 2631, thus making clear the distinction between permissible searches of employer-provided objects and impermissible searches of private property. No New York court has ever held that the government may search an employee's personal car without a warrant.[4]

The Cunningham family was not on notice that their private car was subject to search by Mr. Cunningham's employer, a factor also considered crucial to the Supreme Court's decision to uphold the search in *Quon*. 130 S.Ct. at 2631 (upholding the search only because the employee "was told that his messages were subject to auditing."). Likewise, the New York Court of Appeals has only upheld warrantless searches of government employees where the employees have been on notice about the possibility of such searches. *See Caruso*, 72 N.Y.2d at 440 (upholding warrantless drug testing of police officers because the possibility of such a search was "known in advance"); *Delaraba*, 83 N.Y.2d at 372 (upholding a search because the police officers subject thereto had "prior knowledge of the testing"). DOL's failure to provide any warning to its employees that their families' privacy could be invaded in this manner brings it outside the realm of permissible searches by the government as employer.

Crucially, Petitioner Cunningham, as a managerial employee of the DOL, is categorically unlike the employees with unique or dangerous government responsibilities whose diminished

[4] Indeed, in the only case Petitioner can identify involving a government employer searching an employee's car, the search was upheld only because it was an employer-issued car and was, therefore, the property of the government and the employee had notice of regulations reserving the right to inspect company-issued equipment at any time. *DeMaine v. Samuels*, 2000 U.S. Dist. LEXIS 16277, 16–18, 23 (D. Conn. 2000) ("The fact that the A&O Manual authorizes searches of police-issued equipment at any time for reasonable purposes and any personal property located on or within department property, including a state-issued automobile, weighs heavily in the determination of the reasonableness of the search here."). Not only was Mr. Cunningham's car not an employer-issued car, it was also a car that other members of his family could and did drive, and neither Mr. Cunningham nor his family was on notice of DOL's intent to search their vehicle.

expectation of privacy has sometimes led courts to uphold certain workplace searches. In *Quon*, for example, the Supreme Court found it highly relevant that the employee whose government-issued pager was searched was a law enforcement officer "who would or should have known that his actions were likely to come under legal scrutiny." *Quon*, 130 S. Ct. at 2631. Similarly, every instance in which the Court of Appeals has upheld a government employee search involved police officers with similarly diminished expectations of privacy arising out of the unique responsibilities they bear as law enforcement officials. *See Caruso*, 72 N.Y.2d at 440 (upholding warrantless drug testing because police officers "have a very diminished expectation of privacy due to their pursuit of service in the elite unit"); *Delaraba*, 83 N.Y.2d at 372 (upholding drug testing of police officers in part because they "are voluntary members of an elite organization whose primary purpose is drug interdiction"). Mr. Cunningham's position, by contrast, was not sensitive and in no way created an expectation that his constitutional right to be free from unreasonable government surveillance would be compromised.

For all of these reasons, DOL's search of the Cunningham family's personal car using GPS surveillance was unconstitutional. DOL cannot justify, in the name of establishing whether an employee is where he should be during working hours, such an extensive intrusion into the private sphere of a government employee and his family.

II. THE EXCLUSIONARY RULE APPLIES TO ADMINISTRATIVE PROCEEDINGS AND SHOULD HAVE BARRED THE HEARING OFFICER FROM CONSIDERING THE UNCONSTITUTIONALLY OBTAINED GPS EVIDENCE.

Having established that the search was unconstitutional, the question remains whether there exists any remedy for the violation of Mr. Cunningham's rights. The Hearing Officer wrongly believed that no such remedy exists because, he believed, the exclusionary rule does not

apply to the type of administrative hearing over which he presided. Since 1969, however, it has been established in New York that the exclusionary rule applies in administrative proceedings no less than in criminal trials. This is because, as the Court of Appeals noted, "[t]he logic of the *Mapp* rule, which requires the exclusion of evidence in order to deter State officials from engaging in unlawful searches and seizures, applies equally whether the evidence is sought to be used in a criminal trial or on an administrative hearing." *In the Matter of Finn's Liquor Shop et al.*, 24 N.Y.2d 647, 662 (1969) (applying the exclusionary rule to bar consideration of illegally seized sales slips showing violations of state liquor laws in an administrative hearing to revoke an establishment's liquor license).

Since *Finn's Liquor*, New York courts have frequently applied the exclusionary rule in administrative proceedings. In *Allen v. Murphy*, 37 A.D.2d 117, 119 (App. Div. 1st Dep't. 1971) (per curiam), for example, the Appellate Division overturned the dismissal of two employees on the grounds that their dismissals were based in part on a wiretap obtained without a warrant, relying on *Finn's Liquor*. In *Gaglia v. Starr*, 59 A.D.2d 839 (App. Div. 1st Dep't. 1977), the Appellate Division excluded unconstitutionally obtained evidence from a work-related proceeding related to the firing of a construction inspector for allegedly taking bribes. In *Battaglia v. New York City Transit Auth.*, No. 25523/90, 1994 N.Y. Misc. LEXIS 183 at *12 (N.Y. Sup. Ct. Mar. 4, 1994), the court applied the exclusionary rule to a city transit worker's employment disciplinary hearing, although the decision was later reversed based on the constitutionality of a collective bargaining agreement. 225 A.D.2d 384 (N.Y. App. Div. 1st Dep't 1996).

In finding otherwise, the Hearing Officer below relied on *Boyd v. Constantine*, 81 N.Y.2d 189 (1993), in which the Court of Appeals declined to exclude unconstitutionally obtained

evidence from an employment hearing involving a State Trooper. But that case is wholly inapplicable here. The reason the exclusionary rule did not apply in *Boyd* was that although it was the State Police Department who sought to use the evidence, it was not the State Police who violated the constitution to obtain the evidence. The unconstitutional search was carried out by Buffalo City Police. Thus, precluding the State Police from using the evidence would serve no deterrent purpose, making application of the rule futile. As the Court noted, "[t]he Buffalo City Police could not have foreseen, when they searched the vehicle, that defendant would be subject to an administrative disciplinary proceeding by the Division of State Police. . . . Thus, only negligible deterrence would result from the exclusion of the evidence." *Id.* at 196. Here, by contrast, the same department that authorized and caused the search to be executed sought to use the evidence gathered in the administrative proceeding. The deterrence rationale of the exclusionary rule compels, as *Boyd* itself suggests[5], its application to this case. To hold otherwise would permit an agency to benefit from its own unconstitutional search — precisely the outcome the Court of Appeals rejected in *Finn's Liquor*, *supra*.

The Hearing Officer also relied on the federal case *Burka v. New York City Transit Auth.*, 747 F. Supp. 214 (S.D.N.Y. 1990), which drew a distinction between "law-enforcement-related" and "work-related" hearings, declining to apply the exclusionary rule to the latter. *Id.* at 220. This distinction was based on the court's observation that the plaintiffs in that case "cited no

[5] Even in cases dealing with the application of the exclusionary rule in criminal proceedings, the Court of Appeals has made clear that the question of whether the exclusionary rule should apply is fundamentally one of whether it would serve to deter unconstitutional state action, not whether the purpose of the search is law enforcement. *See People v. Jones*, 2 N.Y.3d 235, 241 (2004) ("The exclusionary rule 'was originally created to deter police unlawfulness by removing the incentive' to disregard the law, but also 'serves to insure that *the State itself, and not just its police officers,* respect the constitutional rights of the accused.'") (quoting *People v. Payton*, 51 N.Y.2d 169, 175 (1980)) (emphasis added).

instance in which evidence was excluded, under the search and seizure clause, in a 'work-related' disciplinary hearing or decisionmaking process." *Id.* But the federal district court in *Burka* — whose decision, needless to say, is not binding on this court — simply got it wrong. Although the *Burka* plaintiffs might have missed it, the several cases cited above establish that both before and after *Burka*, the exclusionary rule frequently has been applied by New York courts to work-related administrative hearings. *See, e.g., Allen*, 37 A.D. at 119; *Gaglia*, 59 A.D.2d at 839; *Battaglia*, 1994 N.Y. Misc. LEXIS 183 at 12.

As Court of Appeals' unequivocal holding in *Finn's Liquor* establishes, New York courts do not recognize a distinction between "law-enforcement-related" and "work-related" administrative hearings when it comes to the applicability of the exclusionary rule. In the Appellate Division's decision in *Boyd v. Constantine*, the First Department noted that "[w]hile the Federal courts may decline to apply the exclusionary rule in an employment-related disciplinary proceeding (*see, Burka v. New York City Transit Authority, 747 F Supp 214*), we are constrained to follow the consistent, unequivocal holdings of the Court of Appeals prohibiting the use of illegally obtained evidence in administrative proceedings." *Boyd v. Constantine*, 180 A.D.2d 186, 189 (N.Y. App. Div. 4th Dep't. 1992). Although the Court of Appeals later reversed the First Department's decision, its decision to do so was based on the absence of a deterrence rationale in that particular case, as discussed *supra*, underscoring the fact that when the deterrence rationale remains intact, as it does here, the exclusionary rule plainly does apply.

For these reasons, the Hearing Officer was wrong as a matter of law in refusing to apply the exclusionary rule in this case and this Court should vacate DOL's decision to terminate Petitioner Cunningham based on evidence that should have been excluded.

CONCLUSION

For the foregoing reasons, the Court should declare that the Respondent's actions of placing a GPS tracking device on the Petitioner's car violated his rights under the New York Constitution, declare that the exclusionary rule should have been applied to the administrative proceeding approving Petitioner's termination, vacate the decision that resulted in the Petitioner's termination, and order that Petitioner be reinstated.

Respectfully submitted,

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