

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

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In the Matter of

The Financial Disclosure Appeals of:

Jose Concepcion
Alexander Santana

FD No. 2016-03

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**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 Earl R. Pfeffer that Jose Concepcion and Alexander Santana are not required to file a financial disclosure report for 2015.

Jose Concepcion and Alexander Santana are employees of the Department of Citywide Administrative Services (“DCAS”) assigned to the Asset Management Unit.¹ Each 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 2015.² Each employee fully and timely appealed the designation as a required filer to both the agency head and the Board, and the matter was heard before an OCB neutral arbitrator, who submitted a Report and Recommendation on September 15, 2016 (“Pfeffer Report”).³

¹ During the reporting period (calendar year 2015), Concepcion’s civil service title was Architect I and his in-house title was Senior Design and Project Manager; Santana’s civil service title was Construction Project Manager III and his in-house title was Design and Project Manager.

² Financial disclosure reports pertaining to a particular calendar year are filed in the next calendar year. For example, reports relating to 2015 were filed in 2016.

³ The appeals were heard pursuant to the Financial Disclosure Appeals Process (“Appeals Process”), the procedure for hearing appeals that was previously agreed to among COIB, the City’s Office of Labor Relations, and DC 37. The matters were heard before Earl R. Pfeffer on July 22, 2016, and July 29, 2016.

Procedural History

Concepcion and Santana first appealed the designation that they were required to file a financial disclosure report for calendar year 2010. DCAS denied their appeals, but failed to provide any reason for its determination. The employees thereafter appealed to the Board, which found that an agency's failure to set forth any reasons for its denial of an employee's appeal is, in effect, a failure to respond within the required time frame, and granted the appeals on default.⁴

DCAS again designated Concepcion and Santana required filers of a financial disclosure report for calendar year 2011. The employees again appealed to the agency and, after DCAS denied their appeals, to the Board. After a hearing before the same OCB neutral arbitrator as in this appeal, the Board adopted the arbitrator's recommendation that neither was required to file a financial disclosure report and granted both appeals on the merits.⁵ The Board found that their work was "to provide technical assistance in the formation of lease documents (the Scope of Work), which is basically limited to selecting pre-determined items from a DCAS approved checklist to meet the Client Agency's needs" and did not involve the exercise of "substantial personal discretion" required to be designated a file of a financial disclosure report.⁶ The Board ruled that Concepcion and Santana were not required to file a financial disclosure report for calendar year 2011 "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."⁷

DCAS did not designate either Concepcion or Santana a required filer of a financial disclosure report for calendar years 2012, 2013, or 2014. In 2014, the unit in which both Concepcion and Santana worked was reorganized, and DCAS thereafter designated both Concepcion and Santana as required filers of a financial disclosure report for calendar year 2015.⁸ Both employees appealed to DCAS and, after DCAS denied their appeals, to COIB. Pursuant to the Appeals Process, the Board referred the matter to OCB for a fact-finding hearing as to whether their duties had changed such that either should be required to file a financial

⁴ See *Matter of Acevedo, et al.*, FD Order 2012-01 (April 19, 2012). According to the Appeals Process § E5, the grant of any appeal by default "shall apply to that filing year only and shall not be a determination on the merits."

⁵ See *Matter of Acevedo, et al.*, FD Order 2013-01 (April 10, 2013).

⁶ *Id.* at 6.

⁷ *Id.* at 10. The Board cited Appeals Process § D14, which states that if COIB grants the appeal from the agency's determination, "the employee will not be required to file a financial disclosure report for that filing year 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."

⁸ The Board notes that, while Concepcion and Santana's civil service titles have not changed since their last appeal, their in-house titles have. In 2011, their in-house titles were Project Architect; in 2015 Concepcion's title was Senior Design and Project Manager and Santana's title was Design and Project Manager. Neither party claimed that Concepcion's "senior" designation, noting his professional license and ability to file drawings with regulatory agencies, was a distinction relevant to the appeal. Pfeffer Report at 2 n. 1.

disclosure report.⁹ After an evidentiary hearing and post-hearing briefs by both parties, on September 15, 2016, Arbitrator Earl R. Pfeffer issued his Report and Recommendation (“Pfeffer Report”) that the appeals of Concepcion and Santana be granted.

Findings of Fact and Conclusions of Law

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

(Emphasis added.)

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.¹⁰ 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,”¹¹ “[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,”¹² 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.”¹³ 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.¹⁴ City Charter §

⁹ Santana and his supervisor, Awymarie Riollano, were the two witnesses at the hearing. The parties stipulated that for the purposes of the appeal the “duties and the responsibilities of the Appellants shall be deemed identical,” that the testimony of Santana’s supervisor described Concepcion’s duties and responsibilities “albeit on different projects” that Concepcion’s supervisor would have described had she testified, and that Concepcion’s testimony “would have described his duties and responsibilities, in relevant respects, as being the same as Santana’s.” Pfeffer Report at 6.

¹⁰ Board Rules § 1-15.

¹¹ Board Rules § 1-15(4) (emphasis added).

¹² Board Rules § 1-15(5) (emphasis added).

¹³ Board Rules § 1-15(6) (emphasis added).

¹⁴ 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

2601(15) defines “ministerial matter” as “an administrative act ... which does not involve substantial personal discretion.”¹⁵

In 2013, the Board granted Concepcion and Santana’s appeals because their work was limited to providing technical assistance in the formation of lease documents and, although it “require[d] a level of professional expertise, it [did] not require the exercise of ‘substantial personal discretion.’”¹⁶ In the same decision, the Board found that Isabel Acevedo, a DCAS Project Manager, was a required filer of a financial disclosure report because she was “directly and substantially involved in the discretionary process of deciding whether change orders should be awarded or granted, and approving them.”¹⁷

In the instant appeal, DCAS claims that Concepcion and Santana are required to file because each enjoys the contracting responsibilities that previously required Acevedo to file: they interact with DCAS clients and are substantially involved in approving contract documents during the construction phase. The evidence introduced in support of DCAS’ position set forth Santana’s efforts to obtain information about the projects he oversaw but did not indicate that he had any decision-making responsibility. For example, in an email in which he contacted Fire Department (“FDNY”) personnel to confirm that work was both requested by FDNY and completed, Santana did not make any decisions about the matter.¹⁸ In an internal email where Santana indicated a contracting decision had been made, he states that “we have all agreed,”

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.*)

¹⁵ The Board concludes that the Charter definition of “ministerial matter” found in Section 2601(15) shall apply to the interpretation of “ministerial tasks” referenced in Board Rules § 1-15(b).

¹⁶ The Board found that Concepcion and Santana’s work followed DCAS established guidelines and boilerplate scopes of work, was limited to the architectural component of the Site Report, and was approved by numerous individuals; it also noted that they did not communicate with outside parties. *See Matter of Acevedo, et al.*, FD Order 2013-01 (April 10, 2013).

¹⁷ Acevedo was the sole DCAS representative at meetings with the landlord, the contractor, and other stakeholders; she had periodic contact with these individuals during the construction period; she advised her superiors about the stage of construction and if a condition in the field required approval of a change order request; she ensured that landlords had complied with lease requirements; and she walked through the site with outside parties to verify that the work on a punch list of outstanding items has been completed. *See Matter of Acevedo, et. al.*, FD Order 2013-01 (April 10, 2013).

¹⁸ Exhibit R-4. In addition, the email, on which Santana copied his supervisors, was limited to City personnel.

without any indication what role he, or anyone else, had in that joint decision.¹⁹ In another email where Santana attached approval for a change order, his signature does not even appear on that approval.²⁰

Documents containing Santana's signature also fail to establish that he employed substantial personal discretion in fulfilling his contracting responsibilities. In a document authorizing release of retainage, Santana's name appears as the first signatory to certify that work was satisfactorily completed in 2014, before the time period of this appeal; however, he did not join the project until many months later, did not sign the document until eight months after the work was substantially completed, and only signed when threatened with disciplinary action after initially refusing to do.²¹ In a second document where Santana's name appears as the first of four signatories to indicate agency approval of a change order, the "Additional attachments/backup included" is an e-mail chain which demonstrates Santana's role was limited to collecting or verifying information; there is no evidence as to whether or how the additional signatories relied on his approval.²²

Although Concepcion and Santana interacted with DCAS clients and signed contract documents, there is insufficient evidence to prove that either was, as was Acevedo, the sole DCAS representative at meetings with outside personnel, had periodic contact with such individuals during the construction period, advised their superiors about the stage of construction and if a condition in the field required approval of a change order request, ensured that contractors had complied with contract requirements, or walked through worksites with outside parties to verify that the work on a punch list of outstanding items had been completed. Accordingly, the Board cannot conclude that their level of contracting responsibility during calendar year 2015 rose to the level of Acevedo's such to require them to file a financial disclosure report.²³

The Board concludes that, while Concepcion and Santana's work may utilize a level of professional expertise to perform their assigned duties, they do not exercise "substantial personal discretion" that renders them required to file a financial disclosure report. Concepcion and

¹⁹ Exhibit R-6 (the Board notes that no non-DCAS names appear in this email chain). In its Post-Hearing Brief, DCAS conceded that Santana and his supervisors "collectively decided" whether the change order should be granted. DCAS Post-Hearing Brief at 6.

²⁰ Exhibit R-7.

²¹ Exhibit R-8; Pfeffer Report at 20.

²² Exhibit R-14; Pfeffer Report at 17-18. *Matter of Akeloko and Lawrence*, FD No. 2015-01 (March 24, 2015) (Lawrence not required to file a financial disclosure report where her "role in processing payments, as the first individual to review the payment request, was limited to determining whether the contractor was in compliance with the contract").

²³ DCAS submitted two exhibits to establish that Santana and Concepcion had contracting responsibilities during calendar year 2015. Both were signed in 2016, outside the requisite time period. The Board notes that these exhibits suggest that both employees may have had contracting responsibilities during calendar year 2016 that would require the filing of an annual report for that year in 2017. *See* Exhibits JT-4B; JT-5B.

Santana are supervised, and neither has final approval authority on change orders or other contract documents. There is a lack of evidence that their supervisors relied on their comments and determinations of the validity of change order requests to the extent that they effectively recommended approval, or that they are directly and substantially involved in the process of deciding whether change orders should be awarded or granted or approving them. Thus, as the Pfeffer Report correctly concluded, Concepcion and Santana are not required to file a financial disclosure report for calendar year 2015 pursuant to Administrative Code § 12-110((b)(3)(a)(4) and Board Rules § 1-15(a).

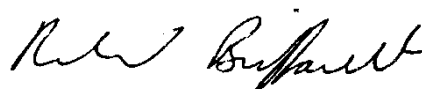
Conclusion

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.”²⁴ That objective is furthered by concluding that Jose Concepcion and Alexander Santana are not required to file financial disclosure reports.

The Board notes that the types of work that might pose a conflict of interest include evaluating bids, recommending or approving lease or contract documents, or recommending or determining to whom they should be awarded with a party with whom the employee has a financial relationship. However, the evidence fails to demonstrate that either Concepcion or Santana’s work at DCAS involved the substantial personal discretion that would require the filing of a financial disclosure report. Therefore, the policy necessitating the filing of financial disclosure reports to determine whether such financial relationships exist, and to avoid such conflicts of interest violations, does not exist herein.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Administrative Code §12-110(b)(3)(a)(4), that Jose Concepcion and Alexander Santana are not required to file a financial disclosure report for calendar year 2015 “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.”²⁵

The Conflicts of Interest Board



By: Richard Briffault, Chair

²⁴ Conflicts of Interest Board Notice, The City Record, January 30, 2004, at 276.

²⁵ Financial Disclosure Appeals Process § D14.

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Dated: December 16, 2016

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