

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

x

In the Matter of

**VANESSA TIRADO  
THOMAS ORAWIEC  
MELANIE COLMAN  
STEVEN MOLLIN  
JOSEPH VARGAS  
BRUCE VOGEL  
MARK KITCHNER**

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 rulings of, a neutral arbitrator of the Office of Collective Bargaining (“OCB”), the Conflicts of Interest Board (“the Board”) declines to follow the annexed Report and Recommendation of OCB neutral arbitrator Jane Morgenstern (“the Report”) to the extent that it recommended that the seven Comptroller employees “are not required to file financial disclosure reports pursuant to section 12-110(b)(a)(4) [sic] of the New York City Administrative Code and 53 RCNY section 1-15” and instead determines as a matter of law that they are required to file such reports. Accordingly, the above-captioned employees shall file a financial disclosure report for calendar year 2006 within thirty days after receipt of this order.

This financial disclosure appeal involves Vanessa Tirado, Thomas Orowiec, Melanie Colman, Steven Molin, Joseph Vargas, Bruce Vogel, and Mark Kitchner, who are each Claims Specialists Level II (the “Claims Specialists”) in the New York City Office of the Comptroller. Between June 19, 2007, and June 22, 2007, each was notified of the requirement to file a financial disclosure report for calendar year 2006<sup>1</sup> pursuant to Section 12-110(b)(3)(a)(4) of the Administrative Code of the City of New York.<sup>2</sup> Each employee fully and timely appealed this designation as a required filer, and the matter was heard before an OCB neutral arbitrator on December 3, 2008.<sup>3</sup>

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<sup>1</sup> Financial disclosure reports pertaining to a particular calendar year are filed in the next calendar year. For example, reports relating to 2006 are filed in 2007.

<sup>2</sup> Vanessa Tirado was notified on June 19, 2007, Thomas Orawiec on June 21, 2007, Melanie Colman on June 22, 2007, Steven Mollin on June 21, 2007, Joseph Vargas on June 21, 2007, Bruce Vogel on June 21, 2007, and Mark Kitchner on June 20, 2007.

<sup>3</sup> On June 28, 2007, the Claims Specialists appealed the requirement to file to the agency, which denied their appeals on July 6, 2007. Between July 9, 2007, and July 10, 2007, all appealed the Comptroller’s denial to the New York City Conflicts of Interest Board (“COIB” or “the Board”). The Board subsequently referred the matter to the

The Claims Specialists each handle approximately 1,000 claims of property damage filed with the City and are responsible for investigating and possibly settling these claims. After approval by a supervisor, the Claims Specialists are authorized to settle the claims for an amount not to exceed \$2,000. After an initial offer is made, the Claims Specialists are authorized to agree to a new demand by the claimant without further approval from their supervisor.<sup>4</sup> While the Report indicates that “[t]he recommendations of the [Claims Specialists] are based to a large but not exclusive extent on certain guidelines,<sup>5</sup> review of the claimant’s bills and estimates, and may include inspection reports by City engineers,” it concedes that “[t]here is no strict formula for adjusting a claim.”

Section 12-110(b)(3)(a)(4) of the Administrative Code of the City of New York requires 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 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 who will be awarded a contract, the approval of documents relating to a contract, or the determination of contract policies, rules, or regulations, is required to file. (53 RCNY 1-15.)

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. (53 RCNY 1-15(b).) The Board’s rules provide an example of such personnel performing “only ministerial tasks”:

[P]ublic 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. (53 RCNY 1-15(b)(emphasis added).)<sup>6</sup>

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New York City Office of Collective Bargaining (“the OCB”) for a hearing before a neutral arbitrator, pursuant to an agreement between the District Council 37, AFSCME (“the Union”) and the City of New York. See Letter dated March 15, 2007, from James F. Hanley, Commissioner, New York City Office of Labor Relations, to Lillian Roberts, Executive Director, District Council 37.

<sup>4</sup> If a matter is not settled, it proceeds to litigation, which the Claims Specialists do not handle.

<sup>5</sup> The guidelines were neither introduced into evidence nor apparently testified to by any of the witnesses.

<sup>6</sup> Examples of ministerial tasks include “typing, filling, or distributing contracts, leases, franchises, revocable consents, concessions, or zoning changes, variances, or special permits or calendaring meetings or who identify potential bidders or venders.” (53 RCNY 1-15(b).)

The Board first concludes that negotiating the settlement a claim against the City in an amount up to \$2,000 constitutes negotiating a contract and, therefore, falls squarely within Administrative Code §12-110(b)(3)(a)(4) and Board Rules §1-15(a)(4), (5), and (6). A finalized settlement is a contract between the claimant and the City; and thus negotiating the claim, with the possibility of a settlement, is the negotiation of a contract. See *DeWitt v. DeWitt*, 62 A.D.3d 744, 879 N.Y.S.2d 516 (2d Dep't 2009) ("A settlement agreement is a contact 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").

The Claims Specialists are responsible for evaluating, negotiating, determining, and recommending whether claimants are entitled to compensation and whether a possible settlement (if less than \$2,000) is consistent with their evaluation of the documentation obtained. As such, they perform the duties outlined in Administrative Code §12-110(b)(3)(a)(4) ("negotiation, authorization or approval of contracts, leases, franchises, revocable consents, concessions and applications for zoning changes, variances and special permits").<sup>7</sup> Although this provision does not explicitly list settling claims against the City,<sup>8</sup> the Claims Specialists' responsibilities are sufficiently akin to the contracting responsibilities outlined that they present the same potential conflicts of interest.<sup>9</sup>

The only remaining question is whether the Claims Specialists are exempted from the filing requirement as clerical personnel who perform only ministerial duties. To be so exempted, a public servant performing contracting responsibilities must be under the supervision of others **and** be without substantial personal discretion **and** perform only clerical tasks. (53 RCNY 1-15(b)(emphasis added).) Although the Claims Specialists are supervised, the supervision is not absolute: after the supervisor's initial review, the Claims Specialists have full authority and substantial personal discretion up to \$2,000.<sup>10</sup> Their work, as the Report correctly concluded, "entails the use of good judgment and professional skills that are not reasonably defined as clerical or administrative."<sup>11</sup> Accordingly, they are not clerical personnel and do not perform only ministerial tasks.

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<sup>7</sup> It is worth noting that the 2004 amendments to Administrative Code §12-110 altered the category of contract filers by eliminating the word "directly" from the filing requirement by those employees "whose duties directly involve the negotiation, authorization or approval of contracts, leases, franchises, revocable consents, concessions and application for zoning changes, variances and special permits," thereby to those employees." (Report of the Office of the General Counsel, The Council of the City of New York, June 27, 2003.) With the enactment of those amendments, employees were required to file if they were involved in the delineated activities, thereby increasing the number of required contract filers to a greater universe of employees than those "directly involved" in the delineated activities.

<sup>8</sup> In her report and recommendation, the OCB neutral arbitrator did not rely upon the absence of an explicit reference in Section 12-110(b)(3)(a)(4) to settling claims against the City.

<sup>9</sup> The Report acknowledged that the Claims Specialists negotiate, but concluded that whatever negotiation there is "is confined within severely limited parameters that do not meet the requirements for financial disclosure."

<sup>10</sup> The Board notes that while Report describes the maximum amount of settlement (\$2,000) as "strictly circumscribed," a Claims Specialist handling 1,000 matters a year can potentially settle claims against the City up to \$2,000,000 annually.

<sup>11</sup> The Board notes that the Report accepted the Union's erroneous argument that the "substantial discretion contemplated by sections 1-15(a)(4)(5) and (6) [sic] of the Rules of the Board" is "a condition of the requirement to file financial disclosure reports" (the union claimed that the Claims Specialists lack substantial discretion).

Finally, the Report concludes “that the work done by the [Claims Specialists] is highly unlikely to be considered by the Board as placing them in a position to engage in a conflict of interest.” To the contrary, the Board considers the work performed by the Claims Specialists to be exactly the type that might pose a conflict of interest. For example, no Claims Specialist should be negotiating the settlement of a claim by someone with whom the Claims Specialist has a financial relationship. That is precisely why financial disclosure by Claims Specialists is crucial.

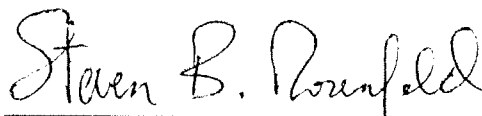
Board Rules §1-15 was enacted to, among other things, “limit financial disclosure filing to those public servants who are at risk of conflicts of interests ... [, and] to ensure that rules for determining who is a ‘contract’ filer are uniform and uniformly applied throughout the City.” (Conflicts of Interest Board Notice, The City Record, January 30, 2004, at 276.) That objective is served by making these Claims Specialists subject to the financial disclosure filing requirement.

For these reasons, the Board finds that the Claims Specialists are required to file financial disclosure reports for calendar year 2006.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Administrative Code §12-110(b)(3)(a)(4), that each above-captioned Claims Specialist file a financial disclosure report for calendar year 2006 within thirty days after receipt of this order.

The Claims Specialists have the right to appeal this Order to the Supreme Court of the State of New York.

The Conflicts of Interest Board



By: Steven B. Rosenfeld, Chair

Monica Blum  
Kevin B. Frawley  
Angela Mariana Freyre  
Andrew Irving

Dated: July 14, 2009

Attachment

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Nowhere in Rules §1-15(a)(4), (5), or (6) of the Board is there any requirement that individuals who are responsible for the tasks listed must enjoy “substantial discretion” to be required to file a financial disclosure report. In fact, that term is mentioned only in section (b) of the Rule and is employed in a phrase noting several requirements that must be met in order for the public servant to be relieved of filing.

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