

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

x

In the Matter of

The Financial Disclosure Appeal of:

FD No. 2016-01

Edward O'Donnell

x

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

Upon consideration of all the evidence presented in this matter and the full record herein, the Conflicts of Interest Board ("COIB" or "the Board") grants on default Edward O'Donnell's appeal of the designation by the New York City Department of Citywide Administrative Services ("DCAS") of him as a required to filer of a financial disclosure report for calendar year 2014.

This financial disclosure appeal involves Edward O'Donnell, a DCAS employee¹ who was notified by DCAS 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 2014.² He fully and timely appealed the designation as a required filer to the agency head and, after DCAS's denial of his appeal, to the Board.

DCAS denied O'Donnell's appeal on the ground that:

part of [his] duties during the reporting period involved negotiating or determining the substantive content of a contract or change order, recommending or determining whether or to whom a contractor or change order should be awarded or granted, or approving a contract or change order. [Mr. O'Donnell] had the authority to manage purchasing and contracting needs for the Mechanical Operations staff. In the event that other Mechanical Maintenance Operations staff members were absent, [he] engaged contract services, as requested by the Senior Stationary Engineers. [Mr. O'Donnell] also reviewed consultant designed projects

¹ During 2014, O'Donnell's civil service title was Senior Stationary Engineer and his office title was Director of Mechanical Maintenance and Operations.

² Financial disclosure reports pertaining to a particular calendar year are filed in the next calendar year. For example, reports relating to 2014 were filed in 2015.

to ensure that they were justified expenditures and could be properly integrated into DCAS buildings and were in compliance with energy regulations.”³

In his appeal to COIB, Mr. O’Donnell claimed that his title “does not meet the criteria for filing annual disclosure”⁴ and denied that he had “the ability to negotiate or determine the substantive content of a contract or change order, recommend or determine whether or to whom a contract or change order should be awarded or granted, or approve a contract or change order.”⁵ Mr. O’Donnell further argued that:

It is not part of my duties nor did I ever have the power to negotiate, approve, determine content of contracts or determine whether a contractor should be awarded or granted anything. I do not approve or negotiate change orders. DCAS HR states that I have the authority to manage purchasing and contracting needs for the Mechanical Operations Staff, I do not manage purchasing or contract needs. DCAS also states that I review design projects to justify expenditures, I simply review mechanical drawings to insure that they will integrate with our existing systems and are code compliant.⁶

Section 12-110(b)(3)(a)(4) of the Administrative Code of the City of New York requires the filing of a annual 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 annual 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.⁷

³ 2014 Annual disclosure Appeal to the Agency Head Determination, dated May 13, 2015, from Shameka Boyer, Deputy Commissioner, Administration to Edward O’Donnell (“DCAS Determination”).

⁴ May 14, 2015, Notice of Appeal to Conflicts of Interest Board (“COIB Appeal”).

⁵ May 14, 2015, letter of Edward O’Donnell to the Conflicts of Interest Board (“O’Donnell Letter”).

⁶ *Id.* Except for the last sentence, Mr. O’Donnell simply denied DCAS’s assertions and did not otherwise state his duties and responsibilities. In a later email, Mr. O’Donnell again generally denied that his duties rose to the level of requiring the filing of a financial disclosure report. See January 19, 2016, Email from Edward O’Donnell to Julia Davis (“January 19, 2016, O’Donnell Email”).

⁷ Board Rules § 1-15.

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,”⁸ “[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,”⁹ 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.”¹⁰ Exempted from this particular category of employees required to file annual disclosure reports are clerical personnel and other public servants who perform only ministerial tasks.¹¹ Charter § 2601(15) defines “ministerial matter” as “an administrative act . . . which does not involve substantial personal discretion.”¹²

DCAS claimed that Mr. O’Donnell was properly found to be a required filer of an annual disclosure report as a result of his contracting responsibilities because he “exercised the authority to manage purchasing and contract needs for the Mechanical Maintenance Operations Staff.”¹³ In support of its position, DCAS referenced a “DCAS Agency Purchasing Request Form” (“Request Form”) filled out by Michael Nettleton and signed by David Dimitri.¹⁴ DCAS explained that:

Mr. O’Donnell was Michael Nettleton’s supervisor during the relevant time period. Mr. Nettleton was the preparer of the attached document and exercised the authority to manage purchasing and contract needs for the Mechanical Maintenance Operations Staff. As his supervisor, Mr. O’Donnell exercised the authority to manage purchasing and contract needs for the Mechanical Maintenance Operations Staff in that he **could** direct Mr. Nettleton in his ability to negotiate contracts and direct Mr. Nettleton to submit a contact for Mr. Dimitri’s signature. Mr. O’Donnell assumed Mr. Nettleton’s duties in his absence.”¹⁵

⁸ Board Rules § 1-15(4)(emphasis added).

⁹ Board Rules § 1-15(5).

¹⁰ Board Rules § 1-15(6)(emphasis added).

¹¹ Board Rules § 1-15(b) (emphasis added). 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 annual 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.*

¹² The Board concludes that the Charter definition of “ministerial matter” shall apply to the interpretation of “ministerial tasks” referenced in Board Rules § 1-15(b).

¹³ See DCAS Determination, November 4, 2015, email from Bisha Nurse to Julia Davis (“November 4, 2015, Nurse Email”).

¹⁴ See Exhibit 2a, attached to November 4, 2015, Nurse Email (“Exhibit 2a”).

¹⁵ See November 4, 2015, Nurse Email (emphasis added). Mr. O’Donnell specifically denied assuming Mr. Nettleton’s duties in his absence. See January 19, 2016, O’Donnell Email.

The Request Form provided by DCAS neither contained Mr. O'Donnell's signature nor indicated what involvement, if any, he had in selecting the two vendors from which to purchase the needed item, determining any other aspect of the purchase, or even recommending that the purchase be made.¹⁶ In addition, DCAS's explanation as to why Mr. O'Donnell was required to file based on this Request Form used only conditional language instead of explaining what he actually did do to warrant being deemed a required filer of a financial disclosure report based on this form.¹⁷ DCAS made additional general assertions about the role that required him to file but, despite repeated requests, did not set forth evidence or documents to substantiate its assertions. Accordingly, the Board grants Mr. O'Donnell's appeal on default due to DCAS's failure to provide requested information.¹⁸

Conclusion

Board Rules § 1-15 was enacted to, among other things, "limit annual 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."¹⁹

¹⁶ See Exhibit 2a.

¹⁷ See November 4, 2015, Nurse Email (Mr. O'Donnell "could direct Mr. Nettleton in his ability to negotiate contracts and direct Mr. Nettleton to submit a contract for Mr. Dimitri's signature."). DCAS also provided no specific instances of how or when Mr. O'Donnell assumed Mr. Nettleton's duties in his absence or engaged contract services as requested by Senior Stationery Engineers in the absence of other staff or tasks it asserted required him to file. See January 12, 2016, Email from Bisha Nurse to Julia Davis ("January 12, 2016, Nurse Email"); November 4, 2015, Nurse Email; Appeal Determination.

¹⁸ See, e.g., Financial Disclosure Appeal Process, § D(7). DCAS also claimed that Mr. O'Donnell "reviewed consultant-designed projects to ensure that they were justified expenditures and could be properly integrated into DCAS buildings and were in compliance with energy regulations." See DCAS Determination; November 4, 2015, Nurse Email. Mr. O'Donnell asserted that his review of and comments on designs was merely to ensure that the proposed projects would be consistent with existing DCAS buildings and compliant with existing laws. See O'Donnell Letter. However, DCAS did not present any evidence as to what Mr. O'Donnell did to ensure the consultant-designed projects were "justified expenditures" but merely offered Mr. O'Donnell's comments on the schematic design for the Brownsville Community Justice Center as proof that he was properly deemed a required filer. Mr. O'Donnell's questions and comments on this schematic design include the following:

1. What is the condition of existing chimney?
2. Why is the entering water temperature this high?
3. Are fans equipped with full air side economizer?
4. Please show sequence of operation for hot water heating pumps.
5. Are there any IT room cooling units? See Exhibit 2c, attached to Nurse Email ("Exhibit 2c").

The Board concludes that these comments do not establish that Mr. O'Donnell had substantial personal discretion in his contracting duties and do not justify inclusion of Mr. O'Donnell as a required filer of a financial disclosure report.

¹⁹ Conflicts of Interest Board Notice, The City Record, January 30, 2004, at 276.

That objective may be furthered by requiring Edward O'Donnell to file a financial disclosure report, but DCAS's failure to provide requested information requires the Board to grant Mr. O'Donnell's appeal of the requirement that he file a financial disclosure report for calendar year 2014 on default.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Administrative Code §12-110(b)(3)(a)(4), that Edward O'Donnell's appeal be granted for calendar year 2014 only and that DCAS may include Mr. O'Donnell on its list of required filers for calendar year 2015 if he meets the criteria of Administrative Code §12-110(b)(3)(a)(4) and Board Rules § 1-15.

The Conflicts of Interest Board



By: Richard Briffault, Chair

Fernando Bohorquez
Anthony Crowell
Andrew Irving
Erika Thomas-Yuille

Dated: January 28, 2016

Cc: Edward O'Donnell, DCAS
Shameka Boyer, DCAS
Bisha Nurse, DCAS

