

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

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In the Matter of

The Financial Disclosure Appeals of:

FD No. 2019-04

Sanad Abdelmessih
Baruch Beer
Dunovan Dillon
Clemence Henry
Mustapha Usman
Joseph Myrthil
Clara Ofikuru
Hakeem Osho
Marie Sinclair-White

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 New York City Office of Collective Bargaining (“OCB”), the Conflicts of Interest Board (the “Board”) determines that Sanad Abdelmessih, Baruch Beer, Dunovan Dillon, Clemence Henry, Mustapha Usman, Joseph Myrthil, Clara Ofikuru, Hakeem Osho, and Marie Sinclair-White¹ (“Appellants”) are not required to file a financial disclosure report for calendar year 2017.

In 2017, Appellants held the civil service title of City Tax Auditor Level IV, more commonly known by their in-house title of Group Chief, at the New York City Department of Finance (“DOF”). Each employee was notified by DOF of the requirement, pursuant to Section 12-110(b)(3)(a)(4) of the Administrative Code of the City of New York, to file a financial disclosure report for calendar year 2017.² Each employee fully and timely appealed the designation as a required filer to both the agency head and the Board. The matter was heard before an OCB neutral arbitrator James A. Brown, who issued his Report and Recommendation on December 11, 2018 (“Brown Report”), recommending that the appeal of Beer be denied and that the appeals of the remaining employees be granted on procedural grounds.³

¹ Dunovan Dillon and Mustapha Usman left City service on November 22, 2018, and December 31, 2018, respectively.

² 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.

³The appeals were heard pursuant to the Financial Disclosure Appeals Process (“Appeals Process”) (Exhibit A) the procedure for hearing appeals that was previously agreed to among the Board, the City’s Office of Labor Relations, and DC 37.

The Applicable Law

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.”

The Rules of the Board clarify which employees with the responsibilities set forth in Admin. Code § 12-110(b)(3)(a)(4) are required to file financial disclosure reports, colloquially termed “contract filers.” 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”⁴ and “**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 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

The Board has previously determined that tax settlements, similar to claims, are contracts under Administrative Code §12-110(b)(3)(a)(4). *See Matter of Horne, et al.*, FD Order No. 2012-3 (Sept. 20, 2012)(tax conciliators who negotiated tax disputes are required filers because tax settlements are contracts); *see also DeWitt v. DeWitt*, 62 A.D.3d 744, 879 N.Y.S.2d 516 (2d Dep’t 2009)(“A settlement agreement is a contract subject to principles of contract interpretation” (citation omitted)). *Cf.* Gen. Mun. Law § 800(2) (defining “contract” for purposes of the New York State conflicts of interest law to include “any claim, account or demand against or agreement with a municipality, express or implied”).⁸

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

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

⁶ Board Rules § 4-04(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.*

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 Brown Report at 15 (“tax disputes, once resolved, are ‘contracts’”)(Exhibit B).

Procedural History

Appellants, with the exception of Beer and Sinclair-White, have previously been designated by DOF as required filers pursuant Admin. Code § 12-110(b)(3)(a)(4).⁹ They appealed the earlier designations, and the appeals were granted by DOF. Abdelmessih, Dillon, Henry, and Myrthil's appeals were granted in 2014 for filing year 2013 and Ofikuru, Osho, and Usman in 2016 for filing year 2015.

The Appeals Process states that once the agency grants an employee's appeal, "the agency shall not place the employee back on the list until or unless his or her title, position, duties, or responsibilities change in such a way that he or she would be required to file pursuant to the criteria specified by NYC Administrative Code § 12-110(b)." ¹⁰ Therefore, the Board must first determine whether there was a change in title, position, duties, or responsibilities that would now allow DOF to require Abdelmessih, Dillon, Henry, Usman, Myrthil, Ofikuru, and Osho to file a 2017 financial disclosure report.

In the instant appeal, DOF argues that Abdelmessih, Dillon, Henry, Usman, Myrthil, Ofikuru, and Osho have been designated as required filers based upon their title change in 2016 to their current civil service title of City Tax Auditor Level IV which confers upon them greater responsibilities and thus justifies their renewed required filing status.¹¹ Appellants disagree and state that, despite the civil service title change, their in-house title of Group Chief, duties, and responsibilities remain largely unchanged since the granting of their appeals.¹²

In 2017, Appellants worked as Group Chiefs in five different audit divisions at DOF: Abdelmessih, Dillon, and Henry at Personal Income Tax; Myrthil at Sales Tax; Usman at Unincorporated Business Tax; Osho at Commercial Tax and Hotel Occupancy Tax; and Ofikuru at Real Property Transfer Tax.¹³ At the time of their prior appeals, Appellants were also Group Chiefs in their respective units.¹⁴ Although the subject matters of the audit divisions differ, the job duties of the Group Chiefs remain largely the same. In general, Group Chiefs supervise the audits conducted by Tax Auditors Levels I to Level III by ensuring that proposed tax assessments and adjustments are in compliance with the applicable tax laws and regulations by reviewing Information Document Requests, work papers, tax assessments, and proposed tax adjustments provided by Tax Auditors to taxpayers.¹⁵ When a taxpayer disputes a proposed tax audit, there are several options available to the taxpayer for further negotiations, adjustments, or a settlement. The taxpayer can submit additional documentation and request a meeting, also

⁹ According to COIB records which contain information of all filers since 1989, there is no history of any prior appeals filed by Beer or Sinclair-White.

¹⁰ Appeals Process at ¶ C.

¹¹ Brown Report at 10.

¹² *Id.* at 7.

¹³ Brown Report at 4.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 4-5; Tax Auditor Occupation Group Duties and Responsibilities, dated August 17, 2016 ("TA Duties") at 5 (Exhibit C).

known as an Exit Conference, attended by the Tax Auditor and Group Chief.¹⁶ The taxpayer can also request a Conciliation Conference with the Bureau of Conciliation and Mediation Services, or a hearing with the New York City Tax Appeals Tribunal, all of which involve the Group Chief's participation.¹⁷

Group Chiefs also make settlement recommendations to Assistant Directors and can negotiate and settle audits without a manager's approval.¹⁸ For supervisors,¹⁹ the Sales Tax Unit permits the settlement of cases of less than \$100,000 without approval of a higher manager,²⁰ while supervisors in other units may approve case settlements in amounts up to \$500,000 depending on the settlement amount as a percentage of the tax liability.²¹ In practice, it appears that Group Chiefs confer regularly with Assistant Directors on whether to accept, reject, or modify proposed tax assessments or settlements.²² In the absence of a supervisor, the Group Chief also performs the duties of that position.²³

A review of the evidence supports the conclusion that Appellants, under the same in-house title of Group Chief, performed largely the same duties and responsibilities as related to tax audits in 2013 and 2015 as they did in 2017.²⁴ There is insufficient evidence to demonstrate that the change in civil service title gave Appellants new work duties or responsibilities that would require them to file. For example, there is no evidence that Appellants in 2017 exercised greater settlement authority or were involved in more complex tax disputes than in previous years that may have supported a different conclusion. Instead, the new responsibilities that Level IV Tax Auditors have -- such as conducting joint audits with the New York State Department of Taxation and Finance; serving as subject matter expert and participating in the development of technical tax training modules formulating recommendations to improve audit and enforcement procedures; and developing new audit case-selection models²⁵ -- are unrelated to their standing as contract filers under the Administrative Code.

Because there is no evidence of any change to their title, position, duties, or responsibilities, the Board concludes that Abdelmessih, Dillon, Henry, Usman, Myrthil, Ofikuru, and Osho are not required to file a financial disclosure report for 2017.

As for Beer and Sinclair-White, in 2017 they were employed as Group Chiefs in the Real Property Transfer Tax Unit and the Sales Tax Unit, respectively. Although Beer and Sinclair-

¹⁶ Brown Report at 5.

¹⁷ *Id.*

¹⁸ *Id.* at 10; Tax Policy and Planning Division, Policy and Procedure Manual, issued April 22, 2014 ("Tax Manual") at 48-50 (Exhibit D).

¹⁹ The record is unclear as to whether the settlement authority in the Tax Manual for supervisors applies only to Level IV Tax Auditors or to all Group Chiefs regardless of civil service title.

²⁰ Memorandum from Fattah to Sales Tax Unit Staff, dated November 3, 2017 (Exhibit E).

²¹ Brown Report at 10; Tax Manual at 49.

²² Brown Report at 8; Sinclair-White Appeal to DOF, dated May 16, 2018 (Exhibit F).

²³ TA Duties at 5.

²⁴ Brown Report at 13.

²⁵ TA Duties at 5.

White have no prior appeals history, it is undisputed that as Group Chiefs, their duties and responsibilities are identical to those of the other Appellants and have remained the same throughout the relevant years despite the civil service title change. Indeed, these are the same job duties that DOF determined did not qualify Group Chiefs to be required contract filers in its prior decisions in 2013 and 2015. Based on the evidence, there is no reason to support a conclusion inconsistent with DOF's previous determination. Therefore, the Board concludes that Beer and Sinclair-White are also not required to file a financial disclosure report for 2017.

Conclusion

The Board concludes that there is insufficient evidence to establish that the title, position, duties, or responsibilities of Abdelmessih, Henry, Usman, Myrthil, Ofikuru, and Osho changed in such a way from the time their appeals were previously granted by DOF such that the employees would be required to file a financial disclosure report for 2017 pursuant to the criteria specified by Admin. Code § 12-110(b). The Board further concludes that Beer and Sinclair-White, as Group Chiefs having the same duties and responsibilities as the other Appellants, are also not required to file a financial disclosure report for 2017.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Admin. Code § 12-110(b)(3)(a)(4), that Sanad Abdelmessih, Baruch Beer, Dunovan Dillon, Clemence Henry, Mustapha Usman, Joseph Myrthil, Hakeem Osho, and Marie Sinclair-White are not required to file a financial disclosure report for calendar year 2017 "or in future years until or unless the employee's title, position, duties, or responsibilities change such that he or she should be a required filer."

The Conflicts of Interest Board



Richard Briffault, Chair

Fernando A. Bohorquez, Jr.

Anthony Crowell

Jeffrey D. Friedlander

Erika Thomas

Dated: April 19, 2019

cc: Sanad Abdelmessih, DOF
Baruch Beer, DOF
Clemence Henry, DOF
Joseph Myrthil, DOF
Clara Ofikuru, DOF
Hakeem Osho, DOF
Marie Sinclair-White, DOF

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