

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

_____x

In the Matter of

The Financial Disclosure Appeal of:

FD No. 2019-03

Duncan Schmitt

_____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, including all papers submitted to, and recommended findings of, the neutral arbitrator of the Office of Collective Bargaining (“OCB”), the Conflicts of Interest Board (“COIB” or “the Board”) adopts the recommendation of OCB neutral arbitrator Mary O’Connell that, pursuant to § 12-110(b)(3)(a)(4) of the New York City Administrative Code (“Admin. Code”) and Board Rules § 4-04, Duncan Schmitt is required to file a financial disclosure report for calendar year 2017.

Duncan Schmitt is an employee of the New York City Department of Environmental Protection (“DEP”). Mr. Schmitt was notified by DEP of the requirement, pursuant to Admin. Code § 12-110(b)(3)(a)(4), to file a financial disclosure report for calendar year 2017.¹ He fully and timely appealed the designation as a required filer to the agency head and the Board, and the matter was heard before an OCB neutral arbitrator.²

Admin. 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 her agency head or employer, subject to review by the conflicts of interest board.

¹ Financial disclosure reports pertaining to a particular calendar year are filed in the next calendar year. For example, reports relating to 2017 were filed in 2018.

² The appeal was heard pursuant to the Financial Disclosure Appeals Process (Exhibit A), the procedure for hearing appeals that was previously agreed to among COIB, the City’s Office of Labor Relations, and DC 37. The appeal was heard by Mary O’Connell who submitted her Report and Recommendation (“Schmitt Report”) on February 8, 2019 (Exhibit B).

The Rules of the Board clarify which employees with the responsibilities set forth in that Section are required to file financial disclosure reports, colloquially termed “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.³ Included in the category of contract filers is any employee who “Negotiates 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,”⁴ “**Recommends 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.”⁵ 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.⁶ City Charter § 2601(15) defines “ministerial matter” as “an administrative act . . . which does not involve substantial personal discretion.”⁷

Mr. Schmitt served as the Conservation Easement Manager in the Bureau of Water Supply and was responsible for the enforcement of 180 conservation easements with landowners in the Upstate New York Watershed.⁸ He monitored the easements by conducting property inspections twice a year.⁹ By agreement, the inspections are conducted on the ground in the fall and aerially in the spring.¹⁰ Upstate aerial inspections require a micro-purchase order to procure the services of a private aircraft.¹¹

In 2017, Mr. Schmitt was involved in the procurement of such a vendor. Due to the requirement of using a Minority- or Women-Owned Business Enterprise (“M/BWE”) vendor, he could not utilize the services of the vendors he had used in the past.¹² As a result, Mr. Schmitt contacted only one potential vendor, Lisa Litts.¹³ Ms. Litts had a private plane and was seeking to form her own aviation company that would qualify as an M/WBE vendor in the Catskills area.¹⁴ Mr. Schmitt admits that he made the decision not to conduct a search for other vendors and instead only contacted Ms. Litts, who he knew from a prior association with another aviation company, River Aviation.¹⁵ Ms. Litts was awarded the micro-purchase order.¹⁶

³ Board Rules § 4-04.

⁴ Board Rules § 4-04(a)(4).

⁵ Board Rules § 4-04(a)(5)(emphasis added).

⁶ Board Rules § 4-04(b).

⁷ The Board applies the definition of “ministerial matter” found in City Charter § 2601(15) to its interpretation of “ministerial tasks” in Board Rules § 4-04(b).

⁸ Schmitt Report at 5. Ms. Schmitt’s civil service title is Associate Project Manager II.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 6.

¹³ *Id.* at 6-7.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 8.

While admitting that he made the micro-purchase order in 2017, Mr. Schmitt argues that he is not subject to the filing requirement because a micro-purchase order, unlike “larger contracts,” fails to put him at a significant risk for conflicts of interest.¹⁷ He further contends that any discretion he may have is limited by M/WBE rules and the small number of vendors in the Upstate area.¹⁸ Mr. Schmitt’s arguments are unavailing. It is well-established that the monetary value of a purchase order or contract has no bearing on the filing requirements.¹⁹ Moreover, although Mr. Schmitt may have been limited in his choice of vendors, the evidence demonstrates that he had substantial discretion to make decisions in selecting a vendor to perform the aerial inspections ranging from deciding not to conduct searches for vendors to only contacting one potential vendor who was ultimately awarded the micro-purchase. Therefore, his duties in 2017 demonstrate that he was involved in recommending the award of a micro-purchase order and thus, is required to file under Admin. Code §12-110(b)(3)(a)(4) and Board Rules § 4-04(a)(5).

Conclusion

Board Rules § 4-04 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 Duncan Schmitt is required to file a financial disclosure report for calendar year 2017.

To be exempt from the filing requirement, public servants performing contracting responsibilities must perform **only ministerial duties**.²¹ Mr. Schmitt was directly and substantially involved in the discretionary process of recommending to whom the micro-purchase should be awarded, and thus, did not perform merely ministerial tasks. He performed activities, regardless of purchase value, that are precisely the kind that have the potential to pose a conflict of interest. Thus, as the neutral arbitrator correctly concluded, Mr. Schmitt is required to file a financial disclosure report for calendar year 2017.

¹⁷ Notice of Appeal to Conflicts of Interest Board, dated August 23, 2018 (Exhibit C); Letter to Conflicts of Interest Board, dated October 18, 2018 (Exhibit D).

¹⁸ Letter to Conflicts of Interest Board, dated October 18, 2018 (Exhibit D).

¹⁹ *See Matter of Roman*, FD Order 2019-01 (January 31, 2019).

²⁰ Statement of Basis and Purpose for Board Rules § 1-15 (now Board Rules § 4-04).

²¹ Board Rules § 4-04(b) (emphasis added).

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Admin. Code §12-110(b)(3)(a)(4), that Duncan Schmitt is required to file a financial disclosure report for calendar year 2017 no later than April 11, 2019.

Duncan Schmitt has the right to appeal this Order to the Supreme Court of the State of New York.

The Conflicts of Interest Board



By: Richard Briffault, Chair

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

Dated: March 12, 2019

cc: Duncan Schmitt, DEP
Morlan Ty Rogers, DEP
Aaron Amaral, DC37
Onya Brinson, DC37