

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

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In the Matter of

The Financial Disclosure Appeals of:

FD No. 2012-3

James Horne
Lai Tang

_____ 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 (“COIB” or “the Board”) adopts conclusion of the Report and Recommendation of OCB neutral arbitrator Earl R. Pfeffer (“the Report”) recommending that the two above-captioned Department of Finance (“DOF”) employees are required to file financial disclosure reports pursuant to section 12-110(b)(3)(a)(4) of the New York City Administrative Code and 53 RCNY § 1-15 and determines that they are required to file such reports. Accordingly, the above-captioned employees shall file a financial disclosure report for calendar year 2010 within thirty days after receipt of this order and for calendar year 2011 within thirty days after the deadline for filing the 2010 financial disclosure report.

This financial disclosure appeal involves James Horne and Lai Tang, who are Senior Conciliators (“the Conciliators”) in DOF’s Conciliation Bureau. Each 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 2010.¹ Each employee 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 on June 14, 2012, and July 6, 2012.

Conciliators in DOF’s Conciliation Bureau are responsible for conducting Conciliation Conferences (“Conferences”). New York City taxpayers may seek a Conference in at least two circumstances: 1) after DOF has issued a Notice of Disallowance denying a tax refund claim; and 2) when a taxpayer does not consent to DOF’s Audit Division’s proposed adjustment of taxes and DOF’s Quality Assurance issues a Notice of Determination of tax due. The

¹ Financial disclosure reports pertaining to a particular calendar year are filed in the next calendar year. For example, reports relating to 2010 were filed in 2011.

Conciliation Conference is attended by the taxpayer, who may have a representative, an Advocate for DOF, and the Conciliator. The DOF Advocate, who is an attorney, presents the position of the Audit Division, even if the Auditor attends the Conference. At the Conference, the Conciliator mediates the dispute between the taxpayer and Audit, as represented by the Advocate. The Conciliators do not have the authority “to overrule the Audit Division or otherwise compel Audit to settle or even move off of its original position,”² even if the Advocate does not object. The Conciliators cannot force a settlement but can, and often do, persuade Audit to change its mind.³ The Conciliators cannot bind DOF or force a settlement.

It is part of the Conciliators’ duties to recommend an agreement settling the dispute among the Conciliator on behalf of the Conciliation Bureau, the Advocate, and the taxpayer, which results in a Proposed Resolution of the dispute. If the taxpayer signs the Proposed Resolution, it becomes final after it is typed and signed by the Director of the Conciliation Bureau.⁴ If the taxpayer does not sign the Proposed Resolution, the Director of Conciliation will issue it as a Conciliation Decision, which the taxpayer may appeal to the Tax Appeals Tribunal. The Conciliators cannot act independently of the Director of Conciliation. There is no limit to the amount of the tax obligation at issue in the Conference.

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 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.⁵ 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.”⁶

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:

² Report at 7, § 12.

³ The Conciliator may confer with the Auditor independent from the Advocate during the Conference, which can last more than one day.

⁴ The Director of the Conciliation Bureau files a financial disclosure report.

⁵ Board Rules § 1-15.

⁶ Board Rules § 1-15(4)(emphasis added).

[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. (Emphasis added.)⁷

The Board first concludes that the Conciliators' role in mediating a tax dispute between the City and a taxpayer, with no limit on the tax obligation at stake, involves them in negotiating and determining the substantive content of a contract. Therefore, the role of the Conciliators falls squarely within Administrative Code §12-110(b)(3)(a)(4) and Board Rules §1-15(a)(4). Mediating a tax dispute, which may result in a Proposed Resolution of that dispute, is akin to negotiating a settlement of a claim against the City so as to require conciliators to file a financial disclosure report. *See Matter of Tirado*, July 14, 2009 (Claims Specialists in the Comptroller's Office who negotiated settlements in the amount of up to \$2,000 were required to file a financial disclosure report because negotiating such a claim is the negotiation of a contract requiring the filing of a financial disclosure report), *aff'd, Tirado v. New York City Conflicts of Interest Board*, Index No. 112955/2009 (Sup. Ct. N.Y. Cty. 7/1/10). *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").

The Conciliators are responsible for proposing and negotiating the terms of Proposed Settlements of tax disputes. 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")⁸ and Board Rules § 1-15(a)(4) ("negotiates or determines the substantive content of a contract, lease, franchise, revocable consent, concession, or application for a zoning change,

⁷ Board Rules § 1-15(b). 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.*

⁸ It is worth noting that the 2004 amendments to Administrative Code § 12-110, to comply with the state mandate for financial disclosure, 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." Report of the Office of the General Counsel, The Council of the City of New York, June 27, 2003. *See also* General Municipal Law § 813(9)(k) ("involve the negotiation, authorization or approval of: (i) contracts, leases, franchises, revocable consents, concessions, variances, special permits, or licenses ..."). 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.

variance, or special permit or change order”).⁹ Although this provision does not explicitly list negotiating the terms of settlements of tax or financial disputes with the City, the Conciliators’ responsibilities are sufficiently akin to the responsibilities expressly cited in the Rule that they present the same potential conflicts of interest.

The only remaining question is whether the Conciliators 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 Conciliators are supervised and cannot act independently of the Director of Conciliation, they “are directly and substantially involved in the process of deciding the terms of the proposed resolutions of tax disputes.”¹⁰ The Conciliators do not perform merely ministerial or clerical duties and are not without substantial personal discretion. Thus, as the Report correctly concluded, “under the Financial Disclosure Law and the Tirado decision, they fall into a category of employees who are required to file.”¹¹

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 furthered by requiring these Conciliators to file financial disclosure reports.

The work performed by the Conciliators is exactly the type that might pose a conflict of interest. For example, no Conciliator should be negotiating or recommending the resolution of a tax dispute with a taxpayer with whom the Conciliator has a financial relationship. That is precisely why financial disclosure by Conciliators is crucial.

For these reasons, the Board finds that the Conciliators are required to file financial disclosure reports.

⁹ The Report stated that because the Conciliators’ duties include recommending the terms under which taxpayer disputes should be settled (Report at 19, 20, and 21), “it is in that role that [the Conciliators] fall squarely under **§1-15(a)(5)**, which requires that any employee who ‘recommends . . . whether . . . a contract . . . should be awarded or granted’ must file.” (Report at 20)(emphasis added). The Board does not base its decision solely on Board Rules § 1-15(a)(5), but also on Board Rules § 1-15(a)(4), which requires filing by 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” (emphasis added).

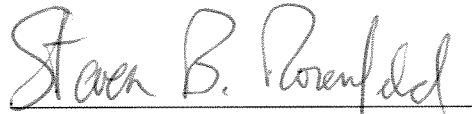
¹⁰ Report at 20.

¹¹ Report at 21 (emphasis in the original).

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Administrative Code §12-110(b)(3)(a)(4), that each above-captioned Conciliator file a financial disclosure report for calendar year 2010 within thirty days after receipt of this order, and for calendar year 2011 within thirty days after the deadline for filing the 2010 financial disclosure report.¹²

The Conciliators 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
Andrew Irving
Burton Lehman
Erika Thomas-Yuille

Dated: September 20, 2012

Cc: James Horne, DOF
Lai Tang, DOF

Ari Lieberman, DOF

Dena Klein, DC 37

Susan Panepento, Esq.

Mayra Bell, OLR

Earl R. Pfeffer, Esq.

¹² The Conciliators have also appealed the designation by DOF as required filers of 2011 financial disclosure reports, which are filed in 2012. In support of that appeal, the Conciliators cited their appeals of the designation as required filers of a 2010 financial disclosure report and provided no new or additional facts or arguments. Accordingly, the determination of this appeal also applies to the Conciliators' appeals of the designation as required filers of a 2011 financial disclosure report.