

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Joan A. Madon

2009-031278 PART 11
NF
6-J Kroll

Index Number : 112955/2009
TIRADO, VANESSA
vs.
NYC CONFLICTS OF INTEREST
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 3-4-10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

Cross-Motion: Yes ~~No~~

Upon the foregoing papers, it is ordered that this motion petition for Article 78 relief is decided in accordance with the annexed Memorandum Decision Order and Judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 1, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

----- X

In the Matter of the Application of
VANESSA TIRADO, THOMAS ORAWIEC,
MELANIE COLMAN, STEVEN MOLLIN,
JOSEPH VARGAS, BRUCE VOGEL and
MARK KITCHNER,

Petitioners,

Index No. :
112955/2009

For a Judgment under Article 78 of the
Civil Practice Law and Rules

-against-

NEW YORK CITY CONFLICTS OF
INTEREST BOARD, Steven B. Rosenfeld,
as Chairperson, and THE CITY OF NEW YORK,
Michael R. Bloomberg, as Mayor,

Respondents.

----- X

JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioners Vanessa Tirado, Thomas Orawiec, Melanie Colman, Steven Mollin, Joseph Vargas, Bruce Vogel and Mark Kitchner seek a judgment vacating and annulling the July 14, 2009 determination of respondent New York City Conflicts of Interest Board, Steven B. Rosenfeld, as Chairperson (COIB) compelling petitioners to file financial disclosure reports pursuant to Administrative Code of the City of New York (Administrative Code) § 12-110 (b) (3) (a) (4). The City of New York, Michael R. Bloomberg as Mayor, and COIB (collectively, respondents) seek dismissal of the petition, and contend that they acted reasonably, properly, and in conformance with all applicable laws and regulations.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioners are employed by the New York City Comptroller's office (Comptroller). They work in the job title Claim Specialist Level II in the property damage division of the bureau of law and adjustment. Petitioners process claims against the City of New York which involve the city's alleged liability for property damage. According to the publicly viewed job description, a claim specialist level II "[n]egotiates, settles and adjusts claims within prescribed limits." Respondents' Exhibit 1, at 1. He/She also "[i]nterprets rules and regulations as applied to minor claims; may make recommendations as to approval or disallowance of such claims." *Id.* Petitioners review these claims, as well as the attached documentation, which may be, for example, from a car repair shop. If the city's liability is not in dispute, the petitioners will submit a claim for settlement electronically to their supervisor for approval. The petitioners only have the authority to settle claims for amounts up to \$2,000.00.

If the claimant provides more documentation, the petitioners may adjust the claim and offer a new settlement without a supervisor's approval. However, only the supervisor can "unlock" the claim from the computer system when new documentation arrives. As such, petitioners contend that "at least, an informal consultation with the supervisor concerning the change to the settlement" has taken place. Petition, ¶ 11.

By a letter dated May 7, 2007, petitioners were notified by the Comptroller that they were being designated as employees who need to file a financial disclosure report with COIB for the 2006 calendar year. COIB interprets and administers rules addressing conflicts of interest for city officers and employees.

In accordance with Administrative Code § 12-110 (b) (3) (a) (4), city employees are required to file a financial disclosure report if their duties "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."

Title 53, Section 1-15 (a) of the Rules of the City of New York (RCNY) further defines the duties of city employees required to file financial disclosure reports as referred to in Administrative Code § 12-110 (b) (3) (a) (4) as being the following:

- (4) Negotiates or determines the substantive content of a contract, lease, franchise, revocable consent, concession, or application for a zoning change, variance, special permit or change order;
- (5) Recommends or determines whether or to whom a contract, lease ... should be awarded or granted;
- (6) Approves 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; or

(7) Determines the content of or promulgates City procurement policies, rules or regulations.

53 RCNY 1-15 (b) also carves out an exemption for city employees who are not required to file a financial disclosure report. 53 RCNY 1-15 (b) states:

Clerical personnel and other public servants who, in relation to the negotiation, authorization, or approval of contracts, leases, franchises, revocable consents, concessions, and applications for zoning changes, variances, and special permits, perform only ministerial tasks shall not be required to file a financial disclosure report pursuant to Administrative Code § 12-110 (b)(3)(a)(4). For example, public servants who are under the supervision of others and are without substantial personal discretion, and who perform only clerical tasks (such as 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) shall not, on the basis of such tasks alone, be required to file a financial disclosure report. Similarly, public servants who write a request for proposals, bid request, change order, contract, lease, franchise, revocable consent, concession or application for a zoning change, variance, or special permit or procurement policy, rule, or regulation under the direction of a superior but who do not determine the substantive content of the document shall not, on the basis of such tasks alone, be required to file a financial disclosure report.

Petitioners argue that they are exempt pursuant to 53 RCNY 1-15 (b) because "they are restricted in the amounts they offer, all amounts must be documented and the settlements are authorized

by supervisors." Petition, ¶ 19.

After receiving the letter dated May 7, 2007, petitioners appealed their new designation with the Comptroller's office. On July 6, 2007, petitioners' appeal was denied. Petitioners then filed an appeal with COIB. COIB referred the appeal to the Office of Collective Bargaining for a hearing in front of a neutral officer, Jane Morgenstern (Morgenstern).

On December 3, 2008, a hearing was held in which petitioners were allowed to present evidence, examine and cross-examine witnesses and argue their position against the Comptroller.

On January 28, 2009, Morgenstern issued a report and recommendation in which she found that petitioners should not be required to file financial disclosure reports pursuant to Administrative Code § 12-110 (b) (3) (a) (4) and 53 RCNY 1-15. In her report, she states the following, in pertinent part:

The recommendations of the CEIIs are based to a large but not exclusive extent on certain guidelines, review of the claimant's bills and estimates, and may include inspection reports by City engineers. There is no strict formula for adjusting a claim, however.

However, as the Union observes, in carrying out their responsibilities the appellants must follow guidelines promulgated by the Comptroller, their authority with respect to the offer amount is strictly circumscribed (up to \$2,000), and their conclusions are based on a limited number of documents substantiating proof of loss, estimates provided by claimants, and engineers' reports where applicable, from which, according to

appellant Tirado, "there is never a deviation."

Respondents' Exhibit 8, at 4-6.

Although petitioners argued that there is no negotiation within their job responsibilities, Morgenstern disagreed. However, she commented that the petitioners' "responsibility and latitude for independent initiative does not rise to a level where they can reasonably be found to negotiate or determine 'the substantive content of a contract'" *Id.* at 6. She concluded as follows:

Finally, in my judgment, the "bottom line," so to speak, is that the work done by the appellants is highly unlikely to be considered by the Board as placing them in a position to engage in a conflict of interest.

Id.

On July 14, 2009, COIB issued its own findings in which it rejected Morgenstern's recommendations. In its findings, COIB informed petitioners that it disagreed with Morgenstern's recommendation that petitioners would not have to file financial disclosure reports, and informed petitioners that they would have to file financial disclosure reports for the 2006 calendar year.

On September 11, 2009, petitioners commenced this Article 78 proceeding.

DISCUSSION

In the context of an Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the

exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 (1st Dept 2006), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); see CPLR 7803 (3). An agency's decision is considered arbitrary if it is "without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d at 231. "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citations omitted]." *Matter of Arrocha v Board of Education of City of New York*, 93 NY2d 361, 363 (1999).

53 RCNY 1-15 (b):

Petitioners argue that COIB's decision was arbitrary, capricious and irrational in deciding that petitioners are not exempt from filing financial disclosure reports pursuant to 53 RCNY 1-15 (b). They maintain that, per the exception listed in 53 RCNY 1-15 (b), petitioners perform ministerial tasks since, at all times, they are subject to supervisory oversight and lack personal discretion. They contend that they follow narrow

guidelines, such as checking off items on a list. Furthermore, any new settlement amounts offered by the petitioners to the claimants after further review are also subject to the same narrow guidelines, and the total settlement amount may not exceed \$2,000.

Respondents argue that the exemption requirements are intended for clerical and other personnel who perform solely ministerial tasks. As such, petitioners do not meet the requirements, since they must use good judgment, and cannot be reasonably defined as clerical or administrative. Respondents mention that petitioners are not subject to a strict formula when recommending a settlement. They also state that petitioners are authorized, "without any further supervisor approval," to agree to a new demand from the claimant as long as it is below \$2,000. Respondents' Memo of Law, at 17.

COIB is mandated to issue and implement rules concerning the filing of financial disclosure statements by city employees. See NYC Charter § 2603 (d) (3). It is well settled that "[a]n agency's interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable. Put another way, the courts will not disturb an administrative agency's determination unless it lacks any rational basis [internal quotation marks and citations omitted]." *Matter of IG Second Generation Partners L.P. v New York State Division of Housing and Community Renewal*, 10 NY3d 474, 481

(2008); see also *Matter of Rizzo v New York State Division of Housing and Community Renewal*, 16 AD3d 72, 79 (1st Dept), *affd* 6 NY3d 104 (2005) (holding "an agency's interpretation of the operational practices attendant to the statute that it administers is entitled to deference"). Respondents decided that petitioners are not the type of employees who are intended to be exempt from the financial disclosure filing requirement. In light of the petitioners' job responsibilities, respondents' decision is not unreasonable, and will not be disturbed.

Administrative Code § 12-110 (b) (3) (a) (4):

Petitioners allege that COIB's definition is misplaced when COIB considers claim settlements to be construed as contracts pursuant to Administrative Code § 12-110 (b). Petitioners maintain that, although they send out a settlement offer via letter, they are not involved in negotiation or contract interpretation.

After considering petitioners' job duties, COIB, as well as Morgenstern, believe that petitioners are involved in negotiation of settlements. Respondents also claim that a stipulation of a settlement is also a contract by nature and, therefore, is subject to the rules of contract interpretation. See *Hotel Cameron v Purcell*, 35 AD3d 153, 155 (1st Dept 2006) (holding that "[s]tipulations of settlement are essentially contracts and subject to principles of contract construction.")

Pursuant to Administrative Code § 12-110 (b) (3) (a) (4),

COIB is mandated to review and determine which employees perform duties regarding negotiation, and contract authorization, among others. It is COIB's duty to protect the integrity of government decision-making by having petitioners file financial disclosure reports, and, as previously stated, COIB's interpretation of its own regulations is entitled to deference and will only be overturned if it is unreasonable or irrational.

Respondents maintain that petitioners' duties involve negotiation of contracts on behalf of the City. They note that petitioners may handle up to 1,000 claims annually, and that petitioners may be susceptible to conflicts of interest when they have to recommend what a claim is worth, and they may actually have to negotiate with individuals with whom they have had a financial relationship. Therefore, respondents' determination that petitioners are employees who are required to file financial disclosure reports, as well as their corresponding actions, cannot be said to be irrational.

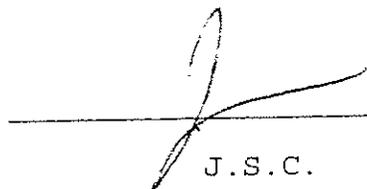
Accordingly, petitioners' application is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: July 1, 2010


J.S.C.