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INVESTIGATION OF THE BATTERY PARK CITY AUTHORITY

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I. BACKGROUND

The Battery Park City Authority (Authority) was created in 1968 with the enactment of Title 12 of the Public Authorities Law to address "substandard, insanitary, deteriorated and deteriorating conditions" rampant in the area of the lower West side of Manhattan known as the Battery Park project area. This area of Manhattan had been comprised of piers and facilities used for the loading and unloading of commercial cargo, a function no longer suitable or maintainable at the site. Based on a New York State legislative finding of a "seriously inadequate supply of safe and sanitary dwelling accommodations for persons and families of low income," the Authority was charged with the duty "to plan, create, coordinate and maintain a balanced community of commercial, residential, retail, and park space within its designated 92-acre site."[1]

The Authority is a public benefit corporation governed by a seven-member board of directors appointed by the governor with the advice and consent of the senate.[2] The Authority finances its infrastructure investments through the issuance of bonds and notes. The Authority owns Battery Park City, enters into long-term leases with private entities to develop the area, and generates funds for its budget from these lease payments. These monies are also used to repay bond holders. Any surplus funds, by operation of law, are remitted to New York City and New York State.

The advantages to the public and state government for an authority to generate its own funds towards the repair and development of public infrastructure are manifest. Moreover, while an authority shares many characteristics of government agencies and is established by the legislature to serve a public function, it is not restricted by New York State constitutional debt limits and is exempt from many state and local regulations. In part, it is this exemption from regulations and oversight applicable to government agencies that led to calls for reform and the passage of the Public Authorities Accountability Act of 2005 and the recent passage of additional reform legislation.[3]

William Thompson, Jr. is the current Chairman of the Authority Board and the other five members are Frank J. Branchini, David B. Cornstein, Fernando Mateo, Robert J. Mueller, and Andrew Shenoy.[4] Under New York State law, all Authority Board members "serve without salary or other compensation, but each member [is] entitled to reimbursement for actual and necessary expenses incurred in the performance of his or her official duties."[5] Board members are also deemed "public officers" and are therefore

[1] http://www.batteryparkcity.org.
[2] When the Authority was first created, the Board was comprised of three members. The Public Authorities Accountability Act of 2005 expanded the boards of all New York State Authorities to seven members.
[3] The stated purpose of the new legislation, which went into effect March 1, 2010, is to "establish an independent authorities budget office ("IABO") to provide improved oversight and regulation of public authorities; mandate greater accountability of authority boards; and increase the transparency of public authority operations."
[4] William Thompson, Jr., who was nominated by Governor David Paterson and confirmed by the senate, was elected chairman by the members on March 29, 2010. Currently, the Authority's Board is comprised of six members.
[5] Public Authorities Law §1973 (2).

bound to comply with sections 73 and 74 of the Public Officers law, which enumerate the code of ethics and required disclosures for public officers.

For the period of this review, James Gill served as Chairman of the Board of the Authority. On February 9, 2010, Gill, who chaired the Authority for 13 years and devoted thousands of hours to its development, resigned as chairman of the Authority. Gill began his law career as an assistant district attorney in New York County from 1958 to 1964. After leaving the district attorney's office, Gill entered private practice at a firm that became Bryan Cave, where he continues to practice law today. Gill also served as Acting Director of the Governor's Office of Employee Relations in 1995 and as Chairman of the Long Island Power Authority from 1995 to 1996. He has also served, among other positions, as general counsel to the Board of Trustees of St. Patrick's Cathedral since 1992 and has been a member of the Board of the Alfred E. Smith Memorial Foundation since 1992.

Charles J. Urstadt served as vice chairman of the Authority for the period of the Inspector General's review. Urstadt, sometimes referred to as "the father of Battery Park City," drafted the legislation and lease required for the creation of the Authority. As the Authority's first chairman, Urstadt was initially appointed as a Board member by then-Governor Nelson Rockefeller in July 1968. In April 1973, Urstadt became the Authority's chief executive officer. Urstadt initial service with the Authority ended in December 1978. In January 1998, Urstadt was reappointed as a Board member by then-Governor George Pataki and was elected vice chairman. Urdstadt's term expired and he was replaced by the appointment of William Thompson, Jr. in March 2010. In addition to the Authority, Urstadt has served on numerous boards and was commissioner of the New York State Division of Housing and Community Renewal from January 1969 through April 1973.

For the period of the Inspector General's review, the other Board members were Frank J. Branchini, David B. Cornstein, Robert J. Mueller, Evelyn Rollins and Andy Shenoy.

Currently, Gayle Horwitz is the President and CEO of the Authority. James Cavanaugh served as Authority President and CEO during the period of the Inspector General's review. Cavanaugh resigned his position as President of the Authority effective October 1, 2010. While president, his duties included overseeing the day-to-day operations of the Authority's approximately 59 employees. Cavanaugh graduated from Fordham University with a degree in communications. He worked as a reporter for the Gannett Westchester Newspapers for five years. He then was employed as a communications director for State Senator Nicholas Spano. For the years of 1994 through 2004, he was elected Eastchester Supervisor. In 2003, he was hired by the Authority as its chief operating officer and then became president and chief executive officer in 2005.

Cavanaugh reported directly to the chairman and attends all board meetings. The following employees comprise the Authority's executive staff for the period of the

Inspector General's review: Alexandra Altman, Executive Vice President and General Counsel; Wilson Kimball, Senior Vice President of Operations; Robert Serpico, Senior Vice President and Chief Financial Officer; Lisa Miller, Vice President of Internal Audit and the Authority's ethics officer; Robert Holden, Vice President of Human Resources; Leticia Remauro, Vice President of Community Relations and Affirmative Action; Anthony Woo, Vice President of Construction; and Stephanie Gelb, Vice President of Planning and Design.[6]

[6] Altman retired from the Authority in October 2010.

II. ALLEGATIONS AND METHODOLOGY

In November 2008, the Inspector General received a complaint[7] which alleged "fraud and corruption" at the Battery Park City Authority involving then-Chairman James Gill, then-President James Cavanaugh, Vice President of Human Resources Robert Holden, and Senior Vice President of Operations Wilson Kimball.

According to the complaint, Cavanaugh was romantically involved with a subordinate, Wilson Kimball, and, as a result of this relationship, she received undue perks. In addition, it was alleged that "no one crosse[d]" Kimball "because any slight gets taken directly to Cavanaugh."

It was alleged that the Authority provided Gill a vehicle and a driver to which he was not entitled and hid the expenses. In addition, it was alleged that Gill hired a friend's consulting firm which failed to earn its substantial fees.

Other allegations included: the dismissal of the Authority's Controller[8] contrary to written policies; a retaliatory termination of a "manager" for documenting a complaint concerning Cavanaugh, Kimball, and Holden; and, the "white wash[ing]" of an investigation by the Vice President of Internal Audit, Lisa Miller, at Cavanaugh's direction.

In an issue dated "November 27 – December 12, 2008," *The Battery Park City Broadsheet* published an article entitled "BPCA Abruptly Dismisses Controller For No Stated Reason." According to the article, Debra Bogosian was singled out at a public board meeting for individual praise for her work on the budget just hours before she was terminated that same day. The article stated that some of the Board members disapproved of such a move without being consulted, especially since they were all present at the Authority the day of her termination, and that staff members "expressed a mixture of outrage and fear" at Bogosian's termination. The article quoted one staff member as saying "[s]he did nothing wrong . . . I would be fired before lunch, if these people heard that I said a word against them."

After receiving the initial complaint, the Inspector General contacted the Authority's recently terminated Controller, Debra Bogosian, and received similar allegations, including: claims that the Authority was improperly providing a vehicle and driver for James Gill; concerns about contributions/donations made by the Authority; assertions that unqualified individuals were hired for top-level positions; and allegations that a consulting firm was being well-paid for an insignificant amount of work because of a relationship with the chairman. Bogosian also alleged that her termination was

[7] The initial allegations the Inspector General received were contained in an e-mail and electronically submitted complaint form on the Inspector General's Web site. Both submissions were transmitted by the same individual and contain similar allegations and, therefore, for purpose of discussion, are being treated as a single complaint.

[8] Although not identified in the anonymous complaint, as discussed further in the report, this referred to Debra Bogosian.

improperly influenced by Wilson Kimball as she believed that Cavanaugh favored Kimball.

The Inspector General interviewed 16 witnesses under oath and recorded their testimony. Several witnesses were interviewed multiple times. Thousands of documents were reviewed, including budget reports, credit card statements, employee manuals, performance reviews, and e-mails.[9]

[9] Allegations not addressed in this report were investigated and found unsubstantiated.

III. SUMMARY OF INVESTIGATION

A. Abuse of Authority Funds

The Authority's revenue is realized largely from lease payments by property developers in Battery Park City. For example, in 2008 the 92-acre site produced approximately $270 million in revenue for the Authority. The Authority uses the money generated to operate the Authority and repay bond holders while the remainder of the funds, under operation of law, is remitted to New York City and State. As such, a lower Authority operational budget inures to the benefit of the public and any abuse and waste of funds necessarily deprives the public of much needed resources.

All of the profligate spending discussed herein occurred prior to and continued during the tenure of the Authority's former president, James Cavanaugh, a self-described fiscal conservative. Because, as noted, any surplus Authority funds beyond its operating budget, by operation of law, are remitted to New York City and New York State, Cavanaugh repeatedly stressed to his staff that every $50,000 cut from the operational budget allows the City to hire another police officer. Notwithstanding these proclamations, as demonstrated below, Cavanaugh did not heed his own admonition and approved the Authority's extravagant spending practices.

Within the annual budget, monies are allotted to specific categories and subcategories some of which include: "Travel and Entertainment" and "Non-Insurance Employee Benefits" and its subcategories of "Acknowledgments – Firmwide" and "Staff Events – Firmwide." The Inspector General reviewed the expenditures from these budget categories for the years 2005 through 2008 and found the expenditures of the allocated funds to be extravagant. During this period, the Authority routinely paid for elaborate parties, business lunches, and gifts for its employees. From 2005 through 2008, the Authority spent almost $163,000 for "Travel and Entertainment" expenses and more than $184,000 on parties, picnics, and acknowledgements.[10]

i. The Authority Spent Over $184,000, Representing More Than $45,000 a Year, for Employee Parties and Gifts

For the years 2005 through 2008, the Authority spent more than $184,000 on parties, picnics, and gifts – an average of more than $45,000 per year. The bulk of the money was spent on the Authority's holiday party held in December and its annual picnic held in July. The remainder was spent on events such as farewell parties for departing employees and acknowledgment gifts.

[10] The Authority's parties and picnics were paid for with monies from the budget category "Staff Events – Firmwide," and gifts and other acknowledgments from the "Acknowledgments - Firmwide" category. From 2005 through 2008, the total amount spent on "Staff Events - Firmwide" was $171,461and the total for "Acknowledgments - Firmwide" was $14,237.

The Authority holds an annual picnic for its employees and the employees of the Battery Park City Parks Conservancy at the Battery Park City baseball fields. These Authority picnics are not simple barbeques but rather catered themed events. A professional events coordinator is hired each year to organize and plan the affair. For each of the years, the Authority rented a cotton candy machine and hired an attendant to run it. A professional photographer was hired to capture all the Authority's picnics and additional amounts were paid for photo collages and slideshows. The Authority also hired umpires for their picnic softball games, rather than enlist volunteer employees. Roughly 250 people attend and the Authority spent on average $13,000 a year to fund the event. Employees do not pay to attend.

In 2005, the picnic had a western theme for which the Authority purchased items such as cowboy hats; rented photo fronts[11] with a jailhouse scene and a cowgirl; provided pony rides at a cost of $1,000; hired a face painting artist at a cost of $600; and arranged for field games and contests at a cost of $2,200. In 2006, the Authority had a 1950s themed picnic and purchased decorations which included music notes, records and a banner. In 2007, the Authority held a baseball themed picnic and hired a service to arrange and operate field games and contests for $2,300 and a clown for $460. And, because apparently the picnic was held on a very hot day, the Authority purchased two misting fans to cool the attendees. The Authority's 2008 picnic had an Olympic and Caribbean theme which included catered Caribbean style food, Caribbean decorations, and an outside company to operate events including potato sack races, limbo contests, and pie eating contests. The Authority also spent $350 for gifts and prizes which were distributed at the picnic.

The Authority also spent lavishly on holiday parties, spending an average of $14,000 each year from 2005 through 2008. The Authority's party included approximately 120 guests each year who, along with other guests, attended the party at no cost. The Inspector General's review of the parties revealed that they all included meals and a full premium open bar. The Authority also hired a disc jockey each year for the holiday party. In 2005, the Authority paid the disc jockey $2,000 for the party and then spent another $600 for an additional hour and a half of services. A professional photographer was also hired for the holiday parties. In 2005 and 2006, the Authority spent $400 each year to purchase items such as raffle gifts, which included gift certificates for the Ritz Carlton and restaurants. And, at the end of 2008, during a time when the governor was calling for budget cuts, the Authority spent more than $16,000 on its holiday party, paying, as was its custom, for unlimited alcoholic beverages.

In addition to the picnics and holiday parties, the Authority also paid for parties and gifts for departing employees. These parties were either held at a local restaurant or catered to the Authority. For example, in November 2005 the Authority paid $2,489 for a party at the Grill Room; in February 2006, the Authority held a party at Steamers Landing at a cost of $1,950; and in August 2007, the Authority held another party at Steamers Landing at a cost of $2,280. In May 2008, the Authority spent $1,747 on

[11] A photo front is a carnival type board that allows an individual to place their head through a hole in order to appear to be part of a scene or on the body of an individual depicted on the board.

catered food from Salsa Caterers for a resigning employee. All of the events were at no cost to the party attendees and guests.

The Inspector General further determined that, from 2005 through 2008, the Authority spent approximately $14,000 on a budget category entitled "Acknowledgements - Firmwide" – an average of $3,500 per year. These funds were typically used for flowers and cakes for employees to acknowledge events such as birthdays, bereavements, and to extend get-well wishes. In 2008, a purchase for $374 included flower arrangements for Authority's administrative staff to acknowledge Administrative Support Day. The Authority paid for fruit and cake every month to celebrate staff birthdays. Examples of these birthday expenses include: $168 in October 2006, $198 in September 2007, and $179 in April 2008. From 2006 through 2008, the Authority also paid to have birthday cards distributed to its staff at an average annual cost of $85.

The Authority's practice of paying for parties and gifts sharply contrasts that of state agencies where the state employee is responsible for paying for holiday and farewell parties – not the agency. While no laws exist specifically prohibiting the Authority from incurring the expense of these parties and gifts, the amount spent is inconsistent with a civic purpose, especially in times of fiscal crisis.

ii. The Authority Routinely Catered Meetings and Paid for Business Lunches for Its Executives

From 2005 through 2008, the Authority expended almost $163,000 for Travel and Entertainment expenses. It should be noted, that with the exception of an annual green buildings conference for six employees, travel does not comprise a large percentage of this budget category. Instead, the majority of expenditures are derived from meals, primarily lunches, for Authority employees. Employees were permitted to expense lunch to the Authority by either obtaining preapproval from a department head to charge lunch to an Authority credit card or submitting a receipt for reimbursement. The Inspector General determined that, in 2007 alone, the Authority spent approximately $30,000 on these meals, roughly 75% of the $39,000 for that budget category.

Travel and Entertainment expenditures in 2007 also included catered departmental meetings. The Authority routinely employed Devon & Blakely to cater their bi-weekly coordination meetings for a total cost of $6,111 in 2007. Business lunches were purportedly held to discuss Authority matters: $130 spent on lunch at Moran's, a downtown pub, to discuss "personnel issues and staffing"; an $82 lunch at Au Mandarin to discuss administration procedures; and a $269 lunch at Devon and Blakely for an "in-house" budget meeting.

The Inspector General's review also revealed that the Authority paid for frequent lunches for then-President Cavanaugh and then-Chairman Gill. From late 2006 through 2008, Cavanaugh and Gill had lunch together at the Authority's expense a total of 32

times. The total for these lunches was more than $2,300 or approximately $70 per lunch. In addition, the Authority also paid for lunches Cavanaugh had with other Authority employees. Other Board members also benefitted from Authority paid lunches. For example, the seven Board members attended a $303 lunch at Steamers Landing during ethics training.

Cavanaugh attempted to justify the Authority's policy of paying for the employee lunches by arguing that business was discussed. When queried by the Inspector General as to what he would consider an excessive amount for lunch, he posited only more than $100 per person. Although the Inspector General attempted to examine the receipts from the catered and outside lunches to ascertain the amounts spent per person, any conclusive determination was thwarted because only a limited number of receipts were available for review as executive staff members used Authority credit cards to purchase meals and were not required to submit receipts. The receipts which were examined revealed such lunch purchases as a "surf and turf" and included alcoholic beverages. Prior to the commencement of the Inspector General's investigation, the division heads were also permitted to self-approve their own lunches.

Notably, the Office of the New York State Comptroller is responsible for issuing opinions and regulations regarding state expenditures by New York State agencies and employees. The Comptroller publishes a Travel Manual which provides the rules for the reimbursement of meals for employees of state agencies. Under these guidelines, the State does not allow for an agency to pay for or reimburse the cost of lunch, even when a state employee is away from the employee's home station and travelling on official business.

For example, a state agency employee whose office is in Manhattan, who is required to travel to Albany on official business, is not reimbursed for lunch. According to Vice President of Internal Audit Lisa Miller, consistent with these regulations set by the Comptroller, the Authority does not pay for lunches for its employees while they are in travel status. In contrast and inconsistent with that policy, Authority personnel, who do not even leave their office, have catered lunches provided to them, at the Authority's expense, because they are purportedly discussing "business" matters at such lunches. Although the Authority is not a New York State agency and is therefore not mandated to abide by the provisions of the Travel Manual, the Authority's business lunches and catered meeting expenditures cannot be reconciled with its public entity status and responsibility.

iii. The Authority Spent Over $300,000, for Annual Rent of More Than $50,000, to Lease an Apartment

From January 2003 through early 2009, the Authority leased an apartment at the Solaire, a residential complex in Battery Park City, at an annual cost of more than $50,000 per year. This amount does not include maintenance and furnishing costs. The Solaire was awarded the Leadership in Energy and Environmental Design Gold

Certification by the United States Green Building Council. According to Cavanaugh, since the Solaire was an innovative "green" building, the Authority leased the apartment to provide tours in attempt to promote and encourage environmentally friendly construction. In addition, on occasion, vendors and other Authority guests stayed at the apartment. Prior to the commencement of the Inspector General's investigation, Cavanaugh had decided not to renew the lease.

An allegation appeared in *The New York Post* that this apartment was being used as a "love nest." The Inspector General found no evidence to support this allegation.

iv. Contributions Made by the Authority

The Inspector General discovered that from 2004 through 2008 the Authority contributed approximately 4.2 million dollars to various not-for-profit organizations. The Inspector General determined that some of the organizations to which the Authority contributed during this time period did not directly relate to the Authority's mission. Significantly, the Inspector General found that the Authority failed to disclose any of the contributions in its financial filings with the state although such disclosure is required by state law.

a. Substantial Contributions Made by the Authority Did Not Directly Relate to Its Mission

The Inspector General learned that from 2004 through 2008 the Authority contributed approximately 4.2 million dollars to not-for-profit organizations.[12] The Inspector General found that contributions were made to organizations which on their face do not directly relate to the Authority's mission, which, according to its Web site, is "to plan, create, co-ordinate and maintain a balanced community of commercial, residential, retail, and park space within its designated 92-acre site on the lower west side of Manhattan."

Since 2004, the Authority's contributions have included: Queens Botanical Gardens, Queens Public Library Foundation, Staten Island Development Corporation, Queens Theater in the Park, United Nations World Food Program, Asian American Legal Defense Fund, The Yonkers Puerto Rican Day Parade, Chinatown YMCA, and the Auburn University Foundation. It should be noted that Auburn University is located in Alabama. Combined, these organizations received more than $100,000 from the Authority from 2004 through 2008.

On October 9, 2007, the New York State Attorney General issued an opinion regarding contributions made by authorities to not-for-profit entities. In that opinion, the Attorney General opined that, as a public authority, the Long Island Power Authority

[12] The total includes a total of $440,000 that was provided to the Battery Park City Parks Conservancy from 2004 through 2008.

(LIPA) was not authorized to make financial contributions unless the donation was directly related to one of its "powers, duties, or purposes." The Attorney General further recognized, "While we do not doubt that these organizations provide worthy services, support of these services is not why the State created LIPA."

The Inspector General acknowledges that in 2008, following the aforementioned Attorney General opinion, the Authority decreased its contributions. However, the Authority continued to make contributions arguably outside its mandate, examples of which include $10,000 contributions to Creative Time, Lower Manhattan Cultural Council and the Association of Minority Enterprises of New York; a $7,500 contribution to the Public Art Fund; a $6,000 to the Asian Women in Business organization and a $5,000 contribution to the Jamaica Business Resource Center. While these organizations may be worthy of support, contributions made by the Authority appear to be outside the scope of its mission and, accordingly, unauthorized by law.

b. The Downtown Alliance

From 2004 through 2008, the Authority has provided $1,778,750 to the Alliance for Downtown New York, Inc. (Downtown Alliance), an organization created to manage the Downtown Lower Manhattan Business Improvement District in order to "enhance the quality of life in lower Manhattan." However, while located in lower Manhattan, Battery Park City is not within the Downtown Alliance's jurisdiction. Hence, while the Downtown Alliance provides services such as supplemental security and sanitation, economic development, streetscape, design and transportation services, and marketing and enhanced tourism programs to areas within its jurisdiction, none of these services is provided to Battery Park City with the exception of a shuttle bus that runs along lower Manhattan.

Interestingly, at the time these monies were donated, then-Chairman Gill was also a member of the Downtown Alliance Board. Because the Authority provides more than $250,000 to the Downtown Alliance, the full Authority Board, including Gill, was required to approve the transaction. Although Gill acknowledged that Battery Park City does not receive all the benefits provided by the Downtown Alliance, he asserted to the Inspector General the bus service alone justifies the contribution. In addition, Gill stated that the residents of Battery Park City benefit from the improvements to the surrounding neighborhoods. The Inspector General finds that, at a minimum, an appearance of a conflict of interest exists by Gill serving as a member of the Board of both the Authority and the Downtown Alliance, and Gill should have recused himself from the approval process.

c. The Authority Inaccurately Reported Its Contributions in Its Required Financial Filings

The Authority Budget Office (ABO) was created "to review and report on the operations, practices and finances of State and local public authorities, promote adoption of effective principles of model governance and provide the governor and the legislature with conclusions and opinions regarding the performance of those public authorities."[13] The Authority is required to submit financial filings to the ABO, which has financial oversight authority over the Authority.

Pointedly, despite contributing nearly one million dollars to various not-for-profit corporations during the 2008 fiscal year, in its required year-end filing for fiscal year 2008 with the ABO, the Authority inaccurately indicated that it had not made any donations during the year. Specifically, in its ABO filing under the category of "Nonoperating Expenses" there is a specific entry denoting for "Grants and donations" made by the Authority. In that category, the Authority placed an entry of "$0." In addition, even though the Authority had already budgeted for contributions in fiscal year 2009, it reported to the ABO that it would not be making any contributions in the succeeding fiscal year.

The Inspector General inquired of Senior Vice President and Chief Financial Officer Robert Serpico as to why the Authority does not separately list contributions and donations, as required, on the ABO filing. Serpico testified that the Authority has always listed contributions in its operating budget, stating that "we didn't think of it as a non-operating expense." By definition, "operating expenses" are those expenditures necessary to maintain a business. Serpico's view is clearly inconsistent with that definition.

In a letter dated February 10, 2010, in response to a draft of this report, Serpico stated in substance that the Inspector General had misstated the filing requirements of the ABO with respect to the Grants and Donations category. Specifically, Serpico asserted:

> In particular, under the ABO's own guidance, the contributions made by the Authority to not-for-profit corporations were not properly classified as "Grants and Donations." On its Public Authorities Reporting Information System website, the ABO explains that the items to be included in the line item for "Grants and Donations" are "assistance awards paid by the authority to another entity (for example: a municipality) for a specific program purpose." None of the contributions made by the Authority were "assistance awards" nor were they "for a specific program purpose." Therefore, these contributions were not properly applied to the "Grants and Donations" line item.

[13] http://www.abo.state.ny.us.

> Indeed, Authority finance staff even discussed the 2009 fiscal year PARIS data submission with Ann Maloney of the ABO and she agreed that the current definition of Grants and Donations" is unclear and should be amended. Authority finance staff agreed to include all sponsorships, contributions and grants in the "Grants and Donations" line item after the ABO issued an expanded and amended definition.

In response to Serpico's letter, the Inspector General interviewed ABO employee Ann Maloney and provided her a copy of Serpico's letter. According to Maloney, the conversation described in Serpico's letter took place approximately a week prior to Serpico's February 10, 2010 letter. Maloney described the Serpico letter as a mischaracterization of her conversation with the Authority. Maloney informed the Inspector General that she never described the Grants and Donations definition as "unclear" and that an "expanded and amended" definition has not been "issued."

Maloney concurred with the Inspector General's finding that the contributions made by the Authority should have been included in the "Grants and Donations" section of the ABO filing.

B. Vehicle Use At The Authority

The Authority maintained a fleet of five vehicles: one vehicle was used exclusively by then president, James Cavanaugh; one vehicle was, until the commencement of the Inspector General's investigation, assigned as "transport for the chairman";[14] one vehicle was and is still used as a pool vehicle; and the remaining two vehicles are assigned to security officers to patrol the 92-acre site. The Authority paid for the gasoline, EZ pass usage, and maintenance of all the vehicles including, until recently, personal use. In addition to the use of a vehicle, the Authority also provided then-Chairman Gill with a driver. The Authority employed three individuals whose duties included driving the chairman. In practice, one of these individuals operated as Gill's main driver while the other two employees were available in his absence.

i. Executive Use of State Vehicles

Agency heads in New York State have traditionally been granted unrestricted use of a state-owned vehicle. As enumerated in various iterations of the New York State Department of Budget's guidelines for vehicle usage, "State officials of cabinet rank and heads of agencies assigned a vehicle shall have unrestricted use of their assigned vehicles." Unrestricted use means that, unlike other state officials and employees who

[14] The vehicle used by former Chairman Gill was auctioned and sold by the New York State Office of General Services on July 15, 2010.

are solely permitted to utilize a state-assigned vehicle for business purposes, agency heads are permitted to utilize the state vehicle for both business and personal use without limitation, including evening and weekends. Despite this ability to use the vehicle at their pleasure because they are regarded as being continually on-duty, applicable federal and state tax guidelines do not exempt the agency heads from reporting all personal usage (specifically including commuting miles) for tax purposes.

According to applicable federal and state tax guidelines, commuting consists of travel between an employee's home and permanent work station. Commuting miles are deemed personal miles irrespective of the employee's position or whether the employee is considered to be continually on-duty. No exceptions are permitted for work performed en route to an office, including planning or telephone calls.

In order to clearly inform agency and authority heads of the rules regarding use of a state-provided unrestricted use vehicle, on May 21, 2007, then-Counsel to Governor Eliot Spitzer, David Nocenti and then-Director of State Operations Olivia Golden distributed a memorandum (Nocenti memo) to "All Agency Heads and Chamber Employees," including the heads of public authorities. The memorandum specifically addressed the requirement that business and personal mileage be segregated on mileage records by state officers granted unrestricted use of state vehicles. In the memorandum, among other things, Nocenti and Golden expressly advised agency heads of IRS guidelines requiring these officials to "maintain a detailed log of all their business-related uses of the vehicle. Any mileage not reported as having a valid business purpose would be treated as imputed personal income to the employee, and all employees who have individually assigned vehicles must report the imputed income from non-business travel on their tax returns." The memorandum unambiguously added, "<u>Travel between home and work in an individually-assigned vehicle is generally not considered a business purpose, and thus must be included in the imputed income calculation.</u>" (Emphasis original.)

The Inspector General finds that certain vehicle usage for then-President Cavanaugh and then-Chairman Gill fell under the definition of commuting, and therefore was required to have been calculated and reported as income for tax purposes. The Authority failed to maintain records to allow for proper reporting of the added fringe benefit, and, indeed, as discussed below, Gill's drivers were instructed by the Vice President of Internal Audit, Lisa Miller, specifically not to record certain trips.

ii. Tax Implications of Use of a State Vehicle

As recognized in the Nocenti memorandum, except in certain narrowly-defined circumstances, unreimbursed personal or commuting use of an employer-owned vehicle is considered personal income that must be reported to the Internal Revenue Service (IRS) on an employee's annual W-2 form. According to IRS guidelines, employees must maintain records that differentiate between personal and business use of employer-owned vehicles. Absent such denotation, any use that is not documented as business use is considered personal, taxable income. IRS guidelines state that it is "the employer's

responsibility to determine the actual value of this fringe benefit [personal or commuting use of a vehicle] and to include the taxable portion in the employee's income."

Under tax guidelines, several formulas exist for determining the fringe benefit derived from the use of an employer-provided vehicle based upon several factors including the value of the vehicle and its permitted use. The method utilized directly impacts the amount of the fringe benefit incurred by the employee and the use of an incorrect method could lead to underreporting of taxable income. Of the three methods provided by the IRS for calculating income derived from personal use of a vehicle only the "annual lease value method" is applicable to Cavanaugh and Gill.[15] Furthermore, under IRS guidelines, the fringe benefit derived from chauffeur services must be evaluated separately. If the employee is using a state provided EZ Pass for personal use, including commuting, those charges are considered an additional fringe benefit and must be reported.

iii. The Authority failed to Properly Compute the Fringe Benefit President Cavanaugh Derived from use of an Authority Vehicle

The Inspector General determined that Vice President of Internal Audit Lisa Miller incorrectly used the cents-per-mile rule to calculate Cavanaugh's fringe benefit for his personal use of his assigned state vehicle, a 2007 Chevrolet Tahoe.[16] Miller's impermissible use of this method, rather than the annual lease value method, produced a lower fringe benefit to be added to Cavanaugh's W-2 form. As a result, Cavanaugh's income was understated by $1,650 in 2007 and $3,015 in 2008. Moreover, because the Authority paid for both gasoline and EZ Pass expenses Cavanaugh incurred during his

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[15] The IRS provides three methods for calculating income derived from personal use of a vehicle: annual leave value method, commuting rule and cents-per-mile rule. A summary of these fringe benefit evaluation methods are below.

Annual lease value method: This method calculates the fringe benefit based on the fair market value of the vehicle in question using tables published by the IRS. This method **must** be used if the fair market value of a newly assigned vehicle is in excess of an IRS determined value (in 2009 the IRS determined value was $19,000). The annual lease value method **does not include** the value of fuel provided by the state agency.

Commuting rule: If the car is used exclusively for business and commuting and the employee is required to commute in the vehicle, the employee is considered to have received a benefit equal to $1.50 per commuting trip, or $3.00 per day, as taxable income, including fuel. The commuting rule is only available to employees earning less than the determined maximum salary (the salary limit was $143,000 in 2008 and $143,500 in 2009), and requires that the agency prohibit personal use of the vehicle other than commuting. The vehicle may not be chauffeured.

Cents-per-mile rule: Depending on the income of the employee and the use and value of the vehicle, the employer may also report personal or commuting income at the applicable cents per mile rate (the cents-per-mile rate was 55 cents in 2008 and 2009). For this rule to be applicable, the vehicle must be regularly used for business (more than 50% of the total mileage) and must be driven at least 10,000 miles a year. This method may **only** be used if use of the annual lease value method is not required.

[16] The purchase price of Cavanaugh's newly assigned 2007 Chevrolet Tahoe was $40,316, which exceeded the IRS determined value and, therefore, required the application of the annual lease value method.

personal use of the vehicle, Cavanaugh received additional fringe benefits which Miller failed to include on Cavanaugh's W-2 form. In 2007 and 2008, the Authority spent approximately $3,694 for Cavanaugh's EZ Pass use.

iv. By Providing a Car and Driver for Then-Chairman Gill, the Authority Improperly Compensated him; Gill Failed to Claim the Income on his Tax Filings

The section of the state Public Authorities Law which enables the Authority states that "members shall serve without salary or other compensation, but each member will be entitled to reimbursement for actual and necessary expenses incurred in the performance of his or her official duties." Although there exist no judicial opinions or other authority directly interpreting this clause of the Authority's statute, this section substantially mirrors provisions contained in the enabling acts of numerous other state and local authorities and boards over 50 of whose statutes were amended in 1992 to eliminate compensation for board members as a cost-saving measure to the state.[17]

Despite the absence of direct binding authority, various opinions issued by the State Comptroller in similar contexts are instructive. Specifically, in addition to appearing analogous to sections of state law applicable to local officials and boards which have been the subject of numerous Comptroller opinions, the language in the Authority's statute appears to closely track the language of § 64 of the Public Officers Law which provides that "[e]very public officer who is not allowed any compensation for his services shall be paid his actual expenses necessarily incurred in the discharge of his official duties." The Comptroller has unequivocally opined that travel from one's residence to one's regular place of business is not an "actual and necessary expense" for which travel reimbursement is appropriate. [18]

Most directly on point, the Comptroller has interpreted Public Officers Law § 64 to preclude reimbursement of travel expenses to uncompensated board members attending meetings, finding that, "[a]bsent express statutory authority . . . the expenses of a member of a municipal governing board in commuting from his or her residence to the place where meetings of the board or normally conducted may not be reimbursed as actual and necessary expenses." This opinion is consistent with the Comptroller's opinions regarding town board members which have long-found commuting travel expenses not "actual and necessary" regardless of "whether such meetings are regular or special meetings" even in the event that these meetings are held "in the evenings or on

[17] For a discussion of the legislative history of these amendments, see Attorney General Op. # 2007-F1.
[18] Under the New York State Constitution, "[t]he accounts of every [ ] public corporation heretofore or hereafter created shall be subject to the supervision of the state comptroller." New York State Constitution, Art. X, § 5. The New York State Court of Appeals has interpreted this constitutional provision to "grant[] the Comptroller the discretionary authority to supervise the accounts of public corporations, with the exercise of that authority being governed solely by individual responsibility and fidelity to one's oath of office. *Worth Constr. Co. v Hevesi*, 8 N.Y.3d 548, 552 (2007). Notably, in *Worth*, the Court of Appeals explicitly did not rule on the question of whether the Comptroller may exercise the full scope of this authority absent approval of the authority itself.

weekends." Likewise, both the Comptroller and the New York State Attorney General have interpreted similar statutes which prohibit "compensation," to include not only salary but also fringe benefits such as contributions to health insurance and that authorities lack the power to override this legislative proscription.

The Inspector General determined that the Authority inappropriately provided both a vehicle and chauffeur to its presiding chairman for more than thirteen years, a practice which predated Gill's tenure. Accordingly, upon his assumption of the Chair, Gill was never informed of any restrictions on his use of an Authority-provided vehicle or informed of any taxable income implications. After December 2007, in response to the Nocenti memo, the Authority began to require Gill to reimburse for some of his trips, but grossly underestimated the amount Gill actually owed. Interpreting the Authority's statute harmoniously with analogous sections of law, by providing a vehicle and chauffeur to Gill, the Authority improperly compensated Gill in violation of the enabling statute which requires Board members to serve without compensation. Furthermore, having received this undue compensation, Gill did not disclose such use on his tax filings.

The Authority incurred significant expenses in order to provide this service to Gill. Prior to the commencement of the Inspector General's investigation, a 2006 Crown Victoria was designated specifically as "transport for the chairman." This vehicle was not maintained or used for other authority business absent an emergency. The Authority also employed three individuals whose job description included the title of driver to chauffeur Gill between the Authority, his residence and his private law office. While many of Gill's trips, such as weekly staff meetings and Board meetings, were scheduled in advance, the drivers also were required to be "on call" in the event Gill desired to be transported to the Authority or elsewhere. The drivers testified that Gill's secretary at his private law firm would routinely contact them to pick him up, often times for lunch meetings at the Authority with then President Cavanaugh. When the drivers took Gill to locations other than the Authority, they never questioned him as to whether the trip was for official Authority business. Prior to December 2007, logs were not maintained to document any use of the vehicle at all. After December 2007, as discussed more fully below, an inaccurate and inadequate automobile log was created by the head of audit, Lisa Miller, who, ironically, was also the ethics officer.

The Inspector General estimates that from July 2006[19] through the end of 2008, Gill should have reimbursed the Authority approximately $15,400 for use of the vehicle alone.[20] In addition, because the Authority paid for the vehicle's fuel, Gill received an added fringe benefit of approximately $1,221. Furthermore, the Inspector General estimates that, during the same time period, the Authority paid more than $2,100 for Gill's EZ Pass use. The combined total of $18,762 does not account for the value Gill received from the use of chauffeurs. Since the Authority failed to maintain adequate records, the Inspector General is unable to evaluate this fringe benefit.

[19] Although Gill had been assigned a vehicle and chauffeur since 1997, the Inspector General's estimation commences from July 2006 when Gill was assigned his most recent vehicle.

[20] Since the purchase price of Gill's vehicle was more than $24,000, as well as for other reasons, use of the annual lease value method should have been employed.

Gill did not reimburse the Authority for the usage of the Authority vehicle and driver. The value of such usage would be considered a fringe benefit, and accordingly, income which should have been added to Gill's taxable income on his annual filings.[21] Gill testified to the Inspector General that he never included this fringe benefit on his tax returns because he purportedly considered his travel to the Authority an expense for which he was entitled reimbursement. Gill's claim that he was unaware of the need to report his vehicle use and driver as a fringe benefit is in contrast to his further testimony wherein he admitted that the value of the vehicle and driver he was provided by GHI[22] was included in his tax filings.

According to his attorney, Gill is currently in the process of amending his tax filings in order to include the income he received from the Authority. Toward that end, the Inspector General is referring the findings to the New York State Department of Taxation and Finance and the Comptroller's Office for their review.

v. The Authority's Head of Audit and Ethics Officer Created an Inaccurate and Inadequate Automobile Log

As discussed above, on May 21, 2007, the Nocenti memo informed agencies of IRS mandating them to "maintain a detailed log of all their business-related uses of the vehicle." The memorandum also required the creation of a log "to differentiate between business and personal transportation" and stated that "[a]ny mileage not reported as having a valid business purpose will be treated as imputed personal income to the employee, and all employees who have individually assigned vehicles must report the imputed income from non-business travel on their tax returns." In December 2007, more than five months after receiving the Nocenti memo from Cavanaugh, the Authority's Vice President of Internal Audit and Ethics Officer, Lisa Miller,[23] created a log to track the use of the vehicle assigned to Gill. However, rather than following the unambiguous directive from the Governor's office and clearly applicable tax law by creating a detailed log to maintain all trips, the log created by Miller required the inputting of only minimal information and excluded crucial information. Moreover, Miller subverted the purpose of the memorandum, by verbally instructing the drivers to only include certain trips and to exclude others, thus creating an inaccurate log suppressing personal taxable use.

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[21] In December 2007, Gill began to reimburse the Authority. However, the amount was a gross underestimate of what he actually owed due to Miller's incorrect analysis. To date, Gill has reimbursed the Authority approximately $3,000.

[22] Gill was also Chairman of the Board of Group Health Incorporated.

[23] Lisa Miller commenced employment at the Authority in June 2000 as an Associate General Counsel. Her current duties as ethics officer require her to serve as the Authority's liaison with the Commission on Public Integrity and to advise employees on applicable ethical standards. In October 2005, Miller was promoted to Vice President of Internal Audit and maintained her position as ethics officer. Miller has been employed as an attorney for the New York City Corporation Counsel, as an assistant district attorney, and has maintained a private practice. Notably, she had no previous audit experience prior to working at the Authority. Unlike other Authority employees, Miller reports directly to Chairman James Gill.

Gill's drivers informed the Inspector General that, as per Miller's instructions, they recorded on the log only trips from Gill's Long Island residence to the Authority. Initially, Miller even instructed the drivers not to include trips from those locations when Gill was attending a Board meeting at the Authority. Miller also instructed the drivers not to include trips within Manhattan.

In direct contravention of the Nocenti memo and applicable tax law, the logs provided no area for entry of actual mileage, making it impossible to accurately determine the percentage of personal use versus business use, a necessary component for the calculation of the vehicle's usage for tax purposes. The log also lacked an area for entry of each trip's duration, rendering it impossible to accurately account for chauffeur services provided. When asked by the Inspector General why she did not just create a detailed log to track all trips as directed by the Nocenti memo, Miller simply stated "I do not know."

Because of the intentional selective record keeping instituted by Miller, the Inspector General is unable to determine a precise amount that Gill owes the Authority or completely evaluate the usage of the vehicle and driver. During the pendency of the Inspector General's investigation, the Authority discontinued the practice of providing a vehicle and driver to the chairman.

The Authority has since acknowledged that the log and policy created by Miller was wholly inadequate and has since transferred the responsibility for maintaining vehicle logs to its Chief Financial Officer. A revised vehicle usage policy was issued in January 2010.

vi. Vice President of Internal Audit Miller Failed to Follow Relevant Law and Regulations When Determining the Amount Then-Chairman Gill Should Reimburse the Authority

In December 2007, in response to the Nocenti memo, Miller drafted an advisory memo to Gill and Cavanaugh, dated December 3, 2007, which stated, in substance, that the Authority had been improperly compensating Gill by providing the use of a vehicle and driver to transport the chairman to Board meetings. Miller, however, advised that Gill's commutation to weekly senior staff meetings, held every Monday at the Authority, constituted a "special meeting," which would be deemed an actual and necessary expense. Miller, in making this determination, improperly relied upon a State Comptroller opinion defining special meetings as those where both the full Board is not present and the meeting does not occur at the regular place of duty of the Board. While the full Board did not attend the weekly senior staff meetings, the meetings did take place at the Authority thereby barring their classification as a special meeting. As such, Miller disregarded the Comptroller's clear second prerequisite, and, in her advisory memo to both Gill and Cavanaugh, asserted that "[a]lthough these meetings are held at the same place that the Board meets, this issue should not be dispositive of whether this travel expense is reimbursable." In making these determinations for both the president and

chairman of the Authority, Miller neglected to consult General Counsel Altman prior to instituting either the new policy or the log.

The Inspector General notes the existence of ample authority, including the very authority upon which Miller relied, demonstrating Miller's conclusion to be unfounded and incorrect. The Comptroller has opined in relation to local boards that, "Board members may not recover mileage between their homes and the place where the [board meetings] are held, whether such meetings are regular or special meetings."[24] The Comptroller provides further support for this position in a later opinion, concluding, "expenses of a member of a municipal governing board in commuting from his or her residence to the place where meetings of the board are normally conducted may not be reimbursed as actual and necessary expenses."[25]

Miller also improperly employed the cents-per-mile rule to evaluate Gill's reimbursement amount which resulted in a gross understatement of the amount actually due, and she failed to account for drivers' time as required. Although the Nocenti memo explicitly outlined the proper methods by which to evaluate personal use of a vehicle, Miller failed to adhere to even basic instructions thereby preventing any conclusive determination of the amount Gill should reimburse. Moreover, knowing that the Authority had been improperly compensating Gill for more than ten years, Miller also failed to correct the problem by having Gill retroactively reimburse the Authority.

vii. The Authority's Audit Division Prepared a Misleading and Inaccurate Audit Report of the Use of Authority Vehicles

In April of 2009, after the commencement of the Inspector General's investigation, the Authority's Audit Committee[26] requested an audit of several areas, including the use of Authority vehicles. Miller, in her role as Vice President of Internal Audit, was responsible for the audit and assigned Roy Villafane, Director of Internal Audit, to conduct it. The primary focus of the audit was the use of Authority vehicles by Gill and Cavanaugh. Hence, Miller in essence was placed in charge of auditing the implementation of a policy she created for Gill's use of the vehicle.

Miller testified that she removed herself from the audit because she believed she would be criticized by the Board. The Inspector General determined that, despite

[24] Comptroller Op. # 80-593.
[25] Comptroller Op. # 93-31.
[26] With the goal of increased oversight and accountability for Authorities, the Public Authorities Accountability Act of 2005 required authority boards to establish separate audit and governance committees. The audit committee, whose members are required to be familiar with corporate financial and accounting practices, recommends to the larger Board a CPA firm to conduct an independent audit of the Authority and then oversees that independent audit. The governance committee apprises the Board of current best governance practices. Within the Authority, Board members Frank J. Branchini, Charles J. Urstadt and Robert J. Mueller comprise the audit committee and David B. Cornstein, Evelyn Rollins and Andy Shenoy comprise the governance committee. James Gill, Chairman to the Authority, serves as a non-voting member of each committee.

Miller's assertions, she did not remove herself from the audit process. Villafane testified that Miller determined the two-year time period and the scope of the audit. More importantly, Miller provided her memo of the flawed interpretation of the Nocenti memo to Villafane for him to use as a basis in his analysis. Villafane testified that he never questioned the legal basis or logic set forth by Miller, his supervisor. Villafane continued to rely on Miller's memo even after he determined that the memo contained errors, including the incorrect use of the cent-per-mile method to calculate the fringe benefit.

In addition to simply relying on the unsound policy created by Miller, the method with which the audit was conducted was flawed. Villafane failed to interview critical witnesses including Gill, Cavanaugh, and two of the three drivers, maintaining that these interviews were outside of the scope of his audit. Villafane claimed that the one driver he did interview reported that all the trips for Gill after December 2007 for which he was the driver were contained in the log, testimony which directly contradicts the driver's and Miller's testimonies to the Inspector General.

In the audit report, Villafane relied on the alleged statements he received from the driver as a basis to calculate the fringe benefit Gill received, inaccurately claiming that the amount represented all of the trips. Furthermore, Villafane inaccurately computed the fringe benefit that both Cavanaugh and Gill received. Villafane also failed to address the additional fringe benefits that Gill and Cavanaugh received since the Authority paid for gasoline and EZ Pass for the vehicles.

After the Inspector General expressed concerns about the misleading and inaccurate content of the report to Andrew Lankler, counsel retained to represent the Authority, he agreed that the audit was flawed and withheld the report from the Board.

C. Termination of the Authority's Controller, Debra Bogosian

In October 2008, Cavanaugh abruptly terminated Debra Bogosian, the Authority's Controller, for cause. Cavanaugh testified that, prior to Bogosian's termination, he did not consult or seek the advice of her direct supervisor, Robert Serpico, nor did he review her performance evaluations. Serpico was simply informed of the termination shortly before Bogosian was notified. When he eventually was informed, Serpico testified that he attempted to convince Cavanaugh not to terminate Bogosian, whom he considered a valued employee and to whom he had consistently given high evaluations. Notwithstanding, Cavanaugh maintained that the termination of Bogosian was proper and justified.

Cavanaugh testified that Bogosian was terminated, in part, because of her conflicts with the Information Technology department (IT), whose director reports to Wilson Kimball. According to Cavanaugh, when a previous IT director resigned in late 2007, that director attributed his leaving, in part, to his conflicts with Bogosian. Cavanaugh related that the replacement IT director also expressed concerns about the difficulty of working with Bogosian. In addition, as a purported basis for Bogosian's

termination, Cavanaugh noted her disregard of his instruction to remove from the budget an amount for MIG, a technology consultant, during the creation of the 2009 budget.

Subsequent to her termination, Bogosian sent a memo to the Board dated November 13, 2008. In her memo, Bogosian requested to be reinstated and raised allegations concerning Cavanaugh and his "Inner Circle." According to Bogosian and others at the Authority, Cavanaugh's "inner circle" included Wilson Kimball, Robert Holden, and Lisa Miller.[27] Bogosian stated in her memo:

> There are many reasons that Jim Cavanaugh and his Inner Circle would want to terminate me and I can provide you with details in a different forum. I am certain that if you interviewed the staff, there would be overwhelming confirmation of how the Authority had been commandeered by Jim Gill, Jim Cavanaugh and their Inner Circle and how the hostile work environment spared few people in their campaign to harass, intimidate, and marginalize staff.

When interviewed, Bogosian asserted to the Inspector General that her termination was improperly influenced by Wilson Kimball, whom she believed Cavanaugh favored. As Vice President of Operations, Kimball was in charge of the Authority's technology division. By all accounts, the relationship between the technology department and Bogosian was strained.

In her November 13, 2008 memo to the Board complaining of her abrupt termination and requesting reinstatement, Bogosian also noted her repeated stellar reviews. The Inspector General confirmed this fact and also noted that, in February 2008, months after the IT director resigned and less than nine months prior to her termination, Bogosian received a merit raise of 2% in addition to the standard cost of living increase of 2.75%. In a memo to Bogosian, dated February 19, 2008, Cavanaugh wrote "[t]his is recognition of the outstanding performance of many Authority employees." In 2008, the Authority's merit increases ranged from 0 to 3 percent.

Bogosian was not reinstated as requested. Instead, she entered into a separation agreement with the Authority that afforded her severance pay.[28]

The Inspector General was unable to determine what effect Cavanaugh's alleged favoritism of Kimball had on his decision to terminate Bogosian. However, Kimball testified that she "might have" recommended to Cavanaugh that Bogosian be terminated.

[27] The perception of Cavanaugh's "inner circle" is discussed more fully below.
[28] The Authority's use of separation agreements is discussed below.

i. The Authority Improperly Used Separation Agreements

In the course of investigating Bogosian's allegations, the Inspector General learned that she received a substantial severance package contained in a separation agreement[29] and that, in a practice which predated Cavanaugh's tenure, the Authority routinely used separation agreements in violation of its own policies.

The Authority's standard separation agreement initially contains the following non-disclosure clause:

> You agree not to make or cause to be made, whether orally or in writing, any remark, comment, statement or reference that materially disparages, criticizes or detracts from the character or reputation of BPCA. This restriction shall not apply to truthful statements made under oath pursuant to subpoena or court order.

The Battery Park City Authority's *Employee Handbook: General and Administrative Policies*, specifically states that an employee terminated for cause may not receive severance pay. According to the handbook, employees who are involuntarily terminated, but not for cause, may receive a severance package at the discretion of the president. The Authority's handbook defines "cause" as including, "but is not limited to such reasons as a violation of Authority policy, misconduct, insubordination, or poor performance." The handbook does not set forth situations in which a severance package would be appropriate or the factors to be considered by the president in deciding if such an agreement should be awarded.

Of greater concern, these agreements were designed to muzzle public disclosure of improprieties in the Authority. In exchange for a cash payout, the terminated employee was required to agree to refrain from uttering any disparaging or critical remarks about the Authority; terms that included revelation of any allegations of misconduct and abuse. The clause existed to prevent an individual who would possess knowledge of the inner-workings of the Authority – a terminated employee – from informing the public of potential improper conduct by public officers. Compounding this effort to silence criticism and exposure of wrongdoing, the agreement prohibited disclosure of criminal conduct to law enforcement agencies such as the Inspector General and required a subpoena or court order as a predicate for the employee's appearance. The New York Court of Appeals has held that contracts which impede criminal investigations of public entities violate public policy and are unenforceable.[30] Even absent legal authority, the non-disclosure clause was repugnant to the Authority's public purpose and repeated efforts by the legislature and the governor to increase transparency in such bodies.

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[29] Bogosian received a severance package totaling $56,304.14, representing six-months' salary.
[30] *City of New York v. Uniformed Fire Officers Ass'n*, 95 N.Y.2d 273 (2000).

After Bogosian's termination and the aforementioned memo by which she informed the Authority's Board members about allegations of misconduct by Authority employees, the Authority still attempted to include the non-disclosure clause in her separation agreement, thereby barring her from further revealing or discussing allegations unless served with a subpoena or a court order. After the Inspector General commenced the instant investigation and pursuant to objections by Bogosian, her nondisclosure clause was revised to state that Bogosian "will make no further comments, whether orally or in writing regarding Authority business to any party, unless required to do so by the appropriate legal authority." This language, while broader that the standard non-disclosure clause, still restricts Bogosian from commenting on Authority matters to anyone except a legal authority.

ii. Cavanaugh Inappropriately Directed Kimball to Review Bogosian's E-mails

As stated above, Bogosian forwarded a memo to the Authority Board describing her perception of the events surrounding her termination, which included the assertion that Cavanaugh and his "inner circle" desired and effectuated her termination in retaliation for her questioning them about actions and expenditures in her position as Controller. As a result of receiving Bogosian's memo, the Board instructed Cavanaugh not to involve himself in Bogosian's severance negotiations and asked General Counsel Alexandra Altman to mediate between the Authority's outside labor counsel and Bogosian's attorney. According to Altman, the Board did not trust Cavanaugh's impartiality given the allegations and the abrupt manner in which he terminated Bogosian.

Despite the Board's apparent intention to the contrary and with the knowledge that Bogosian's allegations involved Kimball, Cavanaugh inappropriately directed Kimball to review Bogosian's e-mails and to report the findings to him. Cavanaugh claimed to the Inspector General that he ordered the review of Bogosian's e-mails to investigate and disclaim her assertion that she was terminated because she was a whistle blower:

> Subsequent to her termination she wrote a series of letters to the Board and we had conversations with Board members wherein she claimed that her termination was as a result of retaliation because she was a whistle blower and had raised repeated instances of internal control violations and, you know, irregularities. And rather than act upon these, we retaliated by terminating her. So after she left, we went through her e-mails to see in fact – because we weren't aware of any this, we went through her e-mails, which we are allowed to do. When you sign on you get a statement on your screen saying, these e-mails are not private. They are the, you know, standard language. And we've done e-mail searches for legal cases. I mean it's not

> – so I looked. We – I had her e-mail searched to see if she had in fact raised these. Because the Board was asking me, and I didn't find, we didn't find any instances where she had in fact raised issues of concern that weren't addressed or any concerns or issues at all, quite frankly.

Cavanaugh also revealed, however, that some possible improprieties by Bogosian had been discovered after she was terminated through the review of her e-mails:

> But we saw the – and one of the, one of the e-mails indicated how often she would be working from home. And I guess we, at some point in looking at requisitions, we saw several occasions where she was having meals delivered to her house during working hours. Clearly – and had been signed off on it by her superior. It just wasn't what was supposed to be happening

When questioned by the Inspector General as to why he did not instruct another employee, such as Altman, to review Bogosian's e-mail, incredibly Cavanaugh asserted that Altman, the General Counsel, would not have known what to look for and that, because any issues would necessarily involve internal control, Kimball, despite being a subject of Bogosian's allegations and a known foe of Bogosian, was the proper person. Tellingly, an examination of certain Authority e-mails by the Inspector General revealed that when Kimball reviewed Bogosian's e-mails, she forwarded some of them to Cavanaugh, Miller, and Holden – the "inner circle." None was forwarded to Altman for her review. In point of fact, Altman learned of the review of Bogosian's e-mails only after it was well underway.

Cavanaugh, in essence, instructed Kimball to investigate herself and the other people named in Bogosian's memo, including Cavanaugh. This directive also contradicted the spirit of the Board's decision that Cavanaugh should not be involved in the severance negotiations because of the accusations regarding him.

D. Relationships Among Executive Level Staff

In November 2008, the Inspector General received an anonymous complaint which alleged that the Authority President James Cavanaugh was romantically involved with Wilson Kimball, who reports directly and only to him. The complaint further alleged, among other things, that as a result of this relationship, Kimball received undue perks. As part of the instant investigation, the Inspector General questioned Debra Bogosian who, in October 2008, was terminated from her employment at the Authority by Cavanaugh. Bogosian claimed to the Inspector General, among other things, that Cavanaugh terminated her because she had a poor relationship with Kimball who Bogosian believed was romantically involved with Cavanaugh. Bogosian further asserted that Cavanaugh was influenced by his "inner circle," which, in addition to Kimball, included Lisa Miller and Robert Holden. The Inspector General received

testimony from witnesses which revealed that, for the last few years, Wilson Kimball and James Cavanaugh have met and had lunch together almost daily and such luncheons included Lisa Miller and Robert Holden. During the many interviews of Authority staff, the Inspector General learned that, at least partly because of these daily lunches, Kimball, Miller and Holden were Cavanaugh's perceived favorites.

The alleged relationship between Cavanaugh and Kimball presented potential problems in part because, as Senior Vice President of Operations, Kimball reported directly to Cavanaugh. Cavanaugh alone was responsible for reviewing Kimball's performance and determining whether her duties and salary should be enhanced. In September 2005, the Authority hired Kimball as Senior Vice President of Operations through then-Governor George Pataki's Appointments Office. From November 2005 to late 2008, Kimball was granted increased responsibility by Cavanaugh, including appointment to the position of Internal Control Officer. Cavanaugh testified that he neither interviewed nor considered anyone else for the position. Kimball was later designated the Authority's Contracting Officer and Records Retention Officer.[31]

In a move which greatly enhanced Kimball's responsibilities, Cavanaugh, in 2007, placed Kimball in charge of strategic planning again without interviewing or even considering anyone else for the position. Each year of her employment at the Authority, Kimball received both cost of living and merit raises, all determined by Cavanaugh. In addition, Kimball received additional enhancements to her responsibilities and raises totaling approximately $28,000. In late 2008, Kimball received a cost of living raise, a merit raise, and an additional raise the total of which was almost double the raise of the average Authority employee.[32] The purported justification given for the raise, as documented in a March 6, 2008 memo from Cavanaugh to Gill, was Kimball's enhanced responsibilities.

The Inspector General is in no position to evaluate or comment on Kimball's job performance nor can the Inspector General determine whether the raises were based solely on merit. However, the obvious problems inherent in the existence of a relationship between the head of an agency and a subordinate as demonstrated by the perception of favoritism are necessarily detrimental to the morale of the Authority. Indeed, then-Chairman Gill opined that he would not approve of a romantic relationship between a supervisor and a subordinate "for obvious reasons" and further stated that he would "be very distressed" if he learned that Cavanaugh was engaged in a romantic relationship with a subordinate. Likewise, Vice President of Human Resources Robert Holden stated that he would not approve of such a relationship between the president and a subordinate because, at the very least, it would present a morale problem for other Authority employees.

[31] While Cavanaugh maintained that these additional responsibilities were not desired positions, all required Board resolutions for official appointment.

[32] Kimball's raise was 8.92% when the average Authority employee received a raise of approximately 4.9%.

iii. Refusal to Answer Direct Questions by the Inspector General

The Inspector General has the statutory duty to investigate allegations of conflicts of interests and abuse in agencies such as the Authority. Based upon the aforementioned testimony and evidence as well as additional credible evidence, while being respectful to the sensitivity of the subject matter, the Inspector General questioned Cavanaugh and Kimball directly concerning the allegations with reference to their effect upon the operations of the Authority. Cavanaugh and Kimball, each represented by counsel, were separately interviewed and asked specific, direct questions about their relationship. Cavanaugh and Kimball both refused to answer.

Executive Law § 54(5) empowers the Inspector General to "require any officer or employee in a covered agency to answer questions concerning any matter related to the performance of his or her official duties." The enabling statute for the Inspector General's Office states that the "refusal of any officer or employee to answer questions shall be cause for removal from office or employment or other appropriate penalty." The Inspector General advised both Cavanaugh and Kimball that a refusal to answer questions could result in their termination. Even after being informed of this potential consequence, both maintained their positions. The Inspector General notified the Authority Board of both Cavanaugh's and Kimball's refusal to answer questions posed to them for their consideration of appropriate action.

IV. EVENTS SUBSEQUENT TO THE INVESTIGATION

Pursuant to Executive Law § 54(6), the Inspector General has the power to "monitor the implementation by covered agencies of any recommendations made by the state inspector general." Upon completion of an investigation, it is the general practice of the Inspector General to disseminate preliminary reports of findings to the subject agencies for response in order for the Inspector General to review the efficacy of the agency's response to the Inspector General's recommendations. Affording an agency a response further allows the Inspector General to credit any policy improvements made by the agency based upon these recommendations and further review any comments by the agency to particular findings or recommendations and incorporate such into the final report where appropriate.

Consistent with this usual procedure, on January 12, 2010, the Inspector General provided the Authority with a preliminary report for response to the findings and recommendations. In addition to the response sought from the Authority, the Inspector General also received myriad unsolicited and contradictory responses from Board members and certain Authority employees. It was clear that the existing Board of such date was conflicted and in no authoritative position to respond productively to the Inspector General's preliminary response.

On February 9, 2010, James Gill resigned as chairman and, subsequently, William Thompson, Jr. was appointed as a Board member and elected chairman. In addition, as discussed above, other individuals were replaced as Board members.

Given the significant change in the composition of the Authority's Board and the various conflicting responses the Inspector General had received from individual prior Board members, the Inspector General met with Chairman Thompson to discuss the preliminary report. Acknowledging the seriousness of the Inspector General's findings, Chairman Thompson requested a postponement of the issuance of the final report in order to institute appropriate changes at the Authority, including personnel. The Chairman stated that after taking appropriate action, he would submit a response to the Inspector General's preliminary report on behalf of the Authority. The Inspector General honored this request.

In June 2010, Gayle Horwitz was appointed Chief Operating Officer of the Authority. Effective October 1, 2010, James Cavanaugh resigned as President and CEO of the Authority and Horwitz was appointed President and CEO of the Authority.

On October 14, 2010, Chairman Thompson provided the final response to the findings in the Inspector General's preliminary report.

V. FINDINGS AND RECOMMENDATIONS

The Inspector General determined that the Battery Park City Authority, a public entity, had been excessively spending funds that otherwise would have inured to the benefit of New York City and State. As such, the Inspector General recommended that the Authority conform its financial practices to those of other public agencies.

Specifically, the Inspector General recommended that the Authority should cease paying for business lunches, parties and picnics and follow all financial guidelines set forth by the Comptroller's Office. Furthermore, the Authority should reevaluate its donation practices and, at a minimum, discontinue contributing funds to entities that do not directly relate to the Authority's mission. That reevaluation should also include an amendment to its policies to require Board approval for donations regardless of amount. To the extent that it chooses to contribute, the Authority should properly report the contributions on its filings with the Authority Budget Office and should amend its prior filings to properly reflect the contributions made.

In his response, dated October 14, 2010, Thompson informed the Inspector General that he has "directed Authority staff to conform its practices to those of other public agencies and to incorporate any relevant guidelines of the New York State Comptroller" concerning the Authority's payment of meals and parties. A final set of guidelines was approved by the Board during its September 14, 2010 meeting.

In regard to donations made by the Authority, a formal policy was approved during the September 14, 2010 Board meeting. According to Thompson, the policy is in compliance with the Attorney's General's opinion on the matter. The donation policy is posted on the Authority's Web site.

Specifically regarding the Downtown Alliance, Thompson directed the Authority to enter into a written agreement for what he described as "by far the most significant of the Authority's donations." The agreement, dated July 12, 2010, detailed the services to be provided by the Downtown Alliance and the amount to be paid by the Authority. Thompson stated that this "agreement will serve as a model for future payments to not-for-profit entities who receive a contribution."

The Inspector General also found that certain vehicle usage for then-President James Cavanaugh and then-Chairman James Gill fell under the definition of commuting and therefore was required to have been calculated and reported as income for tax purposes. The Authority, however, did not adequately maintain records to allow for proper reporting of the added fringe benefit.

With regard to Cavanaugh, the Authority failed to correctly calculate the fringe benefits he received from his personal use of an Authority vehicle and EZ Pass. Therefore, the Inspector General recommended that the method used to calculate the fringe benefits Cavanaugh received in previous years be reevaluated and his W-2s amended where necessary.

Because the Authority provided Gill a vehicle and chauffeur, it improperly compensated him in violation of the Authority's enabling statute which requires Board members to serve without compensation. Furthermore, having received this undue compensation, Gill did not disclose such on his tax filings. During the pendency of the Inspector General's investigation, the Authority discontinued the practice of providing a vehicle and chauffeur to Gill. According to his attorney, Gill is in the process of amending his tax filings and to date, has reimbursed the Authority approximately $3,000. Toward that end, the Inspector General is referring the findings to the New York State Department of Taxation and Finance and the Comptroller's Office for their review. The Inspector General recommended that future chairpersons not be provided with either a car or a driver.

According to Thompson, the Authority has retained independent accountants to assist in the effort to determine the value that Gill and Cavanaugh received through use of vehicles, and with Gill, a driver. Thompson stated that he does not and will not use an Authority vehicle or driver. In fact, according to Thompson, the vehicle used by Gill was sold on July 15, 2010.

The Inspector General also determined that Vice President of Internal Audit Lisa Miller created an inaccurate and inadequate automobile log. Rather than creating a comprehensive log, Miller instructed drivers to exclude certain trips made by Gill. Miller's creation of inaccurate records hampered any effort to determine the value Gill

received from the use of a vehicle and driver. The Inspector General referred Miller's actions to the Board for appropriate action.

According to Thompson, the responsibility of maintaining vehicle usage logs has been transferred to the Chief Financial Officer and a revised vehicle use policy has been issued.

During the course of the instant investigation, the Inspector General learned that, in a practice which predated Cavanaugh's tenure, the Authority routinely disbursed severance pay in violation of its own policies. The Authority also included in the separation agreements a "non-disclosure clause." In exchange for a cash payout, the terminated employee agrees to refrain from making any disparaging or critical remarks about the Authority; terms that include any allegations of misconduct and abuse. The clause would prevent a terminated employee from notifying the Inspector General or other law enforcement agency of wrongdoing, including criminal conduct at the Authority absent a subpoena or court order. This non-disclosure clause violates public policy in that it prohibited conduct that should be encouraged – namely the disclosure of potential misconduct and abuse of state resources and is repugnant to the public nature of the Authority. The Inspector General recommended that the Authority reconsider its practice of using separation agreements, and at a minimum, the Authority should cease using non-disclosure clauses.

In his response, Thompson stated that, since the draft report, the Authority has not entered into any separation agreements. He further stated that "any further use of separation agreements, including non-disclosure clauses, will be reviewed by outside counsel for compliance with State law and public policy concerns and will then be discussed with the Board"; including the recently enacted Public Authorities Law prohibiting certain confidentiality agreements with former employees. According to Thompson, the Board will also "review the use of severance packages and amend the Employee Handbook accordingly."

This investigation further revealed that shortly after Bogosian sent her memo to the Board, Cavanaugh inappropriately directed Wilson Kimball to review Bogosian's Authority e-mails which amounted to assigning Kimball to investigate herself.

Cavanaugh and Kimball were asked specific, direct questions pertinent to Inspector General's investigation. Cavanaugh and Kimball both refused to answer. Executive Law Article § 54(5) provides that the "refusal of any officer or employee to answer questions shall be cause for removal from office or employment or other appropriate penalty." Even after being warned of the potential consequence, both refused to answer. The Inspector General referred this matter to the Board for appropriate action.

In his response, Thompson stated that he "was concerned that two employees did not respond to certain questions despite [the Inspector General's] efforts to warn them of the consequences under the Executive Law Article § 54(5) which provides that 'the refusal of any officer or employee to answer questions shall be cause for removal from

office or employment or other appropriate penalty.'" Thompson stated that the Board has taken steps to ensure compliance with the law. Thompson's response stated:

> First, when the Board met on September 14, 2010, it was agreed that the Senior Vice President for Operations, Ms. Kimball, would lose five days of annual leave.[33]
>
> Second, as for the President, Mr. Cavanaugh, has elected to take part in the State's Early Retirement incentive. Pursuant to this action, Mr. Cavanaugh resigned his position as President of the Authority effective October 1, 2010.

Thompson also informed the Inspector General that during the September 14, 2010 Board meeting, the Authority revised the employee handbook to include an anti-fraternization policy.

[33] It should also be noted that Kimball's reporting structure was altered by the Board and her position in the executive chain of command was reduced.