AN INQUIRY REGARDING (1) THE DECISION BY THE MANAGEMENT OF NEW YORK CITY TRANSIT WITH RESPECT TO THE RATE OF EMPLOYEE HEALTH CONTRIBUTION FOR 2008; AND (2) THE COMPENSATION ARRANGEMENT MADE BY THE PARTIES WITH NEUTRAL ARBITRATOR JOHN ZUCCOTTI

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INTRODUCTION

On December 15, 2005, the collective bargaining agreement (CBA) then existing between the New York City Transit Authority and the Manhattan and Bronx Surface Transit Operating Authority (collectively the Transit Authority, TA or NYCT)[1] and Transport Workers Union of America and its Transport Workers Union Local 100 (TWU)(collectively the Union) expired, but negotiations continued. Then, in the early morning of December 20, after negotiations had broken down, the Union struck the Transit Authority's operations. That strike was in violation of a court issued injunction and a violation of what is commonly known as the Taylor Law,[2] which provided for substantial penalties against the employees and their Union should such a stoppage occur. The strike ended on December 22, 2005, and the Parties, with the assistance of State-appointed mediators, returned to the bargaining table. On December 27, 2005, the parties executed a Memorandum of Understanding (MOU) amending the CBA for a term ending January 15, 2009, subject to ratification by the MTA Board and members of the Union.[3]

On January 26, 2006, the members rejected that MOU by seven votes out of some 22,400 cast. Five days later, the Transit Authority, which had previously filed a Declaration of Impasse Petition, filed a petition for the designation of a Public Arbitration Panel. Following this request, the New York State Public Employment Relations Board (PERB) found that the TA and the Union could not voluntarily reach agreement on a collective bargaining contract, declared a bargaining impasse and, on May 23, 2006, designated a Public Arbitration Panel "for the purpose of making a just and reasonable determination of the dispute pursuant to Section 209.5 of the Civil Service Law."[4]

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[1] The Manhattan and Bronx Surface Transit Operating Authority is a subsidiary of the Transit Authority, which itself is an affiliate of the Metropolitan Transportation Authority (MTA).

[2] New York State Civil Service Law, Article 14, the Public Employees' Fair Employment Act, §§200 –214.

[3] *See*, "In the Matter of the Impasse Between [TA] and [the Union], Opinion and Award" dated December 27, 2006, at p. 4. Quotation marks omitted.

[4] *Id*. at p.2.

Pursuant to the impasse provision of the Taylor Law, the Parties designated their respective Panel members. The Transit Authority chose Gary Dellaverson, then MTA Director of Labor Relations who had been in that position for some 16 years, and the Union chose Basil A. Paterson, Esq. They, in turn, selected George Nicolau as the Public Member and Chair.[5]

Following its designation, the Nicolau Panel held hearings over ten days between August 4, and October 3, 2006. Some twenty-three witnesses gave sworn testimony and 172 exhibits were received in evidence. The transcript of the proceeding covered 1742 pages. The parties submitted both pre- and post-hearing briefs and the record closed on November 17, 2006.[6]

The Nicolau Opinion and Award, dated December 15, 2006, noted (at p. 7) that "the matters contained in that 45-page memorandum [MOU] were fully sufficient to meet [the Parties'] interests" and essentially would be adopted as the Parties agreed to them. By doing so, the Opinion declared (at p. 14) it would "effectively restore the agreement the representatives of the Parties previously made." Among other things, Union members became obligated, for the first time, to contribute a percentage of their earnings "to offset the cost of retiree health benefits."[7] The amount contributed was set at 1.5% of wages for the first year. The MOU then provided that:

> In future years, the 1.5% contribution rate shall be increased by the extent to which the rate of increase in the cost of health benefits exceeds general wage increases. This contribution will be on a pre-tax basis.

In 2007, employee contributions were increased to 1.5307% of wages. The contribution rate was not increased in 2008.

On or about January 6, 2009, eight days before the MTA-TWU contract was to expire, Benito Fernandez, Director, MTA Labor Relations, and Roger Toussaint, former president of the TWU, signed a Joint Declaration of Impasse and Joint Request for Interest Arbitration with PERB, triggering the creation of an arbitration panel.

In the summer of 2009, several news articles criticized the Transit Authority's decision not to raise healthcare contributions for 2008.[8] Subsequent articles that fall were also critical of the fees billed by John Zuccotti for his services as the neutral arbitrator on the 2009 public

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[5] *Id.* This Panel is referred to herein as the Nicolau Panel. However, given that Mr. Nicolau affirmed in the Acknowledgment that concludes the document described in footnote 3 above that he "executed and issued the foregoing as my Opinion and Award," that document is herein referred to as the Nicolau Opinion and Award.

[6] *Id*.

[7] *Id*. at p. 10. MOU at p. 2.

[8] MTA COST CITY $1M, N.Y. DAILY NEWS, Jul. 25, 2009, p. 8. *See also* TRANSIT GUYS SHOULDA PAID MORE, N.Y. DAILY NEWS, Jul. 23, 2009, p. 8; MTA WORKERS GET HEALTH CARE BREAK, N.Y. DAILY NEWS, Jul. 21, 2009, p. 6.

interest arbitration panel involving various parties including the Union, the Transit Authority, and the MTA Bus Company (MTA Bus),[9]

In June 2009, the Zuccotti panel issued an award with respect to an agreement between MTA Bus and the Union that contained a provision relating to employee healthcare contributions. A side letter to that agreement indicated that the implementation of that provision had to be consistent with implementation of the similar provision involving the TA and the Union.

Thereafter, MTA Audit Services (the MTA's internal auditor) performed an audit (the MTA Audit Healthcare Report) at the request of then-acting Executive Director and CEO Helena Williams that examined the reasons for the TA's decision not to increase the rate of contribution in 2008 and reviewed the documentation available to support that decision.

On September 10, 2009, Jay H. Walder was confirmed as Chairman and Chief Executive Officer of the MTA. By letter dated November 16, 2009, Chairman Walder requested that the Office of the MTA Inspector General review the circumstances surrounding (1) the 2008 decision made by the TA regarding employee health contributions; and (2) the TA's compensation arrangement with neutral arbitrator John Zuccotti.

In conducting this review, OIG interviewed, among others: Elliot G. (Lee) Sander (Sander), former MTA CEO; Howard Roberts (Roberts), former Transit Authority President; Gary Dellaverson (Dellaverson), former Director, MTA Labor Relations; Salvatore (Sam) Macedonio (Macedonio), former Counsel to the Director, MTA Labor Relations; Benito (Ben) Fernandez (Fernandez), Director, MTA Labor Relations; James Henly (Henly), MTA General Counsel; Judith Pierce (Pierce), former TA Senior Vice President, Administration; Naomi Drake (Drake), Director, TA Labor Relations; Ralph Agritelley (Agritelley), former Vice President, TA Labor Relations, and current Director, LIRR Labor Relations; Roger Touissant (Touissant), former TWU President; John Zuccotti (Zuccotti), Neutral Arbitrator, 2009; and Lawrence Baer (Baer), Counsel to the Neutral Arbitrator.

Further, OIG reviewed relevant documentation, including the MTA Audit Healthcare Report, as well as statutes, MTA and Agency rules, regulations, by-laws and guidelines.

The following are the results of the Inspector General's review.

[9] ARBITRATOR MADE KINGS RANSOM IN TWU DEAL, N.Y. DAILY NEWS, Oct. 30, 2009, p. 4.; ARBITRATOR IN MTA, TWU PACT MADE THREE TIMES THE STANDING PAY RATE, N.Y. DAILY NEWS, Oct. 30, 2009, p. 4.; $900/HR. MTA FLAP, N.Y. DAILY NEWS, Oct. 29, 2009, p. 2.

PART ONE: RATE OF TWU-REPRESENTED EMPLOYEE HEALTH CONTRIBUTION

BACKGROUND

Employee Contribution to the Cost of Health Care

The requirement that Union-represented Transit Authority employees contribute to funding health benefits, as agreed to by the Parties and ratified by the Nicolau Opinion and Award, is presented in the following terms:

> Effective upon payment of the first general wage increase provided in Sec. 2A of this Agreement all active employees will contribute 1.5% of their bi-weekly gross wages to offset the cost of retiree health benefits. In future years, the 1.5% contribution rate shall be increased by the extent to which the rate of increase in the cost of health benefits exceeds general wage increases. This contribution will be on a pre-tax basis.

Implementation of the Employee Contribution Clause in 2007

Pursuant to the Nicolau Opinion and Award (or CBA), the Transit Authority sought to increase the employee healthcare contribution percentage for 2007, as 2006 healthcare costs increased at a rate greater than that of employee wages for that year. On March 7, 2007, Ralph Agritelley, then Vice President TA Labor Relations, sent the TWU a letter with supporting documentation proposing an employee healthcare contribution increase to 1.54%, effective April 2007. In a March 20, 2007 letter from Touissant to Agritelley, the TWU objected, claiming that the TA's healthcare cost calculations were "flawed." The TWU offered the following in support of its position:

> For example, you have included as an increased cost to the TA in 2006 the increase in monthly premiums paid by our members for the GHI High Option program. Those costs were not incurred by the TA. They were paid by the Union's members. You cannot use the increase in monies paid by our members for the High Option Rider as the basis for increasing the health contribution. You have also included as a cost item that must be factored into the monthly cost an increase in the Incurred But Not Reported (IBNR)[10] category of $1,951,000. These IBNR "costs" are not actual costs but are an estimate of what will have to be paid in the future. These are but two examples of what we believe may be serious errors in the calculation.

Between March and June 2007, the parties tried to resolve disagreements as to what items were to be included as health care costs as well as the mathematical formula to be used to calculate any escalation.

[10] In this context, IBNR refers to funds set aside to pay for claims in one year that arose in the previous year.

The first dispute was over the type of expenses that were to be included in determining the increase in the "the cost of health benefits." As reflected in a letter dated March 26, 2007, from Agritelley to Touissant, the Transit Authority originally took the position that the "cost of health benefits" under the CBA included the IBNR and the GHI High Option Rider. The Authority had also taken the position that Medicare Part D was to be included. The TWU asserted that healthcare cost escalations should include only costs actually incurred by the TA, not those incurred by its members, and thus the above three elements should not be included in "the cost of health benefits."

In a letter dated April 27, 2007 to TWU attorney Thomas M. Kennedy "to confirm our discussions regarding the implementation of the [TWU] increased health contribution rate," Agritelley excluded the IBNR, included an offset for the GHI High Option Rider payroll deductions, and calculated the new rate to be 1.5319%.

Thereafter, Agritelley sent Roberts, the new president of the Transit Authority, an informational memo, dated, May 7, 2007, which began as follows:

> This is to keep you informed on the status of the increase in the [TWU] Health Contribution rate. I had met and reached an agreement with Thomas Kennedy, an attorney for TWU, concerning the calculation of the increase and date of implementation. While I was on vacation, Walter Meginniss, TWU General Counsel, called my office to say that he did not agree with the calculation and wanted a change. We have submitted the two calculations to MTA Chief Financial Officer, Gary Dellaverson, since he negotiated the agreement.[11]

Agritelley reviewed the issue with Dellaverson who instructed Agritelley to exclude the three elements in question, IBNR, Medicare Part D and the High Option Rider, as not part of employer costs. Dellaverson stated that these three elements were not paid for by the TA and were thus not within the intent of the 2005 agreement, the object of which was to have employees bear a portion of the Authority's healthcare costs.

As the 2005 agreement did not define the specific mathematical formula to be used to calculate any future employee contribution escalations, this led to another dispute between the TA and the Union. The difference between their respective proposed formulas was minimal according to a May 7, 2007 memo from Agritelley to Roberts -- an increase to 1.5319% based on the TA's proposed formula as opposed to 1.5307% based on the Union's. In the end, the Union's proposed formula was adopted, yielding a 1.5307% contribution by the employees to the cost of their 2007 healthcare benefits.

[11] After Sander took office Dellaverson became Chief Financial Officer and Fernandez was hired as the Director of MTA Labor Relations.

Healthcare Contribution in 2008

In a letter dated January 25, 2008, the TA informed the TWU of its intention to escalate the employee healthcare contribution rate to 1.6035%, effective April 2008. In a February 22, 2008 response, the TWU made two objections to the TA's calculation.

First the TWU objected to the TA's headcount figures, an error the TA subsequently corrected, leading to a reduction of the TA's proposed escalation figure to 1.577%.

Second, the TWU stated that:

> The calculation does not take into account the reduction in health care costs that resulted from the Authority's receipt of employee health contributions in 2007. Those contributions, made for the express purpose of offsetting the cost of retiree health benefits, must be treated the same as other cost offsets. Thus, for example, the Authority has agreed that the federal government's Medicare Part D payments to the NYCT are to be subtracted from total costs incurred. Likewise, the employees' payments for the GHI High Option Rider are subtracted from total cost incurred. The Union needs an accounting of the total of TWU represented employee health contributions made in 2007, and that total must be subtracted from the 2007 total health cost.

Judith Pierce, then TA Senior Vice President, Administration, stated that she discussed the TWU's position with former MTA Director of Labor Relations Dellaverson and former MTA Labor Counsel Sam Macedonio, both having been centrally involved with the original 2005 negotiations, who told her that, in their views, employee healthcare contributions were never intended to be deducted from healthcare costs. (Both Dellaverson and Macedonio stated that they did not recall ever speaking with Pierce in regard to any aspect of the 2008 negotiation.**)** In a note to President Roberts indicating her own disagreement with the Union's position, Pierce wrote "It is my understanding that employee health contributions were not off-set in 2007 nor was it intended to be offset."

Pierce further stated that she and TA Director of Labor Relations Naomi Drake gave President Roberts a briefing on the issue on March 6, 2008, including the reasons why they, and, according to Pierce, Dellaverson and Macedonio, rejected the Union's position. Pierce stated that she also told Roberts that while she disagreed with the Union's position, there was a risk that the Union could prevail at arbitration.

Naomi Drake stated that she, too, disagreed with the TWU's position, arguing instead that employee contributions should not be deducted from healthcare costs. Specifically, she told OIG that such an offset was not part of the costing at the time of the original negotiations. In addition, Drake said that she did not agree with the Union's argument that contractually mandated healthcare contributions should be treated in the same manner as other items that were deducted in 2007 (such as Medicare and the GHI High Option Rider) as that was not the intent of the original 2005 agreement.

During the staff meeting with Roberts, Drake presented a spreadsheet which showed a number of costing scenarios. One, in which no employee contributions were deducted from healthcare costs, reflected a rate increase to 1.6035%. In another scenario, employee contributions were offset, but the rate of increase was kept at the 2007 rate of 1.5307%. In yet a third scenario, which Drake presented to show Roberts the unreasonableness of the Union's position, employee contributions for both 2006 and 2007 were offset from the 2007 healthcare costs. This scenario actually yielded a rate decrease to 1.3840%.

Roberts stated that following the staff meeting, he engaged in what he described as a routine risk analysis in which he assessed what he believed to be the likelihood of prevailing should the issue go to arbitration weighed against the monetary cost of a possible adverse decision. After making what he termed a "back of the envelope calculation," Roberts determined that, at best, the TA stood to gain $1.6 million while risking $3.3 million from an adverse arbitration decision.

In making his decision not to increase the employee contribution for 2008, Roberts stated that he ultimately consulted only with his own staff, choosing not to speak with then CEO Elliot Sander, or with anyone, including Gary Dellaverson or Sam Macedonio,[12] who had represented MTA in the original 2005 negotiations. Roberts asserted that he considered his decision regarding the rate increase to be a relatively routine exercise in contract interpretation that fell solely under his authority as agency president. When asked why he did not bring the 2008 employee contribution issue to the MTA Board, Roberts again stated that he viewed it as a routine matter under his authority and one not requiring Board approval.

In his interviews with OIG, Roberts set out the bases for his decision. He stated that he reviewed the 2005 CBA and concluded that it was "imprecise." For example, he said, the CBA did not define key terms such as "health costs" and did not spell out what would happen if health costs went down. He pointed to the need for side letters, as well as to the three month negotiation to determine the 2007 increase, as evidence of the lack of clarity in the CBA. In addition, Roberts pointed out that one side letter added to the imprecision by referring to healthcare "costs" as health "contributions." Roberts summed up by stating that, in his experience, when contract clauses are not well written an arbitrator may be unrestrained in his decision, making the outcome difficult to predict.

As Roberts acknowledged that he had never discussed any of his concerns with the individuals who represented MTA during the actual 2005 CBA negotiation, OIG conducted interviews with them in order to obtain their views on these and other issues raised by the former President.

[12] Although Macedonio left the MTA in September 2007 and relocated to Jacksonville, Florida to serve as the Director of Labor Relations for the CSX Corporation, a company providing rail-based transportation services, he has been continuously available for telephone consultation with the MTA and the OIG.

Regarding what Roberts described as imprecision in the 2005 CBA, Dellaverson noted that in his experience of negotiating collective bargaining agreements, not everything either rejected or agreed to at the time of the negotiation is spelled out in the final agreement. The understandings reached on such issues, however, remain clear to the parties' at the time. This, he said, is the nature of labor negotiations.

Dellaverson further noted that the term "health costs" was clearly understood by the parties in 2005 and has remained clear. He explained that his reason for overruling Agritelley, who played no role in the 2005 negotiations, and directing him to exclude Medicare and offset the GHI High Option Rider from the 2007 escalation calculation, was that all parties clearly understood which categories comprised MTA's healthcare costs and which, like Medicare and the GHI Rider, did not.

As to Roberts' view that the very need for side letters in 2005 was evidence of a lack of precision in the CBA, Dellaverson stated that such side letters are a common element in most, if not all, labor agreements. Indeed, a total of six side letters were actually part of the 45-page MOU incorporated in the Nicolau Opinion and Award. Dellaverson also stated that the obvious error in one side letter that mistakenly substituted health "contributions" for health "costs" was not a serious impediment to arbitration, but simply a self-evident mistake.

In response to Roberts' assertion that Agritelley's initial inclusion of the IBNR, GHI High Option Rider and Medicare Part D was yet another indication of the lack of precision of the 2005 agreement, Dellaverson emphasized that this resulted because Agritelley was not a participant in 2005 and did not understand the intent of the parties. In fact, Dellaverson pointed out, the parties specifically discussed the IBNR in 2005 and agreed that it would not be included in the TA's health care costs.

As to Roberts position that what he believed was a lack of precision would make the result of any arbitration difficult to predict, Dellaverson reasserted his view that the 2005 CBA was clear to the parties involved and noted that, in any event, an inability to predict with certainty any arbitration decision is simply a reality in labor management relations.

Along with what he believed to be the general imprecision of the CBA, Roberts asserted in particular that the 2005 agreement had left two crucial issues unresolved. First was the issue of whether the 1.5% employee contribution established in that agreement was a floor below which the contribution could not fall in the remaining years of the contract. Second was the issue of whether employee contributions made in one year should be subtracted from the employee contributions to be made in the next year.

In regard to the question of whether employee contributions could fall below the 1.5% of wages set by the CBA for the first year, Roberts stated that despite the seeming clarity of the

relevant provision of the CBA speaking only to the 1.5% being increased, the intent of the parties, as referred to in a letter from Agritelley to TWU Counsel Walter (Terry) Meginness, dated June 7, 2007,[13] was to keep employee contributions to a constant 10% of overall health costs. It was this 10% target that Gary Dellaverson in 2005 had translated to 1.5% of wages, and which had been agreed to by the parties. (According to Dellaverson, his goal had been to have the Union contribute 10% of healthcare costs and that, by his own estimate, an initial percentage of 1.5% of wages would accomplish that goal. Former TWU President Toussaint added that tying the contribution rate to gross wages instead of healthcare costs was a matter of perception, or "optics," for his union membership, 1.5% of wages appearing less burdensome than stating the higher figure of a percentage of healthcare costs.)

According to Roberts, Agritelley's letter was the basis for Robert's belief that the 1.5% employee contribution could go down with a decrease in NYCT health care costs.

However, both Dellaverson and Macedonio, former MTA Labor Counsel, challenged Roberts' interpretation, stating that the parties in 2005 had certainly intended the 1.5% to be a floor, and had made this intention absolutely clear through the simple, straightforward language of the 2005 CBA. Both asserted that Agritelliey in his 2007 correspondence to the Union was simply re-stating the 10% target to which all parties had agreed, and which Dellaverson, at the Union's request, had converted to 1.5% of wages. All participants, Dellaverson and Macedonio emphasized, understood at the time that the 1.5% was a floor, and that this understanding was the very reason why the 2005 CBA provision was framed only in terms of an increase.

In addition, Macedonio stated that each new percentage increase was actually to become a new floor, rejecting the possibility of the employee contributions falling below 1.5% as "absurd." Further, he pointed out that the TA's healthcare costs had actually not gone down since the original agreement in 2005.

As to Robert's fear that an arbitrator could rule in favor of the Union's demand that employee contributions for 2006 and 2007 be deducted from the TA's health care costs in 2008, both Dellaverson and Macedonio, though recognizing that an arbitrator's decision is never entirely predictable, found Roberts' fear in this case to be particularly unfounded.

To begin, Macedonio stated that treating employee contributions as offsets to the TA's healthcare costs had no validity whatsoever. He observed that the very point in 2005 was that

[13] This letter contained the following passage: "During the past several weeks we have attempted to construct the correct formula for calculating the increase in yearly health care contributions. We have agreed that during negotiations on this subject, the parties intended for the contribution rate of 1.5% of wages to yield a constant percentage of health costs over time."

healthcare costs were "out of control" and that employee contributions were needed to bear a part of the burden. The very point of the agreement between the parties in 2005, he noted, was that the TA would continue to pay the vast majority of the costs and that the employees would contribute some 10%. Macedonio pointed out that since the employee contributions were needed as a revenue generator, it would be "absurd" to deduct these contributions from the next year's calculation. As he stated, this would be the equivalent of giving with one hand and taking back with the other. The entire purpose of the contribution provision, he argued, would be undercut. He declared that agreeing to this interpretation would make the TA's healthcare plan the only one of its kind to allow for such an off-set. For his part, Dellaverson added that an employee contribution off-set was raised by the Union originally in 2005 but rejected by the TA at that time.

As to the importance of employee healthcare contributions, Dellaverson observed that while the Union would have settled for a smaller raise in exchange for no employee healthcare contributions, he would not agree. Indeed, Dellaverson asserted that had the TA not insisted on obtaining either pension or healthcare employee contributions, the 2005 strike never would have occurred.

In his own analysis, Roberts placed significant emphasis on the potentially precedent-setting and damaging impact in an arbitration of Agritelley's ultimate reversal of his initial attempt in 2007 to treat Medicare Part D, the IBNR and the GHI High Option Rider as part of the TA's gross healthcare costs. Roberts said his concern was triggered by the Union's letter of February 22, 2008, rejecting the TA's proffered contribution escalation rate for 2008 of 1.6035%.[14]

Roberts stated that the decision he made in 2008, based in part on his perception that Agritelley's letter of April 27, 2007 (see page 5 above) had established an adverse precedent by excluding the IBNR from "gross health care costs," and by including an offset for the High Option Rider payroll deductions,[15] would not have been required had those costs not been excluded or offset, or had the parties defined "total health care costs" as "gross health care costs." He further argued that even if the TA agreed to deduct these items, any precedential impact could have been avoided had the TA insisted on a stipulation that "the cost of health benefits" had been perfected and that no further deductions would be allowed. Having failed to do so, the TA, in Roberts view, placed itself at significant risk in any further arbitration on the issue. As Roberts put it, he was compelled to make decisions as to the appropriate employee contribution rate for 2008 with no clear guidelines. He stated he did so based on his reading of the language, the 2007 precedents, and the "facts known to me at the time."

[14] See page 6 above.
[15] Apparently Medicare Part D had previously been excluded.

Dellaverson and Macedonio had a different understanding of these "facts."

Dellaverson asserted that Roberts' view confused two completely different conceptual issues. The 2007 categories that were excluded from the TA's gross health costs were, as noted above, simply items that the parties never intended to be included because the TA did not bear the costs, which was why he instructed Agritelley to exclude them. Employee payments pursuant to the 2005 contribution provision, on the other hand, were, according to Dellaverson, the very means by which the TA's employees would contribute a portion of their health care costs. This, Dellaverson stated, was the point of the entire exercise. Any other interpretation, he observed, would undermine the very purpose of the provision.

Macedonio, in agreeing with Dellaverson that Roberts had confused two entirely different issues, dismissed Roberts's analyses as "comparing apples with oranges."

Dellaverson and Macedonio rejected Robert's argument that he was left to make his decision in part because of a failure to limit the precedential impact of the 2007 decision through a written stipulation or other limiting language. Both Dellaverson and Macedonio asserted that there never was any confusion on this issue between the parties. Macedonio stated that the Union understood the issue from the beginning.

An additional explanation given by Roberts for his fear of an adverse decision in a potential arbitration, and his consequent decision to forego escalation of the employee healthcare contribution rate for 2008, was his belief, expressed to OIG, that the arbitrator who would likely hear the matter was an individual (not Nicolau) whose past awards favored the TWU.

In reviewing the 2005 Nicolau Opinion and Award, however, OIG noted the final paragraph (at page 16), which provides as follows:

> The Panel shall retain jurisdiction to resolve any disagreements as to the meaning, interpretation or application of this award. The Panel also retains jurisdiction to resolve any questions regarding effective dates of any provisions of the MOU that the Parties cannot resolve. Either Party may invoke that jurisdiction upon written notice to the members of the Panel.

While Dellaverson and Macedonio acknowledged to OIG that the matter could conceivably have been placed before another arbitrator, they asserted that any such result was unlikely given the clarity of this language.

When asked about the thought process described by Roberts to arrive at his decision, which Roberts essentially described as a routine risk assessment, both Dellaverson and Macedonio agreed that any responsible decision maker would have to conduct a risk analysis.

However, Dellaverson and Macedonio also clearly indicated their view that what Roberts did was a risk analysis in name only. They asserted that if Roberts truly wanted to assess the risks involved, he would have ascertained all of the facts and benefitted from the experience of others, particularly those involved in the 2005 negotiation and arbitration. Notably, though, both Dellaverson and Macedonio stated that they were never consulted by Roberts or by any member of his staff on any aspect of the employee contribution issue.

Moreover, while Dellaverson and Macedonio agreed that Roberts' weighing a potential monetary gain for the Authority of $1.6 million against a potential loss of $3.3 million was a meaningful element to be considered in any risk analysis, both former MTA officials argued that the principle established following the 2005 strike was in a larger sense, even more significant. Indeed, while Dellaverson was clear that he did not expect the TA to lose on this issue at arbitration, he noted that there were some issues so important – this being one – that they cannot be conceded, and that even if the TA loses, it can actually "win for losing."

Finally, when Dellaverson was asked whether the MTA Board should have been consulted prior to the making of this decision, he stated that while he understood that no formal requirement existed at the time to consult the Board or to receive Board approval, he believed sound governance required senior management to have briefed and consulted with its policy makers. He stated that the Board should have been fully briefed before Roberts decided not to escalate the rate of employee contribution to healthcare in 2008.

MTA's Governance Rules, Regulations and State Statutes at the Time of the 2008 Healthcare Contribution Decision

In conducting its review, OIG sought to determine whether any governance requirements were in place in 2008 that would have required President Roberts to inform any MTA Executives or the MTA Board before making his decision on employee healthcare contributions. OIG reviewed all relevant statutes, along with relevant MTA rules, regulations, by-laws and guidelines. Among those reviewed were the New York State Public Authorities Law, the By-Laws of the MTA Board of Directors, the Transit Authority Committee Charter and the MTA's Governance Rules.

At the time of this decision, Public Authorities Law § 2824 directed that Public Authority Board Members were to exercise direct oversight over the authority's chief executive and other executive management in the effective and ethical management of the authority. In addition, they were to "review and monitor the implementation of fundamental financial and management controls and operational decisions of the authority." The terms "fundamental financial and management controls" and "operational decisions" were not defined. The statute is also silent as to the specific information required to be provided to the MTA Board in regard to the day-to-day operations of the Agency or to labor-management issues.

MTA Governance By-Laws and Governance Guidelines in place in 2008 provide little guidance beyond the above statute. To the extent it was addressed at all, the division of authority between the MTA Board and agency executives was set out only in general terms. For example, the then-existing MTA By-Laws defined the Chairman's role as being "primarily responsible for providing leadership to the Authority and the Board as it oversees the management of the Authority…" and the Executive Director's as being "responsible for discharge of the executive and administrative functions and powers of the Authority, including the administration and the day-to-day operations of the Authority…"[16] The By-Laws also state that "the president of the subsidiary and affiliate agencies of the Authority are primarily responsible for the general management and operation of their agencies."[17]

The MTA's Governance Guidelines in place at the time, similar to the Board's By-Laws, speak only in general terms. The Governance Guidelines stated that:

> The Chair of the MTA shall be primarily responsible for (a) providing leadership to the MTA Board in performing oversight of the Authority's Executive Director and other senior management in the effective and ethical management of the MTA's integrated mass transportation system.[18]

The MTA Board itself was charged with being "responsible for the general oversight of the Authority's Executive Director and other senior management in furtherance of the effective and ethical management of the entire MTA, as required by law."[19] The Board's specific duties included "reviewing, approving and monitoring fundamental financial and business strategies and major actions, including fundamental financial and management controls."[20] Again, terms such as "fundamental financial and business strategies" and "management controls" are not defined.

These Governance Guidelines placed the responsibility for managing the day-to-day operations of the MTA's integrated mass transportation system[21] and "overseeing and providing appropriate direction to the President of each of the MTA's constituent authorities"[22] on the Executive Director. Finally, the Presidents of the MTA's constituent authorities were described under the Governance Guidelines as being "primarily responsible for the general management and operations of such constituent authorities."[23] Again, no definition of the terms "general management" and "operations" was provided.

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[16] MTA By-Laws, adopted April 26, 2006, Section 2 and Section 10.
[17] *Id.* Section 5.
[18] MTA Governance Guidelines, adopted December 19, 2007, § 1(a).
[19] *Id.* § 2.
[20] *Id.* § 2(c).
[21] *Id.* § 3(a)(i).
[22] *Id.* § 3(a)(iii).
[23] *Id.* § 3(b).

The Board's Charter of the Committee on Operations of NYCT in place in 2008 specifically charged the Committee with monitoring the Transit Authority's operating performance[24] and finances[25] and keeping the Chairman and the Board informed.[26] The Committee's Charter was silent as to any oversight responsibilities related to the implementation of collective bargaining agreements.[27]

MTA Management Structure and Governance Practices at the Time of the 2008 Decision

OIG also analyzed MTA's and TA's governance practices at the time the 2008 employee healthcare contribution decision was made. A number of MTA and TA executives were interviewed, including Roberts and Dellaverson. They stated that historically and at the time this decision was made, the MTA Board's formal role in regard to labor relations matters was limited to the ratification of new labor contracts or contract modifications. The implementation and interpretation of existing labor contracts was the responsibility of the agency presidents.[28]

While neither governance guidelines nor past practice required Roberts to have fully apprised the Transit Committee of the Board before making his decision in 2008 regarding the core issue of employee contributions to healthcare benefits, which he did not do, OIG strongly believes that doing so would have been the better practice.

Changes in Statutory Requirements since the 2008 Healthcare Decision

Along with the governance rules in place at the time of the 2008 decision, OIG reviewed the management structure in place at that time. Chartered by the New York State Legislature in 1965 as the Metropolitan Commuter Transportation Authority, the MTA was headed by a Chairman/CEO, placing both the leadership of the MTA Board of Directors and the management of its operations under one individual. This remained the organizational structure until the Public Authorities Accountability Act of 2005 enacted in January 2006, which separated the

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[24] MTA Charter for the Committee on Operations of the New York City Transit Authority, the Manhattan and Bronx Surface Transit Operating Authority and the Staten Island Rapid Transit Operating Authority, est. Jul. 29, 2004 (amended Dec. 13, 2006), § VI(1).

[25] *Id.* § VI(2).

[26] *Id.* § VI(3).

[27] The MTA General Counsel informed us that while the Board has the power to adopt guidelines, and had done so related to finance issues, procurement and real estate, there were no guidelines or rules related to the division of responsibility between the Board and Agency Presidents regarding labor relations at that time.

[28] Dellaverson told us that it had been his practice to meet with the Board regularly to update them on significant labor management issues. He also told us that as a matter of governance, not law, agency executive are required to advise the policymakers (*i.e.* the Board) of what they are doing. In his view, if not escalating the employee contribution rate in 2008 is considered an "interpretation" of the 2005 agreement (as Roberts maintained), Roberts should have briefed the Transit Committee, though no vote would have been required. However, if Roberts' action constituted a "modification" of that agreement, the Union members would have had to ratify it and Board approval would have been required.

roles of the Chairman of the Board and Chief Executive Officer.[29] At the time of the decision in question, Chairman H. Dale Hemmerdinger and CEO Sander served under this new structure.

In June 2008, Governor David A. Paterson appointed former MTA Chairman and CEO Richard Ravitch to head a Commission to study MTA financing.[30] In its report entitled "Report to Governor David A. Paterson from the Commission on Metropolitan Transportation Authority Financing" issued in December 2008 (the Ravitch Report), the Commission recommended re-combining the positions of Chair and CEO. Specifically, the Commission wrote:

> [T]he Commission believes that a 2005 statutory change, which altered the division of responsibility between the MTA chairman and Executive Director, was ill advised. Prior to 2005, the chairman acted as Chief Executive Officer of the authority with the power to delegate such powers as he or she deemed warranted to an Executive Director. After 2005 the Chairman ceased to have an executive role, and all executive responsibility was vested in an Executive Director who by statute is appointed by and serves at the pleasure of the Board …
>
> This new governance and management model, as it has evolved in practice, does not serve the interests of the MTA or its stake holders…The Commission is of the view that executive powers for running the MTA should be restored to an independent full-time MTA Chairman, serving for a fixed term.[31]

Subsequently, Public Authorities Law §1263(4) was amended to recombine the position of MTA Chair and CEO.[32]

Additionally, the Legislature amended New York State Public Authorities Law §1263(1)(a) to require that Board members appointed after June 2009:

> Have experience in one or more of the following areas: transportation, public administration, business management, finance, accounting, law, engineering, land use, urban and regional planning, management of large capital projects, ***labor relations***, or have experience in some other area of activity central to the mission of the authority. (Emphasis added.)[33]

[29] L. 2005, c. 766.
[30] Press release dated June 10, 2008.
[31] Ravitch Report at 12.
[32] L. 2009, c. 25, Section 5; Pub. Auth. L § 1263 (4)(a); effective upon the appointment and confirmation of new chair.
[33] L. 2009, c. 25, Section 4.

Prior to this amendment, other than the general guidelines for public authority board members,[34] there were no specific statutory qualifications for MTA board members. This new emphasis on future Board members' qualifications evidences a clear legislative intent that the Board be more involved in and better equipped to perform oversight regarding labor relations.

New Metropolitan Transportation Authority Corporate Governance Guidelines with respect to Labor Relations Matters

Along with the structural change in the MTA's leadership organization, and the new and enhanced qualification requirements for MTA Board membership, at Chairman Walder's request the Board in December 2009, adopted Labor Relations Corporate Governance Guidelines (the Guidelines)[35] specifically giving an increased role to the Board in its oversight of labor-management issues. The stated Purpose of the Guidelines is to:

> [E]nsure that the Board is kept apprised of material developments affecting collective bargaining and in furtherance of the Board's oversight of MTA management with respect to the collective bargaining matters of the MTA Agencies.

While under the new Guidelines the agency presidents remain primarily responsible for day-to-day matters affecting labor relations, the Chair/CEO is given broad responsibility to keep the Board informed. Specifically, the Guidelines provide that:

> The Chairman/CEO, as the official with executive and administrative responsibility for labor matters, shall serve as the principal liaison between management and the Board with respect to labor matters. The Chairman/CEO may act through his designee, the MTA Director of Labor Relations, in connection with providing the Board with information regarding the labor matters of the MTA Agencies that is relevant both to specific decisions that the Board is required to make and to the Board's effective fulfillment of its oversight responsibility.
>
> The Chairman/CEO shall assure that members of the Board receive regular and timely briefings or communiqués concerning significant developments with respect to labor matters. Such briefings or communications, which customarily shall be made by the MTA Director of Labor Relations, shall be provided as needed to keep members of the Board apprised of significant developments with respect to labor matters. Significant developments shall include, but not be limited to:
>
> - The forthcoming expiration of a major collective bargaining agreement (CBA);

[34] Pub. Auth. L. § 2824.
[35] The Guidelines are published on the MTA's website at http://mta.info/mta/compliance/pdf/labor_1209.pdf.

- Key bargaining objectives;
- The status of negotiations with respect to an impactful CBA, including the parties' negotiating positions;
- Proposed agreement to interest arbitration or public interest arbitration;
- The status of impasse proceedings, if any, leading to Taylor Law public interest arbitration or, in the case of the commuter rail lines, the status of bargaining-related proceedings under the Railway Labor Act;
- Pending contract modifications or interpretations with a substantial cost.

In short, the new Guidelines mandate that the MTA Board will be better informed, and thus better positioned, to have a meaningful role in future labor relations.

CONCLUSION

Virtually by definition, and certainly to be meaningful, assessing a risk involves an open-minded, fact-gathering process, performed with due diligence. In our view, by that standard Roberts could hardly be performing a valid risk assessment regarding the employee healthcare contribution provision when he chose not to consult with the MTA Labor officials, particularly Dellaverson and Macedonio, who successfully negotiated that provision with the TWU, as well as other unions, following their 2005 strike against the Transit Authority.

By excluding Dellaverson and Macedonio, Roberts deprived himself of invaluable and singular insight into various aspects of the negotiation and arbitration process in which Roberts himself (and his staff) had no part.

To begin, both Dellaverson and Macedonio, his counsel, were experienced attorneys specializing in labor matters, with Dellaverson having been the MTA Director of Labor Relations and its Chief Negotiator for some 16 years. Further, Dellaverson was the Transit Authority member of the Nicolau Panel, with unsurpassed access to all aspects of the process, and to the Panel Chair, George Nicolau. Moreover, Dellaverson was also the very first witness called at the arbitration proceeding before the Nicolau Panel. Indeed, it was through Dellaverson that the Transit Authority introduced in evidence "Joint Exhibit 3," which was described at the hearing as "the memorandum of understanding signed on December 27, 2005"[36] – the very document Roberts later tried to interpret.

Had Roberts spoken with Dellaverson, Roberts could have explored the entire range of issues that concerned him, including some Dellaverson touched upon in his testimony, such as the linkage between "wage growth and health inflation,"[37] and that the parties had jointly engaged an actuarial firm to do all the health costings, "a technique that the parties used in the past, so there would not be lots of give and take on what is a difficult set of projections when you get into the health area."[38] Roberts could also have heard from Dellaverson, as we did, that the parties understood at the time of the 2005 negotiation that the contribution rate was a floor that would not go lower (at least during the three-year life of the agreement). This would have been confirmed by Macedonio, had Roberts spoken to him.

Had Roberts spoken with Dellaverson and Macedonio, they could have explained their view that subtracting from health costs the employee contributions made pursuant to the healthcare contribution provision was a distortion that defeated the entire purpose of that contribution. Macedonio, who described the subtraction as "absurd," told OIG that this distortion would transform the plan into the only one he ever heard of that backed out employee contributions from the concept of the cost of health care.

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[36] See Transcript of the interest arbitration between the TA and the Union (Tr) at p. 6.
[37] Tr at 58-59.
[38] *Id.* at p. 14.

Dellaverson and Macedonio could also have explained their view about the difference between such contributions and any contributions involving Medicare Part D and the GHI High Option Rider, in that the former was not a cost of the employer (given federal reimbursement) and the latter was paid for entirely by the employees. Indeed, Dellaverson would have confirmed that in 2007 he instructed Agritelley (who was not at the negotiation) to exclude these items because they were not part of the gross costs of health care.

While we find neither violations of law nor of MTA rules or regulations existing at the time, we are constrained to conclude that Roberts' decision was not fully informed. Essentially, he passed up the opportunity to gather together all the knowledgeable parties, calling on them to express their views, some dramatically opposed to his own, and to have a full airing of the issues. Specifically, he failed to hold even a single meeting or conversation that involved Dellaverson and/or Macedonio In short, he made his decision in relative and self-imposed isolation, without the experience and knowledge of those individuals personally involved in the negotiation and arbitration of the issues involved.

Although decisions made by the Transit Authority with the TWU could have significant impact on labor negotiations by other MTA agencies with other unions, it does not appear that Roberts or Pierce (his Senior VP for Administration) considered discussing the issues with the other agencies. Ralph Agritelley, the former TA Vice President of Labor Relations and current LIRR Director of Labor Relations, stressed the need for all of the constituent agencies to work together, not against each other. "Communication and coordination," he asserted, were of the utmost importance.

The failure to communicate and coordinate in this case continued the unfortunately familiar "silo mentality" and lack of transparency that top MTA leadership has been struggling to eradicate for decades.

Finally, the Transit Committee and the full MTA Board were excluded from the process, even on an informational basis. This denied the Board an opportunity to provide its input and agency-wide perspective, which effectively deprived it of the ability to fulfill its own role as MTA's ultimate policy-making authority.

While senior agency executives must be afforded the freedom to exercise broad discretion in making day-to-day operating decisions, certain issues are clearly significant enough to inform, and to seek input from, an actively involved Board of Directors. Employee contribution to the cost of healthcare is clearly such an issue, one with implications beyond the Transit Authority alone.

While the issue itself warranted Board involvement, the particular circumstances of this decision made such involvement all the more compelling. Among these circumstances was that Roberts was not at the MTA when the 2005 strike occurred; he did not participate in the negotiation or arbitration of the landmark employee contribution provision; he was not involved in the first round of employee contribution negotiations in 2007; and as the Transit Authority was but one, albeit the largest, of the MTA's agencies, Roberts needed to respect the others and

take care that his decision did not upset the dynamics between those agencies and their respective unions.

As discussed above, the manifested intent of the new MTA Labor Guidelines is to increase the flow of information from the agency heads to the Board and to:

> Ensure that the Board is kept apprised of material developments affecting collective bargaining and in furtherance of the Board's oversight of MTA management with respect to the collective bargaining matters of the MTA Agencies.

While the agency presidents continue to be responsible for the day-to-day matters affecting labor relations in their individual agencies, the Chairman/CEO or his designee, the MTA Director of Labor Relations, is charged with assuring that the Board receives "regular and timely briefings" concerning "significant" developments with respect to labor matters. In our view, the issues surrounding the 2005 employee healthcare contribution provision were of such significance that the matter should have been discussed with the Board, even in the absence of applicable governance requirements. Now that such requirements are in place, the Board should be fully informed whenever significant labor issues like this arise in the future.

PART TWO: THE ZUCCOTTI COMPENSATION ARRANGEMENT

In addition to the healthcare cost escalation issue discussed above, Chairman/CEO Walder requested a review of the compensation arrangement made with John Zuccotti, who served as the neutral arbitrator on the latest (2009) contract negotiations involving parties including the TWU, the Transit Authority, and MTA Bus. Specifically, the Chairman asked for OIG's "independent investigation and review of the fee arrangements made by the parties with Mr. Zuccotti to clarify what arrangements in fact were made and whether those arrangements were appropriately made."

The Taylor Law and PERB

The Taylor Law was enacted to "promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government."[39] Portions of the Taylor Law specifically apply to the MTA, including the resolution of labor-management disputes.[40]

PERB is an independent agency created by the Taylor Law[41] that, among other responsibilities, assists in resolving employment disputes between various public employers and the unions that represent their workforce.[42] Under the statutory framework, PERB is authorized to create a public arbitration panel to resolve MTA labor-management disputes whenever needed. This need may be identified by PERB itself, or the parties may jointly request that PERB create a public arbitration panel to resolve their dispute(s).[43]

Such a panel is composed of three arbitrators: one selected by management, one selected by the union and one selected jointly by management and the union.[44] This jointly selected member of the panel is commonly referred to as the public member or "neutral." Management and the union can select this public member from either a list of PERB-approved neutrals, or they may agree upon a neutral that does not appear on that PERB-approved list. Specifically, New York Civil Service Law § 209(5) provides in pertinent part that PERB:

> [S]hall refer the dispute to a public arbitration panel, consisting of one member appointed by the public employer, one member appointed by the

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[39] Civil Serv. L. (CSL) § 200.
[40] CSL § 209(5).
[41] CSL § 205(1) ("There is hereby created in the state department of civil service a board, to be known as the Public Employment Relations Board.").
[42] CSL § 209(3)(a)-(f).
[43] More specifically, PERB can empanel this arbitration panel either when it certifies that the MTA and an appropriate public employee organization have reached an impasse in their negotiations such that "a voluntary resolution of the contract negotiations . . . cannot be effected, or upon the joint request" of the MTA and TWU. CSL 209(5)(a).
[44] *Id. See* 4 NYCRR Ch. VII § 205.18(a).

> employee organization and one public member appointed jointly by the public employer and employee organization who shall be selected within ten days after receipt by the board of a petition for creation of the arbitration panel. If . . . the parties are unable to agree upon the one public member, the board shall submit to the parties a list of qualified, disinterested persons for the selection of the public member."

We were informed by representatives of PERB that typically when PERB forwards a list of names of possible neutrals, PERB may also include other information which the neutrals may have provided to PERB; for example, the neutral's resume and the neutral's fee schedule.

We were also informed that PERB does not require the PERB-approved neutral to provide such information to PERB, nor does PERB comment on the appropriateness of the PERB-approved neutral's billing rate(s). PERB acts merely as a conduit of the information provided to it by the neutral. Any negotiations over the billing rates of the neutral are left to the parties.

Finally, PERB representatives told us that in the vast majority of arbitrations neutrals charge a daily *per diem* rate rather than an hourly rate.[45]

Impasse Proceedings before PERB

On or about January 6, 2009, eight days before the MTA-TWU contract was to expire, Ben Fernandez and Roger Toussaint signed a Joint Declaration of Impasse and Joint Request for Interest Arbitration with PERB, triggering the creation of an arbitration panel. Over the next few days, there were numerous reports in the press concerning the decision to proceed with impasse arbitration.[46]

The Selection of John Zuccotti as the Neutral

John B. Zuccotti is a New York attorney, of counsel at Weil, Gotshal and Manges LLP (the Firm). He served as the chairman of the New York City Planning Commission during Mayor Lindsay's administration and as the First Deputy Mayor of the City of New York under Mayor Abraham Beame.

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[45] While various arbitrators charge different rates for the time the neutral actually spends in hearings and for "study time" spent preparing for those hearings, such rates are still *per diem* rather than hourly. For example, during the 2006 contract negotiations between the Transit Authority and the TWU, the neutral George Nicolau charged a $2,000.00 *per diem* rate, applied to hearing and study days. Nicolau reported 10 hearing days and 7.5 study days, with no additional expenses for transportation, hotels or meals. Nicolau's total bill was $34,000.00, to be divided equally between the parties.

[46] *See, e.g.*, MTA & Union OK Arbitration, N.Y. Post, Jan. 7, 2009, p. 9; Let the TWU Share Riders' Pain, N.Y. Post, Jan. 9, 2009, p. 28; MTA, Union Go To Arbitration, Newsday, Jan. 8, 2009, p. A24; MTA, Union Talks Stall, Daily News, Jan. 7, 2009, p. 12.

After considering various neutrals upon which the MTA and TWU were unable to agree, Howard Roberts suggested to Lee Sander and Toussaint, the prospect of retaining Zuccotti, who was not then a PERB-approved neutral.[47] Sander and Toussaint were amenable to retaining Zuccotti and requested that Roberts contact Zuccotti to gauge his interest in serving as an arbitrator. Zuccotti served previously as an arbitrator adjudicating disciplinary disputes between MaBSTOA and its employees represented by the TWU and as a contract arbitrator between the MTA and TWU from 1982 through 1992.[48]

Roberts met Zuccotti to explore the possibility of Zuccotti's service. During that meeting, Zuccotti informed Roberts that he would agree to serve as the arbitrator on the condition that both the Governor of the State of New York and the Mayor of the City of New York approved. After Roberts informed Sander and Toussaint about this requirement, Sander stated that he contacted both the Governor's Office and the Mayor's Office and obtained their approval of Zuccotti's appointment.

By letter dated January 21, 2009, the MTA and TWU notified PERB of their "agreement . . . to the appointment of John B. Zuccotti as the neutral member of the arbitration panel." On January 30, PERB designated Zuccotti as the Public Panel Member and Chairperson. Since Zuccotti did not provide PERB with a breakdown of his fees, PERB did not have that information to relay to the MTA and TWU. Although the parties had selected Zuccotti as the neutral arbitrator, they had not discussed with him the terms of his service or compensation.

The First Meeting between Zuccotti, Roberts, Sander and Toussaint

On or about the first week of February 2009, Roberts, Sander, Toussaint and Zuccotti met for lunch to discuss these details. The recollections of each of the participants at this meeting are essentially consistent, though each may be more certain about one particular point or another.

Based upon our interviews of all the participants and an analysis of documents generated proximate in time to this lunch meeting, the consensus is that, during this meeting, Zuccotti indicated that he would accept the position as a public service and would not accept payment for his work. Instead, he said his fee, which would be computed using a discounted hourly rate that the Firm charged non-profit organizations, would be donated to charity.[49] Zuccotti also stated

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[47] Nothing in the Taylor Law required any prior appointment by the parties or designation by PERB for an individual to be eligible for selection by the parties or to serve as the neutral thereafter.

[48] Roberts told the OIG that he suggested Zuccotti because of his extensive labor arbitration experience between public employers and their respective unions and, in particular, Zuccotti's prior service as a labor arbitrator between the MTA and TWU.

[49] Toussaint recalls that Zuccotti named the TWU Local 100 Widows and Orphans Fund (the "Fund") as the recipient of Zuccotti's donation at this meeting. This is Zuccotti's recollection as well, although he later told OIG that he believed the Fund was a joint undertaking of the MTA and the TWU, explaining why he made reference in his bill to the "MTA/TWU" Fund.

(Continuation of footnote 56)

The Fund is a 501(c)(3) tax exempt organization, established in 2001 to provide support for dependents of TWU represented employees who die in the line of duty. This support is to include continuing health insurance benefits, through COBRA payments, and financial assistance for education costs. In the case of employees who wish to make

that he would utilize Lawrence Baer (a labor lawyer with the Firm), as his counsel. He noted that Baer was to be compensated by the parties, but at the aforementioned non-profit rate. Zuccotti stated that everyone present viewed this arrangement as reasonable and that there was no objection.

The parties in attendance told us they did not believe the arbitration would be overly complex. Rather, they believed at the time that many issues could be resolved by stipulation. Moreover, Zuccotti had travel plans and wanted an assurance that the matter could be concluded by April 2009. The parties agreed that this was likely.

Attempts to Determine Zuccotti's Fee

Immediately after the meeting, Roberts emailed Zuccotti seeking specificity concerning the hourly rates Zuccotti and Baer would charge, noting the need to memorialize a retention agreement and asking whether Zuccotti wanted that written agreement to include his intention to donate his compensation to a charity. Specifically, by email dated February 6, 2009, Roberts sent the following message to Zuccotti: "Need hourly rates for you and Lawrence Baer in order to draw up an agreement. Also need to know if you want to include the fact that you plan to donate your compensation?" Roberts stated that he never received a response to this email.

Sander stated that because the matter at hand was the negotiation of a new labor agreement, he instructed Roberts to step back from further involvement with the arbitration and leave these matters to Fernandez who, as MTA's Director of Labor Relations, functioned as its chief labor negotiator.

As part of this transition, Roberts sent an email to Fernandez on February 20, 2009, copying Sander and James Henly, MTA's General Counsel, recommending follow up on fees, Zuccotti's intent to donate his fee to a charity and the need to memorialize this arrangement.

Specifically, Roberts wrote:

> Ben,
>
> You should talk to Lawrence Baer about fees. John Zuccotti mentioned that his firm has a non-profit rate, which he thought would be appropriate for himself and Lawrence Baer, who Zuccotti wants to serve as staff to the

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a contribution to the Fund or certain other charities and provide authorization, the MTA deducts a portion of their paychecks to reflect their desired contributions and sends them to the charity on the employees' behalf.
For his part, Roberts recalls mention of Zuccotti's fee going to charity, but does not recall that a specific charity was named at this meeting. Sander did not dispute that Zuccotti mentioned donating his fee to a charity, but also did not have a specific recollection as to its identity. In any event, when interviewed by the OIG, both Roberts and Sander said that they would not have viewed Zuccotti's selection of the Fund as inappropriate.

> neutral. I believe Dall Forsythe[50] said his rate was $150 per hour. We may want to pay him no less, however, than Zuccotti and Baer.
>
> John Zuccotti has said that he wants to contribute his fee to a charity.
>
> Presumably Jim Henly can draft an agreement setting forth the fees, the fact that the Zuccotti and Baer fees are split between the TWU and the MTA, the Zuccotti fee goes to a designated charity, etc. I mentioned the need for such a memo to Jim the other day.
>
> Howard

On the morning of February 18, 2009, two days before the above email from Roberts, Henly received an e-mail from MTA's outside labor counsel advising that "Typically the parties would receive a letter from the impartial at the outset informing them of his/her usual rate." The e-mail went on to offer to "…dig out what the impartials in the last few City interest arbitrations were paid as a reference point…" That same day, Henly forwarded this message to Fernandez, and asked whether Fernandez wanted Henly to "dig up that information?" Fernandez responded by email several hours later saying simply, "I'll handle it."

On February 20, 2009, Henly responded to Roberts' concerns about the need to memorialize an agreement with Zuccotti in an MOU by stating that he did not believe a "formal agreement requiring legal work" was necessary, but rather that a letter setting out the fee arrangement had been the model in the past. Specifically, Henly wrote:

> Ben is looking into the manner in which this was handled in the arbitration held most recently, which can serve as the model. I don't believe there way [sic] any involved formal agreement requiring legal work, but simply a letter setting forth an hourly rate for the neutral and the understanding of Local 100 and MTA/ TA/OA to split the resulting fees. Ben is checking.

In an interview with the OIG, Henly explained that this was his view because, although a law firm was retained, this retention was not technically a "legal procurement" as neither Zuccotti nor Baer nor the Firm was providing legal advice to or representation of the MTA. Henly was not involved in contacting Zuccotti or Baer to determine their fees.[51]

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[50] Dall Forsythe was the MTA-appointed member of the interest arbitration panel.

[51] We explored the question of whether the retention of Zuccotti needed Board approval as would be required for "sole-source" procurements exceeding $20,000. In the opinion of MTA's General Counsel, with whom we concur, the selection of a neutral arbitrator, pursuant to the Taylor Law, is not a "sole-source" procurement within the meaning of the MTA guidelines, requiring Board approval. The Taylor Law obligates the parties "…to share equally the cost of the public member." Indeed, we found no precedent, custom or practice of seeking Board approval on the selection of neutrals pursuant to the Taylor Law as "sole-source" procurements.

This task fell to Fernandez. Sander stated that, in his view as CEO of the MTA, it was proper for Fernandez to address this issue because it concerned a labor relations matter. Fernandez was apparently of the same mind, as he indicated in an email reply to Roberts (copy to Sander and Henly) later on February 20, that he "will follow up" in determining Zuccotti's fee.

Fernandez recalls making two or three attempts to contact Zuccotti, placing at least one (and possibly two) phone calls to Baer, speaking with Baer in person during a break at one of the arbitration sessions, and sending one email to Baer. According to Fernandez, Baer never responded to his email, though Baer did inform Fernandez in a telephone call that his fee was $700 per hour and that there was a lesser hourly rate for an associate at the Firm also working on the matter.

Fernandez stated that he told Baer that the MTA did not pay such rates, and asked that Baer provide a lower rate applicable to not-for-profit organizations. Fernandez stated that Baer was non-responsive to his inquiries concerning Zuccotti's fee and never provided the non-profit discounted rates. Fernandez acknowledged that, following these attempts, he did not pursue this matter further, attributing this to his own oversight. Fernandez also acknowledged that he did not bring this issue to Sander's attention.

In his interview with OIG, Baer acknowledged receiving inquiries from Fernandez about the Firm's billing rates, informing Fernandez of his billing rate, and discussing the Firm's rate for not-for-profits. Baer stated that he investigated the Firm's various rates, including various rates applicable to not-for-profits, but somehow he was unable to determine with "clarity" the Firm's appropriate not-for-profit rate for this engagement.

The Bill

On July 9, 2009, the Firm addressed its bill jointly to the MTA and the TWU.[52] Although the first entry on the bill was January 29, the Firm had not provided any intervening monthly statements. In a cover letter Zuccotti wrote:

> Enclosed is our bill for services rendered through June 30, 2009 in connection with the Interest Arbitration. I have not included charges for my work as my firm and I had agreed to proceed on a pro bono basis. The total for my time is [sic] 129 hours at $900 per hour is $116,100.
>
> My understanding with Mr. Sanders [sic] and Mr. Toussaint, is that the parties would make a contribution to the MTA/TWU Widow and Orphans Fund in lieu of my payment.

As for the Firm, it billed $288,469, to be divided equally between the MTA and the TWU, for fees and expenses.

[52] Although the first entry on the bill was January 29, the Firm did not provide any intervening monthly statements.

The fees, for lawyers and, support staff, totaled $272,200:

- $146,010 - An associate at the Firm billed for 314 hours at $465 per hour;
- $117,320 - Baer billed for 167.6 hours at $700 per hour;
- $8,840 – Paralegal and library staff, 55 hours at $160 / $195 per hour

The expenses totaled $16,269:

- $11,295 – Business Meals[53]
- $1,807 – Duplicating
- $3,130 – Computerized Research
- $22.00 – Local Transportation
- $14.00 – Postage

Inexplicably, in the end, the bill did not reflect any not-for-profit or other discounted rate.

CONCLUSION

OIG finds that the compensation arrangement was not handled in an acceptable manner.

To begin, it is self-evident that MTA/NYC Transit should have confirmed the terms of the retention agreement and memorialized them in writing. Certainly, before actually retaining Zuccotti, MTA/NYC Transit should have identified, with precision, the actual fee the Firm would charge under its not-for-profit rate. Proper regard for the expenditure of public funds requires no less. Common sense dictates that if the neutral's fees were to be negotiated, the time to do so was before the neutral had actually been engaged and started work, not after. Further, MTA/NYC Transit should have at least explored why the rate charged was hourly, rather than *per diem* which, as PERB told us, is the rate most often charged by arbitrators.

[53] We note that the standard retainer letter for legal services provides, in pertinent part, that unless otherwise approved in advance by the General Counsel or designee, the MTA shall not pay for meal charges, "except for actual and reasonable expenses (i) when the partner in charge of the matter determines that it is necessary to perform work after normal business hours or (ii) which are required for business purposes, such as working meals with Authority representatives or expenses incurred while preparing a witness for trial."

Moreover, it is simply incomprehensible that Baer remained nonresponsive when Fernandez indicated to him that the MTA did not pay rates as high as the $700 per hour that Baer quoted, and that Baer never provided the promised not-for-profit rate, nor the discount of 20% off standard rates usually accorded to the MTA by private counsel. Faced with Baer's nonresponsiveness, Fernandez should have alerted Sander, the MTA CEO, or Henly, the MTA General Counsel. Since Henly is responsible for MTA's relationships with law firms that do business with the agency, he would have been a natural ally in resolving this issue.

Perhaps by way of some explanation for the less than thorough and rigorous manner in which these fee negotiations were approached, the parties noted that at the time they agreed to retain Zuccotti, they anticipated that the arbitration would be straightforward, would not require a significant time commitment, and thus would not involve significant expense. Given the always contentious nature of labor negotiations, though, it is entirely predictable that the actual proceedings turned out other than as anticipated. Regardless of the cost or length of the proceedings, however, failing to confirm the compensation arrangement and memorialize it in writing, relying instead on an oral and open-ended agreement, was a serious and basic mistake.

To date, the MTA has not paid the Firm's undiscounted bill. As to Zuccotti's portion, the MTA General Counsel informed us based on conversations he had with Zuccotti after MTA's receipt of the bill, that Zuccotti has agreed to waive his fee entirely. As to the Firm's portion, given the absence of any written agreement, the failure of Baer to answer basic questions and the absence of monthly statements, which should have raised red flags, we believe the MTA is entitled to, and should demand, a full accounting of all fees and disbursements, before this bill is paid.

In the last analysis, whatever part of the Firm's portion of the bill survives accounting obviously must be adjusted to ensure that the MTA receives the benefit of the original bargain to have a discounted, not-for-profit rate. At the very least, since this bill as presented seems virtually indistinguishable from any other bill for legal services, this discount should at a minimum equate to the standard 20% discount the MTA receives off regular law firm rates for outside counsel.