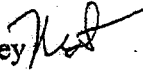


OFFICE OF THE STATE COMPTROLLER

INTER-OFFICE MEMORANDUM

To: File

Date: June 14, 2012

From: Mary Anne Tommaney 

Subject: SF 20120187

Bill Collins sent Nancy a draft of a settlement agreement resolving an employment dispute involving two Assembly staff members. JKD and I spoke with Bill Collins on 5/31/12, to get a better understanding of how the proposed settlement amounts had been arrived at.

Bill told us that the settlement payments represent (i) compensatory damages for emotional distress, and (ii) attorneys' fees. Specifically, he advised us that:

- The payments to the employees are not intended to replace lost salary; to result in a quick resolution so as to avoid adverse publicity; or to address any purpose other than compensating the individuals for the emotional distress they have suffered.
- Of the two employees receiving payments, the one getting the greater amount was the lesser paid of the two.
 - This would be an indication that the settlement figures were not arrived at by taking into account the employees' salaries, and then extrapolating a settlement amount that would be in the nature of front pay. (Back pay does not come into play here at all, since neither employee will be taken off the payroll until the agreement is signed).
 - This would support Bill's assertion that the payments are compensatory damages, rather than lost wages.
- Of the two employees, the one getting the greater amount had allegedly been subjected to much more egregious harassment, and over a longer period of time (the employee getting paid more was longer term than was the employee getting paid the lesser amount).

- This would further support Bill's assertion that the payments in fact represent damages for emotional distress, rather than lost wages.
- After having reviewed the proposed settlement with AAG Arlene Smoller, Bill understands that the State's potential exposure, had the matter been litigated, would have been considerably greater than the amounts under discussion. (In a later conversation we had with Arlene, she confirmed that this was the case).

Based on the considerations discussed above, we concluded that it was reasonable for the full amount of the settlement to be allocated to damages for emotional distress and attorneys' fees, and that no part of the monies to be paid would need to be characterized as wages.

We considered whether State Finance Law §8(12)ff would prohibit this payment because it is in excess of the dollar limitations of the statute. We note, however, that Section 8(12) notwithstanding any inconsistent provision of the Court of Claims Act. This is indication that the dollar limitations prescribed are intended to carve out small tort claims that would otherwise be subject to Court of Claims jurisdiction, and permit payment of such claims without the claimants having first proceeded to litigation. Arlene Smoller confirmed to us that the claims at issue here would not be subject to Court of Claims jurisdiction. Thus, arguably, SFL §8(12) would not be an impediment to payment.

We told Bill that it was important for the Settlement Agreement to articulate the nature and purpose of the payment, i.e. to clarify what Bill confirmed to us as being the parties' intention that the payment is to compensate the employees for emotional distress, rather than lost wages. We suggested language (see below) to be incorporated in the agreement.

This week, Bill provided Nancy with a signed copy of the agreement, which provides that payment of the entire amount payable by the Assembly is to be made by check to the law firm representing one of the employees. The agreement incorporates the language we requested. Consistent with our advice to Bill, the full amount of the payment will be reported on a Form 1099 to the payee law firm.

Substitute for paragraph 9

9. The parties agree that the payment to be made to the law firm of Cuti Hecker Wang LLP under paragraph 1 of this Agreement is made in settlement of the Employees' claims for compensatory damages and emotional distress, and pain and suffering claimed by the Employees, and that such payments do not constitute back pay, front pay, or salary and, accordingly, shall not be subject to any payroll taxes or deductions, income withholding taxes, social security taxes, or other taxes which customarily are deducted from and/or paid with respect to wages. In accordance with federal law, the payment to be made under paragraph 1 of this Agreement shall be reported to the law firm of Cuti Hecker Wang LLP on Internal Revenue Service Form 1099. The parties agree that any and all

tax liabilities with respect to this payment shall be the sole responsibility of the Employees and the Law Firms.

If, for any reason, it is determined by any federal, state or local authority that the payment provided for in paragraph 1, or any portion thereof, should have been subject to the withholding of taxes, the Employees and the Law Firms agree that they shall assume all responsibility for the payment of any taxes, interest and/or penalties assessed in connection therewith, and that they shall indemnify and hold harmless the Assembly and the State of New York ("the State") from any liability with respect to any withholding obligation or payment of tax, interest, or penalties required to be paid by the Assembly and/or the State. Should the Assembly and/or the State receive any assessment or claim of assessment, the Assembly and/or the State, as applicable, will notify the Employees and the Law Firms in writing within thirty (30) days of their respective receipt of any such assessment or claim of assessment, and the Employees and the Law Firms agree that any payments for which they have assumed responsibility hereunder shall be paid in full within ninety (90) days after their receipt of a demand for payment.

Substitute for paragraph 23

23. The parties shall take such other and further steps as are necessary to implement the terms of this Agreement including, but not limited to, submitting this Agreement to the Office of the State Comptroller for pre-audit, pursuant to the power conferred on the Comptroller by the State Constitution, of the payment required by paragraph