

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

X

In the Matter of

The Financial Disclosure Appeals of:

FD No. 2017-03

John Cirincione, Nicole Heim, Susan Montague,
Julio Morales, Carlos Sainz and Klara Szasz

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 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 John Cirincione, Nicole Heim, Susan Montague, Julio Morales, Carlos Sainz, and Klara Szasz are required to file an annual disclosure report for 2015.

John Cirincione, Nicole Heim, Susan Montague, Julio Morales, Carlos Sainz, and Klara Szasz (“Appellants”) are Senior Construction Assessment Specialists (“SCAS”) who work in the Design Management Consultant Studio within the Division of Architecture and Engineering for the New York City School Construction Authority (“SCA”).¹ Each person was notified by SCA of the requirement, pursuant to Section 12-110(b)(3)(a)(4) of the Administrative Code of the City of New York, to file an annual disclosure report for calendar year 2015. Each employee fully and timely appealed the designation as a required filer to both the agency head and the Board. The matter was heard before an OCB neutral arbitrator Earl R. Pfeffer, who issued his Report and Recommendation on April 10, 2017 (“Pfeffer Report”), recommending that the appeals be denied.

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

¹ Their in-house title is Design Project Manager.

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.² 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,”³ “[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,”⁴ 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.”⁵ 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.⁶ City Charter § 2601(15) defines “ministerial matter” as “an administrative act … which does not involve substantial personal discretion.”⁷

As SCASs, Appellants manage the work of outside consultants who perform scope, design, and construction work under requirements contracts with SCA. These projects generally fall into two categories: Capital Improvement Projects which involve repairs to existing projects, and Capacity Projects which involve the construction of new buildings and additions to existing buildings. For Capital Improvement Projects, an SCAS reviews consultants’ reports to ensure compliance with SCA design requirements for overall completeness; facilitates and manages the review of the consultants’ drafts by in-house engineers and architects; and makes factual reports, decisions, and judgments relied on by the SCAS’s supervisors, a District Manager. For Capacity Projects, the SCAS organizes and chairs bi-weekly progress meetings with the consultants and reviewers which are attended by both the Vice President of the Division of Architecture and Engineering and the heads of the Design Management Consultant Studio. During the construction phases of Capacity Projects, the SCAS plays a substantial role in resolving disputes based on his/her knowledge of field conditions.

For all SCA projects, a standard contract or fee agreement letter compensates the consultant for services rendered at milestones or pre-set progress points. Standard language in Appendix B of a SCA contract specifies that, “[t]otal compensation for each specific Phase or

² Board Rules § 1-15.

³ Board Rules § 1-15(4) (emphasis added).

⁴ Board Rules § 1-15(5) (emphasis added).

⁵ Board Rules § 1-15(6)

⁶ Board Rules § 1-15(b). 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 financial disclosure report” (*Id.*). 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.*)

⁷ 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).

Sub-phase, of a Project, will be contingent upon completion of the required Service as well as the acceptance and receipt by the SCA of all required documents and materials.”⁸ Appendix B further stipulates that SCA “may withhold full or partial payment of the completion of any Phase or Sub-Phase when a Deliverable is not to the satisfaction of the SCA.”⁹ It is the responsibility of the SCAS to review documentation at the end of each Phase or Sub-phase to ascertain that milestones have been met and if so, to approve an authorization for payment. As noted in the Report and Recommendation, “[t]he SCAS’s determination a phase has been completed is necessary for the final approval of a consultant’s request for payment.”¹⁰

Although Appellants claim in their appeals to the Board that they do not have substantial discretion in the performance of their abilities, the evidence belies their claim. Instead, the evidence demonstrates that the SCAS each has discretion as a first-level approver to determine the status of assignments and to authorize payment for the respective consultant. While the SCAS does not have final authority to approve or authorize contracts as a whole, the SCAS is personally and substantially involved in negotiating, authorizing, and approving the terms of the contract regarding fees and payments during the course of both Capital Improvement Projects and Capacity Projects. Consequently, based on the approval, authorization and recommendation from the SCAS that the consultant’s tasks have been sufficiently completed, the studio director is able to make the final determination to release payment. The SCAS is also essential for negotiating additional services and additional fees when the cost of a project exceeds the stated estimate in the contract. The SCAS is tasked with making the initial determination on whether a change order is appropriate and for every change order, the approval of the SCAS recommending the change is required. Finally, at the close of a project, the SCAS has the authority to determine if the quality of the punch list items is acceptable. If the quality is not acceptable, then the SCAS can refuse to sign off on the project and delay the closeout date.

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.” That objective is furthered by concluding that John Cirincione, Nicole Heim, Susan Montague, Julio Morales, Carlos Sainz, and Klara Szasz are required to file annual disclosure reports.

To be exempt from the filing requirement, public servants performing contracting responsibilities must perform **only** ministerial duties.¹¹ Here, the Appellants are directly and substantially involved in the negotiations for change orders, payment processes, and project completions related to SCA contracts for Capital Improvement Projects and Capacity Projects. Thus, they do not perform merely ministerial tasks but engage in activities that are precisely the kind that have the potential to pose a conflict of interest.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Administrative Code §12-110(b)(3)(a)(4), that John Cirincione, Nicole Heim, Susan Montague, Julio Morales, Carlos

⁸ Pfeffer Report at 8

⁹ *Id.* at 9.

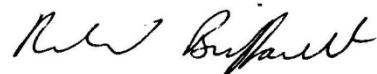
¹⁰ *Id.* at 10.

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

Sainz, and Klara Szasz are required to file an annual disclosure report for calendar year 2015 no later than June 16, 2017.

John Cirincione, Nicole Heim, Susan Montague, Julio Morales, Carlos Sainz, and Klara Szasz have the right to appeal this Order to the Supreme Court of the State of New York.

The Conflicts of Interest Board



By: Richard Briffault, Chair

Fernando A. Bohorquez, Jr.
Anthony Crowell
Jeffrey D. Friedlander
Erika Thomas

Dated: May 17, 2017

Cc: John Cirincione, SCA
Nicole Heim, SCA
Susan Montague, SCA
Julio Morales, SCA
Carlos Sainz, SCA
Klara Szasz, SCA

Seth Blau, SCA
Dena Klein, DC-37

Earl R. Pfeffer