Conflicts of Interest Bd. v. McNeil

OATH Index No. 1790/10 (June 11, 2010), *modified on penalty*, Bd. Chair's Dec. (Oct. 28, 2010), **appended**

Respondent, a retired procurement analyst from the Department of Health and Mental Hygiene, used a Department email account to send and receive emails relating to his outside employment as a certified notary signing agent in violation of Chapter 68 of the New York City Charter and Title 53 of the Rules of the City of New York. Although respondent provided his work telephone number and email address as contact information, petitioner failed to show that he sent or received these emails during his working hours. Considering the totality of the circumstances, a $600 fine is recommended.

The Board Chair determined that the recommended fine of $600 was an insufficient penalty and instead imposed a $2000 fine.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
CONFLICTS OF INTEREST BOARD
Petitioner
- against –
RAYMOND MCNEIL
Respondent

REPORT AND RECOMMENDATION

FAYE LEWIS, *Administrative Law Judge*

Petitioner, the Conflicts of Interest Board, brought this civil penalty proceeding under Chapter 68 of the New York City Charter ("Charter") and Title 53 of the Rules of the City of New York ("Board's rules"). The Board alleged that respondent, Raymond McNeil, a retired procurement analyst from the Office of the Agency Chief Contracting Officer in the Department of Health and Mental Hygiene ("Department"), violated sections 2604(b)(2) of the Charter and sections 1-13(a) and (b) of the Board's rules when he used a Department computer and email account for outside employment between 2006 and 2009; provided his Department e-mail, address and telephone number to parties for his outside employment transactions; and engaged in outside employment while he was required to perform work for the Department (ALJ Ex. 1).

On the request of respondent, the hearing, which was initially scheduled for March 23, 2010, was adjourned to April 20, 2010 due to a scheduling conflict. On April 13, 2010, respondent requested an indefinite adjournment, arguing that pursuant to *In re Western States Drywall, Inc*., 150 B.R. 774 (D. Idaho 1993), his pending bankruptcy precluded the hearing. *In re Western States Drywall, Inc*., does not support respondent's position. Rather, it provides that despite the automatic stay provisions of the Bankruptcy Code, the government may commence administrative proceedings to litigate liability. It is only actions for enforcement of a monetary judgment which are prohibited. 150 B.R. at 776. This is an administrative hearing to determine liability and, if appropriate, to recommend a penalty. Thus, by no means can this be considered an action to enforce a monetary judgment. Respondent's pending bankruptcy does not affect these proceedings. Accordingly, I denied respondent's application.

At the hearing, petitioner presented documentary evidence consisting of printouts of respondent's emails (Pet. Exs. 1A-1S) and respondent presented a copy of his bankruptcy petition (Resp. Ex. A). Respondent elected not to testify.

ANALYSIS

At the hearing there were no factual disputes; petitioner presented its evidence and respondent argued that the evidence did not establish the charges. Petitioner's evidence consisted of emails discussing respondent's enrollment and registration as a notary agent (Pet. Exs. 1E, 1N-Q, 1S), when respondent could take assignments (Pet. Ex. 1A), respondent's assignments (Pet. Exs. 1C, 1D, 1F, 1H, 1J), and respondent's payments for his notary services (Pet. Exs. 1B, 1H, 1R). Seven emails sent by respondent simply consisted of him forwarding emails he received (Pet. Exs. 1F, 1J, 1M, 1N, 1O, 1Q, 1S). The emails were sent by respondent on the following dates and times:

DATE	TIME	PET. EXHIBIT
March 17, 2007	8:11 a.m.	1A
July 10, 2007	4:44 a.m.	1B
July 11, 2007	7:02 a.m.	1B
September 7, 2007	8:10 a.m.	1C
December 11, 2007	2:44 p.m.	1D
May 16, 2008	1:25 p.m.	1E

May 16, 2008	1:27 p.m.	1F
July 29, 2008	12:21 p.m.	1H
August 26, 2008	11:10 a.m.	1I
September 9, 2008	9:05 a.m.	1J
October 16, 2008	11:07 a.m., 11:08 a.m., 11:09 a.m.	1K, 1L
October 21, 2008	8:47 a.m.	1M
February 23, 2009	2:44 p.m.	1N
March 25, 2009	8:42 a.m.	1O
March 26, 2009	1:51 p.m.	1P
March 27, 2009	2:34 p.m.	1Q
April 3, 2009	8:52 a.m.	1R
June 3, 2009	12:49 p.m.	1S

Several of these exhibits contained email chains, showing that respondent received emails relating to his notary business as well (Pet. Exs. 1A-C, 1E, 1I-O, 1Q-S). The extent to which respondent profited from business related to these e-mails is unclear. An email he sent on July 29 (Pet. Ex. 1H) requested a billing invoice for $100, for work involving a total of 25 documents. The parties stipulated that these emails were produced from the City's records, and were sent from or received by respondent's Department email account (Tr. 6-7).

Thus, the only issue to determine is whether these emails are sufficient to show violations of section 2604(b)(2) of the Charter and sections 1-13(a) and (b) of the Board's rules. Section 2604 of the Charter provides:

> (2) No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties.

Sections 1-13(a) and (b) of the Board's rules provide:

> (a) [I]t shall be a violation of City Charter § 2604(b)(2) for any public servant to pursue personal and private activities during times when the public servant is required to perform services for the City.

> (b) [I]t shall be a violation of City Charter § 2604(b)(2) for any public servant to use City letterhead, personnel, equipment, resources, or supplies for any non-City purpose.

The emails submitted by petitioner, which contain material such as respondent's enrollment as a notary agent (Pet. Exs. 1N-Q, 1S), his assignments (Pet. Exs. 1C, 1D, 1F, 1H, 1J), and his fees (Pet. Exs. 1B, 1H, 1R), are sufficient to show that respondent used his Department email account to conduct his outside employment. A Department email account is a City resource. *See* DoITT, DOI, COIB, & Law Dep't, *Policy on Limited Personal Use of City Office and Technology Resources* (2005) (including email in the definition of "office technology and resources"). Thus, using a Department email account for outside employment is in conflict with the proper discharge of official duties. *See Conflicts of Interest Bd. v. Calvin*, COIB Case No. 2008-729 (Aug. 18, 2009) (use of City computer and email account to send and receive information regarding private business ventures constituted a violation of Charter section 2604(b)(2)). Although petitioner submitted no evidence to show that respondent used the Department's computer to access these emails, his use of the email account alone is sufficient to show a violation of section 2604(b)(2) of the Charter and section 1-13(b) of the Board's rules.

The emails petitioner submitted demonstrated that respondent provided his Department email address and phone number as contact information for his outside employment. In addition to providing his Department email address through the act of using the account to send his mail, some of the emails respondent sent specifically provided that he could be contacted through his Department email address (Pet. Exs. 1B, 1C, 1F, 1P). Likewise, in an email about his fee for performing a notary signing session (Pet. Ex. 1B) and on a closing order form sent as an attachment, on which respondent is named as a signing agent (Pet. Ex. 1C), respondent provided his work telephone number as a number at which he could be reached. There is no indication in the emails that respondent gave out his work address. Providing one's City government email address and phone number as contact information for outside employment is in conflict with the proper discharge of official duties. *See Conflicts of Interest Bd. v. Knowles*, COIB Case No. 2008-582 (Aug. 18, 2009) (communicating with private clients from a City phone and e-mail address and listing City phone number as a business contact number violated Charter § 2604(b)(2)). Accordingly, petitioner has established that respondent violated section 2604(b)(2) of the Charter and section 1-13(b) of the Board's rules.

However, petitioner's evidence is insufficient to establish that respondent engaged in outside employment activities when he was required to perform work for the Department. While the emails respondent sent were sent on weekdays, petitioner presented no evidence to confirm that respondent was in fact scheduled to work on those days. Beyond that, petitioner presented no evidence to show which hours respondent was scheduled to work, whether or not respondent had flex-time, whether or not respondent had scheduled breaks, and when he took his lunch. Indeed, the information in the emails suggest that on at least one occasion respondent's work day ended at 3:00 p.m. (Pet. Ex. 1B) and another at 2:30 p.m. (Pet. Ex. 1I). Our case law illustrates that there is a wide variance in work schedules among city employees, even those working in office settings. *See, e.g., Human Resources Admin. v. Nwogu*, OATH Index No. 682/09 (Jan. 9, 2009), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 09-68-SA (Nov. 12, 2009) (eligibility specialist's lunch hour between 12:00 and 1:00 p.m.); *Dep't of Environmental Protection v. Onibokun*, OATH Index No. 871/07 (Apr. 4, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 07-108-SA (Dec. 7, 2007) (research assistant's lunch hour between 1:00 p.m. and 2:00 p.m.); *Dep't of Consumer Affairs v. Rowland*, OATH Index No. 1743/07 (Oct. 19, 2007) (clerical associate permitted to take up to three breaks per day provided the total break time not to exceed one hour); *Dep't of Health & Mental Hygiene v. Nkele*, OATH Index No. 615/07 (May 11, 2007) (public health advisor scheduled to work 10:00 a.m. to 3:00 p.m.).

Here, many of the emails sent by respondent were sent prior to 9:00 a.m. (Pet. Ex. 1A, 1B, 1C, 1M, 1R) and others were sent between the hours during which many people typically take lunch (12 p.m. to 2 p.m.) (Pet. Exs. 1E, 1F, 1H, 1P, 1S). The remaining seven emails were sent either shortly after 9:00 a.m. (Pet. Ex. 1J), between 11:00 a.m. and noon (Pet. Exs. 1G, I, K, L) or between 2:30 and 3:00 pm. (Pet. Exs. 1D, 1R). While one could speculate that at least some of these emails were sent during working hours, as opposed to breaks or an early or late lunch, speculation is no substitute for evidence. An inference that the emails were sent during working hours is impermissible absent some evidence in support. *See, e.g., Dep't of Education v. Fleischmann*, OATH Index No. 1528/05 at 10 (July 26, 2006) ("in order to establish a fact in issue by circumstantial evidence, the inference sought to be drawn must be based on and reasonably taken from proven collateral facts"); *Dep't of Correction v. Cooper*, OATH Index Nos. 2585/08 & 2586/08 (Nov. 12, 2008) (same); *Ridings v. Vaccarello*, 55 A.D.2d 650, 651 (2d Dep't 1976) ("The fact upon which it is sought to base an inference must be shown and not left

to rest in conjecture"); *cf. Transit Auth. v. Ondeje*, OATH Index No. 1339/04 (Dec. 30, 2004) (although assistant architect was receiving personal emails through his agency email account, ALJ found no credible evidence that he was reading or composing them during work hours).

Nor could one infer on the basis of respondent's decision not to testify that he wrote the emails while working. *See Dep't of Sanitation v. Richins*, OATH Index No. 167/01 (Oct. 15, 2001) (". . . the failure of a respondent to testify does not permit the trier of fact to speculate about what his testimony might have been, nor does it require an adverse inference to be drawn. Moreover, a negative inference cannot fill in a gap or supply a deficiency in the other party's case; nor can it be regarded as proof of any essential fact."); *Laffin v. Ryan*, 4 A.D.2d 21, 26 (3d Dep't 1957) ("The inference cannot take the place of evidence; it cannot supply a deficiency in the other party's case nor can it be regarded of proof of any essential fact.") (citing *Kezer v. Dwelle-Kaiser Co. et al*, 222 A.D.2d 350, 356, 225 N.Y.S.2d 722, 729 (4th Dep't 1927)).

Regarding the emails that respondent received, there is no evidence to show when he actually opened and read them. Additionally, although respondent provided his work telephone number as contact information, petitioner did not present any evidence that telephone calls were actually made to respondent in connection to his notary business, much less evidence that calls were made during working hours, as opposed to before work, during lunch, or on breaks. While it is certainly possible that this occurred, there is no evidence to support this inference.

Accordingly, petitioner did not establish that respondent violated section 1-13(a) of the Board's rules.

FINDINGS AND CONCLUSIONS

1. Between March 2007 and June 2009, respondent used his Department email account to send and receive emails relating to his outside employment, in violation of section 2604(b)(2) of the Charter and section 1-13(b) of the Board's rules.

2. Respondent provided his Department email and phone number as his contact information for his outside employment, in violation of section 2604(b)(2) of the Charter and section 1-13 (b) of the Board's rules.

3. Petitioner's evidence is insufficient to support a finding that respondent engaged in outside employment during hours he was required to perform work for the Department.

RECOMMENDATION

For respondent's violation of the Charter and the Board's rules, petitioner seeks a penalty of $5,000 (Tr. 24). Petitioner alleges that this case is most comparable to *Conflicts of Interest Board v. Childs*, COIB Case No. 2006-75 (Apr. 23, 2008), in which a $2295 fine was imposed pursuant to a settlement. Petitioner further asserts that the fine for respondent should be double that imposed against Mr. Childs because Mr. Childs settled and respondent went to trial (Tr. 24). Respondent, conversely, contends that if a Charter violation is found, the penalty should be mitigated because respondent has worked for the City for over 26 years and is currently in bankruptcy (Tr. 18, 19). Respondent also asserts that any recommended penalty should also take into account petitioner's failure to establish the amount of monetary benefit that respondent derived from his use of his City email account. Petitioner argues that these concerns are irrelevant.

I do not agree with petitioner's position. First, I do not believe that the *Childs* case should govern what penalty respondent receives. In *Childs*, which was resolved by a stipulation agreement, a computer specialist admitted using his City email account to send emails relating to his outside employment during his City work hours and also acknowledged listing his City email and phone number as contact information on his personal website and in emails relating to his outside employment.

By contrast, here petitioner did not prove that respondent engaged in outside business activities during his working hours. This is an important distinction as it is a separate violation of the Board's Rules. Indeed, in several cases where the only charge established was the misuse of City resources in violation of Board Rule 1-13(b), the Board has chosen to limit its enforcement action to the issuance of public warning letters. These cases include *Conflicts of Interest Board v. Williams*, COIB Case No. 2007-464 (Aug. 17, 2009), where a City lifeguard used a City phone and location to talk with his private tax-clients during his lunch hours and breaks, as well as *Conflicts of Interest Board v. Smith*, COIB Case No. 2007-003 (Jan. 23, 2008), where a principal special officer with the Human Resources Administration used his City-issued Blackberry while off duty for non-City purposes. The Board issued a more significant penalty in

Conflict of Interest Board v. Kessock, COIB Case No. 2003-752 (Feb. 21, 2007), where it assessed a $500 fine against a staff analyst who allowed his daughter to use his City-issued cell phone, costing the City approximately $450 over an eleven month period.

Even if the Board were to reject my finding that petitioner did not establish a violation of section 1-13(a) of its rules and find *Childs* to be factually comparable, *Childs* is not the only case involving the use of City equipment on City time for private business. Indeed, *Childs,* in which a $2295 fine was imposed, is at the high end of the spectrum for such violations. Other cases have involved fines ranging from $500 to $1,500. *See, e.g., Conflicts of Interest Bd. v. Eng*, COIB Case No. 2010-035a (Apr. 28, 2010) ($1,500 fine for City employee who used his City computer, email account, and Blackberry to send and receive emails about his outside employment while he was supposed to be working for the City); *Conflicts of Interest Bd. v. Knowles*, COIB Case No. 2008-582 (Aug. 18, 2009) ($1,250 fine for technician who communicated with his private clients through his City email account while on City time and listed his City phone number as his contact number in emails and an online advertisement); *Conflicts of Interest Bd. v. King*, COIB Case No. 2008-681 (Feb. 11, 2009) (suspension for three days, valued at $562, for employee who used a City computer and email account to engage in activities related to his outside work as a musician, including sending and receiving emails to solicit business, during City time); *but see Conflicts of Interest Bd. v. Calvin*, COIB Case No. 2008-729 (Aug. 18, 2009) (employee received 16 day suspension, valued as $2,491.55, for using City computer and email to send and receive information about private business ventures at times when she was supposed to be working for the City).

Moreover, the argument that a penalty should be doubled from a comparable settlement if a respondent chooses to go to trial is misplaced. Petitioner cites the Board's decision in *Conflicts of Interest Board v. Williams*, COIB Case No. 2006-045 (Nov. 5, 2009), *modifying* OATH Index No. 2135/08 (Feb. 3, 2009), in support of this proposition. However, in *Williams*, the Board actually imposed a fine commensurate with those imposed in settlements with comparable fact patterns.

The *Williams* case involved a special officer who hired subordinates to work for his video production company. After a hearing, this tribunal recommended a penalty of $750. The Board doubled the penalty, to $1,500. In so doing, the Board rejected the respondent's assertion that his case was comparable to another matter which had settled for a $500 penalty. The Board

found the facts in the matter cited by respondent to be far more mitigatory, and cited the "more important distinction" -- that the other case had settled and Mr. Williams had proceeded to trial. The Board asserted that it would not further its policy of encouraging settlements "[t]o impose equivalent fines on those who settle and those who do not." COIB Case No. 2006-045 at 4.

However, having made that observation, the Board also noted that prior enforcement cases with similar fact patterns to *Williams* had settled prior to trial for penalties not less than $1,500. COIB Case No. 2006-045 at 4 (citing *Conflicts of Interest Bd. v. Byrne*, COIB Case No. 2005-243 (Sept. 15, 2008); *Conflict of Interest Bd. v. Harmon*, COIB Case No. 2008-025 (May 14, 2008); *Conflicts of Interest Bd. v. Della Monica*, COIB Case No. 2004-697 (Jan. 5, 2007); and *Conflicts of Interest Bd. v. Fraser*, COIB Case No. 2002-770 (Oct. 30, 2004)). The Board went on to impose a $1500 fine, commensurate with the fines set forth in these settlement agreements. Thus, it is not accurate to characterize *Williams* as imposing a rigid rule requiring that the penalty be doubled for going to trial.[1]

The question of penalty involves a particularized assessment of the nature of the offending conduct, as well as the nature of the offender. In this case, respondent sent 20 emails on his City email account over a 27-month period to further his private notary business. Some of the emails were substantive; many others simply involved respondent forwarding email that he received. Although respondent provided his work telephone number and email address as contact information, petitioner failed to establish that he used the email account during working hours, as opposed to lunch or breaks. Also to be noted is that respondent is no longer working for the City. Instead, he has retired. It does not appear that he benefited tremendously from his use of his governmental email account, as he has now filed an action for bankruptcy. I do not agree with petitioner that these considerations are irrelevant to the consideration of penalty, simply because respondent has gone to trial rather than executed a settlement agreement.

On the other hand, respondent's use of his City email account to further his private business was repeated over a lengthy period of time; his use of his work telephone number as contact information indicates that he intended that people call him at work; and he did not affirmatively acknowledge his wrongdoing or express remorse.

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[1] In *Williams*, the Board referred to federal sentencing guidelines in support of the proposition that people who settle should receive a lesser penalty than those who go to trial. However, any suggestion that federal sentencing guidelines would support a rigid double-the-fine for going to trial penalty structure is ill-considered. It is precisely this type of inflexibility that caused the Supreme Court to invalidate the mandatory provisions of the federal sentencing guidelines in. *United States v. Booker*, 543 U.S. 220, 227 (2005).

Considering all of the above, I recommend that the Board impose a $600 fine upon respondent.

Faye Lewis
Administrative Law Judge

June 11, 2010

SUBMITTED TO:

STEVEN B. ROSENFELD
Chair

APPEARANCES:

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NYC Conflicts of Interest Bd., Chair's Decision (Oct. 28, 2010)

THE NEW YORK CITY
CONFLICTS OF INTEREST BOARD
Petitioner

- Against –

RAYMOND MCNEIL
Respondent

STEVEN B. ROSENFELD, *Chair*

DECISION

Upon consideration of all the evidence presented in this matter, and of the full record, including all written comments submitted by counsel for the parties and all papers submitted to, and rulings of, the Office of Administrative Trials and Hearings ("OATH"), the Conflicts of Interest Board (the "Board") hereby adopts the annexed Report and Recommendation of OATH dated June 11, 2010 (the "Report"), in the above-captioned matter, with one modification regarding the recommended fine amount, imposing a higher fine for the reasons set forth below. Accordingly, the Board imposes a fine of $2,000 upon Respondent for violating Chapter 68 of the City Charter, the City's conflicts of interest law.

This enforcement matter involves a former Department of Health and Mental Hygiene ("DOHMH") procurement analyst, who used City resources, including his DOHMH e-mail account, to send and receive numerous e-mails in connection with his non-City employment as a certified notary signing agent, and provided his DOHMH telephone number to clients for his outside employment.

New York City Charter §2604(b)(2)

This section states:

"No public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties."

Board Rules Section 1-13(a)

This section, interpreting Charter Section 2604(b)(2), states that:

”Except as provided in subdivision (c) of this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to pursue personal and private activities during times when the public servant is required to perform services for the City.”

Board Rules Section 1-13(b)

This section, interpreting Charter Section 2604(b)(2), states that:

"Except as provided in subdivision (c) of this section, it shall be a violation of City Charter § 2604(b)(2) for any public servant to use City letterhead, personnel, equipment, resources, or supplies for any non-City purpose."

The record shows that Petitioner commenced this proceeding on January 19, 2010, alleging that Respondent served as a Procurement Analyst in the Office of the Agency Chief Contracting Officer at DOHMH during all relevant times until his resignation from City service on October 15, 2009, and that while employed at DOHMH, Respondent misused City resources, including his City computer, City e-mail account, and City telephone, for his outside employment as a certified notary signing agent for real estate closings and loan modifications, in violation of City Charter Section 2604(b)(2) and Board Rules Section 1-13(b). Additionally, the Petitioner alleged that Respondent engaged in the above-mentioned conduct during hours he was required to perform work for DOHMH in violation of City Charter Section 2604(b)(2) and Board Rules Section l-13(a).

At OATH, Respondent was given the opportunity to challenge these allegations about his conduct, and appeared for the hearing on April 20, 2010, before Administrative Law Judge ("ALJ") Faye Lewis, represented by an attorney.

At the hearing, Petitioner presented 20 emails (which, the Board notes, occupy 81 pages of exhibits in the record at the hearing) from Respondent's City e-

mail account regarding his outside business and also presented evidence that Respondent provided his DOHMH e-mail address and telephone number as his contact information to private parties involved in his outside employment. Respondent chose not to testify.

ALJ Lewis issued her report on June 11, 2010, and found, as Petitioner had alleged, that Respondent misused City resources in violation of Board Rules Section 1-13(b) by sending or receiving 20 e-mails on his City e-mail account and listing his DOHMH e-mail and telephone number on documents relating to his outside business, but found the evidence insufficient to establish that Respondent misused City resources during City business hours. ALJ Lewis recommended a fine of $600.

Following the issuance of the Report, Petitioner submitted comments to the Report requesting that the Board impose a fine of no less than $3,000, rather than the $600 recommended by the ALJ. Petitioner argued that the ALJ erroneously disregarded such authority as *COIB v. Williams,* COIB Case No. 2006-045 (November 5, 2009), which stands for the proposition that in order to encourage settlements, the Board's practice is to accept fines in settlements lower than what would be imposed after a trial. Petitioner also argued that it is rare for the Board to impose fines of less than $1,000 for any violation of Chapter 68, even pursuant to settlements. In reply, Respondent's counsel argued that the fine should not be increased and should be no greater than the recommended $600. Respondent's counsel repeated the arguments he made at the OATH hearing in support of mitigation of any penalty: that Respondent recently retired from City service; that Respondent recently filed for bankruptcy; that Respondent worked for the City for over twenty-six years; and that there was no evidence that Respondent benefitted from his use of City resources.

The Board concurs in the ALJ's determination that the evidence establishes a violation of the prohibition against using City resources for non-City purpose. The evidence plainly establishes Respondent's use of his City e-mail for his outside notary business and that Respondent gave out his City e-mail and telephone number

to clients in connection with that outside business. Such use of City resources for personal pursuits constitutes a violation of Section 2604(b)(2), as interpreted by Board Rules Section l-13(b). Specifically, Respondent committed the following misconduct: (1) he sent or received 20 e-mails related to his outside business as a notary signing agent from his City e-mail account from March 17, 2007, to June 3, 2009; (2) he listed his City telephone number and City e-mail address as contact information on multiple occasions for his outside employment; and (3) he provided his City fax number to clients for outside employment.

For the following reasons the Board has concluded that the fine recommended by ALJ Lewis is insufficient and instead imposes a fine of $2,000. In reaching this conclusion, the Board first considered two recent comparable Board cases. In *COIB v. Baker*, COIB Case No. 2009-723 (2010), respondent, an Associate Staff Analyst at the New York City Department of Citywide Administrative Services, admitted to using City resources, and some City time, to receive over 100 pages of e-mails and one fax in connection with his outside business and agreed to pay a fine of $1,750. In *COIB v. Knowles*, COIB Case No. 2008-582 (2009), respondent, a New York City Department of Education ("DOE") Computer Science Technician, admitted to making or receiving 60 calls, totaling two hours, and using his DOE e-mail address nine times for his outside business, sometimes during DOE business hours, and agreed to pay a fine of $1,250. While both *Baker* and *Knowles* involved some use of City time, the use of City resources was comparable to Mr. McNeil's, which, as noted, involved 20 e-mails totaling 81 pages. *Baker* and *Knowles* thus establish that use of City resources for an outside business endeavor warrants a fine, following settlement, of at least $1,000. Here, in addition, it is at least inferable that City time was also used, although the OATH judge did not so find, since the twenty emails included in the record at trial were sent and received by Respondent at various times throughout the day.

In this case, moreover, Respondent declined to settle, forcing the Board's Enforcement staff to prepare for and conduct a trial at OATH, where the evidence received was never disputed or contradicted. Accordingly, the considerations that

the Board addressed in *Williams* are surely relevant. In order to conserve scarce government resources, 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. Since, as noted above, the violations proved without dispute at trial would have warranted a settlement of at least the $600 recommended by the ALJ, and since the Board does not find persuasive the arguments raised by Respondent to support any mitigation, the Board imposes a fine for these violations, following trial, of $2,000.

For these reasons, the Board finds that Respondent violated Charter Section 2604(b)(2) and Board Rules Section 1-13(b) and that the penalty for these violations shall be $2,000.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Charter Section 2606(b), that Respondent be assessed a civil penalty of $2,000 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.

STEVEN B. ROSENFELD, Chair, Conflicts of Interests Board