



***AGENCY REORGANIZATION  
& GOVERNMENT ACCOUNTABILITY***

STAFF OPTIONS BRIEFING PAPER

THE NEW YORK CITY  
CHARTER REVISION COMMISSION

June 26, 2003

## **AGENCY REORGANIZATION & GOVERNMENT ACCOUNTABILITY**

On March 26, 2003, Mayor Michael R. Bloomberg appointed Dr. Frank J. Macchiarola, President of St. Francis College, as Chair of the Charter Revision Commission, and on April 6 appointed ten other distinguished leaders from the civic, academic, and business communities. The Commission is the most diverse in the City's history, a majority of its members from boroughs other than Manhattan.

### **The Commission Members**

**Dr. Frank J. Macchiarola (Chair)** is President of St. Francis College in Brooklyn. His service to New York City stretches back three decades and he was most recently called upon to be the mediator who helped settle the Broadway musicians strike. He served as chief of staff of the Emergency Financial Control Board (1975-1976), schools chancellor (1978-1983), and president of the New York City Partnership (1983-1987). He chaired the Districting Commission (1990-1992) and he has been a member of two Charter Revision Commissions (1986-1988 and 1983), the Campaign Finance Board (1988), the Water Board (1985-1988), and the Tax Study Commission (1986-1990), and chaired a New York City Partnership study of the Board of Elections (1985). His career has included service at the City's public and private universities: as Dean of the Benjamin N. Cardozo Law School, Yeshiva University; as Professor and Assistant Vice President, Columbia University; as Professor and Assistant Vice President, at Baruch College and The Graduate School and University Center, The City University of New York.

**Cecilia Norat (Vice Chair)** is Director of State Relations for the American International Group. She was a member of the 2002 Charter Revision Commission and is a resident of Manhattan.

**Pat Gatling (Secretary)** is the Commissioner and Chair of the New York City Commission on Human Rights. She was a member of the 2002 Charter Revision Commission and is a resident of Manhattan.

**Jerry Garcia** is Vice President and Global Business Manager at J.P. Morgan Investor Services. He was a member of 2002 Charter Revision Commission and is a resident of Brooklyn.

**Mohammed Khalid** is a Doctor of Dental Medicine and President both of the Iron Hill Civic Association, and the Pakistani Civic Association of Staten Island. He is a resident of Staten Island.

**William Lynch, Jr.** is Chief Executive Officer of Bill Lynch Associates, and a former New York City Deputy Mayor under Mayor David Dinkins. He is a resident of Manhattan.

**Steve Newman** is Chief Operating Officer of the Medical and Health Research Association, and a former New York City Deputy Comptroller. He is a resident of Queens.

**Father Joseph O'Hare, S.J.** is President of Fordham University, and the former Chair of the New York City Campaign Finance Board. He is a Bronx resident.

**Katheryn Patterson** is a former law partner at Coudert Brothers. She is a resident of Manhattan.

**Fred Siegel** is a Professor at the Cooper Union for Arts and Sciences, and a former Fellow at the Institute of Advance Studies. He is a resident of Brooklyn.

**Veronica Tsang** is Vice President of Chase Workplace Financial Services. She is a resident of Queens.

### **The Commission Staff**

The Commission is staffed mainly by career public servants and pro bono attorneys and is led by its Executive Director, Alan Gartner, and Chief Counsel, Anthony Crowell.

**Alan Gartner** has served at The Graduate Center, CUNY, as Dean for Research and Co-Director, National Center on Educational Restructuring and Inclusion; as Executive Director, Division of Special Education, New York City Public Schools; and as Executive Director, New York City Districting Commission. He is the author or co-author of greater than two-dozen books on education, race, social policy, and disability. Dr. Gartner is on leave from his position as Research Director in the Office of Dennis Walcott, Deputy Mayor for Policy.

**Anthony Crowell** has extensive experience with the process of Charter revision. He served as Co-Executive Director to the 2002 Charter Revision Commission, General Counsel of the 2001 Commission and Counsel to the 1999 Commission. Prior to joining the City, he managed government affairs and policy at the International City/County Management Association (ICMA) in Washington, D.C. He is an adjunct professor both

at Brooklyn Law School and New York Law School, where he teaches municipal law. He has published numerous articles on public management and legal affairs. Mr. Crowell is on leave from his position as Special Counsel to the Mayor.

Other members of the staff include: Francis Barry, Research Director; Paul Elliott, Communications Director; Howard Friedman, Special Counsel; Mary Rose O'Connell, Deputy Chief Counsel; Elaine Reiss, Pro Bono Counsel; Jonathan Rosenbloom, Special Counsel; Owen Stone, Deputy Director for Communications and Research; Dana Shonk, Special Assistant; Mark Tyler, Chief of Staff and Deputy Chief Counsel; Sara Vidal, Director of Community Affairs; Richard Wager, Senior Advisor; and Jimmy Yan, Deputy Chief Counsel. The Commissions legal and research interns include: Rebecca Adams, Justin Bernstein, Krystal Castle, Shawn Clark, Ralph Constantino, Tom Donohoe, Ariel Dvorkin, Matt Elkin, Shakima Figuera, Brian Kaszuba, Kryzstof Lach, Allica Lam, Tiffany Leyseth, Tucker McKee, Jinja Murray, Jae Woo Park, Erick Payton, Ingrid Rodriguez, David Shyer, Harold Thompson and Chris Watson.

### **The Commission's Public Outreach and Proceedings**

The Commission pursued its mission from the start by reaching out to the public. Prior to its first meeting, the Commission published, on a daily basis, the public notice announcing the meeting in the *City Record* and on its website at [www.nyc.gov/charter](http://www.nyc.gov/charter). The notice was mailed to approximately 3,000 individuals on the mailing list of the 2002 Charter Revision Commission. Shortly thereafter, the Commission sent a second notice with the complete listing of all upcoming public meetings and hearings. This notice was

also published on a daily basis in the *City Record* and mailed to approximately 9,000 individuals on a mailing list that combined those of the 2002 Charter Revision Commission and the 2002-2003 Districting Commission. In response to the Chair's solicitation, the Commission's staff received many letters, telephone calls and e-mails either requesting information on or containing proposals for Charter revision.

### **Scope of Review**

On April 14, 2003, the Commission held its initial public meeting. Chairman Macchiarola stressed that the Commission was committed to reviewing the entire Charter and encouraged the other Commissioners, the public and City agencies to continue to raise issues for possible Charter revision. Chairman Macchiarola emphasized that the Charter review proceedings would be fair and open to the public. The Commission staff provided an orientation to the Commission members on the Charter, the process of Charter revision and the range of issues addressed by the previous three Charter Revision Commissions: the 1998 Powers Commission, the 1999 and 2001 Mastro Commissions, and the 2002 McGuire Commission. Briefing binders containing the public reports of prior Commissions were given to the Commissioners.

Between May 14 and June 2, 2003, the Commission held nine meetings, including public hearings and expert forums, in all five boroughs which received extensive public participation.<sup>1</sup> These events were held on May 13 and May 27 in Manhattan; May 22 and

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<sup>1</sup> The Queens hearing, held at LaGuardia Community College, was directly accessible by four major subway lines as well as bus lines. The Brooklyn hearing at DeKalb Branch of the Brooklyn Public Library, was accessible by subway lines as well as numerous bus lines. Manhattan's public hearing at the Adam Clayton Powell State Office Building was easily reached by subway as well as by bus. The hearing at Eugenio de Hostos

May 28 in Queens; May 20 in Staten Island, May 14 and May 29 in Brooklyn; and May 19 and June 2 in the Bronx. All members of the public were given three minutes to speak at the public hearings, but many spoke for more than the allotted time.

At the June 2 public meeting, the Chair, after extensive discussion with the Commission, directed the staff to prepare reports with preliminary options and recommendations in three areas: nonpartisan elections, procurement, and agency reorganization. He also asked the Commission and staff to continue in its review of the entire Charter.

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Community College in the Bronx was accessible both by subway and bus. The Staten Island hearing, held at Curtis High School, was accessible by the Staten Island ferry and by car, a principal means of transportation for Staten Islanders. All of these facilities were fully handicap accessible and equipped to accommodate more than 200 persons. Additionally, sign-language or translation services in Chinese, Korean and Spanish were made available.

## **AGENCY REORGANIZATION & GOVERNMENT ACCOUNTABILITY**

At its June 2, 2003 meeting, the Commission directed staff to review recommendations received at the public hearings in May, those deferred by previous commissions, and to research other areas of the Charter concerning the topic of agency or government accountability. The Commission asked for a summary briefing of selected issues so that it could give the staff further direction. The issues discussed fall into several categories: (1) administrative tribunals; (2) the budget; (3) government integrity; and (4) independent agencies.

### **1. Administrative Tribunals**

At the Commission's forum on agency reorganization, it heard testimony about the Office of Administrative Trials and Hearings ("OATH"), the City's central administrative court, and other City tribunals. In light of the variety of judicial and court reforms taking place around the country and in the State, and being mindful of the State judicial scandals that have erupted over the last 15 months, the Commission asked for information on OATH to better understand the City's administrative justice system. In particular, they requested historical perspectives on OATH and the Charter's intent with respect to OATH's relationship with the various other City tribunals.<sup>2</sup>

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<sup>2</sup> Those tribunals are located within the Departments of Consumer Affairs, Health and Mental Hygiene, Housing Preservation and Development, as well as at the Police Department, Loft Board, Environmental Control Board, Parking Violations Bureau, Taxi and Limousine Commission, Civil Service Commission, Tax Commission and Tax Appeals Tribunal, among others.



## ***OATH***

Since 1979, The Office of Administrative Trials and Hearings (OATH) has functioned as a central tribunal with the authority to conduct administrative hearings for any agency, board or commission of the city. OATH, established by Executive Order No. 32 to professionalize the administrative hearing system serving City government, was to function as an independent agency of government so that its judges would not be unduly influenced by the prosecutor or petitioning agency.

OATH was created as a Charter agency in 1988 as part of the Charter revisions which comprised the City Administrative Procedure Act (CAPA). The adoption of minimum standards for the conduct of administrative hearings and the establishment of OATH as the City's presumptive independent tribunal were two of CAPA's primary reforms.

Charter §1048 states that OATH "shall conduct adjudicatory hearings for all agencies of the city, unless otherwise provided for by Executive order, rule, law or collective bargaining agreements"(emphasis added). Thus, the Charter envisioned a broad and remedial mandate for OATH as confirmed by the *Report of the Charter Revision Commission*, Vol. 2 at p. 103 (April 1989):

[t]he purpose of formalizing OATH in the charter is to establish an independent adjudicative body that can be a resource to agencies in conducting their adjudications, while at the same time establishing an independent structure outside of the agency to provide an unbiased assessment of the matters to be adjudicated.

Removing adjudications from within agencies remained a primary objective of the Charter revisers. The decision-maker's independence from the prosecuting agency

invites a higher level of confidence in the fairness of the adjudicative process. The Charter revisers further secured this objective by granting five-year terms of office to OATH's administrative law judges "to enhance their impartiality and the respect accorded to their decisions." *Report of the Charter Revision Commission*, Vol. 2 at p. 104 (April 1989).

### ***Structure of OATH***

Administrative adjudication is a "quasi-judicial" process: a judicial function conducted within the Executive branch of government. Full administrative due process is provided through a trial or hearing in which an administrative law judge serves as the fact finder, and such independent administrative tribunals serve as a protective barrier to unwarranted or improvident Executive action.

Traditionally, in both federal and state agencies, the hearing is conducted by a hearing officer who is an employee of the same agency that is taking the disputed action. The agency's advocate and the hearing officer were often seen as colleagues within the same agency.

Modern administrative law is moving away from such internal hearing officers and toward central tribunals such as OATH. In a central tribunal system, the judges are fully independent of the agencies whose advocates appear before them; the judge has the same relationship with the prosecution as with the defense. Although some 26 states have moved at least partially to central panel systems, OATH is the country's first municipal central panel. Chicago and most recently the District of Columbia have also established central tribunals.

The hearing officer of traditional administrative law proceedings hears only cases involving the agency that employed the hearing officer, whereas OATH has the authority to conduct adjudications on behalf of all city agencies. In fact, § 1048 of the City Charter appears to create a presumption that all city agencies' administrative trials will be referred to OATH for adjudication "unless otherwise provided for by Executive order, rule, law, or pursuant to collective bargaining agreements." Thus, OATH has jurisdiction to hear administrative cases referred by any city agency, board or commission, or any state-created authority or other entity that is fully or partly city-funded.

**Option:** To evaluate whether the existing relationships between OATH and other administrative tribunals, and the administrative justice system generally, could be strengthened through the Charter, the staff would: (1) seek guidance from experts working with these issues within the executive branch and in the legal community; (2) undertake an analysis of the State and local legal structures governing the City's tribunals; (3) and review the judicial and court reforms taking place around the country, and being talked about in Albany. Accordingly, once completed, the staff would offer its conclusions and recommendations, if any, on the issue to the Commission.

## 2. **The Budget**

### **Unfunded Mandates**

In these times of fiscal austerity, the issue of avoiding unfunded mandates is critical. Currently, the Charter provides no mechanism for ensuring that mandates arising from local law be made binding upon the City only to the extent that funding is actually appropriated to accomplish such mandates.

Elected officials have in the past enacted mandatory programs without answering the hard questions of which taxes to raise or which other programs to cut in order to obtain the funds to pay for the new programs. Although § 33 of the Charter requires that fiscal impact statements accompany proposed laws or budget modifications, it contains no requirement that the fiscal impact statement specify where or how the estimated funds necessary for a newly-enacted general program to be implemented by the City will be obtained.

If the purpose of fiscal impact statements is to ensure that lawmakers fully confront the economic consequences of their actions, the current Charter provision thus meets this goal only halfway. The fiscal impact statements that are required by § 33 supply, as it were, the “pricetag” of a measure, but they do not require lawmakers to consider how to find the money to pay that price. The merits of a proposed program cannot be meaningfully analyzed with such partial information: it is only when one considers which other programs need to be cut or which taxes need to be raised that the benefits and drawbacks of a new proposal can be fully assessed. Mandating the inclusion of such information in fiscal impact statements would thus promote better informed and more accountable policy-making.

Requiring the City Council to provide meaningful financial information at the time a law is adopted, while important, does not completely solve the problem of unfunded mandates. After passing a local law, the fiscal consequences can be ignored or the necessary appropriations can simply be omitted from the budget. In these circumstances, courts are invited to play a role that they are not well equipped to discharge. In particular, if a new law contains mandatory language or specified

quantifiable goals, then courts may become the arena where the budgetary battles are fought. The judiciary, however, should not be faced with having to evaluate budgetary priorities, and relegating such funding decisions to courts both encourages fiscal confusion and dilutes political accountability.

**Option:** The staff could evaluate the issue of unfunded mandates in New York City, as well ascertain ways in which other municipalities and levels of government deal with the issue. Accordingly, after such evaluation the staff could present a series of recommendations on how the Charter could be changed to address these issues.

### **3. Government Integrity**

#### **Salaries of Elected Officials**

The City Council currently has the power to adopt, and the Mayor to enact, local laws that increase their salaries, and the salaries of other elected officials, whenever they wish and in whatever amount they choose. These increases in salary can be made effective not only immediately, but also retroactively. Any such salary increases can create the appearance that the elected officials are acting out of self-interest, against the best interests of the public. It is for this reason that, under the U.S. Constitution, salary changes for members of Congress and the President cannot take effect until they have been re-elected to another term of office. Indeed, these Constitutional requirements create an effective check against an appearance of impropriety or abuse of power.

**Option:** The Commission staff could evaluate whether the Charter should be amended to provide that any elected official, who is holding an office when a local law is passed to increase the salary of that office, receive the salary increase only after he or she is re-elected to serve another term. The staff would perform a comparative analysis of

how other jurisdictions handle this matter. The staff would make a recommendation accordingly. If adopted, the proposal would enhance the efforts of the Commission to ensure the integrity of elected officials and avoid future appearances of impropriety.

#### **4. Independent Agencies**

The Charter revisions of 1988 and 1989 resulted in a number of independent entities that review, and in some cases regulate, certain areas. These include the Independent Budget Office, Chapter 11, which has a mandated appropriation of at least ten percent of the OMB budget; the Board of Correction, Chapter 25, which adopts minimum standards for City correctional facilities; the Equal Employment Practices Commission, Chapter 36, which reviews and investigates the City's affirmative/equal opportunity employment program and practices; the Voter Assistance Commission ("VAC"), Chapter 45, which reviews the City's voter registration program and appoints a Coordinator of Voter Assistance; and the Commission on Public Information and Communication, Chapter 47, which reviews City information policies. In recent years, the effectiveness of these agencies has been called into question for a variety of reasons.

**Option:** The staff could review whether each of these entities performs a useful role as currently structured. Where appropriate, the staff would make recommendations on whether the agency should be left alone, restructured, restricted or eliminated. It should be noted that the staff report on nonpartisan elections already recommends that the role of VAC be a topic for discussion in a forum to be held by the Commission.