

**THE CITY OF NEW YORK
CONFLICTS OF INTEREST BOARD**

x

In the Matter of

The Financial Disclosure Appeal of:

FD No. 2018-01

Michael Pokalsky

x

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND ORDER**

Upon consideration of all the evidence presented in this matter, and upon the full record herein, the Conflicts of Interest Board (“COIB” or “the Board”) finds that, pursuant to Section 12-110(b)(3)(a)(4) of the New York City Administrative Code and Board Rules § 1-15, Michael Pokalsky is required to file a financial disclosure report for calendar year 2017.

This financial disclosure appeal involves Michael Pokalsky, an employee of the New York City School Construction Authority (“SCA”). Pokalsky was notified by SCA of the requirement, pursuant to Section 12-110(b)(3)(a)(4) of the New York City Administrative Code, to file a financial disclosure report for calendar year 2017,¹ and he appealed that designation as a required filer to the agency head and, after SCA’s denial of his appeal, to the Board.² SCA denied Pokalsky’s appeal, noting his job description requirements and that his actual work performance in 2017 involved the “negotiation, authorization or approval of contracts.”³

In his appeal to the Board, Pokalsky argues that SCA’s denial was based on an outdated job description which includes work duties that do not apply to his position.⁴ He further argues that he does “not negotiate, authorize, or approve contracts, leases, franchises, revocable consents, concessions or applications for zoning changes, variances, or special permits”⁵ and

¹ Pokalsky has filed an annual disclosure report since the beginning of his employment with SCA as Project Officer II in 2001.

² Pokalsky argues that he was denied due process by SCA because the agency initially denied Pokalsky’s appeal before the submission of his written statement. (*See* Financial Disclosure Appeal Process ¶ B4 (Exhibit A). This argument is without merit. Upon realizing the error, SCA withdrew its denial and gave Pokalsky an additional 14 days to submit a written statement. Email between SCA and Pokalsky, dated May 9-11, 2018 (Exhibit J). Pokalsky opted to submit an appeal to COIB instead of submitting a written statement to the agency. SCA then issued a denial of his appeal after waiting the full 14 days.

³ SCA’s Determination of Pokalsky’s Appeal, dated May 30, 2018 (Exhibit B).

⁴ Pokalsky’s Appeal to COIB, dated May 7, 2018 (Exhibit H).

⁵ *Id.*

denies performing duties cited in his job description such as participation in the development and issuance of project procedures and policies, reviewing and recommending authority-wide policies and procedures, using independent judgment to make on-site change order decisions and having authority to negotiate with contracts and commit SCA's resource to the change orders.⁶ Due to the differences in SCA policies and the job description for the position of Project Officer, Pokalsky claims that the reason for filing provided by SCA does not cover all project officers, including him.⁷

Administrative Code § 12-110(b)(3)(a)(4) requires the filing of a financial disclosure report by:

Each employee whose duties at any time during the preceding calendar year involved the negotiation, authorization or approval of contracts, leases, franchises, revocable consents, concessions, and applications for zoning changes, variances and special permits, as defined by rule of the conflicts of interest board and as annually determined by his or him agency head or employer, subject to review by the conflicts of interest board.

The Rules of the Board clarify which employees with the responsibilities set forth in that Section are required to file financial disclosure reports ("contract filers"). Any employee who is involved in the substantive determination of any aspect of the contracting process, whether in the drafting of a contract, the evaluation of a bid, the approval of documents relating to a contract, or the determination of contract policies, rules, or regulations, is required to file.⁸ Included in the category of contract filers is any employee who "[n]egotiates or determines the substantive content of a contract, lease, franchise, revocable consent, concession, or application for a zoning change, variance, or special permit or change order,"⁹ "[r]ecommends or determines whether or to whom a contract, lease, franchise, revocable consent, concession, or application for a zoning change, variance, or special permit or change order should be awarded or granted,"¹⁰ or "[a]pproves a contract, lease, franchise, revocable consent, or concession or change order on behalf of the City or any agency subject to Administrative Code §12-110."¹¹ Exempted from this particular category of employees required to file financial disclosure reports are clerical personnel and other public servants who perform only ministerial tasks.¹² Charter § 2601(15)

⁶ *Id.*

⁷ Email from Pokalsky to COIB, dated August 16, 2018 (Exhibit I at 2).

⁸ Board Rules § 1-15.

⁹ Board Rules § 1-15(4)

¹⁰ Board Rules § 1-15(5)(emphasis added).

¹¹ Board Rules § 1-15(6).

¹² Board Rules § 1-15(b). For example, "public servants who are under the supervision of others **and** are without substantial personal discretion, **and** who perform only clerical tasks ...shall not, on the basis of such tasks alone, be required to file a financial disclosure report." (*Id.*; emphasis added) Examples of ministerial tasks include "typing, filing, or distributing contracts, leases, franchises, revocable consents, concessions, or zoning changes, variances, or special permits or calendaring meetings or who identify potential bidders or vendors." *Id.*

defines “ministerial matter” as “an administrative act . . . which does not involve substantial personal discretion.”

A Project Officer II is “responsible for managing and coordinating personnel, budget, administration and operation activities in involved in all phases of assigned school construction projects, from their initial conception through completion and opening of the facility.”¹³ Under the guidance of a senior-level Project Officer, a Project Officer II has significant latitude for independent judgment and decision-making with regards to all activities related to on-site management of a construction site such as quality assurance, meeting deadlines, problem solving, directing work, and interacting with contractors, vendors, architects, safety officers and senior level personnel.¹⁴ As explained by Pokalsky, because of his “high level of experience and knowledge in construction,” his duties were “largely in quality control, quality assurance, inspection and testing and the coordination of the same.”¹⁵ While he protests his filing requirement because he was not the one who personally negotiated contracts or made on-site change orders or payments, the evidence demonstrates that, without his on-site knowledge, guidance, and concurrence, the Lead Project Officer would not have had sufficient information to proceed with on-site change orders, payment requisitions, or other needed substantive changes related to constructions projects. As stated by a supervisor, Pokalsky oversees the “work in the field and directs the contractor accordingly” and provides direct feedback which “translate[s] into direction and information which is used to process and negotiate change orders as well as pay requisitions.”¹⁶

Pokalsky’s substantive involvement in change orders is evident in his work on the Excelsior Prep High School exterior modification project in 2017. As one of the on-site managers, Pokalsky was given wide latitude for independent judgment and decision-making to ensure successful completion of a complex project.¹⁷ He supervised and directed contractors on a daily basis; met with architects and safety personnel; provided detailed reports on work progress; and coordinated inspections with outside labs which led to deficiencies being corrected. Pokalsky attended bi-weekly meetings where his input was vital to substantive decisions regarding the progress and continuation of the project such as change orders, supplemental agreements, and the interpretation of contract documents.¹⁸ Without Pokalsky’s direct feedback and input, the Lead Project Officer at SCA could not properly negotiate accurate change orders or payment requisitions.¹⁹

¹³ SCA Project Officer II job profile, dated May 3, 2008 (in effect in 2017) (Exhibit D).

¹⁴ *Id.*

¹⁵ See Email from Pokalsky to COIB, dated July 24, 2018 (Exhibit H at 1).

¹⁶ See Email from Joseph Scalisi, SCA, dated August 6, 2018 (Exhibit C at 6); 2017 Annual Review of Pokalsky (Exhibit E).

¹⁷ *Id.*; Meeting Minutes of Excelsior Prep High School Project, dated January 18, 2017, to December 14, 2017 (Exhibit F); Daily Reports Log of Excelsior Prep High School Project, dated January 2, 2017, to December 29, 2017 (Exhibit G).

¹⁸ *Id.*

¹⁹ See Email from Joseph Scalisi, SCA, dated August 6, 2018 (Exhibit C at 6); Email from Susan Moran, SCA to COIB, dated August 17, 2018 (Exhibit C at 4-5).

Conclusion

Board Rules § 1-15 was enacted to, among other things, “limit financial disclosure filing to those public servants who are at risk of conflicts of interests ... [and] to ensure that rules for determining who is a ‘contract’ filer are uniform and uniformly applied throughout the City.”²⁰ That objective is furthered by concluding that Michael Pokalsky is required to file a financial disclosure report for 2017.

To be exempt from the filing requirement, public servants performing contracting responsibilities must perform **only** ministerial duties.²¹ Pokalsky’s actual on-site work duties in 2017 directly and substantively contributed to his supervisor’s negotiations for change orders and payment requisitions relating to SCA construction projects. Thus, he did not perform merely ministerial tasks but engaged in activities that are precisely the kind that have the potential to pose a conflict of interest.²²

The Board concludes that Pokalsky’s duties fall squarely within Administrative Code § 12-110(b)(3)(a)(4) and Board Rules § 1-15(a)(5).²³

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Administrative Code § 12-110(b)(3)(a)(4), that Michael Pokalsky file a financial disclosure report for calendar year 2017 no later than December 31, 2018.

Michael Pokalsky has the right to appeal this Order to the Supreme Court of the State of New York.

²⁰ State of Basis and Purpose for Board Rules § 1-15.

²¹ Board Rules § 1-15(b) (emphasis added).

²² The Board has previously determined that employees who do not have final authority but make recommendations that affect the substantive content of contracts or change orders are required contract filers under Administrative Code § 12-110(b)(3)(a)(4). *See Matter of Cirincione, et. al.*, FD Order No. 2017-03 (May 17, 2017)(Senior Construction Assessment Specialists at SCA required to file because they had substantial discretion in their recommendations to their supervisor who relied on the recommendations to make final decision on contracts, payments and change orders).

²³ The categories of required filers focus on groups of employees with certain duties and responsibilities, such as contract filers and policymakers (*see* Administrative Code § 12-110(b)(3)(a)(2) and (4)). The Board has found employees of various professions who perform contracting duties to be required to file when their work fits the standards set forth in the law and not to be required to file when their work does not. *See, e.g., Matter of Akeloko, et. al.*, FD Order 2015-01 (March 24, 2015) (two architects with different duties both required to file); *Matter of Acevedo, et. al.*, FD Order No. 2013-01 (April 10, 2013) (some architects required to file while others are not).

The Conflicts of Interest Board



By: Richard Briffault, Chair

Fernando A. Bohorquez, Jr.
Anthony Crowell
Jeffrey D. Friedlander
Erika Thomas

Dated: November 30, 2018

cc: Michael Pokalsky, SCA
Susan Moran, SCA

