Conflicts of Interest Bd. v. Oberman

OATH Index No. 1657/14 (Sept. 4, 2014), *adopted*, Board Dec. (Nov. 6, 2014), **appended**, *aff'd*, 148 A.D.3d 598 (1st Dep't 2017)

Petitioner demonstrated that respondent, a former agency attorney, used his agency telephone to perform work on his political campaign in violation of the City Charter section 2604(b)(2), but failed to show that he stored campaign documents on his agency computer in violation of the City Charter. Civil fine of $7,500 recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
CONFLICTS OF INTEREST BOARD
Petitioner
- against –
IGOR OBERMAN
Respondent

REPORT AND RECOMMENDATION

ALESSANDRA F. ZORGNIOTTI, *Administrative Law Judge*

Petitioner, the Conflicts of Interest Board ("Board" or "COIB") brought this civil penalty proceeding under Chapter 68 of the New York City Charter ("City Charter") and Title 53 of the Rules of the City of New York ("Board's rules"). Petitioner alleges that respondent, Igor Oberman, a former Taxi and Limousine Commission ("TLC") attorney, violated sections 2604(b)(2) of the City Charter and 1-13(a) and (b) of the Board's rules, by using his TLC telephone and computer during business hours to work on his political campaign (ALJ Ex. 1).

A hearing was conducted on July 7 and 18, 2014. The record closed on August 5, 2014, following post-trial submissions. At the hearing petitioner presented two Department of Investigation ("DOI") employees and documentary evidence. Respondent testified and denied the charges, called his TLC supervisor, and submitted documentary evidence.

For the reasons below, petitioner proved that respondent used his TLC phone during business hours to work on his political campaign in violation of the City Charter and Board rules

but failed to prove that he stored campaign documents on his TLC computer in violation of the City Charter. For the sustained violation a civil penalty of $7,500 is recommended.

BACKGROUND

From June 11, 2012 until September 11, 2013, respondent was an Executive Agency Counsel at TLC assigned to oversee the prosecution of consumer-initiated complaints against TLC licensees. His duties included the supervision of agency prosecutors and developing a case management system (Tr. 163-64). In addition to being a licensed attorney, respondent is a licensed realtor and the board president of his cooperative, Trump Village (Tr. 331-32).

TLC offices are open daily for hearings from 8:00 a.m. to 4:00 p.m. (Tr. 158). TLC has a managerial flextime policy which requires managers to work a 35-hour work week consistent with the needs of the agency (Tr. 378-78; Resp. Ex. I). TLC also has a reasonable use policy that allows employees to use TLC equipment for personal use (Tr. 159-60). Respondent's supervisor stated that she never monitored respondent's time or phone use because she did not sit next to him and because he worked long hours and was a highly productive employee (Tr. 166, 170-72, 177-80).

Respondent testified that in December 2012, he began to seriously consider running for political office. In January of 2013, he called COIB's hotline to inquire about doing so (Tr. 381-82). COIB advised respondent that he was not permitted to use city time or resources in connection with his political campaign (Tr. 383). Respondent was also advised to speak to the TLC ethics liaison (Pet. Ex. 9; Resp. Ex. J, K; Tr. 382-83, 385).

Respondent testified that on January 18, 2013, he spoke to TLC's assistant general counsel who was also the ethics liaison about his possible run for public office. Counsel advised that respondent could open an account for donations but that he could not solicit from subordinates or use TLC resources. Moreover, respondent was advised that once he declared his candidacy he would have to take a leave of absence from TLC (Tr. 385-89; Resp. Exs. J, K).

Respondent testified that sometime between January and April 2013, TLC's assistant general counsel asked him to provide his donor information to make sure that he was not soliciting donations from TLC subordinates. Respondent went to the Campaign Finance Board ("CFB") website and exported his donor list and downloaded it onto his computer. Since the

information was not complete, respondent stated that he also scanned in his donor checks using a TLC scanner onto his computer, and gave a copy to TLC's counsel (Tr. 395-98; 488-90).

Respondent testified that in mid-March he was still an undeclared candidate and that he wanted to remain working at TLC as long as possible before declaring his candidacy (Tr. 398-402; Resp. Ex. M). Beginning in mid-April, respondent and the assistant general counsel corresponded by email about his candidacy (Tr. 406-09; Resp. Ex. N). On April 19, counsel asked respondent for his campaign filings. Respondent replied that he would look through his personal emails and subsequently forwarded various registration forms and a list of his donor contributions (Resp. Ex. N at 0152-53).

By letter to COIB dated April 14, 2013, respondent stated that he intended to run for city council and requested an advisory opinion on what actions he could take as a candidate employed by the city (Pet. Exs. 10 A, B). Two days later, COIB again informed respondent, *inter alia*, that under the City Charter he may not use city time or resources, including his TLC computer and telephone, in connection with his political campaign (Pet. Ex. 11).

Respondent testified that after meeting with the assistant general counsel on April 22, 2014, it was determined that he should take a leave of absence from TLC (Tr. 410-13; Resp. Ex. N at 174-77). Respondent provided a written statement that he would take a leave of absence, starting on April 23, 2013, to run his campaign for city council. Respondent testified that he had written a leave of absence letter when he worked at the Brooklyn Borough President's office and that he downloaded "Igor's letters" and "City Council Letters" to provide a letterhead and template for the statement he wrote for TLC (Tr. 413-14; Resp. Ex. O).

This case began following an anonymous complaint filed with DOI, which alleged that respondent was using city time and resources in connection with his political campaign and his role as board president at Trump Village (Tr. 16). DOI Assistant Inspector General Reveira was assigned as the primary investigator to the matter.

Ms. Reveira obtained respondent's TLC time sheets from January 2 to May 1, 2013, indicating that he usually worked a seven hour day with one hour for lunch. Respondent's start time was 7:30 or 8:00 a.m. and his end time was 3:30, 4:00, or 4:30 p.m. (Tr. 40-41; Pet. Ex. 5). It was undisputed that respondent worked more than a 35-hour week and that he came to work before his noted start time and left after his noted end time (Tr. 158-59, 176, 179, 469).

Ms. Reveira also obtained a list of all calls made to or from respondent's TLC telephone from January 2 to May 1, 2013 (Pet. Ex. 1). The list identified: the number the call was made to and from, as well as the date, time, and duration of the call. All calls were made between 7:00 a.m. and 9:00 p.m., with the majority made between 8:00 a.m. and 4:00 p.m. (Pet. Exs. 1, 3).

To investigate the campaign-related allegations, Ms. Reveira printed documents from the CFB website regarding respondent's campaign (Pet. Exs. 2, 12-15). She obtained a list with the name and address of respondent's campaign donors and the date and amount of each contribution (Pet. Exs. 2, 12). Using a variety of search engines and donor information obtained from respondent's TLC computer, Ms. Reveira identified telephone numbers connected to the donors (Tr. 20-24; Pet. Ex. 2). She then compared those numbers to respondent's TLC phone records to identify any calls that were made to or from a donor (Tr. 21). In addition to donors, Ms. Reveira used subscriber information to identify calls with respondent's campaign manager and workers, political consultants and attorneys, media agencies, printing services, banks, and government agencies including campaign-related entities (Resp. Ex. B). She further attempted to identify all TLC business related calls, personal calls, calls made on behalf of Trump Village, real estate business calls, and other miscellaneous calls.

Based on her research, Ms. Reveira created a spreadsheet that listed the date and time of every call made to or from respondent's TLC telephone, the duration of the call, and the subscriber information for the other telephone number (Tr. 24-27; Pet. Ex. 3). She color coded the calls: (1) white for TLC calls, personal calls, miscellaneous or unknown subscribers; (2) green for Trump Village calls; (3) blue for private real estate calls; and (4) orange for campaign related calls. The orange category contained a dark orange sub-category of 16 calls that were made to or from donors who contributed to respondent's campaign in close proximity to the call (Tr. 28-29, 31; Pet. Exs. 3, 4).

Ms. Reveira testified that she never called the numbers to verify whether her categorization of a call was correct and that she did not know the contents of the calls. Her spreadsheet was based on the other caller's subscriber information and her judgment (Tr. 73, 76, 99, 104, 112-13). Petitioner provided a reprinted version of the spreadsheet to show the callers' names in alphabetical order (Pet. Ex. 3A).

Ms. Reveira concluded that only 442 calls of the approximately 2000 calls made or received on respondent's TLC phone between January 2 and May 1, 2013, appeared to be for

TLC business. The remaining calls were: 182 campaign calls; 42 real estate calls; 618 Trump Village calls; 329 calls to unknown subscribers; 96 calls to friends and family (some of whom were also campaign donors but not included in that category); and 213 miscellaneous calls (Tr. 29-30; Resp. Ex. B). The duration of the campaign calls ranged from several seconds to about 38 minutes (Pet. Ex. 3).

DOI's forensic unit also examined respondent's TLC computer (Tr. 39). Mr. Hemmingway, an investigator in the digital forensic unit performed searches using key words and found a general folder titled "downloads" that had among other documents, documents related to respondent's campaign, including: (1) copies of numerous donor checks; (2) spreadsheets numbered one to six corresponding to the donor checks; (3) donor completed forms that included donor identifying data; (4) nominating petitions; (5) city council data; and (6) "Igor's letters" (Pet. Ex. 7; Resp. Ex. B; Tr. 193).

The metadata indicated that documents were downloaded on several dates in March and April 2013. For example, the donor checks were scanned using a TLC scanner and downloaded onto the computer on March 13, 2013, at 8:56 a.m. The file was accessed the following day (Tr. 205-07, 289-91; Pet. Ex. 7). The series of spreadsheets were created and some were modified on respondent's TLC computer on March 13, 2013 at various times that day (Tr. 207-09, 783-85; Pet. Ex. 7). The city council data, a 19-page Microsoft Word document, was created on respondent's computer, accessed, and modified on April 22, 2013 at 4:13 p.m. (Tr. 209-11; Pet. Ex. 7). "Igor's letters," a Word document over 800 pages, was created and modified on April 22, 2013, at 2:56 p.m. (Tr. 212-20; Pet. Ex. 7). Except as indicated, information as to how the documents were created on the TLC computer (imported via a thumb drive, an email, or another means) and whether the documents were opened, edited, or printed but not re-saved on TLC equipment could not be determined from the metadata (Tr. 251, 254-58, 268, 271, 275-77).

Respondent appeared for a DOI interview but declined to be interviewed by Ms. Riviera (Tr. 41-42, 461). Thereafter Ms. Riviera prepared a final report that was forwarded to TLC (Tr. 54; Resp. Ex. B).

Based on DOI's conclusion that respondent used his TLC telephone and computer excessively to conduct business for his political campaign, real estate business, and Trump Village, TLC terminated respondent from his employment on September 11, 2013 (Tr. 128, 462). Respondent also lost his run for city council.

COIB commenced the instant proceeding alleging that respondent's use of his TLC telephone and computer for his campaign and real estate business violated the City Charter. On the second day of the hearing, petitioner withdrew the charges relating to respondent's real estate practice (Tr. 316-17).

At the hearing respondent testified that because of his board position, he deals daily with vendors to resolve issues at Trump Village (Tr. 333). A 10 million dollar renovation, to fix damage from Hurricane Sandy, is ongoing (Tr. 333). Respondent asserted that many of his donors are also vendors at Trump Village and that many of the calls identified as political calls were related to Trump Village business (Tr. 334, 468; Resp. Exs. G, DD).

Respondent provided testimony and proof disputing the quantity of alleged campaign-related calls. He testified and provided an invoice and a piece of candy to demonstrate that the four campaign-identified calls to Mini Mints were to order candy for Trump Village, not for his campaign (Tr. 348-49; Resp. Exs. G at 0002, H). He testified that the calls to various law firms were to attorneys for Trump Village. Moreover, the calls to Garfunkel, Approved Oil, and DeRooso were for laundry machines, boilers, and electrical wires at Trump Village that were damaged during Hurricane Sandy. Calls to Sottile Security were for security at Trump Village, calls to True Ballot were for the annual shareholder's meeting, calls to Bluetag and Danu Media were for advertising Trump Village to generate apartment sales, and calls to Advance Group were for a lease extension at Trump Village (Tr. 350-70). Respondent testified that three calls made to a bank, where he had a personal and a campaign account, were not related to his campaign (Tr. 391-93; Resp. Ex. L). Respondent also testified that Mr. Levitt was his campaign treasurer and that they were childhood friends. Fundraising calls were made after work and on the weekends (Tr. 393-94).

Respondent also testified that the call to Catalano, who was the owner of U.S. Restoration, was for mold removal at Trump Village (Tr. 418, 491-92; Resp. Ex. P). The calls to Otano at the Brooklyn Borough President's office, to Iasenik who he knew from the Russian-American community, to Fernandez, to Davison, to Kantara, to Gelselkovitch, to Krasny, to Chernina, and to Rubin were not political calls but were personal in nature (Tr. 421-30, 438, 447-58, 461; Resp. Exs. Y, X). The call to Sanoff, a printer, was for Trump Village letterhead, the calls related to Barrack and pest control companies were for an elderly woman who lived at Trump Village who had bedbugs, and the calls to Bar Gold Storage were for Trump Village (Tr.

430-37, 459-60; Resps. Ex. U, AA). The call to Davidovitch, was a TLC business call that related to his car service (Tr. 442-47). Moreover, the political call attributed to a Schmidt from a law firm, was to a different Schmidt who is a computer programmer (Tr. 440-42; Resp. Ex. W).

With regard to the computer allegations, respondent testified that he had his own equipment at home (Tr. 489). He stated, as described above, that he downloaded the campaign-related documents found on his computer to respond to document requests made by the TLC assistant general counsel, not for his campaign.

ANALYSIS

As a preliminary matter, following the hearing, the Unemployment Insurance Appeal Board issued a decision overruling an initial finding that respondent was disqualified from receiving unemployment benefits because of misconduct in connection with his employment. The administrative law judge found, after an evidentiary hearing, that respondent had not used his TLC phone or computer for campaign activities. This finding was based, in part, on TLC's failure to present any evidence about what was discussed during the alleged campaign calls and that the campaign documents had been downloaded onto respondent's computer in response to TLC's concerns about his campaign activities. *In the Matter of Oberman*, Unemployment Insurance Appeal Bd. A.L.J. Case No. 014-05143 (July 29, 2014).

Respondent argues that the Unemployment Insurance Appeal Board's fact finding should be binding. Essentially, respondent claims that petitioner is collaterally estopped from further consideration of respondent's actions based on the finding that respondent did not use his TLC phone or computer for campaign activities. This argument is without merit.

As a matter of statutory law, Unemployment Insurance Appeal Board decisions are not given preclusive effect outside the context of unemployment appeals. Lab. Law § 623(2) (Lexis 2014) ("No finding of fact or law contained in a decision rendered pursuant to this article by a referee, the appeal board or a court shall preclude the litigation of any issue of fact or law in any subsequent action or proceeding . . . ."). As a result, courts have not given unemployment decisions preclusive effect in other cases. *See e.g. Strong v. NYC Dep't of Educ.*, 62 A.D.3d 592 (1st Dep't 2009) (finding that an Unemployment Insurance Appeal Board ruling lacks preclusive effect in disciplinary proceedings); *Wooten v. N.Y.C Dep't of Gen. Servs.,* 207 A.D.2d 754 (1st Dep't 1994) (determination of Unemployment Insurance Appeal Board that petitioner was

terminated in retaliation for filing complaint was without preclusive effect in Article 78 proceedings challenging determinations of Division of Human Rights, which dismissed, for lack of probable cause, petitioner's discrimination and retaliation complaints). Similarly, this tribunal has held that Unemployment Insurance Appeal Board decisions are not binding in disciplinary proceedings. *Dep't of Health & Mental Hygiene v. Gertskis,* OATH Index No. 1938/10 at 13 (July 30, 2010); *Davidson v. Dep't of Correction*, OATH Index No. 545/95 at 5 (Feb. 7, 1995). Thus, the decision in respondent's unemployment proceeding has no preclusive effect here.

Even if the statute prohibiting unemployment decisions from having preclusive effect did not exist, the result would likely be the same because of the singular nature of COIB proceedings. At issue in the unemployment action was whether, pursuant to section 593(3) of the New York State Labor Law, respondent is disqualified from receiving unemployment benefits because of misconduct. Even though the unemployment decision made mention of the City Charter prohibiting employees from using city equipment for a political campaign, the decision did not analyze whether respondent violated section 2604(b) of the City Charter or sections 1-13(a) and (b) of the Board's Rules.

In *Rosenblum v. NYC Conflicts of Interest Bd*., 18 N.Y.3d 422, 430 (2012), the Court of Appeals held that, regardless of any action an employing agency may take against a city employee concerning a violation of the City Charter, the Board may still proceed, as part of "a separate statutory scheme," to commence an enforcement action against that employee. *See also* Charter § 2603(h)(6) (disciplinary action by employing agency "shall not preclude the [B]oard from exercising its powers and duties under this chapter with respect to the actions of any such public servant"). To preclude petitioner from establishing that respondent violated the City Charter because the Unemployment Insurance Appeal Board, in an unrelated proceeding in which the Board was not a party, made a determination on whether respondent was terminated for misconduct would erode the independence of the Board and impair its ability "to commence administrative actions to enforce the Conflicts of Interest Law." *Rosenblum*, 18 N.Y.3d at 432. *See also Pelzer v. Transel Elevator & Elec. Inc.*, 41 A.D.3d 379, 380 (1st Dep't 2007) (since administrative agencies are often charged with making determinations based on unique and complex statutes which apply specifically to them, care must be taken in identifying the precise issue necessarily decided in an unemployment proceeding when comparing it to the issue in another proceeding).

Turning to the merits, petitioner alleges that respondent used his TLC telephone and computer during business hours to make 182 calls and to store hundreds of documents for his political campaign from January 2 and May 1, 2013, in violation of Charter section 2604(b)(2) and sections 1-13(a) and (b) of the Board's rules. 53 RCNY § 1-13(a), (b) (Lexis 2014).

Section 2604(b) of the City Charter provides in relevant part:

> (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.

Section 1-13 of the Board's rules provides:

> (a) 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 a public servant is required to perform services for the City.
>
> (b) 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 non-City purposes.

In an administrative proceeding, the petitioner's burden is to prove its case by a preponderance of the credible evidence. *Dep't of Correction v. Hall,* OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-5A (May 30, 2008). Preponderance has been defined as "the burden of persuading the triers of fact that the existence of [a] fact is more probable than its non-existence." Prince, *Richardson on Evidence*, § 3-206 (LEXIS 2008); *see also Dep't of Sanitation v. Figueroa*, OATH Index No. 940/10 at 11 (Apr. 26, 2010). Here, petitioner has sustained its burden on the first charge but not the second.

Respondent used his TLC telephone in violation of the City Charter and Board Rules

Petitioner presented, through the testimony of Ms. Reveira and documentary evidence, proof that respondent made or received calls on his TLC phone that were related to his political campaign. The spreadsheet submitted by petitioner (Pet. Exs. 3, 3A), contains the date and time of every call made to or from respondent's TLC telephone, the duration of the call, and the subscriber information for the other caller. Based on the subscriber information, Ms. Reveira used her best judgment to determine whether a call was political in nature. While there was no

proof about the contents of the calls and a few of Ms. Reveira's judgments appear to be wrong, respondent failed to demonstrate that her methodology for compiling the spreadsheet was flawed. To the contrary, the documentary evidence collected and organized by Ms. Reveira is sufficient to conclude by a preponderance of the evidence that the majority of the 182-identified campaign calls made after respondent was advised by COIB that he could not use TLC resources were most likely related to his campaign. It is notable that respondent refused to be interviewed by Ms. Riviera. It seems likely that had some of the documentary evidence presented at trial been given to her, some of the calls identified as campaign related would have been moved to the Trump Village category.

At the hearing respondent established through testimony and documentary evidence that the calls with Mini Mints, True Ballot, Kings Highway, and Queens Jewish Link were for Trump Village, not campaign calls. Respondent's testimony and proof on the majority of the other contested calls was equivocal or less than convincing. For example respondent claimed that his campaign treasurer was a childhood friend and that they only spoke about personal matters. While his treasurer is most likely a childhood friend, it seems highly unlikely that they never discussed campaign issues during any of the 17 calls made on respondent's TLC phone after he seriously began to consider running for office.

Similarly, respondent spoke with the Advance Group on March 7 and 12, 2013 (Pet. Ex. 3A), and made a $2,500 payment to them on March 15, 2013, for marketing services for his campaign (Pet. Ex. 14). While Advance Group was also hired by Trump Village, respondent paid them over $70,000 for campaign work (Tr. 485; Pet. Exs. 13, 14). It seems more likely than not that these two calls related to the campaign work they were doing for respondent at that time. Indeed, respondent failed to provide any documentation showing that Advance Group was also working on a Trump Village project during this period.

Likewise, the numerous calls with campaign donors were most likely campaign related. Ms. Reveira obtained a list of respondent's donors and matched them to the telephone numbers and related subscriber information. With the exception of Schmidt, respondent did not contest the accuracy of this information. Respondent's self-serving testimony that these calls were strictly personal or for Trump Village was not credible. This is especially true when the calls were made in close proximity to a campaign donation (Pet. Ex. 3A). Calls with Alpert, Catalano, Gallagher, Claman, Hochberg, Goldman, Levininsky, Garfunkel, Sottile, Yetin, and Theurer all

occurred within one to five days of making a donation ranging from $10 to $2,500 (Pet. Ex. 12). Notably, respondent received two $2,500 donations from Mr. and Mrs. Sottile after having two calls with Mr. Sottile. Respondent's testimony that he would always talk about Trump Village issues with Mr. Sottile on the TLC telephone and that his campaign discussions occurred in person at Trump Village was not credible (Tr. 355-56). While some of respondent's donors are likely friends, associates, and Trump Village vendors, they were also people who gave to respondent's campaign around the time that he spoke to them on the phone.

Even if respondent is given the benefit of the doubt on all of the contested calls, there are numerous uncontested calls to the CFB, the New York State and City Boards of Elections, consultants, respondent's campaign workers, vendors hired by respondent to work on his campaign, political groups, and other city council and state senate candidates that were most likely related to respondent's campaign. Indeed, there is nothing to suggest that these calls were for any other purpose than to further respondent's political goals. Accordingly, petitioner demonstrated that respondent used his TLC telephone for his political campaign in violation of Charter section 2604(b)(2) and section 1-13(b) of the Board's rules.

Board Rule 1-13(a) also prohibits a city employee from pursuing personal and private activities, such as a political campaign, during times when a public servant is required to perform services for the City. The fact that respondent had managerial flex time and often worked more than his regularly scheduled hours is of no moment. Allowing respondent to repeatedly stop his work day and exempt political calls because he worked more than the required amount is absurd. Notably, the majority of political calls occurred between the hours of 8:00 a.m. and 4:00 p.m. which were the official hours of TLC and the hours he listed on the majority of his time sheets. Similarly, whether respondent was otherwise productive at work and was an undeclared candidate at the time has no bearing on whether he was in violation of the City Charter section 2604(b)(2) and section 1-13(a) of the Board's rules.

Respondent used his TLC computer for city purposes

Petitioner alleges that respondent stored and accessed hundreds of campaign documents on his computer, in violation of Charter section 2604(b)(2) and Board Rule 1-13 subsections (a) and (b). Respondent does not dispute that he downloaded campaign files to his work computer,

but argues that his conduct should be excused because he downloaded the documents to respond to requests made by TLC's assistant general counsel.

Respondent credibly testified, as corroborated by the emails and the metadata, that he downloaded his donor list, contribution cards, and spreadsheets, and that he scanned donor checks in mid-March to respond to counsel's request for proof that he had not been soliciting donations from TLC subordinates or people in the TLC industry. Similarly, the record supports a finding that in mid-April respondent downloaded city council data and his personal letters in response to requests about the status of his candidacy and his need to take a leave of absence from TLC. Since the campaign documents were downloaded to respond to the TLC's document request, respondent's use of his TLC computer was done for a city purpose.

Except for the requests for information from TLC, there is no other explanation why respondent would have these documents on his computer. Respondent testified credibly that he had his own equipment at home and there is no evidence that he accessed or modified these documents for any other purpose except to respond to TLC's document request. The fact that respondent downloaded other campaign documents that he never gave to TLC and that he neglected to remove them before taking a leave of absence does not rise to the level of a violation. Accordingly, this charge should be dismissed.

FINDINGS AND CONCLUSIONS

1. Petitioner demonstrated that respondent used his TLC telephone during business hours to work on his political campaign in violation of Charter section 2604(b)(2) and sections 1-13(a) and (b) of the Board's rules.

2. Petitioner failed to prove that respondent used his TLC computer during business hours to work on his political campaign in violation of Charter section 2604(b)(2) and sections 1-13(a) and (b) of the Board's rules.

RECOMMENDATION

Under the City Charter, the maximum fine for a violation of the Conflicts of Interest Law is $25,000. Charter § 2606(b) (Lexis 2014). For respondent's violations, petitioner seeks a penalty of $9,000. This request is not excessive. However, since the charge that respondent used his TLC computer was dismissed, a lower penalty should be considered.

Fines for the improper use of a City telephone vary from public censure to over $6,000. In *Conflicts of Interest Bd. v. Smith,* COIB Case No. 2007-003 (Jan. 23, 2008), a City employee who used his City Blackberry to make several personal phone calls without authorization was penalized with a public warning letter. In *Conflicts of Interest Bb. v. Tyner*, COIB Case No. 2006-048 (Aug. 24, 2006), the respondent agreed to a 45-day suspension, which had a value of approximately $6,224 for charging $1,829 worth of personal calls on an agency telephone. *See also Conflicts of Interest Bd. v. Carroll*, COIB Case No. 2005-151 (June 30, 2005) (respondent agreed to a $3,000 fine and to serve a 25-day suspension without pay, which was worth another $3,000 for making over 2,000 business calls on an agency telephone and using agency equipment to produce personal business flyers which listed his agency number for his private business); *Conflicts of Interest Bd. v. Thomas*, COIB Case No. 2003-127 (Feb. 15, 2005) (engineer fined $2,000 for using city time and computer to maintain inspection reports and client files related to his private building inspection and consulting services business).

Moreover, settlements involving misuse of city time and resources for political activities have included fines ranging from $2,500 and $4,480. *See e.g. Conflicts of Interest Bd. v. Tapia,* COIB Case No. 2013-468 (Dec. 18, 2013) (respondent agreed to a pay fine equal to 20 days' pay, valued at $4,480 for using city computer, e-mail, and time to work on her work as president of a democratic club, as a district leader, and for her campaign for city council); *Conflicts of Interest Bd. v. Mosley*, COIB Case No. 2013-004 (Sept. 26, 2013) (respondent agreed to pay a $2,500 fine for using city computer and time to work on someone else's assembly campaign).

All of the above-referenced cases were settled prior to hearing. The Board has noted that settling mitigates a penalty that would otherwise be imposed after a hearing because the respondent took responsibility for his actions and avoided the costs of litigation. *Conflicts of Interest Bd. v. Lugo,* OATH Index No. 2013/11 (Sept. 1, 2011) *adopted,* Bd. Dec. (Jan. 30, 2012); *Conflicts of Interest Bd. v. Hill*, OATH Index No. 2199/11 (Feb. 3, 2012), *modified on penalty,* Bd. Dec. (May 3, 2012). Here, respondent has not taken responsibility but instead vehemently denied making political calls even though some of them could not be anything but campaign related. Thus, a penalty above the high end of the range should be considered.

Another aggravating factor to be considered is that respondent is an attorney who should be held to a higher standard of care. *Lugo,* OATH 2013/11 at 8 (special investigator with DOI, held to a higher standard because his job is to investigate conflicts of interest by city employees).

Most importantly, respondent received advice from COIB and TLC to refrain from using city resources and time for his campaign which he ignored. Cases involving respondents who disregard the written advice of the Board against using city time and resources have substantial penalties. *See e.g. Conflicts of Interest Bd. v. Stark*, COIB Case No. 2011-480 (Apr. 18, 2012) ($22,000 fine for Finance Commissioner who used city time and resources in contravention to Board advice to work as a board member of a realty corporation); *Conflicts of Interest Bd. v. Fischetti*, COIB Case No. 2010-025 (Sept. 28, 2010) ($20,000 fine for respondent who used city time and resources in contravention to Board advice to work in his restaurant).

As mitigation, respondent argues that while he was at TLC prosecutions went up and he started a clinic with New York Law School (Tr. 465). Moreover, respondent received praise from his supervisors and a certificate of appreciation for his managerial performance from the former TLC Commissioner (Tr. 465). Finally, respondent argues financial hardship due to losing his job at the TLC and his failed run for city council. Respondent's good work at TLC is not compelling mitigation and there is no proof regarding respondent's financial hardship. However, respondent's termination from employment should be factored into a penalty determination.

Based on the foregoing, a $7,500 civil penalty should be imposed on respondent. Such a fine takes into account the Board's precedent, the aggravating and mitigating factors, and it comports with the Board's deterrent function.

Alessandra F. Zorgniotti
Administrative Law Judge

September 4, 2014

SUBMITTED TO:

STEVEN B. ROSENFELD
Chair

APPEARANCES:

CAROLYN MILLER, ESQ.
Attorney for Petitioner

JOSEPH GABA, ESQ.
Attorney for Respondent

THE CITY OF NEW YORK

CONFLICTS OF INTEREST BOARD

In the Matter of

IGOR OBERMAN

Respondent.

COIB Case No. 2013-609

OATH Index No. 1657/14

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 of OATH Administrative Law Judge ("ALJ") Alessandra F. Zorgniotti dated September 4, 2014 (the "Report") in the above-captioned matter, and upon consideration of the comments to the Report submitted by each party hereto, the Conflicts of Interest Board (the "Board") hereby adopts the findings of fact and conclusions of law contained in the Report. As recommended in the Report, the Board imposes a fine of $7,500 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:

The Respondent was employed from June 2012 until September 2013 as an Executive Agency Counsel at the New York City Taxi and Limousine Commission ("TLC"). Late in 2012 Respondent began to seriously consider running for elective office and indeed ran for City

Council in 2013. Respondent took a leave of absence from his TLC position effective April 23, 2013, once he had officially declared his candidacy for the Council. During the months of January through April of 2013, that is, in the months prior to his leave of absence, Respondent used his TLC telephone during his City business hours for numerous calls related to his political campaign. This conduct violated Charter Section 2604(b)(2). More particularly, this use of City time and City equipment for Respondent's political campaign was conduct identified in Board Rules Sections 1-13(a) and 1-13(b), respectively, as prohibited by Charter Section 2604(b)(2).

The Board also notes, as the ALJ observed with respect to the determination of the penalty to be set for these violations of the law, that the instant case involved three aggravating factors. First, in contrast with individuals who accept responsibility for their actions and enter into settlements with the Board, Respondent declined to accept such responsibility and therefore is not entitled to the lower penalty afforded those who accept responsibility and enter into settlements. Second, as an attorney, Respondent is in the category of City employees historically held by the Board to a higher duty to comply with the conflicts of interest law. Finally, and, most significantly, Respondent received both telephone and written advice from the Board and from the TLC attorney responsible for ethics matters that it would violate the conflicts of interest law for him to use City time or City resources in connection with his political campaign, which advice he failed to heed.

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 $7,500.

WHEREFORE, IT IS HEREBY ORDERED, pursuant to Charter Section 2606(b), that Respondent be assessed a civil penalty of $7,500 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 Bohorquez
Anthony Crowell
Andrew Irving
Erika Thomas-Yuille

Dated: November 6, 2014

Attachment

cc: Joseph Gaba, Esq.
Attorney for Respondent
2707 Mill Avenue
Brooklyn, NY 11234

Administrative Law Judge Alessandra F. Zorgniotti
Office of Administrative Trials and Hearings
100 Church Street
New York, NY 10007