

**IN THE MATTER OF DAVID MARTINEZ
COIB CASE NO. 2015-739
OATH INDEX NO. 498/17
MARCH 29, 2017**

SUMMARY: The Board issued an Order, after a full hearing, imposing a \$10,000 fine and \$845.80 in restitution on a former Job Opportunity Specialist for the New York City Human Resources Administration ("HRA") who used his City position to steal from an HRA client. The Job Opportunity Specialist took a money order for \$845.80 from one of his clients and promised to submit the money order to the client's landlord as part of the client's application to HRA for a loan to help her avoid eviction. Instead, the Job Opportunity Specialist wrote his name in the payee field on the money order, cashed it, and kept the money for himself. In determining the penalty, the Board considered prior penalties in cases of theft from vulnerable City clients; that the Job Opportunity Specialist has still not reimbursed the client for the theft; and that he did not accept responsibility for his actions by settling with the Board. The Board took particular note of the Job Opportunity Specialist's "exploitation of his HRA client's vulnerability, and the underlying breach not only of the trust placed in him by the public, but also of his client's trust." *COIB v. D. Martinez*, OATH Index No. 498/17, COIB Case No. 2015-739 (Order March 29, 017). (2017).

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

Upon consideration of all the evidence presented in this matter, and of the full record, and all papers submitted to, and rulings of, the Office of Administrative Trials and Hearings ("OATH"), including the annexed Report and Recommendation of OATH Administrative Law Judge ("AU") John B. Spooner dated January 6, 2017 (the "Report"), in the above-captioned matter, and upon consideration of the comment to the Report submitted by petitioner, the Conflicts of Interest Board (the "Board") hereby adopts in full the findings of fact and conclusions of law contained in the Report. While the Report recommends that the Board impose a fine of \$6,000, plus restitution of \$845.80 to the victim, a New York City Human Resources Administration ("HRA") client, the Board imposes a fine of \$10,000, plus restitution of \$845.80, upon Respondent for violating Chapter 68 of the City Charter, the City's conflicts of interest law.

Without limiting the foregoing, and in summary of its findings and conclusions, the Board notes the following:

At the commencement of the trial, Respondent admitted under oath the central allegations of the Petition. More particularly, at all relevant times herein, including July 2014, Respondent was an eligibility specialist for HRA. On July 1, 2014, Respondent received from one of his HRA clients, Ms. S. Lewis, a money order for \$845.80. The money order was to be submitted to her landlord as part of an application to HRA for funding to avoid her eviction.

Two days later, Respondent wrote his name as the payee on the money order, cashed it, and kept the money for himself. When Ms. Lewis later called her landlord's management company to inquire of the money order's status, she was notified that the company never received the money order. In order to qualify for HRA funding, Ms. Lewis then had to obtain a second money order to settle with the landlord. As the Report observes, by adding his name as the payee and cashing the money order, the Respondent violated Charter Section 2604(b)(3), which prohibits a public servant from using his position to obtain a financial gain for the public servant.

Because Respondent admitted the allegations in the Petition, the AU recognizes that "the primary issue raised by this case [is] what the appropriate penalty should be." The Report recommends a fine of \$6,000, plus restitution of \$845.80 to Ms. Lewis. Petitioner, both at the OATH hearing and in its comment on the Report, seeks a fine of \$10,000, plus restitution of \$845.80 to Ms. Lewis. Respondent, despite having been offered the opportunity to do so, submitted no comment on the Report.

In reaching its recommendation of a \$6,000 fine, the Report cites several cases dealing with misappropriation of public funds but ultimately, and the Board believes correctly, focuses on cases involving the theft of funds from a client, which in some cases, including in this one, are more egregious than theft from the City. In *COIB v. Belle*, COIB Case No. 2010-156 (2011), on which the Report heavily relies, the respondent settled prior to trial by agreeing to pay a \$5,000 fine, plus restitution, for stealing \$345.02 in client funds, an amount less than half of what the instant Respondent stole from Ms. Lewis.

The petitioner also focuses on cases involving theft from an HRA client, citing in particular *COIB v. Smart*, OATH Index No. 2588/09 (June 30, 2009), *adopted*, COIB Case No. 2008-861 (November 23, 2009). In *Smart*, the Board imposed a \$10,000 fine for an HRA employee who used the confidential information of a public assistance recipient to obtain a credit card and to attempt to enter into a telephone contract. In *Smart*, even though the victim never suffered financial harm, the report recommended, and the Board imposed, a \$10,000 fine because the respondent exploited a vulnerable client of her City agency and exposed the client to further vulnerability. Such exploitation constituted an aggravating factor that the instant Report did not incorporate into the recommended penalty.

The Board believes that *Smart*, rather than *Belle*, is more on point to the instant case and agrees with Petitioner's argument that would distinguish *Belle's* lower fine as arising out of a settlement. The Board "should and does encourage settlements by accepting lower fines where the Respondent admits violations prior to trial than it imposes where the Respondent does not settle," *see COIB v. McNeil*, OATH Index No. 1790/10, *modified on penalty*, COIB Case No. 2009-307 (2010). However, the Board determined in *McNeil* that no such reduction occurs where the respondent declines to settle, even if he does not dispute or contradict the petitioner's evidence. While the Report observed that the instant Respondent professed a "willingness to settle," he did not, in fact, settle. Although the Respondent admitted to his conduct at trial, as the respondent did in *McNeil*, he nevertheless did not lessen the significant additional public

resources that OATH, the Board, and the Department of Investigation (whose employee testified at the hearing) had to expend on this matter as a result of his failure to settle. Moreover, to date, Respondent has not yet reimbursed the victim for his theft.

The instant Report further determined that Respondent's penalty should be mitigated because Respondent resigned his HRA position and now works at a lower-paying maintenance job. Nevertheless, as in the instant case, the respondents in *Belle* and *Smart* both resigned their HRA employment while disciplinary charges were pending. The AU in *Smart* considered this resignation and nevertheless recommended a \$10,000 fine, which the Board adopted.

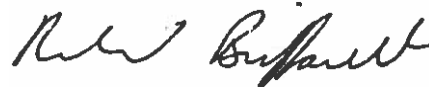
In the Board's view, the appropriate penalty for the instant conduct is \$10,000, plus restitution of \$845.80 to Ms. Lewis. As in both *Smart* and *Belle, supra*, the Respondent's exploitation of his HRA client's vulnerability, and the underlying breach not only of the trust placed in him by the public, but also of his client's trust, warrants a higher penalty than if he had stolen a comparable amount from City funds. The Respondent is furthermore not entitled to the reduction in fine that *Belle* received from settling, nor does the Respondent's resignation from City employment warrant a penalty of less than \$10,000. In short, if \$10,000 was the appropriate fine in *Smart*, as the Board then concluded, \$10,000 is certainly the appropriate fine for Respondent, whose breach of trust was, if anything, even more egregious than Ms. Smart's because Respondent stole from Ms. Lewis money that she provided to HRA to avoid her eviction.

Having found the above-stated violations of the City Charter and having consulted with Respondent's agency head as required by Charter Section 2603(h)(3), the Board determines that the penalty shall be a fine of \$10,000, plus restitution of \$845.80 to Ms. Lewis.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Charter Section 2606(b), that Respondent be assessed a civil penalty of \$10,000, plus restitution of \$845.80, to be paid to the Conflicts of Interest Board within 30 days of service of this Order.

Respondent has the right to appeal this Order to the Supreme Court of the State of New York by filing a petition pursuant to Article 78 of the Civil Practice Law and Rules.

The Conflicts of Interest Board



By: Richard Briffault, Chair

Fernando A. Bohorquez, Jr.
Anthony Crowell
Andrew Irving
Erika Thomas

Dated: March 29, 2017

Attachment

cc: David Martinez

Administrative Law Judge John B. Spooner
Office of Administrative Trials and Hearings
100 Church Street
New York, NY 10007

Conflicts of Interest Bd. v. Martinez

OATH Index No. 498/17 (Jan. 6, 2017)

In conflict-of-interest proceeding, former HRA supervisor admitted appropriating an \$845 money order from a client, cashing it, and using the funds for himself. AU found that the allegations should be sustained and recommended that the employee be fined \$6,000.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
CONFLICTS OF INTEREST BOARD
Petitioner
- against -
DAVID MARTINEZ
Respondent

REPORT AND RECOMMENDATION

JOHN B.SPOONER, *Administrative Law Judge*

Petitioner, the Conflicts of Interest Board ("COIB"), brought this civil penalty proceeding under Chapter 68 of the New York City Charter (the "conflicts of interest law") and Title 53 of the Rules of the City of New York. Petitioner alleges that respondent, David Martinez, a former supervisor and eligibility specialist employee of the Human Resources Administration ("HRA"), violated section 2604(b)(3) of the conflicts-of-interest law when he appropriated an \$845 money order from a client, cashed it, and used the funds for himself.

A hearing on the charges was held before me on December 19, 2016. After respondent testified and admitted the allegations in the petition, petitioner presented the testimony of an investigator who provided more details as to the circumstances under which the money order was taken.

For the reasons explained below, I find that the allegations should be sustained and recommend that respondent be fined \$6,000.

ANALYSIS

At the commencement of the trial, respondent admitted under oath the central allegations in the petition. He admitted that, on July 1, 2014,¹ while acting as an eligibility specialist, he received a money order for \$845.80 from a client named Lewis to deliver to her landlord. He further admitted that, two days later, he wrote his name as the payee and cashed the money order (Tr. 6-7). It was undisputed that these actions were in violation of the law, specifically, City Charter section 2604(b)(3) ("No public servant shall use or attempt to use his or her position as a public servant to obtain any financial gain, contract, license, privilege, or other private or personal advantage, direct, or indirect, for the public servant or any person or firm associated with the public servant").

Investigator Castillo testified to a few additional details of the purloined money order, based upon her interview with the client, Ms. Lewis. She stated that, in July 2014, Ms. Lewis was facing eviction due to unpaid rent. She was seeking a "one-shot deal" payment to avoid being evicted and had obtained the money order in order to qualify for this process. She noticed that respondent had her sign a copy of the money order, not the original. When she later called her landlord's management office she was told that they had never received the check. She was then forced to obtain yet another \$845 money order so that HRA would approve her application for funds to settle with the landlord (Tr. 19-21).

Respondent provided a few more facts as to his employment. He was employed by HRA for ten years. He resigned in March 2016, due to disciplinary charges brought against him concerning his taking the \$845.80 from Ms. Lewis (Tr. 8-9). At that time, he was a supervisor and was earning approximately \$52,000 per year (Tr. 25-26).

At the trial, respondent stated that he took the money due to a gambling addiction. He repeatedly stated that he knew it was wrong to take the money that he was sorry to have caused harm to Ms. Lewis and extra effort by the Board staff. He indicated that he had turned his life around and had a new job doing maintenance (Tr. 15-16). As of the date of the trial, he had not repaid the money to Ms. Lewis, although he insisted that he intended to do so (Tr. 7).

The allegations in the petition concerning respondent's appropriation of a client's funds should be sustained.

¹ Although the petition alleges that respondent received the money order on June 1, 2014, it was undisputed that the money order (Pet. Ex. 1) was dated July 1, 2014, and that it was on this date that respondent took it.

FINDING AND CONCLUSION

The allegations in the petition should be sustained in that, on July 1, 2014, while employed as an HRA supervisor, respondent wrote his own name on a money order for \$845.80 belonging to a client, cashed it, and used the cash for personal purposes, in violation of City Charter section 2604(b)(3).

RECOMMENDATION

Since respondent admitted taking the money order and violating the conflicts law, the primary issue raised by this case was what the appropriate penalty should be. Pursuant to the conflicts of interest law, penalties for violations include fines of up to \$25,000. City Charter § 2606(b). The petition requested that respondent be fined \$25,000 for the violation which occurred here, although, at the hearing, petitioner's counsel requested that respondent be fined only \$10,000. Respondent contended that such a penalty would be too harsh. For a number of reasons, I conclude that a fine of less than \$10,000 would be inappropriate here.

It is true that, in the past, this tribunal has recommended, and the Board has imposed, civil fines from \$7,500 to \$10,000 in cases involving misappropriation of funds where the employee failed to appear at the scheduled hearing. In the majority of those cases, the employees stole funds in excess of \$3,000 in multiple transactions. *See Conflicts of Interest Bd. v. Vera*, OATH Index No. 1677/12 (July 28, 2012), *modified on penalty*, COIB Case No. 2011-750 (Dec. 20, 2012) (\$9,000 civil fine for a school secretary who made 118 unauthorized purchases using a DOE procurement credit card over a two year period, totaling \$ 3,000); *Conflicts of Interest Bd. v. Zackria*, OATH Index No. 2525/11 (Aug. 22, 2011), *adopted*, COIB Case No. 2010-609 (Jan. 30, 2012) (\$7,500 civil fine for custodian who used school funds to pay handyman for over nine hours of work on his own home); *Conflicts of Interest Bd. v. Tatum*, OATH Index No. 2891110 (Sept. 20, 2010), *adopted in part, modified in part*, COIB Case No. 09-467 (Mar. 24, 2011) (\$20,000 civil fine imposed on school custodian for misappropriating approximately \$14,500 of school funds to pay employee for non-school related work); *Conflicts of Interest Bd. v. Smart*, OATH Index No. 2588/09 (June 30, 2009), *adopted*, COIB Case No. 08-861 (Nov. 23, 2009) (\$10,000 fine for HRA employee who used the confidential information of public assistance recipient-obtained by accessing HRA personal records on at least seven different occasions-to enter into a cellular telephone contract and to obtain a credit card); *Conflicts of Interest Bd. v. Bryan*, OATH Index No. 1366/08 (Aug. 14, 2008), *adopted*, COIB

Case No. 2005-748 (Dec. 22, 2008) (\$7,500 civil penalty imposed on assistant principal who inappropriately withdrew over \$2,400 in cash from a school account and used a school debit card to make several personal purchases over the course of one year).

On the other hand, the Board has agreed to fines ranging from \$900 to \$20,000 in settlements with employees who cooperated with the Board's investigation, met with the enforcement staff, acknowledged misappropriating funds, and agreed to settle their cases by paying fines. In *Matter of Belle*, COIB Case No. 2010-156 (June 22, 2011), an HRA supervisor took a client's EBT card and made personal purchases over the course of six years, totaling \$345.02. After resigning from her job, she agreed to pay a \$5,000 fine plus restitution to the client. The Board forgave the fine due to Ms. Belle's "extraordinary financial hardship." See also *Matter of Brown, com* Case No. 2009-140 (Oct. 13, 2009) (assistant principal fined \$1,500 for using a P-card for multiple personal purchases totaling \$1,295.98); *Matter of Chabot*, COIB Case No. 2010-067 (Aug. 18, 2010) (NYCHA employee, who had been suspended for 30 days without pay, was fined \$900 for soliciting and obtaining \$300 in loans from two superiors, and misappropriating \$503 from NYCHA's petty cash fund).

Some settlements involving theft have consisted of a combination of unpaid suspension, resignation, and/or restitution in lieu of a fine. See *Matter of Mouzon*, COIB Case No. 2007-570 (May 18, 2008) (community assistant who misappropriated \$1,279.48 of ACS funds for personal use agreed to a 10-day unpaid suspension valued at \$1,046, six months' probation, and to provide full restitution of the misappropriated funds); *Matter of Deokarran*, COIB Case No. 2016-683 (Nov. 22, 2016) (engineer who admitted to stealing multiple DEP computers with a total purchase price of \$3,000, agreed to resign and accept a prior imposition of a 39-day unpaid suspension valued at \$9,224.32. When calculating the penalty, the Board took into account that the engineer previously paid \$600 in restitution).

In past settlements, fines of \$10,000 or more have been reserved for employees who stole large sums of money of \$7,000 or more. *Matter of Rizzo, com* Case No. 2010-610 (Dec. 23, 2010) (former school secretary agreed to pay \$14,000 for using school funds for multiple personal purchases totaling approximately \$7,000); *Matter of O'Brien*, COIB Case No. 2008-960 (Apr. 29, 2009) (custodian agreed to a \$20,000 fine for multiple violations involving over \$17,000 in personal purchases using City funds and falsification of invoices to conceal the purchases).

Respondent's misappropriation of Ms. Lewis's \$845.80 money order for personal use unquestionably constituted a misuse of his position and a serious breach of the public trust. Exacerbating this dishonesty was the fact Ms. Lewis was facing eviction from her home due to unpaid rent and was forced to replace the funds that respondent stole. Despite his fervent pleas of regret at the hearing, respondent had still not repaid Ms. Lewis for the money he stole from her in 2014.

Yet there are mitigating circumstances. Here, after his misconduct was discovered, respondent resigned from a \$52,000 per year supervisory position at HRA, and now works at a maintenance job on a per diem basis. Although respondent lost his HRA position as a result of his own misconduct, the monetary impact of losing his employment was substantial. *See Conflicts of Interest Bd. v. Smart*, OATH Index No. 2588/09 at 6 (June 30, 2009), *adopted*, COIB Case No. 08-861 (Nov. 23, 2009) (ALJ rejected contention that resignation did not result in "harm" to employee). In addition, unlike several of the adjudicated cases resulting in high fines, respondent is guilty of only one instance of misappropriation for an amount less than \$1,000.

Respondent's actions following the discovery of his theft are more similar to past settled cases than to the adjudicated cases, where employees ignored the Board's enforcement actions and failed to participate or appear at hearings. Respondent appeared at both a conference and at the OATH hearing, admitted taking the money order, and generally took responsibility for his actions. Respondent indicated a willingness to settle the case, and requested a hearing due solely to his perceived inability to pay the \$10,000 fine. The Board has noted that, for employees who appear and settle, penalties should be lower than what would otherwise be imposed after a hearing. *Matter of Williams*, Conflicts of Interest Bd. Case No. 2006-045 at 4-5 (Nov. 5, 2009), *modifying on penalty*, OATH Index No. 2135/08 (Feb. 3, 2009). This makes respondent's circumstances very close to those in *Belle*, where an HRA supervisor stole \$345 from a client and was fined \$5,000. Since respondent presented no proof of financial hardship, he is not entitled to any forgiveness of the fine as Ms. Belle was.

Considering respondent's acknowledgement of wrongdoing, his expressed remorse, the loss of his City employment, and past penalties for employees who have admitted guilt, I believe that a fine of \$10,000 is too harsh. I therefore recommend that respondent, similar to the HRA supervisor in *Belle*, be fined \$6,000 for the conflicts violation. I further recommend that, as

demand by the petition, respondent be required to repay the client \$84.80 within 30 days following the Board's final decision.



John B. Spooner
Administrative Law Judge

January 6, 2017

SUBMITTED TO:

RICHARD BRIFFAULT
Chair

APPEARANCES:

JEFFREY TREMBLAY, ESQ.
Attorney for Petitioner

DAVID MARTINEZ
Self-Represented