The City of New York
Department of Investigation

MARK G. PETERS
COMMISSIONER

80 MAIDEN LANE
NEW YORK, NY 10038
212-825-5900

Release #33-2018
nyc.gov/doi

FOR IMMEDIATE RELEASE
WEDNESDAY, OCTOBER 17, 2018

CONTACT: DIANE STRUZZI
NICOLE TURSO
(212) 825-5931

STATEMENT FROM DOI COMMISSIONER MARK G. PETERS

Today, I have authorized the public release of the investigative findings of James McGovern in connection with the previously announced recommendations pertaining to the substantiated whistleblower claims of Anastasia Coleman and Daniel Schlachet.

The report has been reviewed to evaluate and redact any material subject to legal privilege or other restrictions. That process is now complete.

While the report strongly criticizes me, it credits my rationale and intent to bring SCI into the DOI fold as a way to improve investigative outcomes for the City and the school district.

Readers of this report may be concerned by many of the findings in it. Statements suggesting that I and my senior staff have a lack of respect for and an indifference to the law are particularly disturbing to me. Let me send a clear message: I cannot ask other City officials to be accountable, if I don't hold myself to the same standard. In fact, I take the law seriously and know my senior staff do. The intent of my actions, and instructions to senior staff, were to improve oversight of the City schools, as we have done with other agencies. But I now recognize how these statements came across and that the actions I took to reach my goal were imprudent.

Bluntly, I regret the way I handled this.

I have accepted the report's recommendations as outlined and the matter has now been closed. The important work of DOI continues.

The City of New York
Department of Investigation

MARK G. PETERS
COMMISSIONER

80 MAIDEN LANE
NEW YORK, NY 10038
212-825-5900

This report was redacted to remove privileged information, to protect the confidentiality of witnesses, and to comply with appropriate open records laws.

The City of New York
Department of Investigation

JAMES G. MCGOVERN
ACITING DEPUTY COMMISSIONER

October 10, 2018

By Electronic Mail

Mark G. Peters
Commissioner
New York City Department of Investigation
80 Maiden Lane, 17th Floor
New York, NY 10038

Dear Commissioner Peters:

I am transmitting herewith my investigative report and recommendations for remedial action concerning the whistleblower claims that were filed by [redacted], [redacted] and [redacted] pursuant to Section 12-113 of the New York City Administrative Code.

For the reasons fully explained therein, the submission of this report should bring this investigation to a close.

Respectfully submitted,

James G. McGovern
Acting Deputy Commissioner of Investigation
NYC Department of Investigation
[redacted]

Enclosures

REPORT OF ACTING DEPUTY COMMISSIONER OF INVESTIGATION CONCERNING WHISTLEBLOWER ALLEGATIONS

James G. McGovern
Acting Deputy Commissioner of Investigation
Benjamin A. Fleming
Asmaa Awad-Farid
Jonathan Coppola
Acting Examining Attorneys
Department of Investigation of the City of New York

October 10, 2018

TABLE OF CONTENTS

I. INTRODUCTION AND EXECUTIVE SUMMARY

A. Introduction

On December 8, 2017, Richard Condon – the Special Commissioner for Investigation for the New York City School District (the "Special Commissioner," and his or her office, "SCI") – retired after 15 years on the job. SCI is the external investigative agency responsible for overseeing the City's school district, including the Department of Education ("DOE"). Condon had replaced Ed Stancik, the first Special Commissioner, who had served for the 12 prior years.

Under New York City law, Condon's successor was to be appointed by Mark G. Peters, the Commissioner of the New York City Department of Investigation ("DOI"). Commissioner Peters named [redacted] – [redacted] – to fill the vacancy. But Commissioner Peters did not intend for [redacted] to step into Condon's shoes. Condon and Stancik had operated SCI as an independent watchdog agency, one that directed its sole focus on the city's schools, and enjoyed near-complete autonomy from DOI. Commissioner Peters' goal was to bring SCI into the DOI fold – that is, to treat the Special Commissioner as an "Inspector General" ("IG") of a city agency subject to DOI's direct supervision and management.

DOI senior staff laid the groundwork for these changes before Condon's retirement and in its immediate aftermath. After [redacted] assumed office, DOI senior staff instructed [redacted] that, rather than exercising broad independent authority like Condon or Stancik, [redacted] would report to a DOI associate commissioner, like any other IG. DOI leadership also informed [redacted] that that [redacted] should not use the "Special Commissioner" title, but should rather refer to [redacted] by the new title "Inspector General for the Department of Education;" that DOI would control hiring and set priorities for SCI; that DOI would assume control of SCI's budget; and that SCI would have to comply with DOI's policies and procedures.

[redacted] and others at [redacted] eventually objected to these changes, contending that they were inconsistent with the executive orders and Board of Education ("BOE") resolutions that created SCI. The resulting conflict came to a head in late March. On March 28, 2018 – a mere 51 days after [redacted] had started – [redacted] informed Commissioner Peters, in person and via email, that DOI lacked the legal authority to control SCI. That evening, Commissioner Peters terminated [redacted] and appointed [redacted], [redacted] as the Acting Special Commissioner. The next day, [redacted] demoted [redacted] previously the first deputy at SCI, to [redacted] former counsel position.

[redacted] and [redacted] subsequently brought whistleblower claims pursuant to Section 12-113 of the New York City Administrative Code (the "Whistleblower Law"). However, the sole City agency empowered to investigate and pass upon Whistleblower Law claims is DOI itself. Because the claims of [redacted] and [redacted] alleged misconduct by DOI leadership (including Commissioner Peters), Commissioner Peters appointed the undersigned to conduct an independent investigation of those claims. This report is the result.

B. Executive Summary

After a comprehensive examination of the facts and the governing law, we sustain the whistleblower claims of [redacted] and reject [redacted] claim.

A claim under the Whistleblower Law has five elements: (1) the complainant is an officer or employee of a City agency or contractor; (2) the complainant made a report to one of the entities designated under the Whistleblower Law; (3) the complainant suffered an adverse personnel action; (4) the complaint involved, or the complainant had reason to believe it involved, corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority; and (5) the adverse personnel action was the result of the complainant having made the complaint (*i.e.*, a causal link between the complaint and the adverse action). The entities designated by the Whistleblower Law to receive complaints are DOI on the one hand, and a city council member, the public advocate, and the comptroller on the other hand – each of whom must refer complaints to DOI. In other words: all roads for complaints under the Whistleblower Law lead back to DOI.

This case is unusual – indeed, so far as we can discern, unprecedented – because it involves allegations of wrongdoing made *to* DOI *about* DOI. In the typical Whistleblower Law scenario, a City employee has lodged a complaint with a neutral third party (DOI, the public advocate, etc.), and the question is whether the employee's supervisor has retaliated against the employee for making an *external* whistleblowing report. Not so here. The complainants here were not speaking to a neutral third party; nor did they provide DOI with "new" information. Rather, the complainants here told DOI (to its proverbial face) that DOI's takeover of SCI in the wake of Condon's retirement did not comport with the law.

While this fact pattern may be novel, it is also one that fits comfortably within the Whistleblower Law's language and purpose. The Whistleblower Law is designed to encourage *all* City employees to come forward and report potential wrongdoing in City government. An allegation that the DOI Commissioner and his senior staff abused their authority by taking over another investigative agency without legal justification is appropriately the subject of a whistleblower claim – even if that allegation is made by a DOI employee. The fact that, under the Whistleblower Law, such a complaint must be directed to DOI undeniably puts the complainant in a difficult position. But if DOI took any adverse action against the complainant because the complaint was made, that conduct would violate the Whistleblower Law.

Accordingly, we find as follows:

1. [redacted] were all covered by the Whistleblower Law's protections. [redacted] complained at various times and in various ways directly to Commissioner Peters and other members of DOI's senior staff that DOI lacked legal authority to unilaterally assume control over SCI, in stark contravention of nearly 30 years of precedent.

2. The Whistleblower Law protects complaints that the speaker "knows or reasonably believes to involve" an abuse of authority. The reports by [redacted] at

least "involved" a claim that Commissioner Peters had abused his authority – one of the species of claims of wrongdoing encompassed by the Whistleblower Law.

DOI senior staff suggested that the phrase "abuse of authority" as used in the Whistleblower Law has a narrow meaning – namely, that it contemplates a level of wrongdoing that exceeds a mere technical violation of law. In support of this view, Commissioner Peters and others testified that he had a good-faith belief that DOI's takeover of SCI was legally justified. Commissioner Peters also stated that his motives in assuming control over SCI were made for sound policy reasons, not for personal gain or any other corrupt reasons. Even if true, the takeover of SCI was still a potential "abuse of authority." The text and legislative history of the Whistleblower Law demonstrates that the phrase "abuse of authority" reaches more than corrupt or unethical behavior, and indeed to acts taken under color of law without proper legal grounding. And the takeover of SCI was not just a mere potential "technical" violation of the law. Our investigation revealed that Commissioner Peters proceeded with the takeover of SCI over the recommendation of several of his top deputies, including [redacted] Commissioner Peters justified the takeover on the basis of a novel interpretation of the law that flew in the face of nearly 30 years of unbroken precedent. (As discussed below, we find DOI's interpretation of the law to be unsupportable.) And by his own account, Commissioner Peters acted on his beliefs without obtaining consent from DOE, or approval from the City's Law Department or other stakeholders. Even if Commissioner Peters sincerely thought that DOI's takeover of SCI was legally justified, the manner in which he carried it out was sufficiently careless that it amounted to a potential abuse of his powers.

3. Indeed, the takeover of SCI *did* amount to an "abuse of authority," because under the plain text and long-established understanding of the governing law, the Special Commissioner possesses broad investigative autonomy and control over his or her office – a level of independence that far exceeds that of other City IGs, who are subject to the Commissioner's direct control. And DOI lacked the power to unilaterally override or otherwise ignore the settled legal framework governing SCI.

a. The Special Commissioner's authority derives from: (a) Executive Order 11 ("EO 11"), the 1990 enactment from Mayor David Dinkins that created the Special Commissioner role, and subsequent amendments to EO 11; and (b) two BOE resolutions from 1990 and 1991 that provided the Special Commissioner with investigative and administrative powers over his or her office. While the DOI Commissioner appoints the Special Commissioner, EO 11 contains numerous provisions designed to make SCI broadly independent from DOI and confer autonomy on the Special Commissioner. Among other things, EO 11:

- Authorizes the Special Commissioner to "receive and investigate complaints from any source *or upon his own initiative*," to "refer such matters involving unethical conduct or misconduct *as he or she deems appropriate* to the BOE [or] the Chancellor," to "make any other investigation and issues such reports regarding corruption or other criminal activity, unethical conduct, conflicts of interest and misconduct, *that he or she deems* to be in the best interest of the school district, " and to "recommend such remedial action *as he or she deems necessary*, and monitor the implementation by the City School District of recommendations made by him or her" (emphasis added).

- Provides that the Special Commissioner need only report to the DOI Commissioner only once per year, and must only provide a copy of final written investigatory reports to the Commissioner.

The BOE resolutions, in turn, confer all of the BOE's and the Chancellor's investigatory powers on the Special Commissioner. Those resolutions also provide that the Special Commissioner has "sole jurisdiction over all employees within the Office of the [Special] Commissioner, including but not limited to, the authority to set salaries within established levels, to hire and terminate services, in accordance with applicable law and regulations and within the [budget]." Put simply, the law provides that the Special Commissioner runs SCI.

b. In October 2017, [redacted] drafted a memorandum for Commissioner Peters analyzing [redacted] Commissioner Peters overrode that advice, based on his own understanding that the Commissioner of DOI's broad statutory powers to supervise IGs and the Commissioner's deputies trumped the more specific language of EO 11. Commissioner Peters' legal justification to this effect were not committed to writing at the time. Indeed, notwithstanding the Commissioner's views, [redacted] proceeded to seek a MOU with DOE during the winter of 2017-18 that would have explicitly granted DOI the power to supervise SCI. No such MOU was ever reached.

c. DOI senior staff proffered a variety of different arguments and explanations for DOI's takeover of SCI, including during interviews for this investigation. None stand up to scrutiny, and many demonstrate a marked indifference to proper methods of legal interpretation. Among other things:

- [redacted] March 28, 2018 termination letter, which [redacted] advanced a reading of EO 11 that cannot be reconciled with [redacted] October 2017 memo. The termination letter ignored all of EO 11's provisions conferring autonomy on the Special Commissioner. It also ignored the BOE resolutions' confirmation and expansion of that independence. Instead, the letter focused on a section of EO 11 obliging the DOI Commissioner to provide "assistance" to the Special Commissioner, and concluded that "assistance" in this context meant "anything the DOI Commissioner thought appropriate" – including but not limited to a total takeover of the office. This was a clearly incorrect reading of EO 11, and significantly less comprehensive and persuasive than the [redacted] analysis [redacted] had produced in October 2017. The termination letter also asserted the Commissioner Peters possessed "implied"

supervisory powers over [redacted] and the Special Commissioner's office that far exceeded the express reporting relationship specified in EO 11 – this, too, was a specious position.

- Commissioner Peters and others at DOI asserted that, at the very least, EO 11 was ambiguous as to the Special Commissioner's independence and DOI's oversight powers. It is not. But even if it were, an ambiguous law is not a license to dream. Rather, when a statute or executive enactment is ambiguous, settled interpretive principles oblige the reader to defer to: (a) the traditional understanding of the law, if any; and (b) "legislative" history. Here, both considerations cut starkly against DOI. EO 11 had been understood since 1990 to create an autonomous investigatory office, and until Commissioner Peters stepped in, no DOI Commissioner had ever suggested otherwise. Further, it had also been long understood that the "legislative" history for EO 11 was a 1990 report produced by the Gill Commission – an independent body formed by City Hall and the BOE to investigate the failings of the prior school district investigator. The Gill Commission's report recommended that the existing investigator be replaced by a new office that was independent from both the school district leadership *and* from DOI. While EO 11 did not track every recommendation made by the Gill Commission, the text of EO 11 demonstrates that Mayor Dinkins followed the Gill Commission's suggestion and drafted an enactment that made SCI functionally independent of DOI.

- [redacted] October 2017 memorandum to Commissioner Peters, DOI ultimately ignored the role of the BOE resolutions, based on the flimsiest justifications. Since 2002, under a grant of authority from the state legislature, the City's schools have been controlled by the Mayor. But nothing in the 2002 transition transformed the fundamental relationship between the City and its school district – namely, that the two are separate legal entities. As part of that power shift, the BOE's executive powers were transferred to the schools Chancellor, and the BOE rebranded itself as the Panel for Educational Policy (the "PEP"). Whether particular pre-2002 BOE resolutions and governance survived that transition that must be evaluated on a case-by-case basis. Incredibly, DOI's leadership testified that they were entirely ignorant of this dynamic, and had simply *assumed* that the BOE resolutions were no longer valid. Nobody at DOI did any research on the matter; nobody at DOI checked with the Law Department or DOE's General Counsel about the resolutions' survival; nobody at DOI appeared to know that the BOE had indeed survived the onset of "Mayoral control," or what the PEP was.

- During this investigation, Commissioner Peters asserted that if EO 11 were not interpreted to give him the power to control the Special Commissioner's day-to-day duties, the enactment would violate the City Charter. In particular, Commissioner Peters pointed to a section of EO 11 providing that the Special Commissioner "shall exercise the powers conferred on a Deputy Commissioner of Investigation by Chapter 34 of the City Charter, including but not limited to the power to compel the attendance of witnesses." Commissioner Peters noted that Chapter 34 and other laws give him the power to control his deputies; thus, any reading of EO 11 that conferred independence on the Special Commissioner would be improper. This assertion fails for any number of reasons, some

based in the law itself, and others based on the particular facts of this case. Among others:

- Commissioner Peters' theory is atextual and ahistorical. The Special Commissioner role was pointedly *not* created as a "deputy" of the DOI Commissioner, but rather as a separate, independent role. At the Gill Commission's express urging, the Mayor gave the new role "the powers conferred on" a DOI deputy commissioner, without the strings that come with *being* an actual deputy to the DOI Commissioner.

- Commissioner Peters testified during this investigation that he was bound to follow an executive order that he knew to be unlawful, until such time as the order were repealed or declared invalid by a court. It follows that, even if EO 11's grant of investigatory power to the Special Commissioner were not valid, Commissioner Peters would still be bound to adhere to it.

- Even if the particular portion of EO 11 at issue conflicted with the City Charter, DOI control over the Special Commissioner's office would not ensue. To the contrary: the supposedly faulty grant of investigatory power would be severed from EO 11, and the Special Commissioner would have to rely on his or her other investigatory powers – which are substantial.

For these and other reasons, we conclude that DOI's reading of the law governing SCI was incorrect, and in many instances unreasonable.

4. Commissioner Peters and other members of DOI's leadership testified that DOI's decision to take over SCI could not have been an "abuse of authority" because DOI informed all relevant stakeholders and the public about its plans, and received no complaints. Commissioner Peters pointed in particular to four relevant disclosures: (1) a new DOI organizational chart after the SCI takeover – one showing SCI as an IG "squad," on the same reporting line as other IGs – was posted publicly on DOI's website as of January 2018; (2) Commissioner Peters met with [redacted] and [redacted] on February 20, 2018; DOI's new organizational chart was discussed during the meeting, and neither [redacted] nor [redacted] raised any concerns about the reorganization; (3) Commissioner Peters had a similar discussion with a group of City Councilmembers on March 14, 2018; (4) Commissioner Peters testified before the City Council on March 26, 2018, and discussed DOI's management of SCI to some extent.

These disclosures demonstrate that DOI was not trying to hide the bottom-line result of its actions – that DOI was now asserting direct managerial control over SCI. But all of these episodes share a notable feature – they involved no discussion of the legal authority for the takeover. That makes all of the disclosures irrelevant, at least insofar as DOI offers them as proof of its good faith. While EO 11 and the BOE resolutions provide the legal framework for SCI, they are decades-old authority, and obscure at that. We do not think it reasonable to assume that *any* of the relevant individuals – including [redacted] – would have had any working familiarity with the law governing SCI at the time that Commissioner Peters spoke with

them. As such, we do not think it is reasonable to assume that any of the listeners would have had any basis to know about any potential legal issues with DOI's actions, much less complain about them in the moment.

That is particularly true given the full context of the relevant exchanges, which demonstrate that Commissioner Peters actively avoided giving others in City government the full picture about the SCI takeover, including the potential legal hurdles. For one thing, immediately following a tense meeting with [redacted] touching upon the scope of DOI's authority to control SCI, Commissioner Peters drafted an email to [redacted] and then-[redacted] inviting them to weigh in on whether changes to EO 11 were needed to effectuate the SCI takeover. Commissioner Peters never sent the email, based at least in part on [redacted] For another, Commissioner Peters' March 26 testimony to the City Council contained several misleading statements and omissions that obscured the nature of the ongoing dispute. An example: at several points, Commissioner Peters testified that SCI "had always reported to DOI." That was technically true but materially misleading; Special Commissioners Stancik and Condon had enjoyed a very different "reporting" obligation to DOI than the one Commissioner Peters had imposed on [redacted] and it was the new structure that was causing a conflict with [redacted] and others at SCI. In other words: Commissioner Peters' testimony was spun to conceal the real change.

Put simply, even it were true that nobody outside DOI had told Commissioner Peters that the takeover of SCI was illegal, that is because DOI avoided asking questions or seeking input on the topic. Nor would any silence or inaction by others in City government alter DOI's obligation to follow the law as it was written. The takeover of SCI cannot be justified on the basis that DOI was "open and notorious" about its actions.

5. A would-be whistleblower need not be correct that the conduct they have identified is actually an "abuse of authority." Rather, the Whistleblower Law protects reports that the claimant "reasonably believes" to be such an abuse. Here, even if DOI had not actually abused its authority by taking over SCI, [redacted] reasonably believed as much as of March 28 – the date of [redacted] firing, and of their final whistleblowing complaint.

Several factors show that belief to be reasonable. For the reasons already discussed, [redacted] were justified in believing that DOI's actions violated the governing law [redacted] But there was more. In addition to the law itself:

- [redacted] – told [redacted] and [redacted] in a pair of March 2018 meetings that [redacted] agreed that DOI's actions were inconsistent with the governing law. [redacted]

- Commissioner Peters and his senior staff had offered statements and other indicia indicating a lack of concern for following the law. Most troublingly, in a February 27 meeting with [redacted] Commissioner Peters told [redacted] "*I could, if I had to, go to City Hall and have them just wipe out that executive order. I probably should have, but it wasn't worth my time, effort, and energy. You are the inspector general for the school system. You are also the Special Commissioner of Investigations [sic] for the school district because there is still an executive order that I haven't bothered to have eliminated that says I have to appoint one. So I appointed one.*" The substance of this exchange, and the dismissive, contemptuous tone in which the statements were delivered, would have reasonably suggested to an objective observer that Commissioner Peters was attempting to convey that he was not required to comply with the letter of the law.

- [redacted] were aware that DOI had sought a MOU with DOE that would have accorded DOI explicit legal authority to investigate the DOE and to supervise SCI. [redacted] were also aware that DOE had declined that overture. They also learned that DOE had declined to sign a shorter follow-up letter agreement addressing the DOI-SCI relationship. A reasonable observer could have concluded from these facts (and other context) that DOI had attempted to secure the power to take over SCI, had been rebuffed, but had done so anyway – a patent abuse of authority. DOI witnesses testified that the proposed MOU with DOE was not necessary for the SCI takeover, but was rather intended to confirm the authority that DOI already possessed. Even if we credited those assertions, it would have been eminently reasonable for [redacted] to think otherwise.

- On February 7, 2018 – [redacted] third day on the job – DOI informed [redacted] that it intended to use a SCI budget line (and DOE funds) for a general-purpose administrative role at DOI. [redacted] would have reasonably thought that use of DOE funds for a role *other* than DOE oversight to be illegal. [redacted] immediately raised concerns about the legality of the request, after which [redacted] and others at DOI leadership committed to obtaining written legal justification (from DOE or otherwise) for the funds' use. The promised written agreement or justification never arrived. However, when [redacted] attempted to confer with [redacted] about the status of that legal justification, [redacted] was written up on disciplinary charges – charges that were entirely unjustified. [redacted] would have reasonably believed that [redacted] had been retaliated against for raising a valid legal concern arising out of the SCI takeover – a further sign that DOI had abused its authority. (Worse still, as discussed herein, the DOI witnesses involved in this episode provided inaccurate and inconsistent sworn testimony about it.)

All of the above considerations, and others, meant that [redacted] belief that DOI had abused its authority was reasonable.

6. The Whistleblower Law bars adverse employment actions made "in retaliation for" protected complaints. While the Whistleblower Law does not expressly provide a specific

"causation" standard, other anti-retaliation regimes provide that "[c]ausation can be established either directly through evidence of retaliatory animus or indirectly by demonstrating that the adverse employment action followed quickly on the heels of the protected activity or through other evidence such as disparate treatment of fellow employees." *Balko v. Ukrainian Nat. Fed. Credit Union*, No. 13 CIV. 1333 LAK AJP, 2014 WL 1377580, at *20 (S.D.N.Y. Mar. 28, 2014), *report and recommendation adopted sub nom. Balko v. Ukrainian Nat'l Fed. Credit Union*, No. 13 CIV. 1333 (LAK), 2014 WL 12543813 (S.D.N.Y. June 10, 2014). Additionally, "[a] plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action." *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013). The complainant must show "that the adverse action would not have occurred in the absence of the retaliatory motive," but this "does not require proof that retaliation was the only cause of the employer's action." *Id.*

In light of these and other authorities, the causation question is not a difficult one. [redacted] undisputedly suffered cognizable adverse employment actions shortly after making protected complaints – a same-day termination for [redacted] and a next-day demotion for [redacted] Indeed, the timeline of those adverse actions – made in the heat of an active discussion about the scope of DOI's power, and with all relevant events occurring within a few months of [redacted] hiring and [redacted] promotion in December and January (following glowing interviews) – creates a strong inference of retaliatory intent.

Moreover, there are numerous "weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered . . . reasons for its action." *Id.* DOI's story is that [redacted] were fired not because they had accused DOI of exceeding its authority, but because they refused to follow orders from DOI leadership – in other words, because they were insubordinate. On this logic, [redacted] could have criticized Commissioner Peters' reading of the law to their hearts' content so long as they continued to follow DOI leadership's directions in the meantime. The "insubordination" theory suffers from two key weaknesses.

- It is inconsistent with the record. Neither [redacted] was actually insubordinate, in the sense of explicitly refusing to follow DOI's (illegal) directions. Commissioner Peters may have been told that [redacted] had refused to follow directions, but Commissioner Peters had two in-person discussions and one written exchange with [redacted] on March 28 (the day of [redacted] firing), and the subject of insubordination never arose. In contrast, [redacted] interpretation of EO 11 and Commissioner Peters' contrary understanding of the law *were* discussed. Crucially, [redacted] termination letter said *nothing* about any supposed insubordination; rather, the letter conveyed DOI's disagreement with [redacted] views about EO 11. The inescapable inference is that [redacted] was fired for the latter, and not the former. (The termination letter also alluded to "performance" issues from which [redacted] allegedly suffered, but Commissioner Peters testified that any such issues were *not* the actual cause of [redacted] termination.)

- [redacted] case is even more straightforward. [redacted] (with Commissioner Peters' agreement) retaliated against [redacted] because [redacted] adopted the views [redacted] expressed in a March 28 email to Commissioner Peters flagging DOI's lack of authority to take over SCI. That email expressly identified [redacted] as whistleblowers protected by the Whistleblower Law; notably, the email said nothing about any refusal to follow DOI's directions. [redacted] told [redacted] (and testified) that [redacted] *interpreted* the email as a refusal to follow Commissioner Peters' direction; but that interpretation was atextual and unreasonable.

- Even if [redacted] had refused to follow directions from DOI, that would not be enough to justify adverse employment action on these facts. The core complaint proffered by [redacted] was that EO 11 and the BOE resolutions made clear that DOI lacked the authority to directly oversee and manage SCI. If DOI's senior staff did not understand that before they received [redacted] email on March 28, they surely knew it afterwards. Any supposed failure to follow DOI directives was thus inextricably tied to their protected "whistleblowing" complaints; put another way, the failure to follow orders would have been the no more than a manifestation of their legal dispute. Logic and precedent demonstrate that Whistleblower Law protects complainants in [redacted] position who refuse to follow an illegal order.

- For [redacted] another factor demonstrates retaliatory intent – namely, the fact that, during the pendency of this investigation, [redacted] and others at DOI took a series of counterproductive steps to ensure that [redacted] salary was reduced. By way of background: when [redacted] demoted [redacted] [redacted] restored [redacted] to his prior role of counsel – a move that entailed a roughly [redacted] reduction in annualized salary. For administrative reasons, processing the salary reduction through DOE's payroll system proved difficult. But there was no urgency; DOI knew that [redacted] had filed a whistleblower complaint, and that this investigation would ultimately pass upon whether his demotion (and the accompanying reduction in salary) was warranted. Put another way, at the end of the investigation, the difference would be netted out either way. DOI nevertheless chose to press ahead with the salary reduction in the meantime – a decision that connotes intent to inflict short-term pain on [redacted]

  The tactics DOI used to ensure [redacted] salary was reduced were even more troubling. After [redacted] termination, Commissioner Peters had named [redacted] the acting Special Commissioner. On May 3, 2018, [redacted] sent the City's Department of Citywide Administrative Services ("DCAS") a letter seeking to effectuate the salary reduction. [redacted] letter asserted that [redacted] had been demoted "as a result of his expressed unwillingness and inability to carry out directives and receive assistance that the DOI Commissioner, and I, deem necessary to carry out his managerial duties." ([redacted] had never "expressed" any such thing; [redacted] had premised the demotion solely on [redacted] agreement with [redacted] legal views, a point that [redacted] made to [redacted] during the meeting in which [redacted] demoted [redacted] [redacted] letter also made numerous representations

that [redacted] as the acting Special Commissioner, had authority to hire, fire, oversee, and demote SCI staff like [redacted] Those representations were accurate as a matter of law, but were flatly inconsistent with the position DOI (and [redacted] had taken with [redacted] – namely, that *DOI* had the authority to control hiring and firing at SCI, to direct the conduct of investigations, and to manage SCI's budget as DOI saw fit. [redacted] willingness to *accurately* describe the Special Commissioner's powers in a letter seeking to further punish [redacted] for *agreeing* with the very position was as ironic as it was troubling.

For these reasons and others addressed herein, we concluded that a sufficient causal nexus existed between [redacted] and [redacted] protected complaints and the adverse employment actions.

7. [redacted]

8. For these and the reasons that follow, we conclude that [redacted] must be reinstated to their prior positions. We further conclude DOI must take other remedial action, including efforts to reset the relationship between DOI and SCI to the December 2017 status quo. We also recommend that the Commissioner be disciplined for his discourteous and unprofessional conduct.

II. PROCEDURAL HISTORY

[redacted] was terminated on March 28, 2018; [redacted] was demoted the next day. At the time of [redacted] termination and [redacted] demotion, DOI leadership was aware that both had asserted their entitlement to whistleblower protection. Under the Whistleblower Law, DOI has sole jurisdiction to investigate and report on whistleblower claims. However, due to the nature of the whistleblower allegations, DOI leadership had an obvious conflict of interest.

After discussions between DOI and the Corporation Counsel's office, Commissioner Peters appointed the undersigned on April 4, 2018 as an "Acting Deputy Commissioner of Investigation pursuant to New York City Charter, Chapter 34." He later appointed three other colleagues as Acting Examining Attorneys. In particular, Commissioner Peters directed us "to conduct an inquiry of potential alleged retaliatory personnel actions . . . and to take all necessary

steps required pursuant to the [Whistleblower Law]." Commissioner Peters specified that we should "act independently" of DOI.

To that end, we conducted an independent investigation of the whistleblower claims brought by [redacted] As part of our investigation, we reviewed tens of thousands of documents relating to the relevant events, and assessed and analyzed the governing legal authorities. We also interviewed more than a dozen witnesses, including Commissioner Peters, most of DOI's senior staff, and others in City government. Commissioner Peters and DOI staff took numerous steps to cooperate with the investigation and ensure its independence. Among other things, DOI generally provided relevant documents promptly and responded to follow-up requests in short order; all DOI witnesses appeared voluntarily for interviews; DOI placed no restrictions on the subject matter of our inquiry. The documentary and testimonial record was substantial, and provided a clear picture of the facts.

The investigation was further assisted by the fact that [redacted] made audio recordings of key meetings with DOI senior staff during February and March 2018, and provided those recordings to the undersigned. These recordings were invaluable; they provided a thorough record of important interactions that would have otherwise required recreation through conflicting recollections and fallible memory. Indeed, our access to the recordings substantially obviated the need to rely on credibility assessments in ascertaining the underlying facts.

III. FACTUAL AND LEGAL BACKGROUND TO DISPUTE

The background section that follows is drawn from: (1) the interviews conducted as part of this investigation; (2) the documentary record, including emails, handwritten notes, and the above-mentioned audio recordings; and (3) legal authority. As stated above, because the documentary record was so extensive, the factual background to this dispute is unusually clear and largely undisputed. However, our investigation revealed certain disputes in the participants' recollections of particular events; those disputes are presented in this background section and resolved, as necessary, elsewhere in this report. Additionally, the narrative that follows does not directly attribute views or statements to particular interviewees unless it is necessary, for the sake of clarity or context, to do so.

A. LEGAL AND HISTORICAL BACKGROUND

i. New York City Department of Investigation

The Department of Investigation acts as the City of New York's inspector general. Under Chapter 34 of the New York City Charter, the DOI Commissioner "is authorized and empowered to make any study or investigation which in his opinion may be in the best interests of the city, including but not limited to investigations of the affairs, functions, accounts, methods, personnel or efficiency of any agency." City Charter § 803(b). The Commissioner must also "make any investigation directed by the mayor or the [city] council." *Id.* The jurisdiction of the DOI Commissioner "extend[s] to any agency, officer, or employee of the city, or any person or entity doing business with the city, or any person or entity who is paid or

receives money from or through the city or any agency of the city." City Charter § 803(d). The DOI Commissioner has the power to compel the attendance of witnesses to testify "[f]or the purpose of ascertaining facts in connection with any study or investigation authorized by this chapter." City Charter § 805(a).

On July 26, 1978, Mayor Edward I. Koch issued Executive Order No. 16, entitled "Commissioner of Investigation, Inspectors General and Standards of Public Service" (hereinafter, "EO 16"). As pertinent here, EO 16 set up a series of Inspectors General ("IGs") for City agencies. Section 3 of EO 16, entitled "Responsibilities of Inspectors General," provides that all agencies "shall have an Inspector General who shall report directly to the respective agency head and to the Commissioner and be responsible for maintaining standards of conduct as may be established in such agency under this Order." The executive order adds that IGs "shall be responsible for the investigation and elimination of corrupt or other criminal activity, conflicts [of] interest, unethical conduct, misconduct and incompetence within their respective agencies."

On December 26, 1986, Mayor Koch issued another executive order centralizing responsibility for the City's IG system. EO 105 provided, in relevant part:

> The Inspector General system shall be a single aggregate of personnel and resources within the Department of Investigation under the direction of the Commissioner. There shall be an Inspector General for each agency who shall report directly to the commissioner and shall be responsible for the investigation and elimination of corrupt or other criminal activity and conflicts of interest within the agency to which he or she is designated. The Commissioner shall allocate the personnel and resources of the Inspector General system to the Inspector General offices as needed to develop strategies and programs for the investigation and elimination of corruption and other criminal activity affecting the City of New York. Such investigations and programs shall proceed in accordance with the Commissioner's direction.

EO 105 went on to provide that "the employment and continued employment of all Inspectors General shall be by the [C]ommissioner after consultation with the respective agency head." It added that, "[e]ffective July 1, 1987, the Inspectors General and their staffs shall be employees of the Department of Investigation."

ii. New York City School District

1. Background

In the State of New York, education is not a local matter. Rather, "[i]n New York State, education through 12 grades or equivalent levels is committed to the responsibility of the State, and boards of education and school districts are merely agents of the State for securing the appropriate free education and the raising of funds to provide for that education." *Jeter v. Ellenville Cent. Sch. Dist.*, 50 A.D.2d 366, 374 (4th Dep't 1975), *aff'd*, 41 N.Y.2d 283 (1977). To that end, the state's education department "is charged with the general management and

supervision of all public schools and all of the educational work of the state." N.Y. Educ. Law § 101 (McKinney).[1]

Article 52-A of the Education Law creates the "city school district of the city of New York." *See* N.Y. Educ. Law § 2590-a(1). The history of the City's school district is rich and complex, could fill (and has done) many lengthy books, and is far beyond the scope of this report. But certain points about the relationship between the City school district and the City are relevant.[2]

First, for at least the late 20th century, the Education Law provided that the City's School District would be governed by a Board of Education ("BOE"). The BOE, in turn, appointed a Chancellor, who reported to the Board. The BOE exercised the authority provided by State law, and City law accommodated and worked with the BOE to facilitate its control of the school district. For example, the City Charter vests all title to school property in the City, *see* City Charter § 521, but provides that such property shall be "under the care and control of the [BOE]." *Id.* The charter also provides that the BOE "may investigate, of its own motion or otherwise either in the board or by a committee of its own body, any subject of which it has cognizance or over which it has legal control, including the conduct of any of its members or employees or those of any local school board." City Charter § 526. But while the City funded the BOE and the Mayor appointed some of its members, the BOE was an independent decision-making body.

Second, "it is well-settled that the Board of Education and the City of New York are separate and distinct entities." *Campbell v. City of New York*, 203 A.D.2d 504, 505 (2d Dep't 1994). That is because the BOE is a separate municipal corporation; its existence does not arise out of the City's Charter. In other words: "[t]he BOE . . . is neither a department nor agency of the City." *Matson v. Bd. of Educ. of City Sch. Dist. of New York*, 631 F.3d 57, 77 (2d Cir. 2011). Among the many consequences of that fact: it is well-established that the City cannot be held liable for torts committed by employees of the city school district (*i.e.*, employees of the BOE). *See, e.g., Ragsdale v. Bd. of Educ. of City of New York*, 282 N.Y. 323, 325 (1940); *Eschenasy v. New York City Dept. of Educ.*, 604 F. Supp. 2d 639, 654 (S.D.N.Y. 2009).

2. Mayoral Control in 2002

In 2002, following an intense lobbying effort from Mayor Michael Bloomberg, the state legislature amended the Education Law to provide for greater "Mayoral control" over the city's schools. The legislature effectuated this change in two primary ways. *First*, the legislature

[1] State education law preempts conflicting local enactments. For example, Section 11, subdivision 1(c) of the Municipal Home Rule Law prohibits the enactment of a local law which supersedes a State statute if the local law applies to or affects "the maintenance, support or administration of the educational system in such local government." *See generally Reuss v. Katz*, 43 Misc. 2d 921, 922 (Sup. Ct.) (invalidating a proposed local law amending Section 522 of the City Charter "so as to forbid the Board of Education, in the annual reports to the Mayor required of it, from making recommendations 'contrary to the traditional concept of the neighborhood school' because "[i]t is well settled that the administration of public education is a State function" and "the provisions of the Education Law may not be amended by a local law"), *aff'd*, 21 A.D.2d 968 (1st Dep't 1964)

[2] For more details about the history of the state's role in educational matters, *see generally* http://www.nysl nysed.gov/edocs/education/sedhist htm#nyc.

altered the composition of the BOE. Previously, the BOE had seven members – two appointed by the Mayor, and one each by each of the Borough presidents. Under the new scheme, the Mayor gained the authority to appoint a majority of the BOE, which was expanded to 13 members, eight to be appointed by the Mayor. *See* chapter 91 of the Laws of 2002; Educ. Law. § 2590-b(1)(a). *Second*, the legislature made the Chancellor a direct Mayoral appointee, hired by and answerable to the Mayor. *See id.* § 2590-h.

In almost all other ways, however, the legal framework of the school district was maintained. In particular: the Education Law as amended expressly provided that "The board of education of the city school district of the city of New York *is hereby continued*." *Id.* § 2590-b(1)(a) (emphasis added). It further provided that the BOE was still "for all purposes . . . the government or public employer of all persons appointed or assigned by the city board or the community districts." *Id.* § 2590-g(2).

The legislature's grant of Mayoral authority also had an express "sunset" clause; it lasted only seven years. *See* L. 2002, Ch. 91, s 34 (providing that the key elements of the legislation "shall expire and be deemed repealed June 30, 2009"). Indeed, Mayoral control *did* lapse for a period during the summer of 2009, during which time control over the schools reverted to the BOE. The state legislature has since renewed its grant of Mayoral authority on several occasions, most recently in June 2017, when – on the day before mayoral control expired – the senate agreed to issue a two-year extension running through June 2019.[3] But the State's government can – at any time – rescind "Mayoral control."

In the same 2002 bill conferring mayoral control over schools, the legislature also provided the Mayor with legal control over a separate entity – the School Construction Authority ("SCA"), a creature of State law. The bill also conferred DOI with the power to investigate the SCA. Specifically, the bill amended the Public Authorities Law to expressly provide that "the department of investigation of the city of New York shall be authorized to conduct investigations relating to the authority pursuant to chapter thirty-four of the New York city charter." *See* L. 2002, Ch. 91 s 23; *see also* Bill Jacket ("Sections 23 and 31 grant the New York City Department of Investigation the authority to conduct investigations relating to [SCA]"). Notably, the bill did not provide DOI any authority to investigate the City school district.

3. Post-Mayoral Control Relationship to City

Following the 2002 legislative amendments, the BOE adopted new bylaws renaming itself the "Panel for Educational Policy" ("PEP") and forming a "structure" called the "Department of Education." The bylaws read in relevant part:

> The Board of Education of the City of School District of the City of New York is created by the Legislature of the State of New York and derives its powers from State law.

[3] If and when the grant of mayoral authority from the state legislature lapses, the prior system of governance – in other words, direct governance by a seven-person BOE – immediately snaps back into existence such time as the legislature acts. *See* https://www nytimes.com/2017/06/20/nyregion/what-if-mayors-school-control-lapses-a-2009-episode-offers-clues.html.

> The thirteen member body designated as the Board of Education in section 2590-b of the Education Law shall be known as the Panel for Educational Policy. The Panel for Educational Policy is a part of the governance structure responsible for the City School District of the City of New York, subject to the laws of the State of New York and the regulations of the State Department of Education. Other parts of the structure include the Chancellor, superintendents, community and citywide councils, principals, and school leadership teams. Together this structure shall be designated as the Department of Education of the City of New York.

See https://www.schools.nyc.gov/about-us/leadership/panel-for-education-policy/pep-bylaws (emphasis added).

Notwithstanding the BOE's decision to rebrand itself as the PEP, the formation of the DOE, and the political and practical effects of "Mayoral control," courts quickly realized that very little about the legal framework of the city's school district had changed. As reflected above, the DOE is a collection of individuals employed almost entirely by the BOE who identified more closely with the City's government for reasons of public presentation and framing. While the Chancellor would be, under the new system, a City employee and answerable to the Mayor rather than the BOE, the school district remained a separate entity governed by state law, as would be all of DOE's officers and employees.

To that effect, in August 2003, United States District Court Judge Kram issued a decision "*agree[ing] with the Corporation Counsel for the City* that changes in the statutory scheme regarding the interplay between the Board and the City can be best described as 'political,' with the Board continuing to exist as a separate and distinct legal entity from the City." *Gonzalez v. Esparza*, No. 02 CIV. 4175 (SWK), 2003 WL 21834970, at *2 (S.D.N.Y. Aug. 6, 2003) (emphasis added) (concluding that "the City cannot be held liable for the alleged torts committed by the Board"). New York's courts also agreed. *See Perez ex rel. Torres v. City of New York*, 41 A.D.3d 378, 379, (1st Dep't 2007) ("While the 2002 amendments to the Education Law […] providing for greater mayoral control significantly limited the power of the Board of Education […], the City and the Board remain separate legal entities") (internal citations omitted).

The courts also determined that, notwithstanding the advent of "Mayoral control," and public presentation notwithstanding, the DOE was and is not a "City agency." For example, the Second Circuit observed that "[t]he departments of the City of New York typically, perhaps uniformly, have been created by the City Charter, which does not create a New York City Department of Education." *Ximines v. George Wingate High Sch.*, 516 F.3d 156, 159 (2d Cir. 2008). In contrast, the DOE was "a creation of the BOE . . . through the BOE's bylaws." *Eason-Gourde v. Dep't of Educ.*, No. 14 CIV. 7359 WFK VMS, 2014 WL 7366185, at *1 (E.D.N.Y. Dec. 23, 2014). Thus, "the City remains a separate legal entity from DOE," *Fierro v. City of New York*, No. 12 CIV. 3182 AKH, 2013 WL 4535465, at *2 (S.D.N.Y. Apr. 22, 2013), and DOE is "not a mayoral agency," *Bacchus v. New York City Dep't of Educ.*, 137 F. Supp. 3d 214, 248 n.26 (E.D.N.Y. 2015). *See also Matter of Application of Plumbers Local Union No. 1, U.A., AFL–CIO*, Index No. 112139/08, 2010 N.Y. Misc. LEXIS 1470, at *9 (N.Y. Sup. Ct. Feb. 2, 2010) (holding that DOE, like BOE, is not a mayoral agency); *Dimitracopoulos v. City of New York*, 26 F. Supp. 3d 200, 210 (E.D.N.Y. 2014) ("The City and the DOE are separate legal

entities"); *Biswas v. City of New York*, 973 F. Supp. 2d 504, 532 (S.D.N.Y. 2013) (noting that "it is undisputed that the City and the DOE are two separate municipal entities"); *The Beginning with Children Charter Sch. v. New York City Dep't of Educ.*, 52 Misc. 3d 1216(A), 43 N.Y.S.3d 769 (N.Y. Sup. Ct. 2016) ("Although the Board of Education now consists partially of appointments by the Mayor of the City of New York, the City School District of the City of New York is still governed by the New York State Education Law") (citation omitted); *Varsity Transit, Inc. v. Bd. of Educ. of City of New York*, 5 N.Y.3d 532, 534 n.1 (2005) (observing that "[a]t the start of this litigation, the Department of Education was known as the Board of Education, the original named defendant").

The DOE, then, is essentially a "dba," or a label employed by the BOE/PEP and the Chancellor, one designed – presumably under the Mayor's direction (or with his or her assent) – to make the DOE *appear* as if it is a City agency, so as to further the goals of accountability and centralized decision-making that underlie Mayoral control (for as long as the State government allows it to remain in place). The legal reality is something else.[4]

ii. Office of the Special Commissioner of Investigations for the New York City School District

1. Events Prior to 1990

In January 1980, the BOE established an "Office of the Inspector General" (the "BOE IG") to investigate allegations of crime, corruption, and impropriety. The BOE IG reported directly to the Board (not to the Chancellor), and had broad powers to inspect BOE records and compel testimony from BOE employees. However, the BOE IG's office never became an effective watchdog, and was widely regarded as toothless. By decade's end, the Mayor and the BOE agreed to form a Joint Commission on Integrity in the Public Schools, helmed by James F. Gill and widely known as the "Gill Commission," which would (among other things) investigate the BOE IG's failings.[5]

In March 1990, the Gill Commission issued a lengthy report castigating the BOE IG and recommending its dissolution. The Gill Commission's report concluded that the BOE IG lacked competent lawyers and investigators, and focused its substantial resources on "trivial matters" such as technical BOE rules violations rather than investigating "significant illicit activity." The report also noted that the office suffered from both mismanagement and the absence of certain law-enforcement powers, such as the ability to issue subpoenas and make arrests. The Gill Commission also found that, as a result of the BOE IG's perceived incompetence and lack of independence from the BOE, supervisors and teachers were broadly reluctant to report

[4] [redacted], testified that [redacted] understood DOE was not a City agency "*based not only on . . . a year-and-a-half of experience here, but in my prior role* [redacted] *It was an issue that would come up specifically for me back then. I knew that state law, the Education Law, governed DOE's procurement practices and not local laws, in Chapter 13 I guess, of the Charter, that governs procurement for City agencies. . . . Contracts for DOE were different parties, different forms. Lawsuits . . . for lawsuit purposes, the City and DOE are not the same party. The Law Department will represent both, but for a DOE tort case,* [redacted] *frequently and successfully move to dismiss the City as a party. There are other examples*."

[5] As the Gill Commission noted, the State's Education Department had separately investigated the BOE IG and issued a critical report.

complaints of wrongdoing to the BOE. The report noted that "this pervasive lack of confidence in the system's watchdog is a significant impediment to effective policing."

The Gill Commission thus recommended sweeping changes – namely, that the BOE IG's office "be redesigned from top to bottom, in its mandate, in its goals, in its staff, even in its physical location." The commission's report emphasized that the required new office "must be perceived to be independent of the Board of Education," because "[p]eople are obviously less likely to complain about wrongdoing . . . to an Inspector General answerable to the Board or to the Chancellor." The report thus recommended that a new position be created – a "Special Commissioner," one that "would function, in essence, as a Department of Investigation for the City school system." According to the Gill Commission, the Special Commissioner should "have a mandate to investigate systemic flaws that allow criminality and corruption to exist, and to publicize those flaws and recommendations for improvements in reports, whenever the Special Commissioner deems it in the best interests of the system." The report added that "[i]n addition to making this new office independent, its mission should be . . . made clear to the public . . . in short, to build solid criminal cases against real criminals."

The Gill Commission also recommended a structure for the new office. The report contemplated that the new office would be, at least at first, a temporary one, much like the Gill Commission itself. Thus, the report proposed that, "as an interim measure," the Mayor should retain the power to appoint and remove the Special Commissioner. However, the Gill Commission added that "adopting the expeditious solution . . . does not preclude later consideration of . . . other approaches," including "mak[ing] the Special Commissioner more permanent by legislation."

The Gill Commission's report emphasized, however, that the new investigative commission must be independent, not only of the BOE, but also from the Mayor and DOI. Thus, the Gill Commission recommended that, so as to not "compromise the Special Commissioner's independence," the new officer should only "be required to make formal annual reports to the Mayor," and "aside from these annual reports," should only make reports "when the Commissioner deems reporting appropriate." The Gill Commission also suggested that "the Special Commissioner could be made a deputy commissioner of the City's Department of Investigation, so that the office would have subpoena power, the power to obtain sworn testimony, and the power to grant use immunity."[6] The report added that the BOE would "presumably grant the Special Commissioner" the BOE's own investigatory powers. Finally, the Gill Commission's report also noted that it had "considered and rejected suggesting the transfer of the functions of the [BOE IG] to the Department of Investigation." The commission had a particular concern in mind: "that, as exigencies evolve, [DOI] will inevitably move resources that should be dedicated to eradicating corruption in the school system to whatever the target of the hour may be."

[6] In a footnote, the report noted that the same "device was used by Mayor Koch when he created" the Gill Commission – namely, the enabling executive order appointed the Gill Commission's chief counsel a DOI deputy commissioner so as to enable the Commission to issue subpoenas and take sworn testimony. However, as the Gill Commission report pointed out, its "Chief Counsel did not, and the Special Commissioner would not, report to the Commissioner of [DOI]."

2. SCI and the Special Commissioner Position Are Created

After discussions between the Mayor's office and the BOE, and three months after the Gill Commission issued its report, City Hall and the BOE's replacement for the BOE IG was ready.

a. Mayoral Executive Order No. 11

Executive Order No. 11 (June 28, 1990) created a new position known as the "Deputy Commissioner of Investigation for the City School District of the City of New York" ('Deputy Commissioner')." EO 11, § 1. The position was not, as the Gill Commission report had contemplated, an "interim measure." Rather, the new position was a permanent one – a complete replacement for the discredited BOE IG – and the new investigator was to be appointed by the DOI Commissioner, not the Mayor. In nearly every other way, though, the new position tracked the recommendations of the Gill Commission report – to create a new independent watchdog with responsibility for rooting out corruption, waste, and fraud in the city schools.

First, as the Gill Commission had recommended, EO 11 made it clear that the new position would be an independent one. Section 1 of EO 11, explicitly invoking the Gill Commission's report, stated that the new Deputy Commissioner position would be "independent from the Board of Education." *Id.* EO 11 also contained numerous provisions designed to make the new Deputy Commissioner *independent of DOI*, the city agency with appointment power. For example, EO 11 provided that the Deputy Commissioner could only be removed by the DOI Commissioner "upon filing in the office of the City Personnel Director, the Board of Education, and the Office of the Chancellor, and serving upon the [Special Commissioner] the reasons therefor and allowing such officer an opportunity of making a public explanation." *See* EO 11, § 2. This language paralleled the circumstances under which the Mayor may remove the DOI Commissioner, and is widely understood as allowing removal only "for cause."

EO 11 also limited the DOI Commissioner's involvement in the investigatory work of the Deputy Commissioner in two key ways.

- Section 3(e) provided that "[t]he Deputy Commissioner shall, at the conclusion of any investigation that results in a written report or statement of findings, provide a copy of the report or statement to the Commissioner of Investigation, Chancellor, and the Board of Education." This language indicated that the DOI Commissioner was entitled to a copy of the Deputy Commissioner's investigatory report only after the *investigation's conclusion* and where a written report results – not before or during an investigation, or for any investigation where no written report is generated.

- Section 3(f) stated that "[t]he Deputy Commissioner shall make an annual report of his or her findings and recommendations to the Commissioner of Investigation, the Board of Education and the Chancellor." EO 11 evidences no other obligation to report to the DOI Commissioner. This requirement echoes the Gill Commission's recommendation that the Special Commissioner be required to report to the Mayor only once a year, so as not to "compromise [the position's] independence."

This independence was nothing like the relationship between the DOI Commissioner and IGs of City agencies; EO 16 and other provisions of the City Charter give the DOI Commissioner control over the reporting structure and obligations of IGs. *Supra* at 13; *see generally* EO 16 as amended.

EO 11 contained numerous additional textual indications that the Deputy Commissioner position was intended to be an autonomous role exercising independent discretion to investigate corruption and mismanagement in the city school district:

- Section 3(a) of EO 11 stated that the Deputy Commissioner "shall receive and investigate complaints from any source *or upon his own initiative or* at the direction of the Commissioner of Investigation regarding alleged acts of corruption or other criminal activity, conflicts of interest, unethical conduct, and misconduct within the [city schools]" (emphasis added). Section 3(a) goes on to provide that the Deputy Commissioner "may refer such matters involving unethical conduct or misconduct *as he or she deems appropriate* to the Board of Education, the Chancellor, a Community School Board, or Community Superintendent, for investigation, disciplinary or other appropriate action," and "shall be authorized to make any other investigation and issues such reports regarding corruption or other criminal activity, unethical conduct, conflicts of interest and misconduct, *that he or she deems* to be in the best interest of the school district" (emphasis added).

- Section 3(d) of EO 11 gave the Deputy Commissioner the power to "recommend such remedial action *as he or she deems necessary*, and monitor the implementation by the City School District of recommendations made by him or her" (emphasis added).

- Section 3(g) provided that the Deputy Commissioner "shall make available to appropriate law enforcement officials information and evidence" relating to crimes "that he or she may obtain in carrying out his or her duties."

All of these provisions described an office with independent decision-making authority. Further:

- Section 4 of the EO 11, titled "Cooperation with the Deputy Commissioner," broadly described the obligations of others to assist the Deputy Commissioner in his or her work. Section 4(a) provided that the DOI Commissioner should provide "whatever assistance the Commissioner . . . deems necessary and appropriate to enable the Deputy Commissioner to carry out his or her responsibilities." Sections 4(b), (c), (d), and (e) collectively obliged the BOE, the Chancellor, and their charges to cooperate with and provide documents to the Deputy Commissioner. Section 4(f) imposed an affirmative obligation on BOE *and* City employees to report misconduct of various types to the Deputy Commissioner, while Section 4(g) made clear that City employees also retained the separate obligation to report that misconduct to DOI.

- Section 5 stated that "[t]he salaries and expenses of the Deputy Commissioner *and his or her staff* shall be borne by the Board of Education, within a budgetary allocation to be mutually agreed upon by the Board of Education and the City, provided however, that

such budgetary allocation shall be adequate to ensure the effective and independent performance of the duties and responsibilities of the Deputy Commissioner" (emphasis added). (No provision was made for any DOI oversight of the Deputy Commissioner's budget.)

Second, as the Gill Commission had recommended, EO 11 provided that the Deputy Commissioner "shall exercise the powers *conferred on a* Deputy Commissioner of Investigation by Chapter 34 of the City Charter, including but not limited to the power to compel the attendance of witnesses." *See* EO 11 § 3(b) (emphasis added). But EO 11 did not actually state that the Deputy Commissioner would be or serve as a "deputy" to the DOI Commissioner. Rather, EO 11 used the indefinite article "a" – suggesting that the Deputy Commissioner was intended only to have *the powers* of a DOI Deputy Commissioner. And EO 11 made amply clear that the Deputy Commissioner was not intended to be a vanilla DOI deputy subject to the direction of the Commissioner; to the contrary: by providing that the Deputy Commissioner could only be removed for cause, limiting the Deputy Commissioner's reporting obligation to a single annual update, and according the Deputy Commissioner the power to conduct investigations, issue reports, and make recommendations at his or her own initiative, EO 11 made clear that the Deputy Commissioner was intended to be quite *unlike* the DOI Commissioner's other deputies.

Third, at the time EO 11 was issued, DOI existed in materially the same form as currently, with substantially the same authority – namely, EOs 16, 78, and 105 were all in place. Yet EO 11 pointedly did *not* make the Deputy Commissioner an "Inspector General" subject to the extant IG system. Instead, Mayor Dinkins – in cooperation with the BOE – intentionally did something quite different.

b. The Board of Education Authorizes EO 11

The day prior to EO 11's issuance, the BOE enacted a counterpart resolution to EO 11. The BOE's June 27, 1990 resolution began by repealing two prior BOE resolutions establishing the discredited BOE IG; the new resolution proceeded to authorize the creation of the Deputy Commissioner position by Mayor Dinkins.

The BOE's June 27 resolution mirrored EO 11's language describing the role of the Deputy Commissioner. For example, the resolution provided that the Deputy Commissioner "shall exercise all th[e] duties, powers, and responsibilities of the Deputy Commissioner of Investigation set forth in [EO 11]." But the BOE's resolution also went further. As the Gill Commission's report had anticipated, the BOE conferred upon the Deputy Commissioner all "those powers of the [BOE] and the Chancellor which are necessary to conduct as complete an investigation or to issue such reports as may be appropriate and all "investigatory powers conferred on the Board of Education by the Education Law, the City Charter, or any other law," including "the power to administer oaths and affirmations, to compel the attendance of witnesses and the production of documents [and] to examine witnesses." The BOE's resolution also provided that "the Deputy Commissioner and such deputies as he or she shall designated shall be deemed to be employees of the Board of Education assigned as trial examiners with authority under [the] Education Law . . . to conduct investigations and hold hearings on behalf of the

Board of Education."

In addition to according the new position specific powers and rights under the Education Law, the BOE's resolution broadly and comprehensively directed the officers and employees of the school district to cooperate with the Deputy Commissioner.[7]

3. Stancik Takes Office and SCI Is Formed.

In October 1990, Mayor Dinkins appointed Ed Stancik to the new Deputy Commissioner role. Stancik, who had previously worked for 11 years as an assistant district attorney in New York County, proceeded to put together a staff. To that end, on January 9, 1991, the BOE passed a resolution creating a number of new positions in the "newly created Office of the Deputy Commissioner of Investigation for the City School District." As the resolution explained, after taking office, Commissioner Stancik "subsequently determined his organizational structure and management staffing," which was "approved by the City Department of Personnel" and conveyed to the BOE. The BOE, in turn, adopted a resolution creating nine positions, each with a particular title and a specific designation in the "Board of Education Management Pay Plan." The resolution went on to provide that the Deputy Commissioner "*shall have sole jurisdiction over all employees within the Office of the Deputy Commissioner*, including but not limited to, the authority to set salaries within established levels, to hire and terminate services, in accordance with applicable law and regulations and within the [budget]" (emphasis added).

Two further enactments followed within the next 18 months. First, in Executive Order No. 34 (Jan. 3, 1992), Mayor Dinkins changed "[t]he title of the Deputy Commissioner of Investigation for the City School District of New York" to "the "Special Commissioner of Investigation for the New York City School District." This title change confirmed that the Special Commissioner was *not*, as a matter of law, a "Deputy Commissioner of DOI." The enactment also provided that EO 11 "shall in all other respects remain in full force and effect." Second, on July 7, 1992, the BOE passed a resolution barring whistleblowing conduct by officers and employees of the City school district, and lodging power to investigate whistleblower complaints with the SCI.

With these and other powers in place, Commissioner Stancik proceeded to operate the SCI office as an independent watchdog agency for the next 10 years. During this time, so far as the record reflects, SCI set its own investigatory priorities; issued reports and recommendations without any direct oversight from DOI; separately reported the year-end results of its efforts; and otherwise operated independently.[8] As Commissioner Peters testified: "*Ed Stancik – to his*

[7] Subsequent amendments to the City Charter and the Chancellor's regulations acknowledged that the Special Commissioner was the proper recipient of reports of wrongdoing in City schools. *See* City Charter § 526-a-c; Chancellor's Regulation A-420 (providing that if principals discover corporal punishment of a sexual nature, they must immediately contact the NYPD and "SCI").

[8] For example, SCI's website contains 62 investigative reports from Stancik's tenure. *See* https://www1.nyc.gov/site/doi/sci/public-reports.page (last visited Oct. 9, 2018). None of those 62 reports were sent to or bear the signature of the Commissioner of Investigation; so far as the reports reveal, DOI personnel only assisted with two of the 62.

credit . . . reportedly did a very good job . . . and was reportedly largely left alone to operate functionally independently."

4. Richard Condon Replaces Commissioner Stancik

Commissioner Stancik suddenly grew ill in early 2002, and passed away in March of that year. On June 18, 2002, Mayor Bloomberg and DOI Commissioner Rose Gill Hearn jointly announced that Stancik would be succeeded by Richard Condon. Condon was a well-known figure, particularly in New York City law enforcement circles. He had served as New York City Police Commissioner in 1989 and 1990, prior to which he had a 33-year career in state and local positions, including as New York State Commissioner of the Division of Criminal Justice.

To facilitate Condon's appointment, Mayor Bloomberg made changes to EO 11. Executive Order No. 15 (issued the same day as Condon's appointment) replaced Section 2 of EO 11 with entirely new language. As originally drafted, that section – entitled "*Appointment and Removal* of Deputy Commissioner" (emphasis added) – accorded the DOI Commissioner the power to appoint, provided that removal could take place only for cause, and required that the appointee be a lawyer (which Condon was not). In EO 15, Mayor Bloomberg amended that section to read, in its entirety, as follows:

> Section 2. Appointment of Special Commissioner. The Commissioner of Investigation shall appoint a Special Commissioner of Investigation for the New York City School District. The Special Commissioner shall have had at least five years of law enforcement experience.

EO 15 thus accomplished two things: (1) it removed the requirement that the Special Commissioner be a lawyer; and (2) it removed *all* textual references to the DOI Commissioner's authority to remove the Special Commissioner, including the prior reference in Section 2's title.

5. [redacted] 15-Year Tenure as Special Commissioner

[redacted] proceeded to operate SCI as an almost-entirely-autonomous unit within DOI for the next 15 years. SCI continued to maintain its own investigative priorities, issue its own reports and recommendations, and separately report the results of its efforts.[9] For example, during Commissioner Gill Hearn's tenure, [redacted] occasionally attended DOI's CompStat meetings and orally reported on the results of his investigations; however, [redacted] was not subject to detailed questioning (or challenges) by Commissioner Gill Hearn, as were other Inspectors General. [redacted] also met privately with the Commissioner as needed.

[9] At the same time, the record makes clear that Commissioners Gill Hearn and Peters considered [redacted] to be a part of DOI in some sense; for example, DOI's 2002-03 annual report lists Commissioner [redacted] on a list of DOI staff, just below First Deputy Commissioner Elizabeth Glazer. *See* https://www1 nyc.gov/assets/doi/downloads/pdf/2002-2003_doi_annual_report.pdf, at 23. In December 2010, Commissioner [redacted] was transferred from a DOE line to a DOI line. It is unclear why this transition occurred; nevertheless, it does not appear to have had any effect on the day-to-day relationship between Commissioner [redacted] SCI, and DOI.

That relationship largely remained in place following the 2014 appointment of Commissioner Peters. [redacted] did participate in more DOI business between 2014 and 2017 than he had under Commissioner Gill Hearn.[10] During this time, [redacted] attended DOI's weekly executive meetings. He also assisted with the formation and operations of the DOI's NYPD IG, interviewing numerous candidates during the office's creation and offering feedback on that squad's reports. [redacted] However, while [redacted] himself served as a valuable resource to DOI, the SCI squad did not. For example, on at least one occasion, [redacted] rejected DOI's request for SCI staff assistance to interview NYPD IG office candidates.

In the same vein, DOI oversight of SCI's work remained as it was before – there was none. Among other things, SCI continued to separately release its reports and its statistics.[11] That is true even though the record reflects various scattered attempts by Commissioner Peters and his staff to assert direct control over SCI's operations while [redacted] was in office. For example, early in his tenure, Commissioner Peters instructed [redacted], to (1) consolidate DOI's press office with that of SCI – specifically, to have SCI's press office, [redacted], report directly to [redacted], and (2) to instruct [redacted] to change his letterhead to match that of other DOI units. Neither of those instructions were followed; the press offices never merged, [redacted] told [redacted] that he was in charge of his own letterhead, and the issues apparently died there. Similar attempts to assert control over SCI's fleet of DOE-purchased vehicles also stalled.

DOI senior staff testified that, notwithstanding their considerable personal and professional respect for [redacted] they did not believe that SCI was operating to its full potential during the 2014 to 2017 period. According to this testimony, it appeared to DOI senior staff that SCI was investigating too many "one-off" or disciplinary-type offenses, as opposed to larger investigations addressing more systemic wrongdoing. DOI senior staff noted that SCI did not employ a single auditor or financial forensic investigator, and thus possessed limited (if any) capacity to investigate complex financial misconduct at DOE – a state of affairs at odds with the Gill Commission's long-ago recommendations. [redacted] also noted that the sole "systematic" report that SCI produced during [redacted] final three years – a report about missing children – was investigated in conjunction with DOI.[12]

As of mid-2017, DOI's organizational chart showed Commissioner [redacted] as a direct report to Commissioner Peters – a unique position that was entirely separate from the IGs.

---

[10] In his annual budget testimony to the City Council on March 16, 2015, Commissioner Peters noted that Commissioner [redacted] had "held the position of Special Commissioner of Investigation since July 2002," and added that Commissioner [redacted] had "done a superb job in this role," which was why Peters had "asked him to stay on in the new Administration."

[11] *See* https://www1.nyc.gov/assets/doi/sci/releases/01-17-STATISTICS-REPORT-2016.pdf.

[12] It is notable, however, that while both Peters and [redacted] names appear on the report, the report appears on SCI letterhead and was signed by [redacted] first deputy commissioner, Regina Loughran. *See* https://www1.nyc.gov/assets/doi/sci/reports/05-15-Unsupervised-Children-Ltr.pdf.

a. Background to Dispute – Late 2017 And Early 2018

6. [redacted] Announces His Retirement, and DOI Leadership Ponders the Future.

In mid-to-late summer of 2017, after 15-plus years at SCI, [redacted] moved forward with plans to retire. [redacted] initially intended to depart in the fall; however, the sudden illness and subsequent passing of First Deputy Commissioner Regina Loughran prompted him to delay his retirement until the early winter.[13] News of [redacted] imminent retirement prompted discussions among DOI leadership about the future of SCI. These discussions revolved around two potential options for a post-[redacted] world. One option was to recruit a new Special Commissioner of comparable stature to [redacted] – a figure with substantial law enforcement experience and status who would essentially step directly into [redacted] shoes. This option was, of course, consistent with past practice. DOI leadership also discussed a second option: to centralize SCI under DOI's umbrella. Both options had pros and cons.

Centralization. DOI leadership believed that consolidating SCI into the DOI structure had many potential benefits, one of which was efficiency. As a standalone unit, SCI had its own back-office staff and infrastructure, including its own office administrator, press and public relations function, and part-time IT staff. DOI leadership viewed this as an unnecessary duplication of functions available through DOI, and believed that consolidating operations would result in cost savings that could be reinvested in investigatory work.

Another potential benefit was ensuring uniformity of operations. This consideration had multiple layers. First, DOI leadership was aware of material distinctions between the two offices' practices. For example, DOI leadership understood that SCI investigators did not regularly give interviewees *Garrity* and related warnings[14], which DOI leadership believed was not a best practice. DOI leadership hoped to harmonize SCI's investigatory standards with those at DOI. Second, DOI leadership saw value in broadly aligning SCI's investigative priorities with those of DOI – namely, as DOI leadership saw it, focusing on large-scale, systemic investigations of corruption and wrongdoing rather than "one-off" investigations of individual perpetrators. As DOI leadership saw it, if SCI were in the DOI fold, DOI leadership would not only be able to reset SCI's priorities (both among existing staff and by hiring new staff, including financial auditors, to tackle larger-scale investigations), but DOI would be able to leverage all of DOI's resources to assist with schools-related investigations and oversight. Third, DOI leadership saw value in uniformity of presentation. That is: transforming SCI into an

[13] Loughran's sudden departure presented challenges, both for personal and professional reasons. As [redacted] testified: "*Regina ran that place. I mean, she just was -- she did the work of five people. She ran that place. You know, she was a traditional first deputy. She sort of ran it every day and* [redacted] *was the top figure who signed off on things, but Regina was really, hands-on. She got sick and left the office in July, and things really changed. I mean certainly the work load increased, the sort of level of panic in the office increased.*"

[14] *See Garrity v. New Jersey*, 385 U.S. 493 (1967).

"Inspector General for the Department of Investigation" under the DOI umbrella would present a more unified, rational public face.[15]

DOI leadership also considered consolidation in terms of authority and accountability. As to authority: since 2002, the city's schools had been under mayoral control, and yet SCI's relationship to DOI had not materially changed. DOI leadership considered this to be an anachronism and an outlier given EO 105's direction for "a single aggregate of personnel and resources" among the City's inspectors general. As to accountability: DOI considered itself ultimately responsible for SCI's practices and output, which suggested that DOI should be keeping a firmer hand on the tiller.

Retaining a [redacted] like figure. Keeping SCI as it had been – as a quasi-autonomous office, led by a Special Commissioner – also had potential benefits. For one thing, maintaining the status quo was, by definition, consistent with past practice, and would thus prevent the disruption and management challenges that would accompany a new approach. Additionally, having a figure of [redacted] stature had proven beneficial in the past. [redacted] himself had served as a valued advisor to DOI senior leadership, both under Commissioner Gill Hearn and under Commissioner Peters; a figure of similar gravitas would likely be able to assist DOI in similar fashion.

7. DOI Resolves to Bring SCI Into the Fold.

After debating the merits of the above approaches, DOI leadership ultimately chose the path of assuming direct control over SCI – or, as Commissioner Peters put it, to "*treat the new persona functionally as an IG, give them whatever title they want, but . . . to function like an IG . . . I want them to report to an [Associate Commissioner], I want us to be more involved*." He added that, in contrast to years past, he anticipated that he and his senior staff would have the capacity to take on the additional burden of supervising SCI.

Around September 2017 (*i.e.*, before [redacted] had retired), DOI leadership began to refer to the SCI office by an entirely new designation – "Squad 11." The "squad" label referred to DOI's existing organizational structure, under which IG offices (or groups of IG offices) were organized by numbered squads, each of which reported (through an associate commissioner) up to DOI senior leadership. SCI had never before been referred to as a "squad," and [redacted] did not accept the title. [redacted] testified that, after seeing a DOI "org chart" with the Squad 11 designation, he called Commissioner Peters and told him that he was not the head of any "squad," and would no longer attend DOI senior staff meetings. Commissioner Peters responded that the changes were a "minor administrative" matter. On September 28, 2017, [redacted] sent SCI staff an email with the subject line "the office of the Special Commissioner of Investigation for the New York City School District" stating as follows:

> For administrative purposes, the Department of Investigation has begun to refer to the Office of the Special Commissioner of Investigation for the New York City

[15] This value of this consideration was limited, though, by the fact that SCI had widespread name recognition in the schools. Thus, changing SCI's public-facing identity could sow confusion among SCI's constituents and diminish the office's overall effectiveness.

School District as Squad 11. . . . The Office of the Special Commissioner will continue to use the terms "SCI" and "Office of the Special Commissioner" in all communications both internally and externally.

[redacted] also spoke separately with others about the proposed Squad 11 name. [redacted] recalled a meeting with [redacted] in which he said "I'm not going to be Squad 11" or words to that effect.

Notwithstanding [redacted] views, DOI leadership continued to envision a different relationship with SCI after [redacted] departure. DOI continued to use the new "Squad 11" label for internal DOI purposes – for example, during weekly agenda meetings. [redacted] also testified that, during the fall of 2017, [redacted] "would pretty regularly say . . . that [DOI leadership wanted] to treat the new No. 1 as more of an IG, as more of one of the IGs." [redacted] also emphasized that [redacted] never explicitly said that DOI leadership intended to view the new Special Commissioner "as one of the IGs . . . it was 'more like,' 'more like,'" which [redacted] interpreted to mean some unspecified degree of greater control.

8. [redacted] Issues a Legal Analysis of the Proposed Takeover of SCI.

On September 27, 2017, [redacted] met with [redacted] to discuss the proposed changes to SCI. [redacted]

[redacted] began looking into the issue from an HR perspective; [redacted] began a legal analysis. From an HR perspective, the "Special Commissioner" position had its own code in the City Department of Citywide Administrative Service's ("DCAS") system that needed to be used. On October 4, 2017, [redacted] sent [redacted] an email with the subject line "EO 11: Some Preliminary Thoughts." The four-paragraph email was as follows:

[redacted]

[redacted]

[redacted]

[redacted]

The next day, [redacted] responded "[redacted]"

[redacted] expanded [redacted] preliminary into a formal legal memorandum, which was largely completed by October 12, 2017.

[redacted]

[redacted]

[redacted]

[redacted][15]

[redacted]

- [redacted]

[redacted]

[16] [redacted] eventually concluded that, as a result of the Special Commissioner line having moved to DOI, there would be no impediment to the DOI Commissioner reducing the Special Commissioner's salary so long as it was within the band provided for by the title code.

[redacted]

[redacted]

9. Commissioner Peters Overrules [redacted] Legal Analysis.

On October 17, 2017, [redacted] received an email from [redacted] requesting a meeting regarding "the SCI Memo." [redacted] agreed to the meeting, noting that he hadn't "even sent [the memo] to [redacted] yet," but attaching the memo. Some time that afternoon, [redacted] and [redacted] met with Commissioner Peters and [redacted] to discuss the October Memo. [redacted] was the only one of the attendees to have any specific recall of the meeting; he recalled that [redacted] was disappointed by [redacted] conclusions; that [redacted] wanted [redacted] to give [redacted] and Commissioner Peters additional options, and that [redacted] directed [redacted] to seek a MOU with DOE. [redacted]

Commissioner Peters, [redacted] and [redacted] all testified that they did not recall the initial meeting on October 17. Commissioner Peters testified that he "remember[ed] very long conversations with [redacted] about this around that time in which [redacted] laid out for me [redacted] Commissioner Peters' testimony was thus that EO 11, read in harmony with other aspects of City law, authorized DOI to make SCI an IG's office. [redacted] testified that [redacted] did not recall the specific rationale that Commissioner Peters offered for overruling the analysis in the October Memo. [redacted]

---

[17] [redacted] (a non-lawyer) testified that he did not draft any of the October Memo; rather, [redacted] was responsible for the memo's substance. [redacted] stated that [redacted] role was limited to reviewing the memo and offering [redacted] opinion, which was essentially that he agreed with its conclusions. As [redacted] put it, the takeaway from the October Memo was that DOI "should not really pursue changing . . . the titles and stuff."

[18] [redacted] had separately determined that DCAS rules did not necessarily preclude one "Deputy Commissioner" from reporting to another deputy commissioner, though this conclusion was of unclear relevance given that the Special Commissioner had not been a "Deputy Commissioner" since at least 1992.

[redacted]

[redacted] testimony was somewhat different; [redacted] testified that over "multiple conversations," [redacted] and DOI leadership became comfortable with the idea that DOI had authority to take over SCI on a "two-fold" theory, based on policy and precedent:

> *One, that office needed to become more functional and this was the best way to make it more functional. That we really needed to do investigations. And that was important and this was the best way to do it. And two, that you can have a dual title of SCI and IG because many people have dual titles at DOI and those things can happen simultaneously. That you can have someone function as the IG, that every mayoral agency is supposed to have an IG [and] unless the SCI special commissioner is the IG, then you don't have an IG. So that those things can happen simultaneously.*

The DOI witnesses' recollections as to why [redacted] pursued a MOU with DOE varied. As set forth above, [redacted] testimony was that [redacted] directed [redacted] to pursue the MOU at the initial October 17 meeting.[19] [redacted] testified that [redacted] could not recall telling [redacted] to pursue a MOU and indeed did not know why DOI would have needed a MOU with DOE, other than a generalized desire "to formalize things" and a vague recollection that "it had to do with various funding issues and hiring." [redacted]

10. DOI Proceeds With the Plan to Transform the Special Commissioner Role to an Inspector General Position.

While [redacted] began drafting a MOU, DOI leadership continued to move forward with the process of changing SCI to an IG's office. Within days after the October 17, 2017 meeting regarding the October Memo, [redacted] had instructed [redacted] HR staff to prepare a draft "IG posting" for the Special Commissioner position.

The final version of the Special Commissioner posting listed the position with: (1) the civil service title "Special Commissioner of Investigation – NYC School Dist. DOI," (2) the office title "Special Commissioner of Investigation," and (3) a "Division/Work Unit" of "SCI – Squad 11." The job description contained various conflicting description of what office the new position would hold. The description's second paragraph began by stating that "DOI's Office of the Special Commissioner of Investigation (SCI) has broad authority to investigate wrongdoing by teachers and other school employees within the New York City School District." But the

---

[19] [redacted]

third paragraph provided that the Special Commissioner would "provide overall direction to DOI's SCI Inspector General Office." Notwithstanding this inconsistent verbiage, DOI staff testified that it was well-known at DOI that the new position would perform an IG role, and that the associated salary would be significantly reduced from that which [redacted] had earned.[20]

11. [redacted] Interviews for the Special Commissioner Role, and Is Hired.

[redacted] was among the 10 candidates to apply and interview for the vacant Special Commissioner position. [redacted] had an extensive law enforcement and investigative background. [redacted] By all accounts, [redacted] was known as a highly competent leader with excellent interpersonal skills. Moreover, [redacted] was highly regarded by the DOI leadership who had worked directly with [redacted] For example, [redacted] testified that [redacted] "seemed to be a team player," and that he regarded [redacted] as a friend.

[redacted] had, however, previously applied for an Associate Commissioner role at DOI, and wanted to return to public service. [redacted] applied for the vacant Special Commissioner position on November 21, 2017. One day later, DOI reached out to schedule an interview.

[redacted] ultimately interviewed on November 30 with three [redacted] and [redacted] initial interviewers scored [redacted] as highly qualified for the job. [redacted] then interviewed again on December 5 with [redacted] and [redacted] (who marked [redacted] as an "Excellent" candidate across the board). The next week, on December 12, [redacted] returned for a third interview – this one with [redacted] and Commissioner Peters.

DOI leadership agreed that [redacted] background and stated desire to modernize SCI's investigative approach made [redacted] an excellent fit for the job. For example, during [redacted] second interview, [redacted] told [redacted] and [redacted] that [redacted] would want to hire auditors at SCI to assess how the schools were handling their financial resources. Ultimately, DOI's applicant log showed [redacted] as the first choice among all the interviewees. On December 14, 2017, [redacted] wrote [redacted] a memo stating that [redacted] "has demonstrated a keen understanding of the Department of Investigation and of the skills required to fill the Special Commissioner of Investigations [sic] position in Squad 11." [redacted] added that "[t]hroughout the interview process, [redacted] was calm and confident which are qualities needed to fill the leadership role." [redacted] concluded by noting that [redacted] [redacted]-plus years of "extensive management experience" would "help [redacted] perform well in this position."

[20] The record reflects that the lower salary dissuaded several potential candidates, including [redacted] and former [redacted], from pursuing the position.

The issue of SCI's realignment was discussed to some extent during some of [redacted] interviews, though the extent of that discussion is disputed. [redacted] testified that during [redacted] December 5 interview with [redacted] and [redacted], [redacted] posed what [redacted] described as a "hypothetical question," asking "what if you were the IG or this is an IG office?" [redacted] testified that [redacted] responded "Is this a hypothetical?" and "Do you have an MOU?" at which point [redacted] "cut it off and said let's talk . . . cases." [redacted] also testified that [redacted] raised the oddity of this question with [redacted] after the interview. [redacted] added that [redacted] and [redacted] did not otherwise discuss SCI's incorporation into DOI. [redacted] did not recall specific questions and answers, but testified that [redacted] was fully apprised that [redacted] would be operating as an IG.

[redacted] also testified that, during [redacted] December 12 interview with Commissioner Peters and [redacted] told [redacted] that "this is a squad now," adding that "when you were here it wasn't a squad, but a squad is like an inspector general's office," and using the terms "Squad 11" and "SCI" interchangeably in reference to the office. [redacted] testified that [redacted] did not understand Commissioner Peters' comments to mean that SCI would be turned into a standard-issue IG's office, but rather that Commissioner Peters wanted DOI and SCI to collaborate on investigations. Commissioner Peters testified that "*We said to both* [redacted] *and* [redacted] *um, in the interviews, look, this is, you're going to be changing things. This is going to be different; you're going to be part of DOI. You're going to be part of DOI, we're going to be supervising this more.*"

In any event, following the final interview with Commissioner Peters, DOI provided [redacted] with inconsistent messages about what [redacted] title and role would be. After receiving an oral offer from Commissioner Peters during the interview (and orally accepting), [redacted] subsequently received a call from DOI's [redacted], [redacted] in which [redacted] requested [redacted] oral commitment to a position that [redacted] described as an "Inspector General" role. [redacted] informed [redacted] that [redacted] was wrong (*i.e.*, that [redacted] had been interviewing for a "Special Commissioner" position), and asked [redacted] to check. [redacted] also requested a written offer letter. On December 19, 2017, [redacted] received a letter that "extend[ed] a conditional offer of employment to [redacted] as a 'Special Commissioner of Investigation,'" contingent on OMB approval, a criminal background check, and a DOI background investigation. [redacted] accepted shortly thereafter.

[redacted] then attended a background interview at DOI on December 22, 2017, with [redacted]. [redacted] provided [redacted] with a "Terms and Conditions of Employment" form that listed the payroll and in-house titles as "Special Commissioner of Investigation." But [redacted] also handed [redacted] a document captioned "Offer of Employment and Letter of Commitment." The letter, dated December 22, 2017 (three days after [redacted] prior offer letter) purported to offer [redacted] "the position of *Investigator*" and required a two-year commitment. The letter also stated that [redacted] would report directly to Commissioner Peters and [redacted] signed the letter, but testified [redacted] was confused as to the reference to an "Investigator" position. [redacted] also testified that [redacted] told [redacted] that

he had never delivered such a letter to an executive-level hire; rather, two-year commitments were generally required only for lower-level investigators.[21]

12. [redacted] Interviews and Is Promoted to First Deputy.

Parallel to the hiring of [redacted] DOI also interviewed for and ultimately chose [redacted] first deputy – [redacted] The record reflects that [redacted] was capable and respected; on two occasions in 2014 and 2015, [redacted] (with whom [redacted] had a prior social relationship) solicited [redacted] to join DOI as an IG, which never proceeded.

On October 26, 2017, [redacted] requested a meeting with [redacted] during which [redacted] suggested to [redacted] that he would be a good fit for a SCI leadership role. [redacted] indicated he was interested, and agreed to discuss the issue further. During a subsequent meeting on November 16, 2017, [redacted] provided [redacted] with a more specific proposal – DOI wanted [redacted] to serve as the office's first deputy. [redacted] again expressed interest. That afternoon, [redacted] received a call from [redacted] and [redacted], the purpose of which was to inform [redacted] that, because DOI had not yet posted the First Deputy position, [redacted] should apply for the then-vacant Special Commissioner role.

[redacted] then interviewed with [redacted] on December 1; [redacted] testified that, during the interview, [redacted] said that DOI's plan was to treat SCI "more like an IG," and to treat the Special Commissioner role "more like an IG," but that "there was no talk of taking over or making SCI a unit of DOI." After the First Deputy position was formally posted, [redacted] interviewed with [redacted] and [redacted] on December 20. [redacted] testified that "again, there was the talk of 'more like an IG's office,'" and [redacted] was questioned about [redacted] vision for SCI and what he would change. [redacted] said [redacted] responded by noting that "SCI is not a tear-down." [redacted] gave [redacted] high marks, and wrote that [redacted] "provided keen insight into challenges within SCI and [redacted] desire to fold SCI into DOI and the many advantages – and challenges – in doing so." [redacted] also rated [redacted] highly; [redacted] notes indicate that [redacted] "knows what should be changed."

[redacted] was selected for the promotion on January 5, 2018. A "personal action request form" on that date indicates that [redacted] new title would be "First Deputy Inspector General."

13. [redacted] Retires, and DOI Begins the Takeover of SCI.

[redacted] last day was December 8, 2017. During his final week, [redacted] met with Commissioner Peters to discuss DOI's plans for SCI. Commissioner Peters testified that, during that meeting, [redacted] told him that merging SCI into DOI was a bad idea and urged him to let

[21] [redacted] ultimately cleared [redacted] both on a provisional basis in January 2018 and on a final basis in March 2018. In both of [redacted] clearance communications, he indicated that [redacted] was being cleared for the "Special Commissioner of Investigation" position.

SCI remain independent, but conceded that Commissioner Peters had the legal authority to take over SCI if he chose. [redacted] recalled the exchange differently; [redacted] testified that [redacted] told Commissioner Peters that if he wanted to change the way SCI was run, he needed to obtain an amendment to EO 11. [redacted] recalled that Commissioner Peters responded with words to the effect of "*Well, I have a pretty good lawyer, and* [redacted] concluded that "*I told him I didn't think he could do it and he told me he thought he could do it and that was the end of the conversation.*" [redacted] also debriefed [redacted] on December 7, 2017 about his meeting with Commissioner Peters.[22] [redacted] testified that [redacted] told [redacted] and [redacted] that [redacted] had told Commissioner Peters that taking over SCI would violate EO 11, and Commissioner Peters responded by [redacted]

After [redacted] departed, DOI leadership moved quickly to incorporate SCI into DOI's existing structure. Commissioner Peters never named an acting Special Commissioner. Rather, from December 2017 through February 5, 2018 ([redacted] start date), [redacted] served as an informal head of SCI, liaising as needed with [redacted] During this time, [redacted] took (and directed) action of several fronts:

First, DOI began to gather information about SCI. For example: on December 11, 2017 – the first business day after [redacted] departure – DOI's IT staff began discussions with [redacted] about assessing the status of SCI's IT infrastructure On January 10, 2018, [redacted] asked [redacted] about SCI's headcount and its vacancies. On January 12, 2018, [redacted] emailed SCI office administrator [redacted] seeking a spreadsheet containing job details (including salary) for all SCI employees. [redacted], under the impression that the information was needed for a DOI report to the City's Conflicts of Interest Board, provided the information within a week.[23]

Second, DOI began to issue policy and other directives directly to SCI. For example, on December 20, 2017, [redacted] directed that SCI should send all FOIL requests directly to [redacted] On January 16, 2018, [redacted] emailed [redacted] and stated that [redacted] would "like to have a conversation with you about converting some of [SCI's vacant investigator] positions to give you an auditing staff."

Third, DOI began to physically transform SCI's offices into a DOI IG office. One such step was particularly visible. At 5 p.m. on January 12, 2018 (a Friday evening), maintenance staff at 80 Maiden Lane replaced the signage at the front entrance of the SCI offices – which previously stated "Special Commissioner of Investigation for the New York School District, [redacted] Special Commissioner" – with Mayor de Blasio's name and "Mark G. Peters Commissioner." Nobody at SCI was given any advance notice of this change. Additionally, during the week of January 29, 2018, maintenance personnel – at DOI's direction – erected a wall dividing [redacted] former office into two separate offices.

---

[22] [redacted]

[23] In fact, as [redacted] later emailed [redacted] (but did not disclose to [redacted]), the requested information was to be used for other purposes – namely, preparing to directly manage SCI's staff.

Other changes were afoot. Around this time, [redacted] instructed [redacted] that [redacted] title would be changed to be consistent with the new "Inspector General" nomenclature. [redacted] was given the choice of two titles: "Deputy Inspector General," or "Senior Counsel." [redacted] chose the former. On January 29, 2018, [redacted] emailed [redacted] to tell [redacted] that DOI would be changing SCI employees' email addresses – to doi.nyc.gov addresses from the prior domain (nysci.org). [redacted] also informed [redacted] that DOI would be "consolidate[ing] the [SCI] web site with the doi site." ([redacted] had blocked an attempt to take down the SCI website before his departure.) A few days prior, [redacted] had informed [redacted] that DOI's external affairs team wanted "the anti-corruption communications efforts here more coordinated, with the outreach and intergov teams generally working more collaboratively with [redacted]."

On February 2, 2018, a team from DOI (including [redacted]) and SCI (including [redacted], and [redacted]) met to discuss numerous operational changes at SCI. During the meeting, [redacted] and others from DOI stated that SCI would have to follow DOI protocols for several issues (such as vouchering of evidence and peace officer certification) [redacted] also stated that DOI would be taking over SCI's fleet of vehicles. Numerous individuals indicated that the DOI employees' tone during the meeting was high-handed and dismissive of SCI staff's concerns.[24] [redacted] testified that "a lot of these [demands] are very ham-handed, just like 'This is what's happening.'" [redacted] added that [redacted] "came into that meeting a little bit later" and "tried to sort of ease tensions," but when [redacted] attempted to push back on a particular issue by telling [redacted] that SCI did things differently than DOI, [redacted] responded by saying that SCI "was now DOI."

SCI staff testified that SCI's staff had considerable trepidation about all of these changes. [redacted] testified that the changes were "like a blitz." [redacted] was surprised that, as SCI's head of administration, [redacted] was not consulted or given any advance notice on matters like the changing of signage and the splitting of [redacted] office. [redacted] added that SCI staff was "furious" about the unexpected removal of the SCI signage, that "[t]here was a lot of griping, a lot of, you know, 'How dare they,'" and that "everybody sort of had the feeling like, a certain about that was a done deal, and you know, who are you going to complain to about that? You are going to march into Mark Peters' office? You'll get fired." [redacted] testified that [redacted] was unhappy that [redacted] had not been designated as the acting head of SCI and about his lack of authority during the transition; he also testified that he did not push back against any of the changes made by [redacted] because [redacted] "had some vague notion that maybe something was going on behind the scenes to authorize all of this."

The drop in morale at SCI was understood by at least some DOI senior staff; for example, on January 17, 2018, [redacted] sent [redacted] an email to schedule regarding a "SCI Vacancy Meeting" and told [redacted] "Allegedly people are resigning," to which [redacted] responded "Oh boy."

[24]For example, DOI senior staff had decided that SCI peace officers (*i.e.*, the law enforcement agents of the agency, who are authorized to carry weapons on duty) would have to be recertified pursuant to DOI's requirements for peace officers. But DOI's peace officer program effectively required New York residency, and numerous SCI investigators did not live in New York. SCI witnesses testified that DOI leadership appeared indifferent to the consequences of this sudden policy shift.

14. Commissioner Peters Speaks With the [redacted]

During this time, Commissioner Peters spoke with [redacted] had taken over the first deputy role as of January 1, 2018, after serving for several years as the head of OMB. In that capacity, and through the budgeting process, [redacted] had become familiar with DOI's overall mission. However, [redacted] hoped to use his elevation as an opportunity to reset the relationship between DOI and City Hall, which [redacted] believed had grown "strained."

On January 27, 2018, [redacted] and Commissioner Peters spoke for approximately 45 minutes; Commissioner Peters wrote [redacted] an email summarizing the call. The email recounted Commissioner Peters' view that [redacted] was "actually pretty reasonable and . . . all is good." As to SCI, the email stated:

> 3. He said he had heard we'd hired a new SCI Commissioner and asked who it was. I told him (after explaining it was not yet public). He asked if we'd told Tony Shorris [the prior [redacted] about this and I told him that we had not, and that we did not tell Tony or anyone at CH about our hiring decisions. I suspect he wanted to ask to be told about such hirings going forward but decided not to push the issue. He asked if there were any other IG positions open and I said yes and didn't offer anything further. I think we just ignore this; my sense is he's not at this point going to push on it, but you should know.

[redacted] responded that Fuleihan's comments were "distressing" because "[i]t is absolutely essential that we retain full independence vis-a-vis hiring," and DOI "cannot compromise on that." Commissioner Peters added that he "[t]otally agree[d]."

In an interview, [redacted] agreed he did indeed want to be "told about such hirings going forward" because, in his view, the Special Commissioner was an extremely important position with a massive amount of responsibility over DOE, and City Hall had a vested interest in weighing in on the new hire. [redacted] also testified that he asked Commissioner Peters for an opportunity to meet the new Special Commissioner. Fulehian added that Commissioner Peters did not flag any issues about changes at SCI on the call.

15. Initial Confusion About [redacted] Title

[redacted] first day on the job was slated for February 5, 2018 – before which confusion about [redacted] title and role continued to persist, at least on [redacted] end.

[redacted] was invited to visit DOI and meet the SCI staff before [redacted] official start date. During the phone call inviting [redacted] in, [redacted] learned that [redacted] had been named as [redacted] first deputy. [redacted] met at [redacted] on January 23, 2018. [redacted] testified that during that discussion, [redacted] told [redacted] about Commissioner Peters' comments during [redacted] interview (*i.e.*, that Commissioner Peters wanted to treat SCI more like an IG's office), and [redacted] that DOI planned to give [redacted] an IG title. [redacted] testified that, at that time, [redacted] thought that the IG title would be an internal one. [redacted] testified that [redacted]

expected that "it would always be kind of the way that [redacted] was there, that [the office] may be somewhat diminished, but like it will always be the Special Commissioner, you'll always have a big seat at the table." Afterwards, [redacted] called [redacted] to discuss [redacted] new role; [redacted] testified that [redacted] told [redacted] to "be careful" regarding changes to [redacted] role, and to look to EO 11 for guidance.

On January 31, 2018, [redacted] was introduced to the SCI staff by Commissioner Peters, [redacted] and [redacted] All of them referred to [redacted] as an IG, with no mention of the "Special Commissioner" title. After the introductions, when SCI staff asked [redacted] whether to call [redacted] an IG or a Special Commissioner, [redacted] advised the staff to call [redacted]

That Friday, [redacted] directed a press inquiry from the [redacted] about [redacted] departure to [redacted]. The inquiry included, among other things, what [redacted] new title would be; [redacted] instructed [redacted] to coordinate with the [redacted] as needed. That evening, [redacted] called [redacted] to discuss the issue. [redacted] testified that after [redacted] explained the discrepancy between [redacted] offer letter (which stated that [redacted] was hired as the "Special Commissioner of Investigation") and the "Inspector General" usage by DOI leadership on January 31, [redacted] stated that offer letter was a "mistake" and that [redacted] was "just an inspector general." [redacted] testified that Lambiase's tone during this conversation was "forceful."[25]

16. [redacted] Declines to Sign a MOU.

a. [redacted] Prepares a Draft MOU Modeled After Those With Other Non-Mayoral Agencies.

While DOI took steps to absorb SCI, [redacted] began to pursue a MOU with DOE. On October 27, 2017, [redacted] sent [redacted] a draft MOU modeled after DOI's MOU with the New York City Health and Hospitals Corporation ("HHC"). The first draft of the MOU began with several "WHEREAS" clauses which, among other things, described DOE as "a City agency that serves the largest school district in the United States," and asserted that, under Chapter 34 of the city's Charter, "DOI has jurisdiction over DOE;" and that "the Special Commissioner is an employee of DOI and the staff of SCI are employees of DOE." The draft MOU then contained 22 numbered paragraphs, 20 of them substantive, containing a number of proposed understandings between DOI and DOE. The most relevant of those paragraphs are the following:

> 1. SCI shall be staffed by: (a) the Special Commissioner, who shall be appointed by the Commissioner in his sole discretion; and (b) such other staff as the Commissioner shall deem appropriate. Up to ___ (__) SCI personnel shall be appointed pursuant to this Agreement. The staffing of SCI may be increased by up to _____ (__) additional personnel without the need to amend this Agreement, if, in the Commissioner's sole discretion, such additional personnel are necessary to effectuate the purposes of this Agreement. Subject to the

[25] [redacted] testified that [redacted] had told [redacted] to call [redacted] because of confusion regarding [redacted] job title, but did not recall the content of the call with [redacted] [redacted] testified that [redacted] only "vaguely" remembered the exchange.

requirements of the New York State Civil Service Law and any applicable collective bargaining agreement, DOI shall be under no obligation to retain DOE personnel who currently work in SCI.

2. The Special Commissioner shall continue to be an employee of DOI. All other SCI employees shall continue to be employees of DOE. DOI shall be responsible for payment of the salary and benefits for the Special Commissioner. DOE shall be responsible for the payment of the salaries and benefits of the other SCI staff. DOE may, consistent with the terms of this Agreement, seek indemnification for this responsibility in whole or in part from the Office of the Mayor pursuant to a separate agreement between DOE and the Office of the Mayor, the form of which agreement DOI shall have the right to approve. In no case, however, may DOE agree to the funding of fewer SCI staff positions than the number set forth in paragraph 1 above. The Commissioner shall have the exclusive authority to: (a) hire and remove; (b) set the salaries of; (c) assign the duties and responsibilities of; and (d) promote or demote, the Special Commissioner and staff of SCI.

3. The Special Commissioner shall report to the Commissioner or his or her designee.

4. The Commissioner and/or his or her Executive Staff shall have the exclusive authority to approve, monitor and supervise all SCI investigations and shall approve the issuance of all subpoenas, the making of all arrests and the making of all referrals of matters to other law enforcement or prosecutorial agencies. . . .

8. Pursuant to this Agreement, DOE acknowledges that DOE personnel are bound by the provisions of Executive Order 16 of the Mayor of the City of New York, as amended by Executive Orders 72, 78, and 105 (collectively, “EO 16 as amended”), as well as the provisions of EO 11, subject to the understanding that EO 16 as amended is deemed to be modified as follows in its application to DOE and its, officers and employees: throughout EO 16 as amended, the term "Inspector General" shall be deemed to refer to the Special Commissioner.

9. Except where the Commissioner has approved the referral of a matter to another law enforcement agency pursuant to Paragraph 4 of this Agreement or where the Special Commissioner has determined that the integrity of a criminal investigation might be compromised, all requests for SCI documents or data, whether in hard copy or in electronic form, by any federal, state or local law enforcement agency shall be subject to prior review and approval by the DOI General Counsel or the General Counsel's designee. All demands or requests for SCI documents made through subpoena or other legal process shall be forwarded to the DOI General Counsel for consultation and cooperation in preparation of a response that is appropriate to enable DOE to be compliant with law and not in contempt.

10. The Special Commissioner shall provide the DOE General Counsel or the DOE General Counsel's designee with access to all original records of DOE (deemed to include documents from third parties received in the normal course of business by components of DOE other than SCI) that are being retained in the custody of the Special Commissioner. Records prepared after the effective date of this Agreement by SCI and records, other than original records of DOE or copies of such original records, received after the effective date of this Agreement by SCI from third parties shall be deemed records of DOI. Any request received by DOE for access to such DOI records under the New York State Freedom of Information Law ("FOIL"), or otherwise, shall be forwarded to DOI's General Counsel. To the extent that documents requested from DOE under FOIL are documents of DOI, DOE will respond as such to the FOIL requestor and provide no further response unless compelled by court order. A copy of any request received by DOE for DOE's records related to SCI shall be shared with DOI's General Counsel and the parties will discuss the best way for DOE to respond consistent with law. . . .

14. DOE shall not promulgate any directive, rule or regulation affecting SCI, other than on routine administrative or personnel matters that are addressed DOE-wide, without prior consultation with the Special Commissioner or the Commissioner. . . .

20. Any prior resolutions of the DOE regarding SCI inconsistent with this Agreement (including, but not limited to, resolutions of the former Board of Education adopted January 9, 1991, annexed hereto); and any prior agreements, understandings or protocols between DOI and SCI, or DOE regarding SCI, are hereby void, to the extent such resolutions, agreements, understandings or protocols are inconsistent with the terms of this Agreement.

On its face, then, the draft MOU contained numerous provisions conferring oversight authority for the DOE (and SCI) on DOI. Commissioner Peters, [redacted] and [redacted] variously testified that these provisions were not needed to give DOI control over SCI; rather, the draft MOU was only as broad as it appeared because: (1) [redacted] had used the HHC MOU as a model; or (2) the HHC MOU was necessarily broad because that HHC was a separate legal entity from the City, and DOI needed HHC's agreement (or consent) to conduct oversight on HHC.

b. [redacted] Explains the DOE's Objections to the Proposed MOU to [redacted]

[redacted] called [redacted] on December 15, 2017 and told [redacted] that [redacted] had a proposed MOU that was similar to those that DOI had with other "non-Mayorals." [redacted] generally recalled [redacted] telling [redacted] that, while SCI had had two prior "strong commissioners," DOI wanted to go in a different direction and desired to bring SCI into alignment with DOI's practices. [redacted] recalled being surprised that [redacted] was so open with [redacted] about DOI's goals.

After the call, [redacted] emailed [redacted] a copy of an MOU dated December 13, 2017, which [redacted] proceeded to review with [redacted] staff.
[redacted] made two follow-up inquiries (December 27, 2017, January 9, 2018) before emailing [redacted] a modestly revised version of the MOU on January 16, 2018.[26] [redacted] and [redacted] ultimately agreed to speak about the MOU on the afternoon of January 26, 2018. During the approximately hour-long call, [redacted] walked [redacted] through a markup of the MOU that [redacted] and his staff had prepared (but not sent to [redacted] took handwritten notes of the discussion, which included the following:

Whether SCI employees were "DOE Employees." [redacted] and [redacted] began by discussing the recital providing that "the staff of SCI are employees of DOE." [redacted]

Retention of SCI personnel. The final sentence of Paragraph 1 provided that "DOI shall be under no obligation to retain DOE personnel who currently work in SCI." [redacted]

Reporting structure. [redacted] told [redacted] that paragraphs 3 and 4 – which described the reporting and oversight relationship between DOI and SCI [redacted]

Applicability of EO 16. [redacted] told [redacted]

DOI Control of SCI Documents. [redacted]

[26] The additions provided that SCI employees would be bound by the DOI Code of Conduct.

[27] [redacted]

[28] [redacted] testified that [redacted] did not raise any issues with the draft MOU's first recital – that DOE was "a City agency" – on the call because it did not occur to [redacted] But [redacted] agreed that [redacted] could not and would not have agreed to a MOU with that recital.

[redacted]

After discussing paragraph 10, [redacted]

[redacted]

c. [redacted] Reports on the Conversation to DOI.

On January 29, 2018, [redacted] sent DOI's executive staff an email purporting to report on his conversation with [redacted]

[redacted] email added that [redacted] has told [redacted] that [redacted]

[redacted] concluded that [redacted]

[29] We ultimately conclude that [redacted] report of the [redacted] call was not accurate. *Infra* at n. 116.

B. Background to Dispute – [redacted] Tenure At Sci (February 5, 2018 through March 28, 2018)

[redacted] first day at SCI was February 5, 2018. [redacted] was terminated on the evening March 28, 2018. [redacted] 51-day tenure was remarkably eventful. [redacted] engaged in numerous discussions on a variety of fronts about the scope and nature of [redacted] role and the scope of [redacted] authority. [redacted] participated in numerous notable meetings with Commissioner Peters and his senior staff, including a tense "ultimatum" meeting on February 27, 2018. By [redacted] second week at SCI, [redacted] had started secretly recording conversations with DOI executives; by [redacted] fourth week, DOI leadership had started to write confidential memoranda about [redacted] supposed transgressions. Before the end of March, [redacted] and [redacted] staff had consulted with the [redacted] the [redacted] and [redacted] about the legality of DOI's changes at SCI, and the *New York Times* had landed a one-on-one interview with Commissioner Peters to discuss those changes.

i. [redacted] First Two Weeks: February 5, 2018 through February 19, 2018

The early days of [redacted] tenure generated several disputes relating to the scope of [redacted] authority. These can be sorted into three general areas: [redacted] title, [redacted] reporting chain, and an issue surrounding DOI's intent to hire a Chief Information Security Officer ("CISO") for DOI using DOE funds.

ii. [redacted] Title and External Messaging.

When [redacted] arrived at work on February 5, there was no mistaking DOI's intent to call [redacted] an "Inspector General" and not the "Special Commissioner for Investigation." [redacted] first-day HR paperwork indicated that [redacted] was an "Inspector General," as did [redacted] identification card. The nameplate on [redacted] office door also contained the title "Inspector General." That afternoon, [redacted] sent DOI staff an email welcoming [redacted] the email referred to [redacted] as an "Inspector General" for Squad 11, and made no reference to the "Special Commissioner of Investigation" title.[30] [redacted] also met that afternoon with [redacted] and [redacted] during which [redacted] informed [redacted] that [redacted] was "technically" the Special Commissioner, but for all intents and purposes, [redacted] was an IG. [redacted] also was instructed to ensure that SCI staff told callers to the main SCI switchboard that they had reached the "Inspector General's Office for DOE."

DOI leadership understood tha [redacted] title change was a notable event that would draw attention. For example, DOI had decided that, for the first time, DOI would incorporate SCI's statistical announcement describing its 2017 results into the larger DOI release. On February 2, 2018, [redacted] prepared a "Q&A" document to be used if reporters asked questions about why DOI was reporting SCI's results and the broader change in relationship between SCI and DOI. [redacted] initial draft, which he circulated to [redacted] and others, included the following mock exchanges:

[30] The email was not actually received by SCI staff, whose conversion to DOI email addresses had apparently not been finalized.

Q: Why is the SCI Statistics report on DOI Letterhead?
A: DOI is harmonizing branding for all city inspectors general to reduce confusion, improve accountability and ultimately deliver better results for people of the City of New York. . . .
Q: Doesn't the executive order call this role Special Commissioner of Investigations?
A: Yes, and that remains the formal title. The functional title and the public brand will be Inspector General.

[redacted]) responded via email to recommend that "the language about rebranding" be "eliminated," as "this doesn't seem appropriate for a govt agency and it doesn't strike me as something to share internally." Struzzi then added that "the facts are what the facts are about the name change," and suggest that, in response to anticipated questions, DOI be prepared to tell reporters that "There are no changes to SCI's operation or its independence" and that the name change was being done solely to "fully integrate [SCI] as part of DOI."

The issue of [redacted] title continued to recur, not least because DOI had either overlooked or disregarded the various ways in which the title switch would need to be reconciled with traditional practice and external messaging. Thus, during these first two weeks, [redacted] made inquiries of DOI leadership as to what title [redacted] should use on [redacted] business card, LinkedIn account, and elsewhere – inquiries that apparently irked DOI senior staff. As late as March 12, 2018, [redacted] and [redacted] operations team continued to debate whether [redacted] formally had a "senior title" for city reporting requirements.[31]

iii. Reporting Structure and Powers.

On February 7, 2018, DOI announced the promotion of [redacted] to an Associate Commissioner role, and that [redacted] would be reporting directly to [redacted] Formerly one of the two IGs of Squad 5, [redacted] had never previously been informed that [redacted] would be reporting to an Associate Commissioner, or to [redacted] in particular.

At this point, DOI leadership (through [redacted] and others) began to direct [redacted] not to use the powers that had been conferred upon the Special Commissioner by EO 11 and the BOE resolutions. These included specific investigatory powers, such as the ability to issue and sign subpoenas or refer matters to outside prosecutors. But the restrictions also encompassed the broader, discretionary authority provided by EO 11 – in short, the power to set SCI's investigatory priorities. And DOI leadership, through [redacted] ultimately communicated to [redacted] that DOI had the authority to hire and fire SCI's staff.

[31] As [redacted] explained in an email to [redacted] (1) "on a monthly basis . . . the Mayor's Office requires DOI to provide updates on all recent hire of senior staff titles"; (2) [redacted] "civil service title is listed in the city's databases as Special Commissioner," even though "[redacted] office title is Inspector General"; and (3) "the Mayor's Office [was] asking [DOI] to include [redacted] name." [redacted] then commented "What a conundrum" before volunteering that "if we don't include her as one of our senior title[s] it may open us up to possible scrutiny."

Priorities. At the outset, [redacted] and DOI leadership assumed authority over SCI's investigations and priorities. By way of example, in a briefing memo prepared for [redacted] DOI leadership directed that SCI should create a "Team 2," one specifically designed and dedicated to "addressing data, audit, and financial analysis-heavy investigations," and designated a number of positions that should be filled for the team. The same memo also purported to set out additional short- and long-term objectives for "Squad 11," including "[i]mplement[ing] new and progressive investigative strategies in a broad range of relevant subject areas." And DOI leadership regularly informed [redacted] that [redacted] should pursue so-called "systemic" investigations.

Powers. After [redacted] departure, Peters had agreed to sign subpoenas for SCI on an interim basis. But after [redacted] arrived, [redacted] instructed [redacted] that SCI would continue to follow DOI protocols for subpoenas – namely, that [redacted] had to approve all subpoenas, with a supporting explanatory memo. This was a marked departure from past practice, given that [redacted] (or Loughran as his designee) had signed subpoenas for SCI pursuant to EO 11's authority. [redacted] was also informed that [redacted] could not refer matters to other agencies and prosecutors without clearing those referrals with [redacted] – another departure from past practice and a deviation from the discretionary authority conferred upon the Special Commissioner.

iv. CISO Issue

On the morning of February 7, 2018, [redacted] emailed [redacted], SCI's budget director – copying [redacted] – with a job posting for a "CIO," and asked [redacted] to post the position. [redacted] added that "[redacted]." In fact, the posting indicated that the CISO would lead "the implementation and management of information security controls that will increase the Agency's overall information security posture." In other words: while it was possible that the CISO would be assisting SCI an indirect way, the position was a DOI-wide role. By using a SCI line, DOI hoped to use SCI's budget (provided by the DOE) to pay for the position. And according to the testimony of [redacted] (who would have supervised the CISO), DOI intended – at this time – for its use of the SCI line to be a permanent state of affairs.[32]

The potential impropriety of using a SCI line to pay for a DOI position was immediately apparent to [redacted] who told [redacted] and others not to respond to [redacted]s email for the time being [redacted] then asked [redacted] and [redacted] to prepare a draft letter to [redacted] asking for a legal opinion about the propriety of the posting. [redacted] ultimately did not send the resulting draft (which [redacted] considered too confrontational). However, the next morning, during a meeting involving [redacted] told [redacted] that DOI was "taking" a SCI line. [redacted] sent an email to [redacted] that day requesting [redacted] advice about "our practices of using funds that we received from DOE to employ the staff and pay the expenses of Squad 11." The email added that while [redacted] was

[32] Some witnesses testified otherwise. Commissioner Peters testified that he believed that the use of the SCI line was always intended to be temporary. [redacted] testified that DOI planned to seek funding for the CISO position from OMB in the DOI budget and thus hoped that DOI's use of the SCI line would be temporary, but acknowledged that DOI had no way of guaranteeing OMB's funding in that or any year.

"fully on-board about integrating Squad 11/SCI into DOI," [redacted] "want[ed] to be sure that our practices moving forward are consistent with" EO 11, the 1990 and 1991 BOE resolutions.

February 13, 2018 Meeting. The issue was ultimately addressed in a February 13, 2018 meeting that included [redacted] and in part [redacted] recorded the meeting. The meeting addressed several topics, but [redacted] eventually turned to [redacted] concerns about using DOE funds for non-DOE purposes. [redacted] started by telling [redacted] and [redacted] about [redacted] conversations with [redacted] – namely, [redacted] said that [redacted] had told [redacted] that [redacted] "didn't know if [DOE] wanted to sign something like [a MOU] because we've always thought of DOI as SCI." [redacted] acknowledged that until recently, "SCI didn't consider themselves to be DOI." However, [redacted] explained that [redacted] had said that DOE considered DOI to be the employer of SCI's staff – or, as [redacted] put it, [redacted] had said "We don't get to tell SCI what to do; you do." [redacted] thus concluded that he did not think that '[redacted]" about using a DOE-funded line on the CISO position.

[redacted] then inquired about the legal basis for [redacted] alleged opinion, at which point [redacted] began looking through [redacted] notes of [redacted] January 26 call with [redacted] added that [redacted] understanding of [redacted] position was different; namely, that [redacted] view was that he was "not allowed to make decisions on that," had said something to the effect of "I'm not touching that," and that DOE was "not going to offer a view on how [SCI] should or shouldn't run your office." [redacted] then noted that this was not consistent with [redacted] explanation of [redacted] views, and that DOI should "be very cautious saying '[redacted] says it's okay, so we're good with it.'"

[redacted] entered the meeting at that point; [redacted] briefed [redacted] about [redacted] concerns about relying too heavily on [redacted]s oral representations. [redacted] then stated "Let's get that in writing" ("that" being DOE's agreement in some form). [redacted] then noted that the 1990 and 1991 BOE resolutions strongly suggested that DOE funds should be used only for DOE oversight. [redacted] called that "a[redacted]," and suggested that "We dust that off and take a closer look at it," at which point [redacted] asked [redacted] to confirm that the CISO line had not yet been posted. The following exchange then occurred:

[redacted]

The discussion then turned to whether SCI was otherwise in compliance with the BOE resolutions – *i.e.*, whether the particular positions listed in the 1991 resolution were still filled at the salary bands specified in the resolution. [redacted] said no, at which point [redacted] said "[redacted]." The conversation then addressed other topics, including the difficulties with activating [redacted] new email address. [redacted] also indicated that many investigators were willing and "excited" about doing "different types of cases," which [redacted] said was great to hear, and confirmation of what [redacted] saw from SCI staff

during [redacted] January 31 unveiling, which [redacted] described as "[redacted]."

[redacted] eventually returned the conversation to the MOU issue, saying "[redacted]." [redacted] hopped in at that point, saying "[redacted]." [redacted] agreed with that, and [redacted] continued: "[redacted]." The meeting then moved on to other topics.

Later in the same day, [redacted] met with [redacted] and [redacted] to instruct them that [redacted] office would handle arrangements for meetings between SCI and [redacted] office, and [redacted] should not do so without prior approval.[33]

1. The Issues Ripen: Commissioner Peters Meets with [redacted] and [redacted] Meetings Regarding the MOU, the Restructuring of Squad 11, and Commissioner Peters Issues an Ultimatum to [redacted]

a. February 20, 2018: Commissioner Peters and [redacted] Meet With [redacted] and [redacted]

On February 20, 2018, Commissioner Peters and [redacted] attended a meeting with [redacted] and [redacted] The meeting lasted between 30 and 45 minutes. The meeting was not dedicated to SCI or DOE-related issues; rather, it was a broader meeting intended to help [redacted] – who, as noted above, had only been elevated to the [redacted] role as of January 2018 – become more familiar with the sweep of DOI's portfolio and investigations.

During the meeting, Commissioner Peters and [redacted] provided [redacted] and [redacted] with an 8.5-11 version of the current DOI organizational chart, which included the NYPD IG (as "Squad 10") and the SCI (as "Squad 11"), and explained generally why DOI's organizational structure – IGs reporting to Associate Commissioners and on up – was beneficial (*i.e.*, because it allowed IGs to take advantage of Associate Commissioners' expertise and view across squads/agencies, which would facilitate broader investigations). Commissioner Peters and [redacted] testified that they specifically explained that the new "DOE IG" ([redacted] would have a different reporting structure than [redacted] had. [redacted]'s testimony was not entirely consistent with that; [redacted] testified that because the term "Special Commissioner" was not used, he did not understand or appreciate that there had been any change to the existing relationship between DOI and SCI. In any event, all parties agree that [redacted] and [redacted] did not ask any specific questions about the "new" role of the DOE IG, and the legal framework for SCI generally or for

[33] On February 16, 2018, [redacted] met with [redacted] recorded the meeting, which lasted about 40 minutes, and concerned preparations for [redacted] first "tri-weekly" meeting. The meeting was unremarkable; all appeared to have a good working relationship. Later that day, [redacted] had a short second meeting, during which [redacted] gave [redacted] tips for [redacted] upcoming meeting with [redacted] and others on February 21. This meeting, too, was friendly and collegial.

DOI's changes to SCI was not discussed. [redacted] testified that, at this meeting, [redacted] again requested an opportunity to meet with the new Special Commissioner.

b. February 20, 2018: [redacted] and [redacted] Meet with [redacted]

[redacted] was scheduled to visit SCI on February 20, 2018 regarding a separate investigation. Before that visit, [redacted] – who had heard rumblings regarding a proposed MOU with DOE – urged [redacted] to bring a copy of the MOU. [redacted] did so, and although [redacted] declined to give [redacted] a copy of the draft MOU, [redacted] discussed it with [redacted] notes of the meeting reflect that [redacted] and [redacted] went through the proposed MOU, and contain [redacted] reactions to various paragraphs of the MOU. Among other things, [redacted] captured [redacted] reactions to the last sentence of paragraph 2 and paragraphs 3 and 4 – the portions of the draft MOU directly addressing DOI's oversight of SCI. [redacted] described [redacted] s response to the last sentence of paragraph 2 as being "[redacted] reaction to paragraph 3 was "[redacted]"; for paragraph 4, it was "[redacted]." [redacted] added that paragraph 20 – the portion of the draft MOU that purported to "void" any inconsistent prior BOE resolutions – [redacted]

c. The February 21, 2018 Breakfast

A breakfast was held on the morning of February 21, 2018 involving SCI's staff and DOI leadership, the goal of which was to attempt to "break the ice" between the two.[35] From that perspective, the event was not a success. During the "Q&A" portion of the breakfast, not a single question was asked of DOI leadership. Following the official Q&A, [redacted] – partially at [redacted] urging – approached [redacted] with an inquiry. [redacted] was speaking with [redacted] approached [redacted] introduced herself, and asked if [redacted] was "the last Special Commissioner," and what [redacted] should call [redacted] According to [redacted] and [redacted] became visibly irritated by the question, and responded, among other things, that "there are official titles and office titles," and that [redacted] was considered an IG. [redacted] then added, in a sarcastic manner, that "if we want to get super technical then [redacted] is a 'super secret' Special Commissioner." [redacted] repeated the phrase several times, adding that that [redacted]

[34] On the same day, Commissioner Peters and [redacted] sent out an email to the DOI staff about upcoming initiatives with the subject line "Looking Ahead." The email began: "With [redacted] taking over as Deputy Commissioner for Investigations, [redacted] moving into [redacted] new role as [redacted], [redacted] coming on board to head our schools investigations and [redacted] as the corrections IG, we now have (most) of our key investigative roles filled." [redacted] not surprisingly, noticed that of the four individuals mentioned, three of them were described by their title, but [redacted] was not. [redacted] wrote to [redacted] that night and asked [redacted] whether he thought the omission was intentional; [redacted] responded that evening and said he did not believe the omission was "intended as a slight" and added that the Commissioner was "very excited to have [redacted] as the leader of Squad 11." During an interview, [redacted] said that [redacted] intent when responding to [redacted] was to offer reassurance about [redacted] role, but he agreed that, in retrospect, the omission of [redacted] title appeared to be a "sensitive issue." [redacted] intent notwithstanding, [redacted] viewed [redacted] rejection of [redacted] concern as incredible, and this exchange contributed to the growing lack of trust between the two.

[35] DOI regularly conducts breakfast meet-and-greets with its leadership and the various squads; [redacted], intentionally moved up Squad 11 in the breakfast rotation due to what he perceived as difficulties in the incorporation of Squad 11 into DOI.

"needs to stop worrying about [redacted] title and start making arrests." When [redacted] asked for additional clarification about [redacted] title, [redacted] stated that [redacted] "is an IG," adding that if DOI "really want[ed] to go to the Mayor to officially change the unit's title and all, they will but for now it's going to stay the way it is."

[redacted] testified that [redacted] could not hear [redacted] during this exchange, but could tell that [redacted] was animated. [redacted] drafted a memo memorializing this interaction the next day, the accuracy of which [redacted] confirmed.[36]

d. The February 21, 2018 Restructuring Meeting.

DOI had scheduled a "restructuring" meeting for the afternoon of February 21, 2018, the purpose of which was to discuss how to restructure Squad 11 to integrate it into DOI. [redacted] attended. [redacted] recorded the meeting on her phone; it lasted approximately 45 minutes. As relevant here, during the meeting:

- [redacted] told [redacted] that all SCI investigators were "out of compliance" with DOI regulations, and indicated that they needed to be retrained.

- When the issue of the number of vacant lines at SCI arose, [redacted] told [redacted] and [redacted] "You have 9 not 10, right? Remember that [redacted] is stealing one." [redacted] attempted to respond, beginning to say, "We never found out . . ." (presumably a reference to the legal issues raised on February 13) but [redacted] cut [redacted] off, saying "He's stealing it." [redacted] then attempted to interject, at which point [redacted] repeated: "You have 10 vacancies, right? You're losing one." [redacted] then agreed, saying "Yeah, [redacted] is stealing one. Every once in a while [redacted] has to steal a line."

- [redacted] then explained that they had a meeting with [redacted] a few weeks ago, during which [redacted] promised them that he'd "give us something in writing." [redacted] and [redacted] responded by saying that [redacted] had "talked to DOE" and "DOE's fine with it." When [redacted] volunteered that [redacted] "understanding from counsel's office at DOE is that it's not the way that it was sort of described in that meeting," [redacted] said it was "not a problem," that "you guys can meet with [redacted] and "we will work this out," and that [redacted] "was working on a letter [to DOE] anyway formalizing the DOE stuff." [redacted] then specifically stated that [redacted] would be uncomfortable using DOE funds for non-DOE work, at which point [redacted] said "first of all, it's not really non-DOE work," and added that "everybody's on board" with this plan, that "[redacted] will confirm," and that "you guys don't need to worry about it."

[36] [redacted] testified that [redacted] did not recall the interaction at all, or who [redacted] was.

"needs to stop worrying about [redacted] title and start making arrests." When Runko asked for additional clarification about Coleman's title, [redacted] stated that [redacted] "is an IG," adding that if DOI "really want[ed] to go to the Mayor to officially change the unit's title and all, they will but for now it's going to stay the way it is."

[redacted] testified that [redacted] could not hear [redacted] during this exchange, but could tell that [redacted] was animated. Runko drafted a memo memorializing this interaction the next day, the accuracy of which [redacted] confirmed.[36]

d. The February 21, 2018 Restructuring Meeting.

DOI had scheduled a "restructuring" meeting for the afternoon of February 21, 2018, the purpose of which was to discuss how to restructure Squad 11 to integrate it into DOI. [redacted], [redacted], [redacted] and [redacted] attended. [redacted] recorded the meeting on [redacted] phone; it lasted approximately 45 minutes. As relevant here, during the meeting:

- [redacted] told [redacted] and [redacted] that all SCI investigators were "out of compliance" with DOI regulations, and indicated that they needed to be retrained.

- When the issue of the number of vacant lines at SCI arose, [redacted] told [redacted] and [redacted] "You have 9 not 10, right? Remember that [redacted] is stealing one." [redacted] attempted to respond, beginning to say, "We never found out . . ." (presumably a reference to the legal issues raised on February 13) but [redacted] cut [redacted] off, saying "He's stealing it." [redacted] then attempted to interject, at which point [redacted] repeated: "You have 10 vacancies, right? You're losing one." [redacted] then agreed, saying "Yeah, [redacted] is stealing one. Every once in a while [redacted] has to steal a line."

- [redacted] and [redacted] then explained that they had a meeting with [redacted] a few weeks ago, during which [redacted] and [redacted] responded by saying that [redacted] had "talked to DOE" and "DOE's fine with it." When [redacted] volunteered that [redacted] said it was "not a problem," that "you guys can meet with [redacted] and "we will work this out," and that [redacted] "was working on a letter [to DOE] anyway formalizing the DOE stuff." [redacted] then specifically stated that [redacted] would be uncomfortable using DOE funds for non-DOE work, at which point [redacted] said "first of all, it's not really non-DOE work," and added that "everybody's on board" with this plan, that "[redacted] will confirm," and that "you guys don't need to worry about it."

[36] [redacted] testified that [redacted] did not recall the interaction at all, or who [redacted] was.

- With respect to SCI vacancies generally, [redacted] said "Make sure your postings get approved first by [redacted] and then by [redacted] [redacted] then directed [redacted] and [redacted] to make sure that SCI's HR person was coordinating with [redacted], and to provide any information requested "just like [redacted] would get it from any other squad."
- [redacted] then entered the meeting, prompting a discussion about SCI staff's ongoing reluctance to provide their personal email addresses for purposes of DOI's "continuity of operation" or "COOP" plan in case of an emergency. [redacted] ultimately stated that SCI staff should have to provide their addresses as a condition of their employment. The "personal email" issue had not been on the meeting's agenda; [redacted] [redacted] and [redacted] all appeared to become agitated about SCI staff's refusal to comply with this new directive.

- After several minutes of discussing the COOP email issue, [redacted] asked [redacted] "Did, um, DOE get back to you about the, you know, the question that we had about the . . ." At that point, [redacted] interjected that "we have a 3 o'clock interview," and [redacted] jumped in to say "[redacted] will circle back," prompting the meeting to conclude. As the group began to pack up, [redacted] said "I'm just worried about it." [redacted] said "Yeah," and both [redacted] and [redacted] said "All right." [redacted] tone was neutral and professional; [redacted] did not raise [redacted] voice or in any way act unnaturally. [redacted] did not answer [redacted] question.

At this point, [redacted] had not in fact followed up with [redacted] about the legal issues discussed at the SCI/DOI February 13 meeting. The basis for [redacted] statement that "DOE's fine with it" and the similar sentiments expressed during the meeting remains unclear.

The debrief. Later that day, [redacted] had a de-briefing meeting with [redacted] which [redacted] also recorded. [redacted] who had spoken to [redacted] and [redacted] after the "restructuring" meeting, told [redacted] that the substantive parts of the restructuring discussions had gone very well. [redacted] cautioned [redacted] about discussing issues that were not on the meeting agenda – like the COOP email issue – with [redacted] and [redacted] because DOI leadership "likes to keep the meetings tight." [redacted] called it a "really small miniscule example" of a problem "that everyone has to figure out how to deal with." That led to the following exchange:

> [redacted]: *I think, that* [redacted] *and* [redacted] *are doing a really great job in a very challenging situation because there's a lot of different stuff to be dealing with. Some of it is changes and some of it is learning the existing structure, and that itself is a difficult thing. I don't want to see little things like the personal email discussion, like sidetrack people's views of how well everything actually is going. I don't want them to get bogged down in a little thing like that. Like, I really think we could have dealt with.*
>
> [redacted] *Gotcha. It seemed to piss off* [redacted] [redacted] *seemed pretty angry.*
>
> [redacted]: *Yeah*
>
> [redacted] *And I was like, sorry, I wasn't trying to cause trouble here.*

[redacted]: *I wasn't surprised by* [redacted] *I think they were more upset hearing about what it was more than anything else and they sort of took it out on the whole room a little bit, I think. But, um, I was a little surprised to see* [redacted] *that angry too.*

[redacted] also informed [redacted] that [redacted] thought it was improper for [redacted] to have directly asked [redacted] about the status of DOE's response to [redacted] concern about the use of DOE funds for the CISO position. [redacted] explained to [redacted] that this was "a burning question for [redacted] and that [redacted] was "worried about it." [redacted] also questioned [redacted] about what [redacted] had done wrong by asking [redacted] a follow-up question; [redacted] responded that [redacted] thought "there was a feeling of frustration with, like, continuing to deal with it after they felt the conversation was closed."

[redacted] also asked [redacted] whether [redacted] had read EO 11 recently; [redacted] said [redacted] had not. [redacted] that said "As a lawyer, I am worried about that. I think that we need to comply with it." [redacted] changed the topic and told [redacted] that [redacted] had already answered [redacted] questions in the February 13 meeting. [redacted] disagreed, reiterating [redacted] desire for a legal opinion addressing the legality of "stealing" an SCI line for the CISO position, and the following exchange ensued:

[redacted] *Combined with, I don't think that, relying on* [redacted] *word while* [redacted] *is flipping through notes. That* [redacted] *doesn't totally recall the conversation, if it was about who controls the employees. It was very shaky, it wasn't so obvious that that was . . .* [redacted] *had a real response and a real justification and legal justification for co-mingling funds.*

[redacted]: *Which I think it is fine that you asked* [redacted] *to go back and check. I don't have a problem with that. Um . . . It is more just about thinking about when we are in a meeting and what we deal with and what topics we are to cover. I think that where people get into trouble is when they go off on, you know, topics that are not necessarily . . . and I am not saying that it is totally irrelevant because it still is a position and what funds are used for it. Um, but I think it's a matter with things like that and we are not sure with how they are going to respond, or maybe it's like you are raising an issue that is really with* [redacted] *and now it is being raised with* [redacted]. *I think it is just something, you know. . . . My takeaway is that I am sharing that you to just say, we should communicate about stuff like this.*

[redacted] *All right.*

[redacted]: *When we go into meetings like that . . . the part of the meeting, you know, that we all did talk went really well. I think they all acknowledge that it went really well. Everything about the hiring plans, I think people are all on board with and I think everyone's thinking people are doing great work to move in that direction.*

That led to a final exchange on the topic:

[redacted]: *Yeah, but I do want you to know, it actually went really well until we started kind of taking on these other things and um, part of it is, they don't know*

everything, especially with the whole [redacted] line and money thing. I don't think especially [redacted] really understood prior discussions on that. So, they're just kind of, they kind of make judgments without full information. Just, you don't really want that to have that happen down there.

[redacted] I mean, but [sigh] I'm still worried about it. Even like [redacted] having a conversation and that [redacted] to follow something that you're like, I need a justification. Not, "[redacted] says it's okay." Like, because of the nature of what it is. If it wasn't co-mingling of funds, giving one funds to another to do something that is not for the purpose, you know . . . That is the problem. Because like, isn't that what our agency does? We make sure money is where it is supposed to be and used the way it is supposed to be. That is my problem.

[redacted]: Yeah.

[redacted] And it is essential.

[redacted]: But, I will

[redacted] So having [redacted]. I am cool with so many other things but that is the one thing

[redacted]: And for that one, I will speak to [redacted] about it. And I will let you know what the outcome of that is. And I will see about getting something in writing and ask [redacted] exactly what it was and I will, I will find out.

e. February 22, 2018: [redacted] Follows Up With [redacted]

On February 22, 2018, [redacted] finally followed up on the issue [redacted] had raised in [redacted] January 29, 2018 email to DOI senior leadership – namely, [redacted] "sense" that DOE would be willing to sign a "much shorter letter agreement" regarding control over SCI. [redacted] thus sent [redacted] an email attaching a short letter agreement, with the subject line "Office of the Special Commissioner for Investigation for the New York City School District:"

Dear [redacted]

Further to the conversation we had on January 25, 2018, this will confirm certain understandings between the Department of Investigation (DOI) and the Department of Education concerning the Office of the Special Commissioner for the New York City School District (SCI). As we discussed, DOE acknowledges that although the salaries and benefits of SCI staff are paid for by DOE (other than the Special Commissioner/Inspector General, whose salary and benefits are paid for directly by DOI), such staff are, for all intents and purposes, DOI employees. Accordingly, the Commissioner of Investigation shall have the exclusive authority to: (a) hire and remove; (b) set the salaries of (subject to the historical process pursuant to which DOE procures the budget for SCI); (c) assign the duties and responsibilities of, consistent with the needs of DOI; and (d) promote or demote, the staff of SCI. Further, SCI staff are subject to and bound by DOI's Agency Code of Conduct, and other policies and procedures of DOI concerning employee conduct; and DOI shall have the prerogative to impose appropriate discipline on SCI staff, including termination.

To effectuate the aforementioned understandings, DOI and DOE agree to meet and confer on an as-needed basis and the DOE shall adopt such policies, rule or resolutions as may be necessary with appropriate consultation with DOI.

Please have the [redacted] indicate [redacted] acceptance and agreement with the aforementioned understandings by signing where indicated below. . . .

[redacted] testified that, upon reviewing the letter, [redacted] had two concerns with its opening paragraph – one minor, one major. [redacted] minor concern was that [redacted] was not sure it was strictly accurate that DOE had in fact "procure[d]" the budget for SCI." But [redacted] major concern was that the letter was written "as if DOE is agreeing about what the proper relationship is between DOI and SCI," and [redacted] "didn't have an opinion" about that topic, and "didn't think it was [redacted] role to have an opinion." As [redacted] explained, both on the January 26, 2018 call and afterwards, [redacted]

[redacted] clarified that [redacted] eventually prepared a revised version of the letter inserting a caveat into all assertions of DOI's authority – namely, that the assertions of authority were only "as between DOI and DOE." [redacted] redraft also included a new sentence: "DOE takes no position as between DOI and SCI as to whether DOI has such authority." [redacted] never sent [redacted] re-draft to [redacted] rather, the two eventually discussed the issue in March. However, [redacted] had said on the January 26, 2018 call about DOE's views regarding DOI's authority [redacted].

f. The February 27, 2018 Ultimatum Meeting and Its Context.

(i) [redacted] Meets With Commissioner Peters and DOI Senior Staff.

[redacted] had three notable meetings on February 27, 2018. The stage for those meetings was set the prior day – [redacted] – when [redacted] emailed Commissioner Peters' assistant to request a one-on-one discussion with the commissioner to discuss [redacted] mounting concerns over the legality of various changes at SCI. [redacted] received in response a calendar invitation that listed all of DOI's senior staff. [redacted] then followed up with Commissioner Peters directly to reiterate [redacted] desire for a personal meeting. He responded:

> [redacted]
> As has been explained several times, you report to [redacted], you report to [redacted], who reports to [redacted] who reports to me. I will meet with all of you tomorrow morning.
> Best,
> MGP

Later on February 26, [redacted] and [redacted] met with [redacted] to express their dismay that [redacted] had requested for a one-on-one meeting. [redacted] recalled that [redacted] and [redacted] said, in so many words, that [redacted] had caused a "self-inflicted wound." [redacted] also set a pre-meeting for 10 a.m. the next morning. Afterwards, [redacted] left [redacted] a voicemail and sent [redacted] an email asking [redacted] to call [redacted] [redacted] responded that [redacted] was not available that

evening. [redacted] then requested [redacted] call [redacted] at 9 a.m. before the pre-meeting, which [redacted] did not do.

When [redacted] arrived at the 10 a.m. pre-meeting, [redacted] and [redacted] chastised [redacted] for failing to follow the chain of command, including [redacted] failure to call [redacted] as directed. About an hour later, around 11:45 a.m., [redacted] and [redacted] arrived on the 18th floor for the meeting. At that point, [redacted] informed [redacted] that [redacted] was not allowed to join, and [redacted] returned to SCI's offices.

[redacted] recorded the meeting, which lasted about 10 minutes. When [redacted] entered Commissioner Peters' office, [redacted] [redacted] [redacted] and [redacted] were all present; some were seated and some were standing; Commissioner Peters himself was leaning on his desk, with an open chair in front of him. [redacted] moved to sit down in the chair, at which point Commissioner Peters said "I didn't offer you a seat." [redacted] responded "Okay," to which Commissioner Peters followed up "Thank you. I'm not sitting." The recording then continues:

Peters: Let me be really, really clear, because there apparently seems to be some lack of clarity, so I'm gonna make this extremely clear. Obviously like all DOI employees if you ever see something that is either illegal or inappropriate you report that to the inspector general for this agency who is [redacted] *fellow officer. Absent that, you're the inspector general for Squad 11 for the school system. That means, like all inspectors general you report to an associate commissioner, in this case* [redacted]*. That means you keep* [redacted] *fully apprised of everything that is going on in your squad and you follow* [redacted] *orders promptly and in full. If* [redacted] *determines that there is something that anybody on the executive floor needs to know,* [redacted] *will let* [redacted] *boss,* [redacted] *know. If* [redacted] *determines that this is something that I or* [redacted] *might need to know,* [redacted] *will tell* [redacted] *boss* [redacted] [redacted] *as you know, runs this agency on a day-to-day basis and speaks for me as though I were speaking. If* [redacted] *decides that is something that I need to know about,* [redacted] *either -- with some group or not will tell me about it. Is there anything I just said that's unclear?*

[redacted] *There is one thing that is unclear.*

Peters: Tell me what's unclear right now.

[redacted] *I've been told that* [redacted] *technically the special commissioner, you're telling me that* [redacted] *the inspector general for the DOE. I just want to know for sure what [it is].*

Peters: OK, I would be –

[redacted] *Because I've been told,* [redacted]*, it's a secret, what is the story?*

Peters: I would be really –

[redacted] *OK*

Peters: There are multiple executive order statutes that require me to appoint various people to various things. A special inspector general for the police department, an SCA I forget what the title is, a special something for [], and in each instance I appoint the inspector general for the relevant agency to that position so as to fill whatever requirement it is. In [redacted] *case, I am required to*

appoint a special commissioner of investigation for the city school district. And I have - And in [redacted] *capacity as IG I've appointed* [redacted] *as such. Like the executive order says that that person is a deputy commissioner, that person reports to me, is selected by me, and serves at my pleasure. That person reports to me through whatever surrogates I choose. Those surrogates are, as I just laid out for* [redacted], [redacted], *and then* [redacted] *and then* [redacted] *As to the title, I'm not a big believer in titles. There is a legal requirement that I have a special commissioner for investigation, and I appointed the inspector general for the school system to hold that title.*

[redacted] *So wait, so, I don't get it. So* [redacted] *appointed as an inspector general of the school system, but* [redacted] *acting as a special commissioner or* [redacted] *not?*

Peters: Okay, you know what, this is really . . . I thought I was being clear, maybe I'm not. I could, if I had to, go to City Hall and have them just wipe out that executive order. I probably should have, but it wasn't worth my time, effort, and energy. [redacted] ***the inspector general for the school system.*** [redacted] ***also the Special Commissioner of Investigations [sic] for the school district because there is still an executive order that I haven't bothered to have eliminated that says I have to appoint one. So I appointed one.*** *In the same way that I appointed* [redacted] *as the person who will do certain functions that the City Council spelled out in terms of Rikers, and I've appointed* [redacted] *to whatever title that [] and I appointed* [redacted] *to whatever it is the SDA says, though we fixed that. It used to be that* [redacted] *had to have a second title too. You are the ins- I have to appoint somebody with that title, I appointed somebody, I appointed my IG to have that title, all that goes with it. All that goes with it, right, is the right to call yourself that I suppose, and that's it. There is nothing that goes with it, it is not any special thing. You still report to me, through whatever mechanism I set up, the mechanism I set up is the one I just named for you. You report to* [redacted].

[redacted] *Okay.*

Peters: I'm not gonna spend any more of my time that I already spent on this. I thought it was made clear, now I'm making it excruciatingly clear. Is there anything now that is confusing?

[redacted] *I'm just a little confused about the executive order, but you've clarified for me how you want me to be and what you want me to be, so. . . .*

Peters: Here's the deal. You think about this and you decide if this is the job you want. If it is, you come tell me at 5 pm today you want the job. If it's not the job you want, I understand, you can leave, we can figure out a resignation, and I'll go and do a search. But that's what . . . how it's gonna work.

[redacted] *All right, I want to talk to* [redacted].

(Emphasis added.)

[redacted] testified, and the recording confirms, that Commissioner Peters' tone during this meeting was stern and dismissive. Commissioner Peters testified that he was "deliberately brusque" with [redacted] and that he would not disagree with the description of "intimidating." [redacted] testified that [redacted] "was taken aback by the tenseness of the room." [redacted] agreed that

Commissioner Peters' tone "was adding an intimidating character" to the scene. [redacted] testified that [redacted] believed the meeting as a whole – including the presence of DOI senior staff, the exclusion of [redacted] and Commissioner Peters' opening remark directing [redacted] not to sit – was organized for [redacted] to "be ganged up on." [redacted] also testified that [redacted] "was feeling intimidated."

DOI senior staff explained Commissioner Peters' anger with [redacted] in various ways. [redacted] that [redacted] had "been giving [redacted] and [redacted] a really hard time," and that [redacted] and [redacted] "were trying to get [redacted] to focus and to do cases and to be proactive and to restructure and [redacted] wasn't doing any of that." [redacted] testified that [redacted] "wasn't unhappy" with [redacted] performance, but that Commissioner Peters "was put off [redacted] not going through the chain of command and so he wanted to reach out to [redacted] and talk to [redacted] about that, um, so that [redacted] would know what to expect when [redacted] went in." [redacted] added that "if you have a problem, you go to your direct report. And we decide what to escalate. Because his time is very valuable." Commissioner Peters testified that he was "brusque" with [redacted] because "she's three weeks on the job, literally, she's just started, and she's already, basically, telling [redacted], 'I'm not going to take directions from you.'"

(ii) Next Steps: a Disciplinary Meeting with [redacted]

A flurry of activity ensued that day.

1. Immediately after the meeting, [redacted] – likely at [redacted] instruction – began writing disciplinary memoranda documenting [redacted] purported transgressions.[37] [redacted] returned to [redacted] office and began drafting a note to that effect. By 1:19 p.m., [redacted] had produced a draft reciting that [redacted] had "failure to follow directions from [redacted] supervisors" on multiple occasions. [redacted] memo recited the following failings: (1) that, at the February 21 "restructuring" meeting, [redacted] had raised "two issues that were not on our agenda for the meeting" (namely, the legality of the CISO position and the COOP issues)[38]; (2) [redacted] questioning of [redacted] was inappropriate given [redacted] instruction (some 10 minutes prior, and notwithstanding the fact that [redacted] had subsequently joined the meeting) that [redacted] would pursue that issue[39]; (3) [redacted] failure to call [redacted] late on February 26 and early on February 27; and (4) [redacted] tone, body language, and questions at the 10 a.m. pre-meeting.

[redacted] sent the draft to [redacted] and [redacted] made two substantive edits: (1) [redacted] added, in the note's first paragraph, that in addition to failing to follow orders from supervisors, [redacted] had "demonstrated poor judgment"; (2) [redacted] made an edit to the effect that

---

[37] [redacted] testified that [redacted] believed [redacted] had given the instruction; [redacted] did not recall doing so, and [redacted] denied doing so.

[38] This was the issue that [redacted] had characterized to [redacted] as a "really small miniscule example" of a problem "that everyone has to figure out how to deal with." *Supra* at 50.

[39] [redacted] characterized the exchange as one where "[redacted] proceeded to ask [redacted] to explain [redacted] actions regarding that issue." That characterization was not fair; [redacted] merely asked [redacted] whether DOE had "gotten back" to [redacted]

[redacted] at [redacted] February 13 meeting with [redacted] had "provided an answer" to [redacted] about [redacted] CISO-related question.

[redacted] was not informed that [redacted] had written this memorandum. Nor was [redacted] given a copy. Over the next month-plus, [redacted] wrote five additional memos relating to alleged disciplinary issues. [redacted] was not informed about, or shown a copy of, any of them. When asked why [redacted] was never apprised of the existence of these memoranda (much less their contents), [redacted] stated that the memos were not intended to address and improve [redacted] performance, but rather "to document our communications with [redacted][40]

2. [redacted]

[40] [redacted] agreed that the memos were not "disciplinary" in nature, testifying "They were not for [redacted] . . . these are memos I put in my file to document what happened."

[redacted]

3. At 3 p.m., [redacted] was called to a disciplinary meeting with [redacted] and [redacted], the latter of whom informed [redacted] that [redacted] was to be "formally" written up for the chain-of-command and tone issues described in [redacted] memorandum of the same day. [redacted] requested a copy of those written charges so that [redacted] could respond to them. (As noted above, no written charges were ever provided to [redacted]

4. At 5 p.m. that day, [redacted] returned to Commissioner Peters' office and informed him that [redacted] wanted to keep [redacted] job. Commissioner Peters instructed [redacted] to follow [redacted] directions, adding that, if [redacted] was notified of any acts of insubordination, [redacted] "would no longer be employed by DOI." [redacted] testified that [redacted] believed that Commissioner Peters' message and tone during this meeting was intended to intimidate [redacted]

8. Before the Termination: Events Through March 26, 2018.

a. Early March: Further Developments on the CISO Issue.

Toward the end of the week of February 26, DOI took steps to document its position vis-à-vis the issues [redacted] had been raising.

First, on March 1, 2018, Commissioner Peters drafted a memorandum to file memorializing his February 20, 2018 meeting with [redacted] and [redacted] The memorandum recited in relevant part as follows:

> At the meeting, I reviewed DOI's most recent Organizational Chart (copy attached). In particular, I noted that DOI, in an effort to standardize and better monitor the work of all inspectors general, had implemented a new structure in which IGs, including the IG for the NYPD (Squad 10) and for the DOE (Squad 11) would now report to an associate commissioner who would report to the deputy commissioner for investigations. Both [redacted] and [redacted] offered no concern about this structure and I provided them with copies of the Org Chart.

[redacted] and [redacted] agreed that Commissioner Peters' recollection of these events was factually accurate, but testified that, because Commissioner Peters provided no context for the changes at SCI and did not raise any issues surrounding the legal authority or framework for the changes at SCI, they did not consider themselves to have "signed off" on any changes at SCI as a result of this exchange.

Second, March 2, 2018, saw major developments with the CISO position. During the mid-morning, [redacted] sent an email to [redacted] instructing [redacted] to move forward with the posting of the CISO position on DOE's Galaxy system. [redacted] email asserted that the posting "has been cleared and approved by all parties cc'd on this email" – a group that included [redacted], [redacted], [redacted], [redacted], and [redacted] That was not accurate; in fact, so far as the record reflects, *nobody* cc'd on the email had approved the posting.

[redacted] had not approved the posting, and said so in a response to [redacted]:

Dear [redacted],
Please be advised that I am not the person who approves and clears this particular posting as I had previously raised my objection to this posting to [redacted] and my superiors listed on this email and others. I have been informed by my superiors that this approval is not for me to make because [redacted] do not have the authority and control over the SCI budget. Instead, this posting and budget allocation request is being approved by [redacted], [redacted] and [redacted] of DOI.

Dear [redacted],
I know you are out of the office today. Please process this request as per the above direction and approval when you return to the office on Monday.
Thank you,
[redacted]

Indeed, [redacted] had not heard anything further from [redacted] or [redacted] (who, following the February 21 restructuring meeting, had promised to pursue a written legal opinion from [redacted]

[redacted] On February 27, 2018, per an email from [redacted], [redacted] had directed that the CISO position be posted in "Operations" (*i.e.*, using DOI funds) and not using SCI's previously targeted line, precisely because [redacted] did not want a fight over the propriety of use of DOE funds for the position. During testimony, [redacted] could not recall how or why the decision was made to move forward with the CISO posting on SCI's system on March 2.

[redacted] **and** [redacted]. [redacted] appeared to be confused by [redacted] March 2 email; [redacted] wrote to [redacted] and inquired "Is this a position you approved? I don't recall a CIO vacancy or plan to hire?" (In fact, this was the line that [redacted] had told [redacted] that [redacted] was "stealing.") [redacted] replied to [redacted] that "[redacted] generated this posting" and that [redacted] "understanding is that this is the position that will be within Operations." However, a posting "within Operations" would not have gone up on the DOE Galaxy system. During their testimony, neither [redacted] nor [redacted] recalled why the CISO posting was "cleared" as of the morning of March 2 or who made the decision to proceed with the posting.

Third, that same evening, Peters sent [redacted] an email (copying OMB and [redacted] stating as follows:

Dear [redacted]
DOI has recently determined that there are [redacted]

[redacted]

We will [be] requesting this line in our new needs assessment to OMB, and I and my staff will be prepared to properly brief you and OMB on this matter as we go through the budget process. [redacted] in the interim, we propose to use a line that is presently vacant from the DOE budget allocated for the Inspector General for DOE (the Special Commissioner for Investigation) to fill this role. At such time as we receive OMB approval for an ISO, we will then backfill the position at the DOE IG. While DOI and DOE General Counsels have previously discussed the fact that the lines are funded by DOE but operate, like all IG lines, at DOI's discretion, I believe it is important that this only be a temporary rather than permanent solution.

Needless to say, I am happy to discuss at your convenience and we will fully brief this matter in our new needs assessment. [redacted]

Best,
MGP

So far as the record reflects, this was the first point at which DOI's use of DOE funds for the CISO position had been described as "temporary."[41]

Earlier that day, [redacted] (who prepared the first draft of the email to [redacted] and [redacted] discussed DOI's plans to "fill" the line in its budget request to OMB, which would be submitted later in the month, with budget director [redacted]. [redacted] informed [redacted] that even if DOI's plan was to "borrow" the line from SCI, there was a risk that "OMB may not 'return' the line to SCI" because "the line which was loaned was never filled and thus there is no need to 'return' it."

[redacted] ultimately posted the CISO position on Galaxy on March 9. However, the posting lacked a position number (which would have been required to hire). [redacted] followed up with the DOE on several occasions over the next week seeking a position number; [redacted] continued to check in on whether the position number had been received.

b. March 9 to March 16, 2018: The *New York Times* Enters the Picture, and [redacted] Hears Back from DOE.

On the evening of March 9, 2018, [redacted] informed DOI leadership that [redacted] had received a call from Willy Rashbaum, a reporter at the *New York Times* whose beat included New York

[41] [redacted] testified that [redacted] did not recall receiving this email – [redacted] testified that [redacted] receives dozens of such emails a day – and that if [redacted] had received it, [redacted] would have forwarded the email to OMB. [redacted] testified that [redacted] discussed the CISO funding issue with [redacted], who supposedly told [redacted] that this funding arrangement "was wrong."

City government. Rashbaum told [redacted] that he planned to write about the changes at SCI, and wanted to discuss "why they were needed and how [DOI was] able to do them without changing the EO." Rashbaum's queries included "whether the PEP . . . has been changed to reflect these changes." Commissioner Peters quickly volunteered to conduct a sit-down interview with Rashbaum on Monday morning.

That same Friday evening, [redacted] met with [redacted], and others to discuss DOI's response to Rashbaum's questions. [redacted] DOI leadership also focused on points that Commissioner Peters had previously articulated to [redacted] (*i.e.*, that "nothing in EO 11 makes SCI independent of DOI"; "nothing in EO 11 precludes a new reporting structure").

On Monday morning before the interview, [redacted] circulated the proposed talking points to a group that included Commissioner Peters and [redacted] while Commissioner Peters responded: "What is the PEP?" [redacted] then spoke with [redacted] and responded to the group via e-mail: "Just spoke with [redacted] who indicated that when [redacted] spoke with [redacted] it was [redacted] position that employees of SCI work under the control of DOI. [redacted] agree that should be the answer for that question."

The interview with Rashbaum proceeded as scheduled at 11:15 a.m. DOI witnesses universally agreed that the interview did not go well. Commissioner Peters began by explaining the policy rationale for DOI's takeover of SCI. When Rashbaum asked Peters whether DOI planned to obtain a new Executive Order and new Board resolutions, Commissioner Peters departed from the prepared talking points and asserted that the City Charter and EO 16 made him "the IG for the City and all City agencies," adding that at the time of EO 11, the schools were not under Mayoral control. When Rashbaum pointed out that all BOE resolutions were still in effect, Commissioner Peters told him that "EO 16 superseded it when [DOE] became a Mayoral agency."

Rashbaum then pointed out that the DOE had declined to sign the MOU that DOI had sent, and that [redacted] February 22 follow-up letter to [redacted] also remained unsigned. At that point, Commissioner Peters responded that he had not heard that DOE did not plan to sign [redacted] letter, and if that was the case, he also suspected that DOE would "probably not cooperate with investigations." When Rashbaum said that a decision by DOE to decline DOI's offer letter was not equivalent to failing to cooperate with an investigation, Commissioner Peters told him there are" two forms of people – those who cooperate, and those who don't." Commissioner Peters then added that DOI was comfortable with the changes to SCI, and reiterated his point about there being two types of people – "those who cooperate and everyone else."

After that, Rashbaum made a comment suggesting that Commissioner Peters was simply trying to steamroll all opposition to his plans in the same way that Peters' former boss, Eliot Spitzer, was known for. Commissioner Peters did not take this suggestion lightly; he responded

by hotly suggesting to Rashbaum that the *Times* did not cover City and local news. The interview ended shortly thereafter.

c. March 12, 2018: [redacted] Re-Connects with [redacted] Regarding [redacted] Proposed Letter Agreement.

Later in the day on March 12, 2018, [redacted] called [redacted] about the proposed February 22, 2018 letter agreement with DOE. [redacted] took notes of the call. [redacted] explained [redacted] concerns – namely, that DOE had no position as between DOI and SCI who controlled SCI; that new PEP resolutions might be needed to effectuate the type of relationship that DOI contemplated; and that [redacted] wanted to talk to the Law Department (regarding what other new enactments might be needed) and with City Hall (to discuss the policy implications of the new approach).[42] [redacted] elaborated in testimony:

> *There are a lot of old things written in the Ad[ministrative] Code and the Charter to use other examples that actually we, meaning the Law Department, don't think are actually effective anymore. For, you know, the passage of time or changes in other laws or things like that. And I found [the 1991 BOE resolution] a little confusing, even at that point, where I hadn't done as much thinking on it. . . . I certainly could read the words and recognize that the words were inconsistent with paragraph one [of DOI's February 22 letter]. I wasn't positive at that point that the right answer was, "Yep, it's inconsistent." Now, that's my opinion. But leading into that conversation with [redacted] I thought I might have a conversation with the Law Department and we might delve into it and we might find that . . . maybe not. Maybe the old reso was vestigial.*

On the call, [redacted] asked [redacted] how much time would be required to obtain new PEP resolutions if needed; [redacted] said [redacted] "thought a few months." [redacted] recalled that [redacted] tone made [redacted] think [redacted] was "unhappy," which was a new development; up until that point, [redacted] had not perceived [redacted] to be displeased with the pace of their discussions.

[redacted] notes are consistent with [redacted] recollection.[43] Among other things, the notes say [redacted]

[42] [redacted] explained that, after reviewing the February 22 letter, [redacted] was unsure about how to handle the second paragraph's proviso requiring DOE to "adopt such policies, rule or resolutions as may be necessary with appropriate consultation with DOI." [redacted] ultimately concluded that DOE could not agree to this language as drafted because neither [redacted] nor [redacted] could preemptively bind "DOE" to actions that would require PEP approval, which changing the "DOE's" position as to SCI might well do. As [redacted] put it, "*Two chickens can't agree to get together and agree to do something that the law says something there's a process to do that involves more than them. . . . I couldn't sign it the way it was written.*"

[43] [redacted] recalled sitting in on a single call with [redacted] and [redacted] and was confident the call took place after [redacted] started; this is the only exchange that fits that description. However, [redacted] did not have a clear recollection of what was said on the call.

[redacted] also testified that the process [redacted] described – new resolutions and consultation with the Law Department – was only necessary to "have a formal understanding" and that "doesn't mean that an informal understanding was wrong."

[redacted] recollection is also confirmed by an email exchange on March 12 between [redacted], several other administration officials, and [redacted]. In that exchange, [redacted] relayed several questions [redacted] had received from the *Times*: namely:

> Do we know anything about Peters trying to reinterpret the DOE special investigator (or whatever [redacted] was called) EO, or DOE refusing to sign off on Peters' request to alter the chain-of-command or that job? NYT asking. Bluntly asking if mayor is considering a new EO to allow or prevent the shift. Anyone know anything?

[redacted], copying [redacted] responded:

> +[redacted]
> DOI has repeatedly asked DOE to enter into a MOU setting forth what he thinks the authority of Special Commissioner of Investigation for DOE (SCI) should be in relation to DOI proper and DOE. [redacted] Peters is stymied and went to NY1. He must've had a falling out with the DN.

[redacted] then added:

> Probably not by coincidence, I spoke today to [redacted] today [redacted] I was getting [b]ack to [redacted] about [redacted] latest proposal, which was that DOE sign a letter acknowledging that DOI could act vis a vis SCI in whatever way it wanted, primarily about personnel matters. I said I needed to discuss with the Law Dept. and City Hall, because, as written, the letter would probably require amendment to one or two old Board of Ed resolutions from the early 1990s. [redacted] acknowledged that I wasn't saying no, only that more thought was needed.

d. March 13-16, 2018: Follow-Up with the *Times*.

The next morning, Rashbaum called [redacted] and asked [redacted] to clarify whether it was the "DOI's position that when BOE became DOE, and thus a City agency, it undoes the two BOE resolutions (in 1990 or 1991) and EO 11?" [redacted] caucused with [redacted] and others, and eventually responded to Rashbaum as follows:

> We did not say that the transition from BOE to DOE undid EO 11. We said that once it became a mayoral agency, EO 11 and EO 15 became redundant because EO 16 covers mayoral agencies. EO 11 requires the Commissioner of Investigation to appoint a Special Commissioner and EO 11 requires the Commissioner of Investigation to appoint an IG over mayoral agencies. The Commissioner has appointed [redacted] to fulfill both of those roles.

Rashbaum had a second question as well: "whether [redacted] still has the same powers, to hire and fire, to compel testimony." [redacted] and [redacted] prepared a draft response for DOI leadership's review, which [redacted] approved with some small modifications. The response stated that DOI had made "operational changes to better integrate investigations relating to DOE within DOI," and confirmed that DOI had effectively stripped [redacted] of the power to sign subpoenas and "the ability to hire and fire staff," the latter of which could now only be achieved "with the approval of DOI senior staff, which is consistent with all Inspectors General."

On March 14, 2018, Rashbaum provided DOE's comment on the matter to [redacted], and asked for DOI's response. DOE's comment was: "The authority of the Special Commissioner for DOE arises from the current Executive Order. That authority cannot be altered unilaterally by the DOI Commissioner. We are aware of no reason why that authority should be changed, by the way of MOU or otherwise." This statement came as an unwelcome surprise to many at DOI, who: (1) had been operating under the assumption, based on [redacted] descriptions of [redacted] telephone conversations with [redacted] that DOE's view of the legal landscape was similar to DOI's; and (2) had used DOE's perceived agreement as a talking point in discussions with Rashbaum (and [redacted][44]

Rashbaum's article appeared online on the evening of Friday, March 16, 2018, and ran in the paper's Saturday edition. Entitled "Fight to Control Office That Roots Out Corruption in New York Schools,"[45] the article described a "municipal scuffle" between DOI and DOE arising out of Peters' attempt "to seize total control of the semiautonomous office that polices corruption in the school system," and described the various changes made to SCI over the past three months. The article also stated that DOE had "refused to sign" the proposed MOU and February 22 confirmation letter that [redacted] had sent [redacted] and noted that incongruity between DOI's provision of those documents to DOE and Commissioner Peters' claims to Rashbaum that he "has the authority to make the changes [to SCI] without the legal documents." The article attributed the belief to Commissioner Peters that "an even older executive order, from 1978 [EO 16], gave him the authority to make the changes he has undertaken because the city school system is now under mayoral control." The article also addressed funding for the CISO position, and noted Commissioner Peters' assertion that "the education department funding for the position was only temporary."

e. March 13-26, 2018: Discussions Outside DOI.

During this time, [redacted] and [redacted] began to relay their concerns to individuals

[44] Though DOI did not know it at the time, DOE's comment was largely drafted by [redacted] in consultation with DOE officials.

[45] https://www.nytimes.com/2018/03/16/nyregion/doi-schools-new-york-investigations.html

outside DOI, and Commissioner Peters provided testimony to the City Council about the same issues.

City Council Member Brad Lander. Beginning in late February, [redacted] attempted to schedule time to meet with [redacted] City Council Member, Brad Lander. On February 23, 2018, [redacted] sent Lander an email stating, among other things that:

> [redacted] retired in December, and almost immediately after his departure, DOI began a series of moves regarding SCI that have a number of us very uncomfortable. Several of us have raised questions about the legality of certain steps being taken by DOI, and have received no satisfactory answer from DOI General Counsel. As a council member, and a member of the Ed. committee, I thought you might have some thoughts about the changes under way and the process by which they are being changed.

[redacted] eventually met with Lander on March 15, 2018, at Lander's office. During that meeting, [redacted] told Lander that [redacted] believed that DOI's takeover of SCI contravened EO 11 and the BOE resolutions, in particular with respect to the CISO hiring.

[redacted] **and** [redacted] On the Monday morning following Rashbaum's *Times* article – March 19, 2018 – [redacted] left a voicemail for [redacted] asking to discuss [redacted] situation. [redacted] called [redacted] back the next morning, and then called [redacted] again that afternoon to request that [redacted] come to a meeting at City Hall the next day, and "bring something in writing" if possible. [redacted] [redacted] and [redacted] then worked throughout the evening to put together a rough draft of a memorandum describing the changes at SCI.[46]

[redacted] and [redacted] arrived the next morning, draft memo in hand, to meet with [redacted] [redacted] joined, which [redacted] had not anticipated. The meeting lasted for more than an hour, during which time [redacted] and [redacted] relayed the details of their interactions with DOI leadership. According to [redacted] and [redacted] seemed surprised by what they heard. Toward the meeting's end, [redacted] noted that [redacted] was in a difficult situation from a whistleblowing perspective, because the law directed [redacted] to bring a whistleblower complaint to DOI, and as [redacted] put it, "I can't report Mark Peters to Mark Peters." [redacted] responded to [redacted] by telling [redacted] that "We're going to figure this thing out," and telling [redacted] and [redacted] that they were "on the front lines."

[redacted] testified that [redacted] told [redacted] to "document everything, because we didn't know what direction this was going." [redacted] also testified that, upon [redacted] review of EO 11, the BOE resolutions, and the Gill Commission's report, it was clear to [redacted] as a matter of law that Commissioner Peters "did not have the unilateral authority or capacity to change the relationship between [SCI] and DOI." [redacted] added that [redacted] told [redacted] as much; namely, [redacted] testified that [redacted] would have "certainly come away from [their] discussions with the notion that I agreed that EO 11 did not permit Mark Peters to do what he was doing."

The City Council. On March 26, 2018, Commissioner Peters testified before the City

[46] [redacted] and [redacted] eventually prepared a cleaned-up version of the memorandum, which they provided to [redacted] on March 23, 2018.

Council's Committee on Oversight and Investigation for a hearing on DOI's proposed 2019 budget. [redacted] and [redacted] also attended; [redacted], along with [redacted] staff, drafted prepared remarks, which included a brief section about the changes at SCI:

> As always, DOI's goal is to leverage our expertise across the agency's 11 investigative squads to develop highly complex cases in line with our strategy of attacking corruption comprehensively, through systemic investigations that lead to high impact arrests, preventive internal controls and operational reforms. With that in mind, I note that we have recently made changes to our organizational structure with a view toward both ensuring consistency of investigations and maximizing DOI's ability to see across agencies to City functions as a whole. Previously, certain investigative squads, including those overseeing the NYPD and Department of Education, operated separately from DOI's main organizational structure. Four years of experience has demonstrated to me that this does not allow DOI to maximize the impact of this work or to take full advantage of DOI's institutional knowledge and strengths. As such, we have taken steps to fully integrate this work within our reporting structure, a chance that will result in even greater impact and ability to tackle issues going forward.

The testimony also folded in details about SCI's 2017 caseload and statistics into the larger DOI report.

The hearing lasted for more than two hours, and covered a wide range of topics related to DOI's activities and mission. Approximately one hour into the hearing, Council Member Torres asked Commissioner Peters to explain the difference between the jurisdiction of SCI and OSI. Peters responded that OSI was DOE's "internal" investigator for disciplinary matters. Commissioner Peters then stated as follows:

> *The Special Commissioner for Investigation, also known as the Inspector General for [DOE], is the . . . is the Inspector General reporting to me part of DOI. It's called Squad 11 internally. That is the DOI Inspector General who does investigations, recommends discipline, etc.*

Torres then followed up by asking about Rashbaum's *Times* piece, which Torres said "portrayed a dispute between you and DOE." Torres said he "was not clear on the nature of that dispute." Commissioner Peters responded:

> *Well neither was I. Um, to be honest, neither was I. So, very honestly, one, the most important thing to note is the mission of the Inspector General's office hasn't changed, the Inspector General has always reported to DOI, and will continue to, and most importantly, the Inspector General will continue to be independent of [DOE]. I will tell you that, as I alluded to in my testimony, we have made some managerial, structural changes to better integrate both – for a variety of reasons we have made managerial and structural changes to both the NYPD IG and the [DOE] IG to bring them within, fully integrated within, DOI so that they can and will be doing the same kinds of work that all of DOI does . . . I*

will tell you that at no time, while the New York Times reported there was a conflict, at no time has anyone from [DOE] contacted me or anyone on my staff to object to anything we're doing. So I'm not quite sure where the controversy is either. DOE certainly hasn't objected to us. . . .

Torres then summarized Commissioner Peters' answer: that DOI "was renaming" SCI. Commissioner Peters jumped in:

Well, by law they are, will always technically be called the "Special Commissioner [of] Investigation[s]. They are also called the Inspector General for DOE. That strikes me as a bit of nomenclature. I tend to refer to it as the IG because it is important that we have consistent work across the line. As a matter of law they still have a separate and additional title.

Torres then began to ask about the reporting structure for both the NYPD IG and SCI, at which point Commissioner Peters explained DOI's overall reporting chain, which Commissioner Peters termed "an extraordinarily efficient model for handling cases."

About an hour later, Council Member Lander began questioning Commissioner Peters. After a series of questions about the NYPD IG, Lander asked a question "about the restructuring, not on the NYPD IG side, but on the SCI and [DOE] side." Lander explained that he'd "been reading the newspapers and had heard from some folks in SCI as well." Lander said that, in his view, more investigatory resources needed to be devoted to the DOE, and asked about the potential diversion of resources to the overall DOI mission – a backhanded reference to the CISO issue. Commissioner Peters responded:

There has been no diminution [of resources] . . . let me go back to first principles. The Inspector General for the schools system, whether we title it the Special Commissioner [of] Investigation[] or the Inspector General . . . that office always has reported to DOI, it always will, it is independent and always will be of [DOE]. There's been no diminution in resources. The newspaper article noted there is a position that happens to be vacant there that we are using for a[n] overall DOI function. That does happen from time to time because all of these IGs are dependent on, um, you know, on DOI's overall functioning. I am actually hopeful that that is temporary. We've even said to OMB we're doing this in a temporary way and we'd like the line back. Um . . . this is a very important area, I certainly would not say no to additional staff.. . .

Lander jumped in at that point to ask "Am I right as a matter of math that the headcount as a percentage of total DOI headcount is substantially lower than the percentage that the DOE budget represents of the city's budget?" Commissioner Peters said he believed that was true, and eventually said that he'd "like to add to the schools Inspector General more accountants and auditors because they spend a huge amount of money on contracting, and I would like DOI to be able to take a closer look at that contracting and where that money is going."

After the hearing, Commissioner Peters' car was waiting outside to take [redacted] and [redacted] back to DOI HQ. After settling, talk in the car immediately turned to the question of who at SCI had spoken to Brad Lander. Commissioner Peters, [redacted] and [redacted] all testified that Commissioner Peters immediately speculated that [redacted] was Lander's source.

9. [redacted] Performance Prior to [redacted] Termination

The run up to March 27. As noted above, after the February 27, 2018 "ultimatum" meeting between Commissioner Peters and [redacted] directed [redacted] to begin documenting [redacted] supposed transgressions. [redacted] and [redacted] testified generally that, during this period, [redacted] became less responsive to requests and [redacted] job performance began to suffer.[47]

On March 14, 2018, [redacted] wrote a memo to file regarding: (1) [redacted] March 2 email regarding the CISO position, which was supposedly "unprofessional insofar as it informed other staff in detail of [redacted] disagreement with the instructions of supervisors"[48]; (2) [redacted] and [redacted] had not made specific edits to SCI job postings as [redacted] had instructed; and (3) during the week of March 5, [redacted] prepared a series of inadequate investigative plans. [redacted] testified that while he was not personally building a case for adverse employment action, [redacted] *"recognized . . . in being directed to create, you know memos as needed . . . others were, you know, directing me to make a record because they were concerned that, you know, there was a disagreement and that it was unclear where things might lead, and that we should have a record of things."*

On March 14, [redacted] wrote [redacted] an email regarding a directive from [redacted] to "hold back" a "new hire for the intake unit." [redacted] responded and denied that [redacted] had told [redacted] to hold back the position; rather, [redacted] indicated that [redacted] had "said we would wait on posting the vacancy to consider Squad 11's resources and needs," and said [redacted] email had "mischaracterized what I had said." However, [redacted] testified that [redacted] had indeed told [redacted] to "hold off" or "hold back" on hiring one of two intake positions that [redacted] had sought to fill; [redacted] simply did not believe that [redacted] had been "as definitive" as [redacted] email indicated. In any event, [redacted] and [redacted] both testified that they considered themselves to have the authority to direct [redacted] to "hold back" on filling particular positions, even if they had not exercised that authority in the particular manner that [redacted] email portrayed. [redacted] testified generally that the email reflected the "breakdown of trust" that had occurred between [redacted] and [redacted] by that point.

March 26, 2018 Meeting With [redacted] On March 26, 2018, [redacted] met with [redacted] to discuss what [redacted] termed "[t]he initial discussions on some of these potential systemic cases and investigations." [redacted] recorded the meeting. [redacted] began by asking [redacted]

---

[47] [redacted] also testified that [redacted] was somewhat unprepared for [redacted] first "tri-weekly" meeting with DOI leadership on February 16 – in other words, a substantive meeting two weeks onto the job – but we found no evidence in the record to support this contention.

[48] Neither [redacted] nor anyone else in DOI leadership ever raised this supposed concern with [redacted] Indeed, [redacted] testified that "no one ever talked about that email with me other than [redacted]."

for [redacted] impressions of the prior week's staff meetings. [redacted] said that [redacted] thought that the SCI staff had been disrupted by the *Times* piece, and questioned why DOI leadership had not addressed it. [redacted] then shared [redacted] impressions of the SCI staff meetings, which included a generalized concern about a lack of engagement:

> *I mean look, you know, people came in, they shared information when prompted but I got to say, I haven't been in many meetings where people didn't really come with any thoughts prepared. People came in and . . . I am speaking generally here, it's not to say everyone was sort of responsive the same way in the meetings. But these were things I saw across a few people or generally. I felt . . . I don't think there is a single word to describe it, but some combination of resistance, frustration, lack of interest in the conversations.*

[redacted] then said that this lack of engagement was not acceptable, and that [redacted] and [redacted] needed to work through any resistance to the changes at SCI with the staff.

At that point, [redacted] told [redacted] that the SCI staff was confused about the assertions in the *Times* piece about the source of DOI's authority over SCI, and whether that authority emanated from EO 11 or EO 16. [redacted] responded that "Executive Order 11 applies obviously because it explicitly references the Inspector General for the Department of Education and the creation of the special commissioner." [redacted] corrected [redacted] noting that EO 11 "doesn't reference the Inspector General of the Department of Education." [redacted] responded by claiming that EO 11 "at the very opening says that we need the Inspector General for the Department of Education to be independent," adding that "[t]he organization that was created independently was the Inspector General for the Department of Investigation."[49] After some further discussion about the applicability of the 1990 and 1991 BOE resolutions, [redacted] eventually told [redacted]

> *It's not your job or [redacted] job to question the realignment or transition. And if you think there is an issue with communicating that, I don't want to hear EO 11 this, EO 16 that. We should clarify people's uncertainties about things, absolutely, I have no problem with that. But, we need to get people committed and understanding of what the vision is, give them a sense of the strategy, and then work with them to get them to achieve this successfully. Because I get that there is a period of transition but we have to get people to understand what the goals are and they need to be part of implementing them. And I think we will have continued meetings to do this. But it is not something that is coming exclusively from outside the organization. You and [redacted] really need to drive it and we should think about ways to do that. Certainly, these meetings should continue and we can think of ways to do that. And if you think people are uncertain of that you and [redacted] need to address (or) that I should be part of addressing, you should bring that to me. If you want to talk about it before you address it or before you and [redacted] address it, that is fine. But, meetings like last week, I get it was the opening salvo on some of these discussions but we had the group meeting before that, so they really shouldn't be going that way.*

[49] Neither of these assertions was accurate. *See supra* at 18-21.

Later in the meeting, [redacted] told [redacted] that [redacted] should "step back from" the individual case reviews [redacted] had been doing, telling [redacted] that [redacted] and [redacted] did not "need to be familiar with 400 cases on an ongoing basis." [redacted] responded that [redacted] understood, and [redacted] review of case files was driven by [redacted] desire, "in the beginning," to get a sense of what types of case SCI had so [redacted] could offer an informed view about where SCI should go. [redacted] told [redacted] "Sure, that is fine."

Toward the meeting's end, [redacted] told [redacted] that [redacted] and the SCI staff was committed to making changes in the office and doing systemic cases, but that the lingering questions over DOI's authority continued to crop up:

> [redacted] *Certain things, I am trying to figure out how this is going to work out because they, you know. When Regina died and* [redacted] *they had their way and they were very set. And things were changed completely. They have a different mind-set that is completely different than other places because they were independent so they don't understand why we are changing things. They are up for changing that. But this other bigger . . . like "What is going on with DOI and us?" still comes out as issues when you talk to them.*
>
> [redacted]*: So [cross-talk]*
>
> [redacted] *And it comes back to this EO 11 business. They would say, I would say this and why aren't you doing the subpoenas anymore. Why are they taking so long? Now we have to put them in through* [redacted] *and* [redacted] *is now on vacation the next few days. We will figure it out. Because it was much easier for them to just hand it over and it would be signed. They are all very similar. There is a lot.*
>
> [redacted]*: So we will . . .[cross-talk]*
>
> [redacted] *There are lots of little rubs that they each have.*
>
> [redacted]*: We should raise those in the individual meetings. And we can raise it in a group meeting afterwards, that is fine too.*
>
> [redacted] *I think, individual ones, people will be afraid to bring it up to you. Everyone is afraid they are going to lose their job.*
>
> [redacted]*: They don't bring it up at the group meeting. So when are they bringing it up. I mean,*
>
> [redacted] *Then either I give you a list and say this is what I know people are worried about.*
>
> [redacted]*: Yeah, that is a good idea. Give me a list and then we will deal with it in every meeting. Whether they bring it up or not.*
>
> [redacted] *They do say these things, as we are going through the day, and they are little digs, and*
>
> [redacted]*: Yeah, yeah, yeah. I got you.*

By the meeting's end: (1) [redacted] (a project [redacted] called "a long-term issue to resolve" and "an on-going thing"); and (2) [redacted] informed [redacted] that, before anyone at SCI gave an oral or written referral to a prosecutor, [redacted] sign-off was needed.

[redacted] wrote a memo to file about the meeting same day. The memo's description of

the meeting was largely accurate, with one exception. [redacted] memo states that [redacted] told [redacted] that it was [redacted] "responsibility to manage" the SCI staff's "questions relating to [EO 11] and the unit's independence," that [redacted] "asked if [redacted] felt [redacted] will be able to handle this responsibility as the leader of the squad," and that "[redacted] said that [redacted] is able to do so." The recording of the meeting shows that while [redacted] relayed these concerns to [redacted] and that [redacted] did indicate that [redacted] (along with [redacted] should manage those concerns, [redacted] did not request (or receive) [redacted] approval for that plan of action.

The March 27 Meeting. Later on March 26, [redacted] and [redacted] exchanged emails regarding [redacted] desire to meet individually with SCI's investigators "to discuss the realignment of the squad and their role/responsibilities." [redacted] also agreed, as had been discussed, to pull a set of "clarifying questions that [had] been raised in various ways." [redacted] sent the list of questions to [redacted] midday on March 27 via email:

> Dear [redacted],
>
> Below is a list of the various concerns that many people have and this is not necessarily coming from the specific managers from those meetings:
>
> 1. We've always used EO 11 to seize documents, compel witness statements and subpoena records — are we not using that anymore? Are we using EO16 instead?
> 2. Worried that some school superintendents, principals and teachers will soon not provide documents as per EO 11 because we are not using EO11 and then will not provide docs and or we will have to subpoena every document.
> 3. The unions are just waiting for a crack in the doorway and will try to usurp power and authority — as the CSA, UFT and 1181 have made individual comments to people that you are no longer, etc.
> 4. The manner and way that people are spoken to by central DOI staff where there is a constant insinuation (or) comments that SCI has not been doing things "correctly" in the past because they had not worked in the same manner as DOI. It has been described as condescending.
> 5. People have asked me why I report to you and that I should only be reporting to the Commissioner.
> 6. At Investigator McGarvey's going away party --- his speech was like a swansong to EO11 which I believe that most of the staff has relied upon for so long (so it is difficult to change that mind set).
> 7. Fleet management — people are upset about the plaque and car issues and DOI continues to manage the fleet.
> 8. People are generally concerned that they will be fired by DOI which is based upon the peace officer discussion when they do not believe that they work for DOI when they do not believe they work for DOI.
> 9. People have made comments to me about this news article and whether it is truthful and if things are changing as a result of the article.

Separately, I have some of my own concerns that we should discuss, as I would like to be able to properly address some of the concerns people have raised with me:

1. I've never actually received the three write-ups from HR from 2/27 and would like to have copies of these write up; should I ask [redacted] for these
2. Newspaper article comes out and it is never addressed by you to me; I'd like some clarity because no one told me a newspaper reporter was asking questions.
3. Based upon the article it looks like DOE did not sign whatever [redacted] sent over; it was my understanding from our meetings that [redacted] was sending over a letter confirming their conversation for the [redacted] to sign — not [redacted] to sign.
4. The article said that the IT job is temporary; so is that now what is happening with that job.
5. We should discuss E011 as I don't believe that I interpret it the same way that you do based upon our conversation yesterday. Is there a plan to change it now?

We should discuss as I want to address these concerns. Many people want to do all these great cases of systematic corruption but feel very overworked because of the case load and all the changes as a result of now becoming a squad at DOI, which is completely different from how they operated independently. They've never had so many meetings before this past month.

Looking forward to discussing.
Thank you,
[redacted]

Later in the day, [redacted] and [redacted] engaged in a lengthy discussion regarding these issues. [redacted] recorded the conversation. [redacted] began by directing the discussion to [redacted] personal concerns. With respect to the *Times* piece, [redacted] and [redacted] discussed DOI's reading of EO 11, and why [redacted] did not agree with it (because, among other reasons, [redacted] did not agree that "DOE is considered a city agency," which was "part of the rub"). [redacted] eventually told [redacted] that it was the responsibility of [redacted] and [redacted] to sell SCI staff on the changes that DOI had made.

At that point, [redacted] reassured [redacted] that "People want to do other types of cases and they are into it," but noted that "there are people that have been here for 30 years" and were questioning the basis for the change in SCI's independence. [redacted] also questioned the wisdom of trying to impose a broad range of changes in practice at once – a concern with which [redacted] agreed:

[redacted]: *No, I think that is wise. You don't want to implement every change at once. But in addition to the concrete actual systems changes, process changes that get made, for something like that, like closing memos, or the fact that*

evaluations are going to happen -- there is a larger mindset or perspective that needs to be changed as well. And for me, that's a big thing because these other little changes . . . like every time you want to change a closing memo or do evaluations, you're going to run into challenges in implementing those if the mindset doesn't shift. . . . And part of that shift is getting people out of the business of questioning the realignment and transition whether it is questioning it from an EO 11 or EO 16 perspective or whether it is questioning it simply from the this is the way things were done in the past perspective, whether it is questioning it because you know, we are a tightly knit group and we always had a particular way of doing things and a culture - we don't want to change -- whatever it is that is the reason that you know, this kind of mindset is fairly pervasive and manifests in different ways, like that is a huge thing that needs to be worked on because until that is worked on and until that is addressed like directly, a lot of these other things are going to be harder to pivot.

[redacted] thus explained that, from [redacted] perspective, "the first thing that needs to happen is that the managers need to all, you know, adopt that, the appropriate perspective on this, and that means there needs to stop being questions about this stuff." That led to the following exchange:

> [redacted] *I don't know how to answer those questions, that's the problem. How should I answer those questions? Is it -- you are a DOI employee? Should I just tell them that?*
> [redacted]*: Their salaries are paid for by DOE but they are part of the Inspector General for the Department of Education, that's what they are. And they are part of DOI. Whether they want to think of themselves as DOI employees or not doesn't really matter.*
> [redacted] *[...]But there are people who were here when the DOE IG's Office was disbanded to become SCI. They were in the DOE IG Office and it was actually disbanded. So those people are telling other people, there is none. That's the problem.*
> [redacted]*: Right*
> [redacted] *So, forget about the historical knowledge and just tell them, no, there is an IG of DOE?*
> [redacted]*: That's what they are now.*
> [redacted] *OK*
> [redacted]*: The Inspector General of the Department of Education. SCI no longer exists as a name.*[50]

[redacted] appeared to assent to delivering this message, telling [redacted] that "We probably should" communicate that message to staff in individual meetings, and agreeing when [redacted]

[50] That was a bit strong: [redacted] clarified later in [redacted] meeting with [redacted] that SCI "can be used as a legacy name" because [redacted] "g[o]t that people are used to that is what it is called." [redacted] continued: "*I don't have a problem with it if people refer to it colloquially because, I get it, there is a history with that name. But, on documents we send out, on memos we send out, on signature lines it is the Inspector General for the Department of Education, Department of Investigation.*" [redacted] also asked [redacted] whether the "Chancellor's Regs" would be updated to reflect the name change; [redacted] did not appear to have any understanding of what those regulations were, and asked [redacted] to send them to [redacted]

reiterated the point. But [redacted] continued to push back on [redacted] suggestions that SCI's staff were unwilling or unable to perform large-scale systemic investigations, telling [redacted] that the issue was whether DOI had the authority to tell SCI what to do:

> [redacted] *No, but I think the meetings that we have had, its where -- this is what we should look at, you are telling us, this is what you should look at -- we should look at water, we should look at internet, we should look at these things. It is seen that we are being told to look at these things, which is not what they did in the past. It's just the Special Commissioner and not someone from DOI ever sitting in on meetings and telling them what to do. That is the problem.*
> [redacted]: *I get it. You are new to the role. And I have come in to work with you and try to assist you in getting these conversations started. I am happy to be less involved over time in getting and moving these cases forward. But it is not just about you. I mean, this group has not been used to doing these kinds of cases so to just say go do this project.*
> [redacted] *No, but they can do these cases and they have done them in the past. Whether you don't think that they have done big cases in the past, they actually have. So this is not going to be a foreign thing for them, right. It's more of – they have a lot of cases but when are we going to do this.*

Near the meeting's end, the following exchange took place:

> [redacted]: *But when we sit down and we meet with managers individually, this is the beginning of you know the conversation to lay these things out clearly in terms of how we are going to do things moving forward. This is squad 11, Inspector General for the Department of Education, of course, people know this group as, SCI from the past, so they can continue to refer to that when they speak to people, I think that that is fine. But, in terms of how we write it up in memos and letters for anything like that, I think it is much cleaner that it is part of the Department of Investigation for the Department of Education. Um, let people know that they report to* [redacted]*, and you report up through* [redacted] *and* [redacted] *and* [redacted] *to the Commissioner.*
> [redacted] *Right*
> [redacted]: *Because that is the organizational structure that the Commissioner set up.*
> [redacted] *Okay.*
> [redacted]: *We let them know that they're responsible through you and the other managers for implementing the mission and vision of the unit and that includes obviously pursuing cases related to the schools.*
> [redacted] *Well, yeah*
> [redacted]: *Including the systemic investigations that we are going to identify and work on together.*
> [redacted] *Right*
> [redacted]: *And I think we want to confirm with people that we understand that. Do you understand? Do you feel you will be able to communicate that to the managers in the meetings?*

[redacted] *Sure. [PAUSE.] Yeah.*

Individual staff meetings were thus set to begin at 10 a.m. the next day, with [redacted] and [redacted] set to meet at 9 a.m. ahead of time.

10. March 28, 2018: [redacted] is Terminated.

Initial Meeting With [redacted]. [redacted] met with [redacted] on the morning of March 28. [redacted] recorded the meeting, the transcript of which is as follows:

[redacted]*: So I'm meeting with* [redacted] *this morning?*

[redacted] *Yeah.*

[redacted]*: Okay. Good. So you know, as we discussed, we should, you know, talk about why we are having the meeting. Go through some of the stuff we talked about yesterday, just making, you know, very clear that, you know, going forward the name is the Inspector General for the DOE, the group is part of DOI, has to be integrated within the reporting structure and the processes, and we need to focus on the mission and the vision and the strategy we've talked about. And then I'd like to talk...*

[redacted] *Just. I mean, I thought about this a lot.*

[redacted]*: Okay.*

[redacted] *I have thought about it all night, and I think what you are asking me to do is not following Executive Order 11. It really is what's. happening and I don't feel comfortable with that.*

[redacted]*: Okay. Then we should cancel the meeting and we should have a further conversation later in the day.*

[redacted] *Okay.*

[redacted]*: I want you to think about that a little bit.*

[redacted] *Yeah, because I don't interpret the law the way you do.*

[redacted]*: Okay. And I am not the only one that interprets the law this way.*

[redacted] *Okay.*

[redacted]*: We've had conversations about this. Okay.*

[redacted] *Right, let's just make sure that you and I understand what's going on here.*

[redacted]*: Yep.*

[redacted] *Because I asked about a MOU the third day here and I was told, "Oh yeah, don't worry about it." Then I'm told we are sending some letter... we are having a conversation, we are sending some letter over and it's for* [redacted] *to sign. Then I read in the paper that it's something that gets sent over for* [redacted] *to sign.*

[redacted]*: Which I discussed with you yesterday.*

[redacted] *Right.*

[redacted]*: Which I think is an inaccurate statement but I talked with you about it. And...*

[redacted] *Right.*

[redacted]*: You know. (Laughs). But your direction does not come from the New York Times.*

[redacted] *I'm not getting direction from the New York Times. I am getting direction from reading the Executive Order 11 and there has been conversations about why don't we go change the Executive Order 11? It hasn't been changed and it is still in effect, right? So you know, you keep talking about . . . yesterday you kept talking about . . . "Hey there is some line in the very beginning" and I went back and read it, you know about the purpose, and it refers to this March 1990 report which I took out and looked at again, and in that report, at the end of this report, it sets up a completely separate office and it contemplates . . .*
[redacted] *: Separate from whom?*
[redacted] *From DOI and DOE. Do you want to see it?*
[redacted] *: Send it to me.*
[redacted] *Send it to you? I mean, did you read . . . are you following? Are you looking at the law yourself because . . .*
[redacted] *: [Interjecting.]* [redacted]
[redacted] *I just, I am really upset.*
[redacted] *: This meeting, this meeting is over. Okay.*
[redacted] *Right, it is over.*
[redacted] *: We will talk later today. I want you to know.*
[redacted] *We should*
[redacted] *: You can send that to me and we will talk later today.*
[redacted] *Sounds good.*

The transcript of the meeting thus reveals two things. *First*, [redacted] did not refuse to follow any direction from [redacted]; rather, [redacted] indicated "[redacted] was not comfortable" leading individual meetings with SCI staff as [redacted] envisioned due to [redacted] different understanding of what EO 11 required, at which point [redacted] terminated the meeting. *Second*, [redacted] said nothing at all about a refusal (or view one way or another) to make any of the policy changes that DOI envisioned (*i.e.*, focusing on "systemic" cases).

[redacted] **Goes to DOI Leadership.** [redacted] immediately informed DOI leadership about [redacted] meeting with [redacted] While [redacted] did "not remember the exact words" [redacted] used in doing so, [redacted] testified that the gist of [redacted] comments was that [redacted] had refused to take direction from [redacted] Commissioner Peters, [redacted] and [redacted] all testified that they understood [redacted] comments in that way.

Commissioner Peters quickly called [redacted] to his office. [redacted], and [redacted] were also present. [redacted] recorded the ensuing conversation:

Peters: I think this is (inaudible). It's not working You're clearly are not comfortable with the idea of SCI, of Squad 11 being part of DOI and I respect that, but the head of this Squad has to be . . . [inaudible]. Changes have to get made in Squad 11, it has to be fully integrated into DOI and has to start doing large systemic cases that DOI does, it's got to all, Squad 11 has to operate the way everyone else does and you clearly are not comfortable with that . . .
[redacted] *Can I just explain why I feel uncomfortable because I think it is important to . . .*

Peters: You can, sure.

[redacted] *To understand.*

Peters: Of course.

[redacted] *Right, because there is this Executive Order 11.*

Peters: Mmm hmm.

[redacted] *And I want to follow it and I don't think we're following it, so it's important to follow it because it hasn't been changed. If it's been changed, I get it, but it's not changed. As the [interjecting].*

Peters: [Interjecting] I have read that Executive Order quite closely many, many times and I have [redacted] *The Executive Order says that the title needs to be "Special Commissioner of Investigation" as a technical matter and I concede that point, and I've conceded it, but other than the fact that it says that the title needs to be Special Commissioner, it clearly says that the person who has that job reports to me. It clearly says that I may provide whatever support I need, appropriate support and assistance I deem necessary to do the job, which in my opinion requires* [redacted], [redacted] *and* [redacted] *it clearly says . . . [inaudible] there is also the Executive Order that says I get to be the Inspector General for the school system, so I actually disagree with you. But . . .*

[redacted] *In the Executive Order.... It's appoint.... you can tell me and direct me to do an investigation but the investigations, it is set up to be separate and it is set up to be independent and I can ask for assistance from DOI and that's not what is going on here.*

Peters: So here's the deal. Honestly, it actually says that I will provide the assistance that I decide is necessary. But. . .

[redacted] *[Interjecting.] No, no, no that's not how I read it.*

Peters: We don't need to have this conversation.

[redacted] *Okay.*

Peters: You are entitled to disagree with me about how to read Executive Order 11. You're a smart person and you don't agree with my reading of it, you are entitled to not agree with my reading of it. But you are not entitled to both work for me and disagree with my reading, right? So I think, you know, I think frankly, yes you are entitled to disagree, but you are not entitled to both disagree and be the IG of Squad 11. *I think that I want to do this in a way that is, I want to do this in a way that minimizes problems for you. I want to do this in the most decent way possible.* ***I think you need to resign because I think your view of the laws and requirements are different from mine and at the end of the day, I get to make that decision.*** *So I sorta think you need to resign. If you would like to do so, we are obviously prepared to find you a place for a short while at DOI while you figure out what's next, because I have no desire to be mean about this. So if you say to me that you are going to resign, clearly we will find a place for you here so that you have some time to figure out what's next, but you can't... and if you don't want to resign..*

[redacted] *I don't know.*

Peters: Then that's that. If you do not want to resign. I am asking for your resignation. I am asking for your resignation because I think that is better than simply saying you're fired. But do not misunderstand me. I am comfortable with my reading of Executive law, Executive Order 11, you and I have had this conversation a couple of times and you have had it multiple times with [redacted]. *So I would like you to think about it. If.. I am asking for your resignation. There is no law that requires that you give me your resignation, if you would like to be fired, I will do so. If you would like to resign, I will find a place for you here so that, you know, a place for you here so that you can find another landing spot. If you don't want that, that's fine too. Just let me know. And if you want to think about it for a moment, you can.*

[redacted] *Yeah, I will have to think about it. I mean, I haven't, I mean there is..*

Peters: You cannot, you cannot continue to run a large part of this agency disagreeing with my fundamental views on how that ought to be. At the end of the day, I get to make policy decisions for this agency and people are always free to disagree with me, but once I make a decision, everybody in this room, everybody in this room has the right to tell me they disagree with me, but once I announce that a decision has been made, nobody in this room has the right to continue to… at that point people need to abide by my decision or leave.

[redacted] *Okay.*

Peters: So think about it.

[redacted] *Alright. I mean, I do disagree about the law for signing subpoenas and all these other things that are listed in the law and that's the problem.*

Peters: [redacted] *I hear you. I do and I am not suggest…. I disagree with you and I believe your reading of the law is wrong. I am extremely comfortable in that view and* [redacted], *so does everybody else who is in this room. You are entitled to think I am wrong but you are not entitled to think I am wrong on a fundamental matter of running the agency and stay here.*

[redacted] *Gotcha.*

Peters: Those two are not (inaudible)

[redacted] *Alright.*

Peters: And that is what I tried to say two weeks ago. You let me know at the end of the day what you want to do.

[redacted] *Okay. I will.*

Peters: Thank you.

[redacted] *Thanks.*

(Emphasis added).

Next steps. [redacted] returned to [redacted] office, and immediately began to draft a follow-up email to memorialize [redacted] views; [redacted] assisted [redacted] with drafting the email. DOI leadership called [redacted] to Commissioner Peters' office, where [redacted] told [redacted] that [redacted]. Other witnesses' recollections were similar; [redacted] recalled

having meetings on and off all day about these issues.[51]

Coleman's Email. At 12:22 p.m., [redacted] sent Commissioner Peters and [redacted] an email (copying [redacted] laying out [redacted] view of the dispute. The subject of the email was "SCI and EO 11," and it read:

> Dear Commissioner Peters,
>
> As the head of DOI, and based on our conversation today, and several with [redacted] over the past few days, I must reiterate that I do not agree with DOI's interpretation of the law, specifically Executive Order 11. I am obligated to lawfully follow and execute Executive Order 11, which has been interpreted only one way for the past 30 years. I have been appointed to the position of Special Commissioner of Investigation for the New York City School District but have been instructed by DOI never to use the title, and that it is only a "technical" appointment - that I am to "function" as an IG. However, Executive Order 11 is still in effect, unchanged, and Executive Order 11 "functionally" provides me with certain powers and authority.
>
> During multiple meetings with executive staff, I was instructed when I first arrived at this job that I was not to use SCI letterhead, I was to have [redacted] review and edit SCI closing reports of investigations and referral letters to the [redacted] before they were sent under the DOI letterhead by DOI Commissioner Mark Peters and only signed by me, as Inspector General. DOI has reiterated that I cannot issue and sign-off on subpoenas. These instructions conflict with, and are in contrast to, EO 11. Essentially, I am being asked to disregard the law, and I find this troubling.
>
> When I spoke with [redacted] yesterday, [redacted] set forth that EO 11 was solely created to make sure that SCI was independent of DOE and dismissed my statement that it was created to be independent of both DOE and DOI. [redacted] referred to the opening few sentences which fell under the statement of purpose. However, the opening sentences referenced a March 15, 1990 report by the Joint Commission on Integrity in the Public Schools which established the need for independence from both the DOE and from DOI. The report outlined a new office set up by the SCI Commissioner. At page 84, it specifically stated, "The Commission has considered and rejected suggesting the transfer of the functions of the Inspector General to the Department of Investigation. The concern is that, as exigencies evolve, the Department will inevitably move resources that should be dedicated to eradicating corruption in the school system to whatever the target of the hour may be."

[51] [redacted] also drafted a memo that day about [redacted] failure to "provide timely notice to" [redacted] about [redacted], which required DOI "to seek an extension of time to respond" and "to work more quickly than would have been necessary." Both [redacted] and [redacted] testified that they did not believe that [redacted] error independently merited a memo; rather, the memo was written because of the pending friction in the office.

On my third day of employment at SCI, I asked whether there was a Memorandum of Understanding or any agreement with the DOE. Apparently, DOI sent an MOU to DOE, in addition to a letter of understanding, all referencing SCI and its status. All of the action moving towards a "restructuring" were apparently based on a telephone call between the [redacted] which I asked to be memorialized because what I was being asked to do did not conform with EO11.

The current attempt to control and direct SCI was never requested by me or anyone at SCI, as per EO11. We have not requested the assistance of DOI in performing the operational work to run the office of the Special Commissioner, as laid out in EO 11.

And, the daily direction and meetings called by [redacted] to direct the SCI staff are not within the mandate of EO11.

We asked in writing for a legal justification why money from the SCI budget, which is funded by the DOE solely for investigative purposes by SC1, was to be allocated to fund a DOI employee who would be performing DOI IT work. No explanation was given. [redacted] and 1 were present in a meeting with [redacted] and [redacted] in which we specifically requested a legal justification in writing. Although there had been conversations regarding having EO11 changed, to date, this law has not been repealed or changed. We requested and never received any legal justification or clarification as to why DOI was not complying with EO11, the corresponding Board of Education Resolutions of 1990 and 1991, and OMB practices. Without such explanations, we are obligated to follow the law as currently written. You mentioned that other people and [redacted]. However, the EO11 law has been in effect since 1990 and has been interpreted only one way for the past 30 years. Once the prior Special Commissioner retired, suddenly DOI interpreted the law differently than it had been interpreted for the past 30 years.

[redacted] and I have made clear since the beginning of this new SCI administration that we had concerns regarding the position and actions that DOI was pursuing regarding SCI and the DOE, and that we believed those actions to be contrary to current law. We stand by those positions. It is also our understanding that under the New York City Administrative Code, Section 1. § 12-113 (b)(1), we cannot be subjected to adverse personnel actions for having raised a concern to DOI and its general counsel, regarding the potential of criminality, wrongdoing, or mismanagement by a City agent regarding a City entity.

Finally, and on a personal note, I returned to public service because I wanted to serve the people of the City of New York, specifically I wanted to make sure that the school system was not subject to corruption, grossly mismanaged, and that children were in safe and positive learning environments. The fact that DOI has

attempted to direct me and my office otherwise and to not follow the law, has been a complete-distraction from the purpose and vision of the SCI office.

Thank you,
[redacted]

[redacted] email was thus notable in several ways: (1) the email clearly states that [redacted] believed that DOI's actions were "contrary to current law"; (2) [redacted] identified [redacted] self as a whistleblower; and (3) nowhere in the email did [redacted] state that [redacted] would refuse to follow directions from the commissioner or his delegates.

That afternoon, [redacted] forwarded the email to [redacted] and told [redacted] that [redacted] did "not plan to resign at 5 pm today and will inform [Commissioner Peters] of that at 5 pm." [redacted] also attached transcripts of [redacted] conversations with [redacted] and Commissioner Peters from earlier in the day.

Termination Letter. [redacted] prepared a draft termination letter – structured as a letter to [redacted] from Commissioner Peters – which DOI senior leadership edited and commented upon. The termination letter begins by rejecting [redacted] assertion that Commissioner Peters had asked for [redacted] resignation because of a whistleblower-type complaint, and posits that Commissioner Peters asked [redacted] to resign because "of an intractable disagreement between you on the one hand, and on the other hand DOI senior staff, including me, regarding the scope of [DOI's] oversight of you." The letter then made four core assertions.

First, the letter advised [redacted] that "[b]ecause [redacted] place[d] great reliance on the text of Executive Order 11 of 1990, as amended," it was "important to review some fundamentals of what" the EO does and does not say: namely, that "EO 11 does say that as the Commissioner of Investigation, I have the prerogative to both appoint and remove you."[52]

Second, the letter argued that the power to appoint and remove implied the power to control [redacted] day-to-day duties. The letter cited two cases for this proposition: (1) *Silver v. United States Postal Service*, 951 F.2d 1033 (9th Cir. 1991); and (2) *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Neither case dealt with New York law or statutory interpretation;[53] rather, the cases address the Appointments Clause of the U.S. Constitution.[54]

---

[52] However, the 2002 amendments to EO 11 had removed all textual reference to the DOI Commissioner's authority to remove the Special Commissioner. *See supra* at 27. It is thus unclear what authority the DOI Commissioner relied upon in firing [redacted] – but in any event, that authority did not arise from what EO 11 actually said.

[53] [redacted]

[54] *Humphrey's Executor* is seminal Supreme Court decision standing for the proposition that Congress can, consistent with the Appointments Clause, impose limits by statute on the president's ability to remove the heads of executive agencies. The Court offered the dicta quoted in the [redacted] termination letter – "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will," 295 U.S. at 629 – in explaining why *maintaining the independence* of executive agency appointees was important. *Silver* rejected a litigant's claim that "the President's executive powers

The letter also rejected [redacted] reliance on the Gill Commission report as legislative history, asserting that "EO 11 neither states nor implies that SCI is independent from DOI" and that the DOI Commissioner's "power to hire and fire . . . negates any assertion to the contrary."[55]

Third, the letter asserted that Section 4 of EO 11 gave Commissioner Peters the power to provide [redacted] with "the expertise of DOI's senior staff" regardless of whether [redacted] had requested or had sought to reject that "assistance." In a footnote hanging off this paragraph, the letter then briefly addressed [redacted] concerns over the CISO issue; it described Commissioner Peters' March 2, 2018 email to [redacted] and [redacted] about DOI's proposed temporary use of DOE funding and concluded that "[t]o date, neither [redacted] nor DOE has objected to DOI's proposal (which has not in any event been implemented)."

Fourth, in a paragraph added at [redacted] suggestion, the letter asserted that [redacted] "performance issues standing alone would provide sufficient cause for me to . . . remove you," citing [redacted] memoranda. As described below, each of these four contentions was inaccurate, unreasonable, or misleading.

The termination. At 5 p.m., [redacted] arrived on the 18th floor, and was led to a conference room. At approximately 6:30 p.m., Commissioner Peters, [redacted], and two armed DOI peace officers arrived. [redacted] recorded most of the interaction. Commissioner Peters asked [redacted] "So. . . are you going to resign?" [redacted] said no. Commissioner Peters responded "You are terminated," and quickly added "Here's your letter" before turning and leaving the room. [redacted] then attempted to secure [redacted] phone; [redacted] emailed [redacted] self a copy of the audio recording and then gave the phone to [redacted]. Afterwards, DOI peace officers escorted [redacted] to [redacted] desk, and then drove to [redacted] house, where [redacted] handed the officers [redacted] laptop.

[redacted] At 3:37 p.m. that afternoon – at the direction of [redacted] – [redacted] emailed [redacted] and asked [redacted] whether [redacted] email from earlier that day "reflect[ed]" [redacted] "views, as [redacted] represent[ed]." [redacted] responded affirmatively, adding: "I've always been clear on my interpretation of EO11 and the corresponding BOE resolutions of 1990 and 1991, and I believe I've made that clear during several of the recent meetings, as well as over my 14 year career at SCI." [redacted] did not respond.

---

have not been properly delegated to the Postal Service in accordance with the Appointments Clause." 951 F.2d at 1036. In so doing, the Ninth Circuit considered who or what was the "head" of the Postal Service for Appointments Clause purposes; the court determined that the Postal Service's nine-member Board of Governors was the agency's "head" because it had complete statutory/discretionary authority to hire and fire the Postmaster General as the governors saw fit. The Ninth Circuit's observation that "The power to remove is the power to control" arose in the context of a discussion about whether the Postmaster General would feel him or herself bound to follow the orders of the Board of Governors. But the Ninth Circuit did not find (for example) that the Board of Governors had implicit authority *to direct the day-to-day activities of the Postmaster General* in a manner that would trump the specific statutory scheme setting forth the Postmaster General's powers.

[55] The letter also asserted that "[i]n each of your interviews for your position, including the one you had with [Commissioner Peters], DOI's vision for how SCI would operate going forward, and your role in that vision, clearly was explained to you."

That night, DOI leadership concluded that [redacted] would be named as acting Special Commissioner. ([redacted] was the first choice, but [redacted] did not have five years of law enforcement experience, and was thus ineligible under EO 11.) [redacted] testified that [redacted] made the decision to demote [redacted] (albeit with Commissioner Peters' approval).[56] [redacted] testified that [redacted] made that decision because [redacted] had "confirmed that [redacted] ascribed to the view that [redacted] could not take direction from Commissioner Peters, which [redacted] thought was] in direct contravention of EO 11.

C. Background to Dispute – Events Following [redacted] Termination (March 29, 2018 to present)

i. The Day After – March 29, 2018.

1. [redacted] is Demoted

[redacted], [redacted], and [redacted] met on the afternoon of March 29, 2018; [redacted] recorded the meeting. The full exchange is as follows:

[redacted] *So, I'11 get right to it. Um. So, as the acting special commissioner of investigation and acting IG for DOE, it is my prerogative to have the people who work for me, and the people that report to me, have my confidence. And, that confidence includes, um, that person's, and those people's ability to implement their job functions the way I direct them. I see my directions as coming from the DOI commissioner. So, the DOI commissioner's directions on this job are my directions. They are one in the same. My understanding is that you communicated with [redacted] through an email that [redacted] letter to the commissioner of DOI, um, reflects your views as well. Right?*

[redacted] *Yeah. If you ask whether, uh, my response was that my, uh, reading of EO 11 has been steadfast for 14 years...*

[redacted] *That's not what I'm asking you.*

OK.

All right?

OK. Well, that was my response to [redacted].

Well, [redacted] email copied you and said in, a lot of times "[redacted] and I feel that," "[redacted] and I, we believe as follows." [redacted] also stated other positions. I think that [redacted] asked you if, when [redacted] stated that you were "with [redacted] in the position, was it true that you, those positions were yours as well?"

[redacted] *Yeah, my, the, the, it was a brief response. The bulk of my response was my EO 11 and Board resolution response, but I did say "Yes, it does."*

[redacted] *It accurately reflects my views. Right? OK.*

I said "Yes, it does." Yes.

So, my interpretation of [redacted] views, which are now interpreted as your views as well, are that, included in that view, um, is not accepting direction from the DOI commissioner or his designees.

---

[56] [redacted] who had a pre-existing personal relationship with [redacted] recused [redacted] self from decisions about [redacted] job status.

[redacted] *That's not a statement that I have made, or would make, I don't know if that's fairly attributed to me, but, eh...*

[redacted] *Well. OK, so, alright. So,* [redacted] *articulated* [redacted] *interpretation of EO 11 as, basically, Commissioner Peters, you don't get to tell us what to do. I get to ask for your assistance. Ok?*

[redacted] *Are you asking me what my interpretation is of this?*

I'm asking you if you agree with that interpretation.

My understanding of EO 11 is again as it has always been, which is, yes, the DOI commissioner can, uh, request that certain investigations be conducted by SCI, that SCI is entitled to any and all support from DOI, that they need on investigations.

[redacted] *My reading of, I'm not going to get into this with you again . . .*

I know.

I'll just say that EO 11 directly states that the DOI commissioner can direct the special commissioner of investigation to do investigations.

[redacted] *Yes. No. That it does say. Yes.*

And it also states that, so it doesn't state that the SCI commissioner gets to decide that. The DOI commissioner gets to decide that.

[redacted] *You know, I, I, again, I don't want to argue about interpretation of it. I mean . . .*

[redacted] *I wanna, I wanna, I'm trying to see from you,* [redacted]

Yeah

If I can trust you in a position that follows a, an understanding of EO 11 that I believe is the right one, that the DOI commissioner believes is the right one, and my directives that come from the DOI commissioner, we speak, we speak the same language. What he says is what I say. What I say is what he says as to, um, the directives of the direction of the IG for DOE. And, so I need my people in leadership to not have any, whatsoever, ambiguity about that direction. My interpretation of this letter, that was sent to Commissioner Peters, that you have adopted as your own is that I can't trust you in the first DIG position to be the person who is communicating and implementing the direction of the commissioner of DOI. So, I think, so, I don't think, so I need you to not be the first DIG.

[redacted] *Ok.*

And, I'm restoring you back to your counsel position.

Ok.

That also means restoring to that salary.

That, again, that is a DOE salary position, it will have to go through that DOE process.

[redacted] *I am the acting Special Commissioner of Investigation.*

I understand...

And this is how I am handling it.

Ok.

Ok? It is my understanding that your salary is, was [redacted]*, if that is an incorrect number, you should let me know that.*

[redacted] *It is, but...*

[redacted] *Ok, so, just gimme the real number.*
Ok.
But, not right here. Ok?
Yup.
Alright.
Um, just, and just so we know, the other part in adopting that whole letter...
[redacted] *Yeah.*
The Whistleblower statute...
Oh, I understand your Position.
Is absolute, I just want to make it very clear.
It's clear.
Here as well, you know, and all of those dates and all of the information stands for me as well.
[redacted] *I understand. Thank you.*
Thank you.

[redacted] immediately wrote to [redacted] to inform [redacted] of what had occurred.

2. Commissioner Peters meets with SCI staff.

Earlier that morning, Commissioner Peters, [redacted] and [redacted] made a brief visit to the 20th floor to inform SCI of the changes that had been made. [redacted] recorded that visit. Commissioner Peters spoke for about 20 seconds, telling the assembled SCI staff that [redacted] had been named the acting Special Commissioner and IG, and stating – in a matter-of-fact manner – that:

> *As of last night, [redacted] is no longer working for the Department of Investigation. [redacted] is no longer the Special Commissioner of Investigation or the inspector general for the school system. As of this morning, I have appointed [redacted] as the acting Special Commissioner for Investigation, and the acting inspector general for the school system.*

Voice rising, and with emphasis on the word "everyone," Commissioner Peters then said:

> *I expect that **everyone** in this room will give [redacted] their full support and cooperation.*

He then left the gathering. [redacted] said "So, there's really nothing else to say except I look forward to working with you all, as I did in the last couple of months. [redacted] will continue to work with me." [redacted] then directed SCI's staff to feed the reports that would have otherwise gone to [redacted] to [redacted], and departed. The entire interaction lasted less than a minute.

3. [redacted] Pens Several Additional Memos.

Later that day, [redacted] wrote the first of two memos [redacted] would ultimately write about [redacted] interaction with [redacted] on March 28. This memo covered the conversations [redacted] had with

[redacted] on March 27 and 28. With respect to the initial meeting on March 28, [redacted] wrote that [redacted] said "[redacted] was not comfortable giving those directions to staff *and would not give those directions to staff*" (emphasis added).[57] [redacted] also wrote a memo addressing [redacted] demotion, which tracked the recording of the meeting – namely, that [redacted] had agreed with the sentiments expressed in [redacted] email, and those "views were contrary to the directions of Commissioner Peters."

4. The Whistleblower Claims Arrive.

That afternoon, [redacted] emailed Councilperson Lander, copying [redacted] told Lander that Lander's question to Commissioner Peters at the March 26 City Council hearing – which indicated that Lander had heard from folks "in SCI" – had "essentially disclosed [redacted] identity." [redacted] thus requested Lander's assistance with pursuing a whistleblower claim.[58] [redacted] separately sent [redacted] and [redacted], a letter requesting whistleblower protection.

ii. Fallout from the Mayor's Office.

On March 30, 2018, Rashbaum wrote an article in the *Times* describing [redacted] termination, [redacted] demotion, Peters' brief March 29 meeting with the SCI staff, and other related issues.

Two days later, on April 1, 2018, Mayor de Blasio issued Executive Order 32, which amended EO 11. EO 32 restored the title of EO 11's Section to "Appointment *and Removal* of Special Commissioner," as it had been prior to 2002. EO 32 then amended the substance of Section 2 to: (1) provide that the Mayor must "consent" to the appointment of the Special Commissioner by the DOI Commissioner; and (2) state that the Special Commissioner "may be removed only with the consent of the Mayor." The next day, Rashbaum wrote another story in the *Times* covering the new enactment.[60] The article included a statement from [redacted] about the importance of SCI's independence from DOI. It also relayed a statement from the Law Department that it had "opened an investigation into three whistle-blower complaints made against the Department of Investigation by Ms. [redacted] and two members of [redacted] staff," noting that "[w]hile the Department of Investigation generally conducts such inquiries, it is conflicted in this instance."

After further discussions between DOI and the Law Department, the Law Department proceeded to drop its investigation in favor of the instant one.[61]

---

[57] [redacted] wrote another memo on March 30 covering the events of March 28.

[58] Lander forwarded the request to [redacted] on April 2, 2018.

[59] https://www.nytimes.com/2018/03/30/nyregion/investigation-chief-special-commissioner.html

[60] https://www.nytimes.com/2018/04/02/nyregion/de-blasio-peters-schools-investigations.html

[61] Rashbaum wrote another *Times* piece regarding on a separate exchange between the Law Department and Council Member Torres. *See* https://www.nytimes.com/2018/04/11/nyregion/city-council-investigations-mayor.html.

iii. Other Relevant Events.

1. [redacted] Salary Reduction

On the evening of March 29, 2018, [redacted] sent [redacted] an email (copying [redacted]) informing [redacted] about [redacted] demotion and concomitant salary reduction and instructing [redacted] to "take the necessary steps to implement this decision immediately." [redacted] added that [redacted] should "acknowledge this email [sic] that you are complying with it" and to let [redacted] "know when you have taken the necessary steps." [redacted] told [redacted] the next morning that [redacted] would follow up with the necessary personnel. On April 4, 2018, [redacted] sent [redacted] a further email asking [redacted] to "confirm this action has been implemented" and requested "documented confirmation of such." [redacted] responded (copying [redacted]) that DOE's Galaxy system was making it difficult to process the "transaction" and that DOE had informed [redacted] that the DOE employee best situated to assist was out of the office. [redacted] subsequently resigned from SCI for unrelated reasons. Over the next several weeks, [redacted] directly liaised with [redacted] at DOE in an to attempt to process [redacted] salary reduction; [redacted] told [redacted] on several occasions that DOE needed approvals from DCAS in order to process the reduction.

On May 3, 2018, [redacted] sent [redacted] at DCAS a letter (copying, among others, [redacted]) to facilitate the salary reduction process. The letter made numerous representations that [redacted] as the Acting Special Commissioner, had authority to manage SCI employees like [redacted] – representations that starkly contrasted with positions that DOI senior staff (including [redacted] had taken with [redacted]. In particular: [redacted] letter recited that "the Special Commissioner of Investigation for the New York City School District (Special Commissioner) is the head of the unit commonly referred to as SCI." The letter added that "[w]ith the exception of the Special Commissioner, who is a DOI employee, all SCI unit staff are employees of [DOE] but are hired and overseen by the Special Commissioner." Finally, the letter stated that "[a]s Acting Special Commissioner of SCI, it is my responsibility to determine who and when SCI employees may be hired, terminated, and demoted."

[redacted] letter also stated that [redacted] had been demoted "as a result of [redacted] expressed unwillingness and inability to carry out directives and receive assistance that the DOI Commissioner, and I, deem necessary to carry out [redacted] managerial duties," and [redacted] "corresponding loss of confidence in [redacted] ability and competence to be the First Deputy of the unit."

On May 9, 2018, [redacted] responded to [redacted] and indicated that "decisions regarding [redacted] title and salary may be made by your agency." Later that day, [redacted] wrote to [redacted] and requested that [redacted] "create a galaxy job id for the title, level and salary for [redacted] at Agency Attorney" at [redacted] pre-promotion salary. [redacted] also asked [redacted] to "make it retroactive to March 29, 2018 if possible," and asked [redacted] to "let me know once you have done this."

DOE ultimately processed the request, and sent [redacted] a letter on May 22, 2018 "offer[ing]" [redacted] the position of Agency Attorney." The letter provided [redacted] with three options: [redacted] could either "Accept" the offer; "Decline" it; or "Acknowledge" it, which would

provide [redacted] with "the opportunity to discuss the terms presented." [redacted] clicked "Acknowledge." Later that day, [redacted] sent [redacted] a letter reiterating [redacted] request for a "formal, written explanation of the charges leading to [redacted] demotion." [redacted] responded the next day with a letter that ignored [redacted] request for a written explanation.

On June 5, 2018, [redacted] met with [redacted] and [redacted] to discuss this issue. [redacted] recorded the conversation; [redacted] later wrote a memorandum to file about the meeting. The discussion centered around whether [redacted] would "Accept" the DOE's "offer," *i.e.*, take an affirmative step to effectuate the reduction of [redacted] salary. During the meeting, [redacted] acknowledged that the instant investigation would ultimately resolve the question of whether [redacted] salary reduction was permissible. [redacted] ultimately requested that [redacted] consider the issue and revert to [redacted] The next day, [redacted] requested [redacted] response by COB on Friday, June 8.

[redacted] sent a response that Friday afternoon, in which [redacted] thanked [redacted] and [redacted] for "candidly discussing this situation, which we all conceded is difficult and uncomfortable." [redacted] recounted [redacted] comment that the "offer letter" was "an arcane procedural 'hurdle' which does little to alter [redacted] current employment status." [redacted] pointed out that while [redacted] salary had not yet been reduced, [redacted] had been functioning as an "Agency Attorney" since March; [redacted] also agreed that whether [redacted] would remain in that role or would be restored (in title and salary) to First Deputy would depend on this result of this investigation. [redacted] then added:

> The decision of whether a portion of my salary is "clawed back" or remains at its current level will be determined by the findings of [this investigation]. I have every intention of abiding by the determination of those proceedings, and will certainly refund any overpayment I may owe the City, if that is the outcome. I have no doubt, as [redacted] said, that once the outstanding issues are resolved, all money owed to either party "will end up in the right place." However, I do not see the necessity in rushing the actions into effect when the investigative outcome remains in doubt. I will, therefore, decline the offer . . . with the understanding that the issue will be revisited upon the conclusion of the current administrative proceedings.

The next Monday morning, June 11, 2018, [redacted] ultimately liaised with the City law department and [redacted] to process the reduction. [redacted] received confirmation of the salary reduction on June 27, 2018, retroactive to March 29. The next day, [redacted] received a memo from [redacted] indicating that [redacted] would "be receiving a [DOE] overpayment notice from a DOE payroll officer." Soon afterwards, [redacted] received notice from DOE that [redacted] paycheck would be garnished until DOE recouped the ~$7,000 "overpayment" [redacted] had received.

2. DOI Promulgates a Ban on Recording Conversations.

On August 9, 2018, [redacted] sent DOI employees a memo setting out a new DOI "Policy Regarding the Recording of Conversations in the Workplace." The new policy proscribed the electronic or audio recording of workplace-related communications "without the consent of all

parties to such communications." [redacted] memo provided that the policy was intended "to foster a collegial workplace environment and the free exchange of information in and relating to the workplace; to safeguard the confidentiality of sensitive information; and to protect personal privacy." The new policy did not appear to restrict DOI senior staff's practice of documenting its communications with [redacted] in written memoranda.

IV. ANALYSIS OF WHISTLEBLOWER CLAIMS

[redacted] all brought claims under the City's Whistleblower Law. That section provides in relevant part that "[n]o officer . . . of an agency of the city shall take an adverse personnel action with respect to another officer or employee in retaliation for his or her making a report of information concerning conduct which he or she knows or reasonably believes to involve corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority by another city officer . . . which concerns his or her office or employment." N.Y. Admin. Code § 12-113(b)(1). Under the Whistleblower Law, protected "reports" can be made to any of the following individuals: (1) the Commissioner of DOI; or (2) a city council member, the public advocate, or the comptroller, each of whom must "refer such report to" DOI. The law contains no requirement that a putative whistleblower expressly identify him or herself as "a whistleblower" when making a report.

A claim under the Whistleblower Law thus has five elements:

1. The complainant is an officer or employee of a City agency or contractor.
2. The complainant made a report to one of the entities designated under the Whistleblower Law.
3. The complainant suffered an adverse personnel action.
4. The complaint involved, or the complainant had reason to believe it involved, corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority.
5. The adverse personnel action was the result of the complainant having made the complaint.

The Whistleblower Law has no private right of action. *See Healy v. City of New York Dep't of Sanitation*, No. 04 Civ. 7344 (DC), 2006 WL 3457702 (S.D.N.Y. 2006) (Chin, J.). As a result, no court has ever provided an authoritative or binding interpretation of it. However, judicial interpretations of other whistleblower provisions – such as New York State's whistleblower law for public employees, Section 75-b of the New York Civil Service Law, *see* N.Y. Civ. Serv. L. § 75-b – are persuasive in assessing the Whistleblower Law's precise contours.

For the reasons that follow, we conclude that [redacted] have made out a substantiated whistleblower claim, but [redacted] has not.

A. Elements One Through Three

Both [redacted] and [redacted] satisfy the first three elements of the Whistleblower Law's test. [redacted]

Officer or employee of a City agency or contractor. All three of [redacted] are officers or employees of a "City agency" for purposes of the Whistleblower Law. [redacted] was an employee of DOI, a city agency. *See supra* at 52. [redacted] are not DOI employees; rather, as part of SCI, their salaries are paid by the DOE, and their working conditions are under the "sole jurisdiction" of the Special Commissioner. *See supra* at 22. But the Whistleblower Law also makes plain that "[f]or purposes of this subdivision, an agency of the city *shall be deemed* to include . . . an agency the head or members of which are appointed by one or more city officers, and the offices of elected city officers." NYC Admin. Code § 12-113(b)(1). The head of SCI – the Special Commissioner – is and was "appointed by one or more city officers" – namely, the Commissioner of DOI. [redacted] thus work for "an agency the head . . . of which [is] appointed by one or more city officers," and are "City agency" employees for Whistleblower Law purposes.

Report to a covered person or entity. [redacted] each made at least one covered report. By its terms, the Whistleblower Law provides that whistleblowing complaints must be made to the "commissioner" of DOI or to another designated person (who must then refer the complaint to the Commissioner). [redacted] joint March 28, 2018 email to Commissioner Peters qualifies as a protected report – the email contains allegations that DOI's takeover of SCI exceeded the Commissioner's legal authority, and was obviously made directly to the Commissioner. *See supra* at 78. The same goes for [redacted] conversation with Commissioner Peters earlier on the same day. *See supra* at 76. [redacted] March 15, 2018 conversation with Councilman Lander would also qualify as a protected activity, *supra* at 65, as would [redacted] oral statements at her February 27, 2018 "ultimatum" meeting with Commissioner Peters, *see infra* at 53.

We pause here to note that the Whistleblower Law's operation as to DOI is, by necessity, unique. A complainant working for *any other* agency will have her complaint received and evaluated by an outside authority – DOI. The act of making the complaint is thus not directly entangled with the complainant's day-to-day duties or her direct managers. But when the complaint is one of wrongdoing *within* DOI – and particularly of an alleged abuse of authority by the Commissioner and DOI senior staff – the situation is entirely different. From the complainant's perspective, there are two problems: (1) the inevitable conflict that arises from direct conflict with one's managers; and (2) reporting DOI's wrongdoing *to DOI* is likely to be a waste of time. *See Tipaldo v. Lynn*, 48 A.D.3d 361, 362 (1st Dep't 2008) ("Because these were the individuals plaintiff alleged had improperly procured signs in connection with a traffic reconfiguration project, reporting the violation to them would have been futile."). Yet the Whistleblower Law provides no other outlet that offers the complainant whistleblower protection. And because it is conceivable both that individuals within DOI (like any other city agency) could abuse their authority *and* that a complainant would be entitled to whistleblower protection in connection with a report about that abuse, the Whistleblower Law applies in full, notwithstanding the awkward fit.[62]

[62] The distinction (or lack thereof) between an intra-DOI claim of wrongdoing and a "failure to follow direction" is addressed *infra* at 132.

Further, in these circumstances, the Whistleblower Law should be read to include complaints made not just to Commissioner Peters personally, but to *anyone* on DOI's senior staff. DOI's own interpretation of the Whistleblower Law has long been that *any* complaint to a member of DOI – not only reports to the Commissioner him or herself – is sufficient to trigger whistleblower protections. Moreover, the First Department's *Tipaldo* opinion suggests that, in circumstances where the statutory recipient of a whistleblower complaint and the alleged wrongdoer are one and the same, the requirements for lodging an effective report should be relaxed. As such, any assertions by [redacted] about the unlawfulness of DOI's actions – including [redacted] conversation with [redacted] on the morning of March 28 – should also qualify as protected reports. Nevertheless, we need not address this issue further because [redacted] lodged complaints directly with Commissioner Peters or another designated person.[63]

[redacted]

Adverse personnel action. Under the Whistleblower Law, an adverse personnel action includes "dismissal, demotion, suspension, disciplinary action, negative performance evaluation, [or] any action resulting in loss of . . . other benefit." NYC Admin. Code § 12-113(a)(1). [redacted] was terminated; [redacted] was demoted from First Deputy to his prior counsel position; both are clearly adverse personnel actions.

[redacted]

[redacted]

[63] Likewise, while we doubt that the "Objection Memorandum" [redacted] sent to [redacted] qualifies as a whistleblowing report even in these unusual circumstances, we need not address the question.

[64] [redacted] duly forwarded [redacted] complaint to DOI, as directed by the Whistleblower Law.

[63] [redacted]

B. Element Four – Content of the Reports

A report of wrongdoing can rise to the "whistleblowing" level in one of two ways. The report must describe conduct that the complainant either "knows *or* reasonably believes to *involve* corruption, criminal activity, conflict of interest, gross mismanagement or abuse of authority by another city officer . . . which concerns his or her office or employment." NYC Admin. Code § 12-113(b)(1) (emphasis added). Because the active verb in the Whistleblower Law is "involve," the whistleblower's report need not be one directly *of* an "abuse of authority" or other misconduct, but need only *include* some element of that misconduct as part of the report. Put another way, the report must "include" some conduct that either rises to a certain level, or that the complainant reasonably believes to meet that standard.[66]

For the reasons explained below, we find that [redacted] complaints satisfy both prongs of this test. That is, [redacted] were correct that the conduct described in [redacted] March 28 email – Commissioner Peters' restructuring of the relationship between DOI and SCI, and his subordination of the Special Commissioner's role – involved an abuse of authority because it contravened the letter and spirit of the governing law. We also find that, at the very least, [redacted] reasonably believed that DOI's actions involved an abuse of authority at the time they made their whistleblowing complaints.

i. In This Context, An "Abuse of Authority" Does Not Require More Than a Violation of Law.

During interviews, DOI senior staff suggested that the phrase "abuse of authority" as used in the Whistleblower Law has a narrow meaning – namely, that it contemplates a level of wrongdoing that exceeds a mere technical violation of law. *Cf.* N.Y. Civ. R. L. § 75-b(2)(a) (protecting complaints about "improper governmental action," which means "any action by a public employer . . . which is undertaken in the performance of such agent's official duties . . . and which is in violation of any federal, state or local law, rule or regulation"). According to DOI, EO 11 and the other governing laws are at least ambiguous as to the question of DOI's authority to manage SCI; if DOI made a good-faith choice among two plausible interpretations, the argument goes, then even a finding that DOI ultimately made an incorrect choice does not constitute an "abuse" of the law. In support of this view, Commissioner Peters (among others) testified that his motives in assuming control over DOI were made for entirely sound policy reasons, not for personal gain or any other corrupt reasons.

We fully credit Commissioner Peters' testimony about the rationale for DOI's takeover of SCI, and accept that he sincerely believed that bringing SCI into the DOI fold was necessary to improve investigative outcomes for the City and the school district.

---

[66] First Amendment retaliation cases such as *Sheppard v. Beerman*, 317 F.3d 351 (2d Cir. 2003), have no application in this context. A public employee's First and Fourteenth Amendment rights to speak about matters of public concern are far more circumscribed than under statutory whistleblower provisions: indeed, "the Supreme Court has held that First Amendment protection applies only when the public employee speaks as a citizen" and that "[s]tatements made pursuant to official duties are not protected." *Nagle v. Marron*, 663 F.3d 100, 106 (2d Cir. 2011). In contrast, the City's Whistleblower Law is *designed* to protect statements made pursuant to a City employee's official duties and City business. *See also infra* at n 103.

Nonetheless, for the reasons that follow, we conclude that if DOI's actions were indeed unlawful, they would constitute an "abuse of authority" under the Whistleblower Law.

First, the phrase "abuse of authority" is not defined by the Whistleblower Law. Nor is it defined in any relevant City or state law. Dictionary definitions are not dispositive; an "abuse" certainly requires an "improper or excessive use," but whether that impropriety or excess also requires ill motives is unclear.[67] While judicial usage is spotty, it shows that legally impermissible conduct by a public official constitutes an "abuse of authority." More than a century ago, the Court of Appeals found that the commissioner of highways could be enjoined from removing a plaintiff's house based on the commissioner's wrongful interpretation of the law; "the action was maintainable upon the ground of a threatened *abuse of authority* by a public officer, under color of office." *Flood v. Van Wormer*, 147 N.Y. 284, 288 (1895) (emphasis added).

Moreover, the history of the Whistleblower Law shows that "abuse of authority" must mean something more than "corrupt" acts or those made with ill intent. The initial version of the law, enacted in 1984, did not contain the phrase "abuse of authority," but rather protected only complaints involving "corruption, criminal activity or conflict of interest."[68] But in 2003 – and at the urging of DOI Commissioner Gill Hearn – the City Council amended the Whistleblower Law to *expand* the types of reports that would be covered, specifically to include "abuse[s] of authority" and "gross mismanagement." *See* Local Law 10 (2003). It is thus clear that an "abuse of authority" includes acts that would not be deemed "corrupt" or "criminal."[69]

Second, characterizing DOI's actions as a mere "interpretation" of EO 11 and the governing law rather dramatically understates the scope of the controversy. Commissioner Peters did not merely proffer a new and potentially incorrect interpretation of the law governing SCI; he proffered a novel interpretation of the law that flew in the face of a nearly 30 years of unbroken precedent, *and he acted on that interpretation* without obtaining confirmation from any outside source – DOE, the Law Department, City Hall, or anywhere else – that it was correct. Even assuming that Commissioner Peters believed his actions to be fully justified, they amounted to a profound break from the established order based solely on his say-so (and, as discussed above, in the face of contrary, documented advice from several of his deputies, including [redacted] The risk of being wrong in *that* scenario is quite apparent; pushing forward regardless was potentially an abuse of authority.

---

[67] *See* https://www.merriam-webster.com/dictionary/abuse (abuse includes both "a corrupt practice or custom" and "improper or excessive use or treatment").

[68] Local Law 10's statement of legislative purpose indicated that the Council's goal was to encourage workers to "report to the appropriate person information regarding *improper actions* within their agencies," so that "*incidents of wrongdoing*" could be unearthed.

[69] Commissioner Peters testified that the phrase "abuse of authority" should be analogized to the "abuse of discretion" standard applied by federal appellate courts. The analogy is inapt. The "abuse of discretion" standard applies only to matters that fall by law into a district court's sound discretion; when a district court interprets the law, that interpretation is subject to *de novo* review. *See, e.g., Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 119 (2d Cir. 2012) ("We review a district court's denial of leave to amend for abuse of discretion, unless the denial was based on an interpretation of law . . . in which case we review the legal conclusion *de novo*."). Here, of course, the scope of Commissioner Peters' powers is not a matter committed to his discretion; Commissioner Peters' powers are bounded by written laws.

DOI's new "interpretation" of the law also had immediate and significant consequences for the object of that new interpretation – SCI. Moving forward with SCI's reorganization undoubtedly resulted in personal and professional upheaval for its staff – among other things, the swift imposition of DOI policies onto SCI in the winter of 2018 immediately imperiled the peace officer status of numerous SCI investigators, *supra* at 71, and caused other disruptions in the office as a result of the seizure of control over SCI's vehicle fleet, *supra* at 71. Moreover, Commissioner Peters also testified that if his interpretation of the governing law was wrong, then DOI's attempted use of a DOE-funded line for the CISO position would have undoubtedly been unlawful. In other words, DOI's adoption of this novel legal framework necessarily entailed substantial, real-world consequences for SCI's staff and DOE's budget, and the decision to place those stakes at risk on the basis of a bare "reinterpretation" of existing law was a fraught one.

We credit Commissioner Peters' testimony that he had sound policy reasons for moving forward with the reorganization plan before hashing out SCI's legal framework with City Hall, the City Council, and others – namely, that acquiring a new Executive Order or legislation regarding SCI would have taken months, and Commissioner Peters wanted to reform SCI sooner rather than later.[70] But while that decision to move ahead was understandable as a matter of policy and perhaps political reality, those considerations did not cure the risk of *illegality* that was inherent in DOI's new program. Accordingly, taking into account all of the above factors, we conclude that if Commissioner Peters' decision to fold SCI into DOI *actually* exceeded his legal remit, that decision would constitute an "abuse of authority" for purposes of the Whistleblower Law.

ii. DOI'S Assumption of Direct Managerial Authority Over SCI Constituted an Abuse of Authority

We find that DOI's assumption of day-to-day control over the management of SCI contravened the governing law – Executive Order 11 and the corresponding BOE resolutions. Our reasoning is broadly similar to the [redacted] That is: (1) read fairly, EO 11 (as amended) and the corresponding BOE resolutions plainly provide that the Special Commissioner enjoys a substantial degree of operational and decisional autonomy from the DOI Commissioner, and that the Commissioner's oversight of SCI is quite limited; (2) DOI's attempts to impose direct control over SCI and treat it as a standard-issue IG office – without securing any alteration in the legal status quo – contravened the bounds of DOI's authority. We further find that nothing in the DOI Commissioner's broader legal authority provides sufficient justification for exercising direct oversight over SCI. And we reject the various justifications that DOI has offered for its actions, both publicly and in interviews in connection with this investigation.

[70] We also credit testimony from [redacted] and others that changes to SCI's peace officer and related policies were much needed. But the question of when and how to replace those policies is a matter of discretion, and so the question of who exercised that discretion was meaningful.

1. The Governing Law.

EO 11 (as amended) and the corresponding BOE resolutions, with some assistance from the City Charter, provide the legal framework for the Special Commissioner's investigatory and oversight powers. These implementing provisions are important because, prior to SCI's creation, the City lacked authority to create an IG-like role for the city school district. Rather, under the state's Education Law, that authority was vested in the BOE. *See supra* at 21. EO 11 and the corresponding BOE resolutions thus incorporate a delegation of investigatory authority by the BOE to the City, but one that is limited by its terms.

In considering EO 11 (as amended) and the BOE resolutions, we have adhered to traditional principles of statutory interpretation. In considering statutory language, 'all parts of a statute are intended to be given effect' and 'a statutory construction which renders one part meaningless should be avoided.'" *Anonymous v. Molik*, No. 77, 2018 WL 3147607, at *4 (N.Y. June 28, 2018) (quoting *Rocovich v. Consolidated Edison Co.*, 78 N.Y.2d 509, 515 (1991)). Put another way, "[i]t is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other." *People v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979); *see also* N.Y. Stat. Law § 97 (McKinney) ("A statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.").

The "[r]ules applicable to statutes apply to an executive enactment as well." *People v. Esposito*, 146 Misc. 2d 847, 850, 553 N.Y.S.2d 612, 615 (Sup. Ct. 1990). Additionally, we have taken particular note of the fact that EO 11 and the 1990 BOE resolution "were enacted simultaneously and should, therefore, be so construed as to give effect to each." *Strauch v. Town of Oyster Bay*, 263 A.D. 833, 31 N.Y.S.2d 534, 535 (2d Dep't 1941). We have also endeavored, at Commissioner Peters' urging, to read EO 11 against the backdrop of the City Charter.

Considered in full and in context, EO 11 and the BOE resolutions create an investigatory office that: (1) enjoys full autonomy from the City School District and its leadership; (2) exercises near-complete investigatory and operational discretion from DOI; (3) retains "sole jurisdiction" over its own staffing and budget; and (4) as a result, simply cannot simply be shoehorned into the broader DOI structure at the Commissioner's discretion.

a. Executive Order 11 (as amended).

As described above, EO 11 accords the Special Commissioner a broad mandate to investigate corruption and wrongdoing in the city school district. The Special Commissioner "shall receive and investigate complaints from any source *or upon his own initiative*," EO 11 § 3(a), and may refer such matters to other authorities "*as he or she deems appropriate*." EO 11 expressly provides the new offers "authori[ty] to make any other investigation and issue such reports regarding corruption or other criminal activity, unethical conduct, conflicts of interest and misconduct, *that he or she deems* to be in the best interest of the school district." *Id.* And EO 11 broadly requires full cooperation "*with the Deputy Commissioner*." As [redacted] pointed out in a January 29, 2018 memo, and as should be obvious to anyone familiar with the DOI Commissioner's jurisdiction, EO 11's grant of broad investigatory powers and mission with respect to the city school district parallels the DOI Commissioner's own authority over City agencies. There is simply no mistaking it – the Special Commissioner *is* the Commissioner of

Investigation for the city school district.

Numerous other textual elements of EO 11 confirm this conclusion. EO 11 does not provide any management or oversight role for the DOI Commissioner; rather, the Special Commissioner need only "make an annual report of his or her findings," *id.* § 3(f), and share copies of investigatory reports "at the conclusion of [the] investigation," *id.* § 3(e). These provisions confer no general supervisory authority on the DOI Commissioner; they make the DOI Commissioner a passive observer to another office's activities. The same applies for the Special Commissioner's funding; EO 11 makes no provision for DOI involvement in SCI's budgeting. And the position's 1992 title change – from "Deputy Commissioner of Investigation for the City School District of New York" to "the "Special Commissioner of Investigation for the New York City School District," *see* EO 34 § 1 – certainly did nothing to *diminish* the autonomy of the position. If anything, by removing the "Deputy" title and replacing it with the "Special" label, EO 34 serves to reinforce the role's independence from the DOI Commissioner.[71]

Any of the above-referenced provisions would, on their own, provide strong evidence that the Special Commissioner position possessed a considerable amount of independence and autonomy from all comers. But "construed as a whole" and with "its various sections . . . considered together and with reference to each other," *Mobil Oil Corp.*, 48 N.Y.2d at 199, EO 11 leaves no doubt – the Special Commissioner possesses broad independence from both the BOE and DOI.

b. The 1990 and 1991 BOE Resolutions

Like EO 11, and with intentionally parallel language, the BOE's 1990 resolution contains a multitude of textual indications that the Special Commissioner position holds substantial investigative and decisional autonomy.[72] But the BOE went further: under its 1990 resolution, the Special Commissioner receives "all those powers of the [BOE] and the Chancellor which are necessary to conduct as complete an investigation . . . as may be appropriate, including but not limited to the power to . . . compel . . . the production of documents" and to "preside at or conduct. . . hearings and investigations." The same resolutions also designates the Special Commissioner "*and such deputies as he or she shall designate*" as "employees of the [BOE] assigned as trial examiners with authority . . . to conduct investigations and hold hearings." All of these provisions vest broad authority in the person of the Special Commissioner.

The 1991 resolution adds a further gloss: (1) the "WHEREAS" clause stating that the Special Commissioner has "determined his organizational structure and management staffing" – a clear indication that EO 11 and the BOE's 1990 resolution were intended to (and did) confer that authority on the Special Commissioner, not DOI; and (2) the final "RESOLVED" clause, which provides that the Special Commissioner has "sole jurisdiction over all employees within [his] office," including but not limited to hiring and firing authority. While the phrase "sole jurisdiction" is not a legal term of art, it is entirely clear in this context what it means – by law,

[71] We were unable to locate any "legislative history" for this particular enactment.

[72] The 1990 resolution also confers upon the Special Commissioner additional policy-making and deliberative powers. *See* Penultimate RESOLVED (stating that "*the Deputy Commissioner*, in consultation with the Board and the Chancellor, *shall develop procedures* to ensure the effective and timely implementation of this resolution").

only the Special Commissioner may exercise the particular supervisory powers set forth in the BOE resolution (namely, to hire, fire, and set the salaries of SCI's staff). *See, e.g.*, *People v. Mitchell*, 15 N.Y.3d 93, 97 (2010).

2. DOI's Actions Contravened EO 11 as amended and the BOE Resolutions.

There is no dispute that DOI has attempted to transform SCI into a regular IG's office, one with the same relationship to DOI as the IG for any city agency. Indeed, that was one of the key policy rationales underlying DOI's proposed structural changes – to foster "parity" across the IG positions and to regularize SCI's procedures with those of DOI. *See supra* at 67. Whatever the merits of these changes from a policy rationale, they are simply inconsistent with EO 11 and the corresponding BOE resolutions. Among other things:

- DOI leadership's attempt to dictate a particular mission or set of investigative priorities is flatly inconsistent with the numerous provisions in EO 11 and the 1990 BOE resolution conferring that discretion on the Special Commissioner. *See supra* at 20.

- Forcing the Special Commissioner into DOI's regular reporting structure is inconsistent with EO 11 (which requires no more than an annual report to the Commissioner him or herself) and imposes an unwarranted check on the Special Commissioner's independence. *See supra* at 19.

- DOI's attempts to: (1) direct the Special Commissioner to hire and fire staff; and (2) use SCI's budget for broader DOI purposes over the Special Commissioner's objection – even on a "temporary" basis – squarely contravene the 1991 BOE resolution conferring "sole jurisdiction" for those matters on the Special Commissioner. Those measures are also incompatible with the Special Commissioner's broader autonomy, *see supra* at 19.

- DOI's various attempts to "regularize" SCI's procedures with DOI's are inconsistent with the specific powers assigned to the Special Commissioner by EO 11 and the 1990 BOE resolution, including the power to make referrals in his or her discretion, *supra* at 19, and the power to issue and sign subpoenas, *supra* at 20.

And some changes that did not violate specific provisions of EO 11 of the BOE resolutions nevertheless grossly contravened the spirit of the law – most notably, DOI's direction that [redacted] *was not allowed* to meet with [redacted] without prior approval. *Supra* at 47.

In short, DOI reduced the Special Commissioner role to nothing more than an IG overseeing "Squad 11," an IG squad of DOI. That treatment was not permissible under existing law.

3. DOI's Justifications Are Unavailing.

0During the events described in this report and throughout this investigation, DOI leadership has offered a variety of justifications for the above-described changes at SCI. These include the following: (1) that after mayoral control was instituted in 2002, DOI acquired jurisdiction over DOE through EO 16 as amended; (2) that EO 11 is ambiguous, and thus can be reasonably (or at least plausibly) read to allow the Commissioner to do what he did; (3) that regardless of what EO 11 or EO 16 says, the Commissioner of Investigation necessarily enjoys power over the SCI as a result of his or her authority under the City Charter; (4) that the BOE resolutions are void, or at the very least, unimportant in the analysis; (5) that [redacted] and Stancik's autonomy was part of an "informal understanding" between those men and DOI, and not required by the law; (6) that SCI's deficient performance mandated immediate changes in the office's structure; and (7) that DOI was "open and notorious" about its intentions to take over SCI, such that there cannot have been any "abuse" of authority. We consider each of these issues in turn.

a. EO 16 and Mayoral Control.

Commissioner Peters testified that the onset of "mayoral control" in 2002 made EO 11 obsolete, and that he relied in part on this rationale in rejecting the [redacted]. Indeed, he and DOI staff offered a similar rationale during and after the March 12 interview with Rashbaum of the *Times*: namely, that "[o]nce [DOE] became a mayoral agency, EO 11 and EO 15 became redundant because EO 16 covers mayoral agencies . . . and requires the Commissioner of Investigation to appoint an IG over mayoral agencies."

This explanation suffers from several material defects.

First, it relies on a false premise. EO 16 as amended requires the Commissioner of Investigation to appoint an Inspector General for each "city agency." And DOE is simply not a "city agency." Rather, as described *supra*, the DOE is a label affixed to the workings of the Chancellor and the PEP – a legally distinct entity. The legal separateness of the DOE from the City has been comprehensively litigated and addressed. *See supra* at 14. Indeed, it is beyond dispute that, at any moment, the State legislature can wipe out "mayoral control" and restore governance of the City schools to their pre-2002 arrangement (or something new). A "department" that exists, if at all, at the pleasure of Albany is not a "city agency" in any meaningful sense.

It does not appear that Commissioner Peters, [redacted] or any other decision makers at DOI ever acquainted themselves with the legal particulars of the agency they sought to oversee. As discussed above, as of March 2018 (and through the interviews in this case), DOI senior staff (including Commissioner Peters) were not aware that the BOE was not, in fact, dissolved, but continued in existence as the PEP. *See supra* at 61.[73] Nor was DOI's senior staff aware of the

[73] Commissioner Peters testified that nobody could credibly say that DOE is anything other than a city agency. With respect, that is simply not correct. For one thing, [redacted] testified precisely that. For another, the Corporation Counsel regularly makes precisely that argument in lawsuits where both the City and the DOE or BOE are named as defendants. *See supra* at 16. Commissioner Peters also testified that the DOE must be a city agency because the Chancellor functionally acts as the "Commissioner" of DOE (albeit with a different title). This, too, is

other particulars of "mayoral control" – including the details of the authorizing 2002 bill (which also conferred Mayoral control over the SCA *and* expressly authorized DOI to investigate the SCA, but said nothing about DOI's jurisdiction over the schools writ large – a clear negative implication about the state legislature's intent to retain the status quo).[74] We appreciate that DOI can and has acquired control over IG offices for non-city agencies, including NYCHA and HHC; but DOI has done so exclusively via consent from those entities. Absent consent from DOE, the peculiarities regarding DOE's structure *are* relevant and significant to evaluating DOI's authority. And they became relevant for DOI, *at the very latest*, as of March 14, 2018, when – in the exchanges leading up to Rashbaum's initial *Times* piece of March 16 – DOI was put on notice in a very public manner that DOE had no interest in signing an MOU. DOI's continued reliance on a surface-level legal understanding of DOE's status was simply not reasonable. *See also infra* at 121.

Second, even if EO 16 obligated the Commissioner of Investigation to appoint an IG for DOE, that obligation would not justify an attempt to *treat the Special Commissioner as an Inspector General*. The Commissioner of DOI undoubtedly can manage the City's IGs as he or she sees fit. *See supra* at 12. But as detailed at length in this report, the Special Commissioner is not an "Inspector General," but rather a unique position assigned particular powers and responsibilities under a separate body of law. In other words, the fact that Commissioner Peters might have the power to create a new office says nothing about his power to unilaterally alter the duties, responsibilities, and powers of an existing one. That is particularly true where, as here, the new office was created *well after* the unitary IG system was already in place. It is also undoubtedly true that any newly formed DOE IG position would overlap with the Special Commissioner's office, and that any such overlap would be inefficient. But any such inefficiency would be purely of the Commissioner's making, and provided no basis to expand his or her authority over a separate office.[75]

b. DOI Claim: EO 11 Expressly Authorizes DOI's Oversight of the Special Commissioner's Office, or Is At Least Ambiguous on the Question.

At various times and in various ways, DOI senior staff have offered interpretations of EO 11 that depart from the one we expressed above. In its strongest form, some at DOI have offered the view that EO 11 positively commands the DOI Commissioner to exercise direct oversight of the Special Commissioner. This is essentially the position DOI took in [redacted] March 28

---

incorrect. Unlike the commissioner of a mayoral agency, the Chancellor's authority: (1) derives from State law – namely, the authority carefully described and delimited by the Education Law; and (2) coexists with that of the PEP, which has the authority to oversee and approve the Chancellor's initiatives, make policies for the district (including those relating to budgeting and procurement), and approve contracts. *See* N.Y. Educ. L. § 2590-g; *cf.* City Charter §§ 385-89 (describing powers of heads of mayoral agencies).

[74] Indeed, the timing and nature of 2002's amendment to EO 11 – which Mayor Bloomberg promulgated after the state had agreed to transfer authority over the schools to him, but made no mention at all of EO 16, DOI, or the extant Inspector General system – is particularly compelling evidence that EO 11 was not, in fact, made redundant by "mayoral control."

[75] The Commissioner's position also necessarily implies that, from 2002 to 2018, Commissioner Rose Gill Hearn and Commissioner Peters were derelict in their duties by not appointing an IG for DOE. That is simply not a tenable interpretation in light of the countervailing factors.

termination letter. DOI staff have also made the more modest claim that EO 11 is at least ambiguous in several respects, and so a reading that it allows for direct oversight of SCI by the DOI Commissioner is within the range of permissible outcomes. We reject both of these contentions.

c. The Strong View

DOI officials have pointed to four provisions in EO 11 itself that supposedly authorize DOI's oversight of SCI.

1. EO 11's grant of hiring and firing authority to the DOI Commissioner, which (the logic goes) implies the ability to supervise the Special Commissioner's day-to-day duties.
2. Section 4(a) of EO 11, which provides that DOI "shall provide whatever assistance the Commissioner of Investigation deems necessary and appropriate to enable the Deputy Commissioner to carry out his or her responsibilities." [redacted] March 28 termination letter relied on both provisions for the proposition that Commissioner Peters was entitled to direct [redacted] as he saw fit.
3. Section 3(a)'s statement that the Special Commissioner shall "investigate complaints . . . at the direction of the Commissioner of Investigation."
4. A stray reference to EO 105 in Section 4(g).[76]

There are many, many problems with this view of the law.

First, DOI's focus on these provisions cannot be squared with the primary goal of statutory interpretation – to read a law as a whole and to give effect to all of its parts. *Supra* at 95. Read as a whole, EO 11 confers broad discretion and authority on the Special Commissioner. DOI's view of the law would effectively eliminate the role's discretion and autonomy, and make each of those authorizing provisions empty. Accordingly, DOI's view cannot be the right one.

That can be seen in spades as to the specific provisions DOI invokes. Start with Section 4(a), which DOI reads to mean that the Commissioner can provide *any* "assistance" to the Special Commissioner, including wholly unwanted or rejected "assistance" like being relegated to the functional status of an inspector general. That reading is absurd on its face, but even if it were not, the context of EO 11 and the governing law would reveal it to be wholly meritless. For one thing, Section 4(a) is housed in an overall section 4 entitled "*Cooperation with* the [Special Commissioner]" (emphasis added); each of the other subsections describe ways in which personnel related to BOE/DOE must cooperate with the Special Commissioner and SCI's investigations. The inescapable inference is that Section 4(a) authorizes the DOI Commissioner to provide as much *cooperative* assistance with the Special Commissioner as DOI deems prudent – not any other type. In contrast, the reading that DOI offers – that, in the guise of "assistance," the DOI Commissioner may dictate the terms of how and when the Special Commissioner

[76] Commissioner Peters noted a fifth relevant provision – Section 3(b), which provides that the Special Commissioner "shall exercise the powers conferred on a Deputy Commissioner of Investigation by Chapter 34 of the City Charter" – that is discussed on page 104 below.

performs investigations, makes referrals, and offers recommendations – would swallow Section 3 of EO 11 and both of the BOE resolutions in their entirety. That would be wildly inconsistent with the goal of reading the law as a whole and giving effect to all its points. *See Molik*, 2018 WL 3147607, at *4.

There is more. EO 11 contains *a clear statement* about the Special Commissioner's responsibility to report to DOI – namely, Section 3(f) provides that she "shall make an annual report of his or her findings." The fact that EO 11 contains a specific reporting requirement precludes any reading that would imply a different one – particularly one as distinct and complex as DOI's current organizational structure. *See Awe v. D'Alessandro*, 154 A.D.3d 932, 934 (2d Dep't 2017) ("'The maxim *expressio unius est exclusio alterius* is applied in the construction of the statutes, so that where a law expressly describes a particular act . . . to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded'") (citing McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240)).

The same goes for DOI's contention that the Commissioner's power to "hire and fire" the Special Commissioner implies a degree of control over her day-to-day duties. Initially, it is untrue that EO 11 as amended confers any express power on the DOI Commissioner to *fire* the Special Commissioner; Mayor Bloomberg's 2002 EO 15 struck out the portion of the enactment conferring that power, *supra* at 27, and DOI's persistent failure to notice this hole in its legal theory is perplexing.[77] But even if the Commissioner had the power to hire and fire, those powers could not create any *implied* authority over the Special Commissioner that contravened the *express scope* of her authority under EO 11 and the BOE resolutions. *See Golden v. Koch*, 49 N.Y.2d 690, 694 (1980); *see also Awe*, 154 A.D.3d at 934.[78]

Section 3(a)'s statement that the Special Commissioner must undertake investigations at the DOI Commissioner's "direction" is equally unavailing. In the same breath, EO 11 also provides that the Special Commissioner can undertake investigations "upon his or her own initiative." Any reading of Section 3(a) that negates that "initiative" necessarily fails. More importantly, the fact that the Commissioner can direct the Special Commissioner to perform investigations says nothing about whether the Commissioner can also tell the Special Commissioner *how*, *when*, and with *what relative priority* to perform those investigations. This can be seen by direct analogy to the Commissioner: Section 803(a) of the City Charter provides that the Mayor and the City Council may *direct* the Commissioner of Investigation to perform

---

[77] Indeed, it is not clear that Commissioner Peters had legal authority to terminate [redacted] at all. Notably, the recently enacted EO 32 does not contain a clear statement that the DOI Commissioner has the power to remove the Special Commissioner, but rather states that the Special Commissioner "may be removed only with the consent of the Mayor." But EO 15 wiped out any statutory authority for the Commissioner to *remove* the Special Commissioner, and that power exists now (if anywhere) only by implication. None of the relevant whistleblower claims included any assertion that Commissioner Peters lacked the authority to terminate [redacted] and so we do not pass upon the issue. But the question of who has the legal right to remove the Special Commissioner should be made explicit as soon as possible.

[78] The two cases cited in [redacted] termination letter, *supra* at 81, were inapposite; they have no bearing on the interpretation of an executive enactment like EO 11. Indeed, the fact that [redacted] on the *very day* that [redacted] was to be terminated strongly suggests that DOI was far less interested in ascertaining the legal merits of its position than in backfilling a legal rationale for a path DOI had chosen to take regardless of its legality.

investigations; but the suggestion that the Mayor or City Council also have the power to directly *manage* those investigations would fail at the first step. Any contrary reading of EO 11 is equally absurd.

Finally, Section 4(g) of EO 11 contains a reference to an amendment to EO 16 – specifically, it provides that "[t]he obligation to report information regarding corruption . . . to the [Special] Commissioner shall be in addition to the reporting obligations imposed on City officers and employees to report such information to [DOI] pursuant to [EO 105]." In context, the purpose of this subsection is clear:

1. Sections 4(b) through 4(f) impose a variety of reporting and cooperation requirements on the BOE, the Chancellor, "[e]very officer or employee of the City School District of the City of New York," *and* employees and officers of the city. In other words, for matters within the Special Commissioner's jurisdiction, both BOE/DOE and City employees must report schools-related wrongdoing to the Special Commissioner, cooperate with SCI's investigations.

2. Section 4(g), then, makes clear that, in addition to whatever reporting requirements they may have with respect to the Special Commissioner, City employees must *also* report schools related wrongdoing to DOI *if* it comes within the ambit of EO 105.[79]

DOI could have no valid basis for believing that Section 4(g) – which, read together with its neighbors, imposes overlapping reporting obligations on some City employees, and nothing more – had any effect on DOI's ability to control SCI.

Second, DOI's approach not only does violence to EO 11's text, it also ignores the precedents interpreting EO 11, which cut against DOI's position. For example, in [redacted] *v. Inter-Religious Found. for Cmty. Org., Inc.*, the State Supreme Court noted that "SCI is the only administrative investigatory body for the City School district." *See* 18 Misc. 3d 874, 880–81 (Sup. Ct.) (emphasis added), *aff'd*, 51 A.D.3d 465, 856 N.Y.S.2d 620 (2008). That observation was based on the principles described above – namely, that EO 11 (like other executive enactments) "should be interpreted to give effect to all of its terms," and "[l]anguage should not be considered superfluous." *Id.* The case law is admittedly sparse, and of limited probative value.[80] Nevertheless, it exists; DOI appears to have accorded it no weight at all.

Third, DOI's current interpretation of EO 11 is problematic because it is completely at odds with the [redacted].

[79] During [redacted] testimony, [redacted] seemed unwilling to grasp this distinction in part because [redacted] had deemed DOE employees to be City employees. They are not. *Supra* at 14.

[80] *See* [redacted] *v. Sabater*, 113 A.D.3d 203, 204 (1st Dep't 2013) ("New York City's Special Commissioner of Investigation for the New York City School District (SCI) was established in 1990, as an arm of the City Department of Investigation. It has investigatory and subpoena power and reports the results of its investigations to the Department of Education (DOE), which has the power to take disciplinary actions against employees."); *see id.* at 206 (concluding that "SCI was *established as an investigatory body* to aid the DOE" (emphasis added)); *see also Matson v. Bd. of Educ. of City Sch. Dist. of New York*, 631 F.3d 57, 60 (2d Cir. 2011) ("The SCI publicly issued its report, in accordance with its specific authority to issue reports of investigations where it would be in the best interest of the school district." (citing EO 11)).

Fourth, [redacted] May 3, 2018 letter to DCAS – in which [redacted] proclaimed that the Special Commissioner (and not the DOI Commissioner or [redacted] designees) possesses authority to hire, fire, and oversee SCI employees, *see supra* at 87– creates a strong inference that DOI's contrary representations in [redacted] termination letter and during their interviews in this investigation were insincere. [redacted] of course, sent the letter to DCAS at a time when [redacted] was the Acting Special Commissioner; in other words, when a DOI senior staffer stood in the Special Commissioner's shoes, and thus when DOI had practical control over SCI's levers. DOI's sudden realization in May 2018 that the Special Commissioner did indeed possess broad powers to manage his or her own office is somewhat suspect. Taken together with all of the other factors described above, it confirms the lack of merit in any view that EO 11 provides for DOI control over SCI.

d. The Weaker View

In interviews, DOI officials (including Commissioner Peters and [redacted] also took a different approach: namely, that EO 11 is at the very least ambiguous as to the question of DOI's authority, such that multiple reasonable interpretations are possible. We agree that EO 11 is not necessarily a model of draftsmanship. But statutory interpretation is not a beauty contest; laws that could be clearer must nevertheless be enforced according to the legislative or executive intent. *See* N.Y. Stat. Law § 92 (McKinney). As discussed above, there is no question about what EO 11 was intended to do, and so DOI's complaints about the skill with which the enactment was drafted are beside the point.

Even if EO 11 were ambiguous as to the question of SCI's autonomy and DOI's oversight role, that would not assist DOI. An ambiguous statute is not a license to distort; to the contrary, "[i]t is a cardinal principle of construction that, '[i]n case of doubt, or ambiguity, in the law it is a well-known rule that the practical construction that has been given to a law by those charged with the duty of enforcing it . . . takes on almost the force of judicial interpretation.'" *Matter of Lezette v. Board of Educ. Hudson City School Dist.*, 35 N.Y.2d 272,

[81] Given this context, it would have been cynical and disingenuous for Commissioner Peters to defend his right to make changes at SCI in conversation with [redacted] in December 2017 by invoking his [redacted] *See supra* at 35. Commissioner Peters did not recall making the comment, but he did not deny making it, and agreed that it sounded like something he might say.

281 (1974) (quoting *Town of Amherst v. County of Erie*, 236 A.D. 58, 61 (4th Dep't 1932)). Here, there was one (and only one) "practical construction" given to EO 11 and the corresponding BOE resolutions for a period of nearly 30 years – that SCI was an independent or at least quasi-autonomous investigator body. That established construction is, as a matter of law, far more persuasive than the decades-later, strained interpretation offered by the current DOI administration.

That is not all. "Sound principles of statutory interpretation generally require examination of a statute's legislative history and context to determine its meaning and scope." *New York State Bankers Ass'n v. Albright*, 38 N.Y.2d 430, 434 (1975). The Gill Commission's report has always been understood as the impetus for EO 11.[82] That report cuts firmly against DOI's current interpretation in multiple respects. *See supra* at 17. Among other things, the Gill Commission's report plainly envisions an office that is independent from both DOE, DOI, and the Mayor. *See id.* at 18. [redacted], the Gill Commission report is not gospel; the drafters of EO 11 clearly deviated from the report's recommendations in several key areas. But on several key questions – including why Mayor David Dinkins and the BOE might have wanted to make SCI an office that was fully independent of both the school system and DOI – the report provides important guidance and context. *Supra* at 18. The Gill Commission's report also explains why EO 11 provides that the Deputy Commissioner should "exercise the powers conferred on a Deputy Commissioner of Investigation by Chapter 34 of the City Charter," but does not say that the position *is* a "Deputy" to the DOI Commissioner – the answer being that the Gill Commission wanted the new position to have subpoena power and other related authority, but did not want the new position to answer to the DOI Commissioner. *See supra* at 18.

The longtime "practical construction" given to EO 11 by DOI and SCI and the particulars of the Gill Commission report were no secret to Commissioner Peters. To the extent that he found EO 11 to be ambiguous, it was improper for him to accord his newly minted legal interpretation controlling weight over nearly 30 years of precedent and the available explanatory documents.

iii. DOI Claim: The City Charter Requires the Special Commissioner to Report to the DOI Commissioner.

During an interview, Commissioner Peters advanced an argument that did not appear in [redacted] termination letter. Namely, Commissioner Peters asserted that EO 11 *must* be read to permit him to control the day-to-day activities of the Special Commissioner because it would otherwise be inconsistent with the City Charter and thus invalid. Commissioner Peters relied on Chapter 34, which governs DOI and provides that "[t]he commissioner may appoint two deputies, either of whom may, *subject to the direction of the commissioner*, conduct or preside at any investigations authorized by this chapter." City Charter § 802; *see also id.* § 807 (providing that the commissioner has veto power over IGs at city agencies and "shall promulgate standards

[82] *See supra* at 19; *see also* Abby Goodnough, "Edward Stancik, New York City Schools Investigator, Dies at 47," *N.Y. Times*, Mar 13. 2002 ("Mr. Stancik's office was created in 1990 as an outgrowth of the Gill Commission, which was appointed during the Koch administration to investigate patronage, politics and corruption in the school system. The commission concluded that the board's investigative arm was reminiscent of the Keystone Kops,' persuading Mayor David N. Dinkins to create the independent investigator's post.")

of conduct and shall monitor and evaluate the activities of inspectors general in the agencies to assure uniformity of activity by them"). Commissioner Peters also pointed to Chapter 49, which confers upon heads of departments broad powers to supervise deputies and organize city offices. *See* City Charter § 1101(a) (providing that "[a]ny head of a department established by this charter may appoint, and at pleasure, remove so many deputies as may be provided for by law and determine their relative rank . . . and, except as otherwise provided by law, shall assign to them their duties").

We credit Commissioner Peters' concern about adhering to background legal principles. But nothing in EO 11 as amended is obviously inconsistent with the City Charter.[83] And even if it were, the proper "remedy" would not be for DOI to ignore EO 11 and assert plenary control over SCI.

Initially, the elements of the City Charter on which Commissioner Peters relies – Chapters 34 and 49 – describe the Commissioner of Investigation's powers over "inspectors general" and "deputies." But since at least 1992, the Special Commissioner has not been, as a legal matter, a "deputy" of DOI.[84] And the Special Commissioner has never been an "inspector general." So, on their face, these provisions do not apply.

Even if they did apply, most of the relevant provisions of the City Charter would not bar an arrangement under which the Special Commissioner retained autonomy from the Commissioner. For example:

- Section 1101(a) provides that the Commissioner (the head of a city department) may "assign . . . duties" to his deputies "*except as otherwise provided by law*" (emphasis added). EO 11 and the BOE resolutions do provide otherwise – "by law," they confer substantial independence and autonomy on the Special Commissioner. *Supra* at 18.

- The same goes for Section 1102(a), which provides that, "[a]ny head of an administration or a department established by this charter, *to the extent to which the organization of the administration or department is not prescribed by law*, shall by instrument in writing filed in the agency organize the administration or department into such divisions, bureaus or offices and make such assignments of powers and duties among them, and from time to time change such organization or assignments, as the head of the administration or department may consider advisable" (emphasis added). The BOE's 1991 resolution, among other sources, recognized the creation of an "Office of the [Special] Commissioner of Investigation for the New York City

[83] To the extent that Commissioner Peters expressed concern about EO 11's inconsistency with EO 16 as amended, we do not view this as a problem; rather, the later-in-time enactment of EO 11 – at a time when the IG system and the Commissioner's supervisory role was well-known to the Mayor – demonstrates that EO 11 intended to create a position that fell *outside* the IG system. And nothing about the 2002 advent of "mayoral control" warrants revisiting that question, particularly given Mayor Bloomberg's 2002 amendment of EO 11 shortly after the state agreed to grant him that control. *Supra* at 23.

[84] For that matter, EO 11 (originally, and as amended) does not actually say that the "Deputy Commissioner of Investigation for the New York City School District" is a "deputy" to the Commissioner of Investigation. *See supra* at 19.

> School District," and conferred "sole jurisdiction" over the organization of that office on the Special Commissioner. *Supra* at 22.

These provisions of the City Charter clearly contemplate exceptions to the general rule that the head of a city department controls all matters within the department. SCI is one such exception.

Commissioner Peters also pointed to what he viewed as a particularly important conflict between EO 11 and the City Charter. Namely: Section 3(b) of EO 11 attempts to give the Special Commissioner "the powers conferred on a Deputy Commissioner of Investigation by Chapter 34 of the City Charter," including subpoena authority. In turn, Chapter 34 of the City Charter expressly provides that the Commissioner of Investigation's deputies are "subject to the direction of the commissioner." Commissioner Peters reasoned that, to the extent that EO 11 seeks to give the Special Commissioner the powers of a DOI Deputy Commissioner without the concomitant obligation to follow DOI's "direction," EO 11 is *ultra vires* because Chapter 34 of the Charter delimits the Mayor's authority to confer subpoena power, and the Mayor lacks any independent basis under the City Charter to confer such power. Thus, Commissioner Peters concluded, by analogizing to the principal of constitutional avoidance, EO 11 *must* be interpreted so that the Special Commissioner is indeed "subject to the direction of" the DOI Commissioner.[85]

This argument fails for a host of reasons.

First, it is yet another example of statutory cherry-picking. Read as a whole, EO 11 unambiguously accords the Special Commissioner operational autonomy from the DOI Commissioner. *Supra* at 19. There is no way to harmonize Commissioner Peters' suggested reading of Section 3(b) of EO 11 with the rest of the enactment – not least of which that the section is manifestly intended to confer *more* power on the Special Commissioner, not less. Accordingly, and for the reasons discussed above, Commissioner Peters' proposed interpretive methods are simply unpersuasive.[86]

---

[85] Commissioner Peters appears to have advanced a similar point during an April 4, 2018 conversation with Josh Gondelman of the *Daily News*; the notes of that meeting indicate that Commissioner Peters responded to a question from Gondelman about EO 11 by stating "[a]n EO can't give you subpoena auth[ority]."

[86] Commissioner Peters testified that the drafters of EO 11 would have understood that the City Charter, and in particular Chapter 34's limits on the powers of the DOI's Commissioner's deputies, limited their ability to make SCI an independent office:

> *I'm assuming they sit down and said – look – in our perfect world we would create this independent entity that would be the IG for the school system. But we don't have the ability to do that because we don't want to pass the legislation and the Mayor has no ability to create such a thing by executive order, so let's do a compromise. We'll issue an executive order that tells the Commissioner of Education to appoint a deputy who will do this.* ***We'll gussy it up with a fancy . . . title and with as much . . . language suggesting . . . importance – more importance than the regular run-of-the-mill IG as we can, but it can't be a perfect solution because the person has to be a deputy commissioner, because otherwise they can't enjoy the powers.*** *And if they have to be a deputy commissioner, then it has to conform with the Charter and the Charter says that, one, deputy commissioners are appointed by the Commissioner of Investigation and, two, that they are subject to the Commissioner's direction. So clearly on one level, whoever gets this job is subject to the direction of the commissioner of DOI because the charter says he or she is subject to the*

Second, even if we assumed that there was a legal infirmity in Section 3(b) of EO 11 – *i.e.*, that Mayor Dinkins could not, consistent with the City Charter, give the Special Commissioner "the powers conferred on a Deputy Commissioner of Investigation" *and* operational independence from DOI – that would not improve DOI's argument. For one thing, Commissioner Peters conceded at his interview that any legal infirmity in EO 11 would not authorize him to take unilateral "curative" action. To the contrary, on multiple occasions throughout his interview with the undersigned, Commissioner Peters stressed that he would be *obliged to follow an illegal executive enactment*, and indeed could be terminated for failing to do so. He first made this point in the context of explaining why he believed [redacted] arguments about EO 11 had not been properly advanced:

> *What happened is I said to* [redacted] *over the course of two meetings – "Got it, got you don't like this, but I've made the decision, here's the way we're gonna go." And* [redacted] *said, in the first meeting,* [redacted] *said "Okay." In the second meeting,* [redacted] *said to me – "No, I won't comply. I won't take direction from* [redacted]*. I won't do the systemic cases. I won't you know, I will not agree to be supervised by* [redacted]*. I won't take direction." And* [redacted] *got fired, not for telling me* [redacted] *disagreed with my views of the law,* [redacted] *got fired for saying "I ain't gonna do it."*[87]

He then reiterated the point with respect to EO 32, promulgated by Mayor de Blasio in the wake of the instant controversy:

> *Peters* [redacted] *Now, as a practical matter, I said publically when he issued this that I planned to comply with the executive order. . . .*

> *direction of the commissioner of DOI, but* ***we'll give it some gussied-up language*** *and . . . we'll tell, I think it was Susan Shepard who would have been the DOI Commissioner, who picks Ed Stancik and we'll sort of say to her, "Give this person wide berth."*

(Emphasis added.) While imaginative, this interpretation is untenable. The Gill Commission clearly thought that the Mayor could award Deputy Commissioner-level powers to others without the strings of DOI oversight; indeed, the Gill Commission believed that they themselves had been granted that precise freedom. *Supra* at 18. And the record betrays no indication that anybody at DOI thought otherwise – either in the moment or in the decades that followed, during which Special Commissioners exercised Chapter 34 powers without accepting direction from the DOI Commissioner – until Commissioner Peters decided that he wanted to take over SCI. *Supra* at 21-24. While Commissioner Peters noted that DOI has always considered the Special Commissioner to be one of the two "deputies" provided for in Chapter 34: (1) there is no indication that the drafters of EO 11 would have known or anticipated that; and (2) even if they had, they clearly did not consider it an impediment to creating an independent office. As for Commissioner Peters' reference to "gussied-up language," this presumably refers to the numerous provisions in EO 11 according the Special Commissioner broad investigatory authority and discretion. The notion that EO 11's drafters included those provisions *knowing that they were illegal* is as illogical as it is unsupported.

[87] The record does not reflect that [redacted] said any of those things in the "second meeting," or ever. *See supra* at 140.

Question: Okay, well, how about this one. Let's just take those facts and say – let's say that you – this whole thing clears the air or whatever - you're now going to go out and find yourself a new [Special Commissioner].
Peters: Right.
Question: And you go find [an experienced candidate]. And he's like "Yeah, this is great, I would love to come back as the [Special Commissioner]." Right?
Peters: [Laughs]
Question: Sounds great, and then, you go, in compliance with the new executive order, and you say "Hey Bill, great news! [Candidate] is coming back and I want him to be the new [Special Commissioner]." And he says "No."
Peters: Right.
Question: And you're like, Holy Cow! I can't – my lawyer says that this is – this new executive order is BS.
Peters: Right.
Question: And you say, "Hey, Mayor de Blasio, I think that you are abusing your authority right now by imposing this illegal executive order on me."
Peters: Mmm hmm. Right.
Question: Could he fire you?
Peters: Have I hired [Candidate] or have I just said that to him?
Question: No, the issue has ripened. You have named a guy – I'm not – this isn't just conceptual right. I mean, this is real.
Peters: Right. I go…
Question: You've got [Candidate] there and he's there – he's ready to start work and de Blasio says "No. Under the executive order, I am telling you you can't do that."
Peters: Right.
Question: And you go and say "You're abusing your power ---- executive order and I'm blowing the whistle on you." Could he fire you?
Peters: At that point? No, no. But that's not what she did. If I then said "This is a BS thing and I'm going to go hire him anyway." Then he could fire me because I'm now being insubordinate. But, if I say to him, "Mr. Mayor, I think you're wrong. And I'm gonna tell Ritchie Torres that I think you're wrong and see if the City Council will pass legislation"…
Question: Mmm hmm.
Peters: That's . . . I can do that. . . . But if I say to him – if I say to him, "You know, I'm hiring [Candidate] anyway because I think this is crap" –
Question: Here's the paperwork…
Peters: Yeah, here's the paperwork I'm getting ready to submit. No, he could fire me for that.
Question: Okay.
Peters: And that's why…
Question: I think it's just further down the chain, but yeah.
Peters: And that's why – by the way – when the newspapers all called and said "Are you gonna follow this?" Even though at the time I got the question, I already knew that it was improper, I said, "[o]f course, we will follow the executive order."

Commissioner Peters' arguments about the supposed conflict between EO 11 and the City Charter are thus, by his own account, irrelevant. Even if he were right that Mayor Dinkins lacked the power to give the Special Commissioner the powers of a DOI deputy commissioner without the requisite strings attached, and that EO 11 was on shaky legal ground, Commissioner Peters' own testimony establishes that he would still be bound to follow EO 11 (and, ironically, that his failure to do so would amount to an abuse of authority).

There is a separate problem with Commissioner Peters' argument. Even if Section 3(b) of EO 11 were legally suspect, the "remedy" would not be for the DOI Commissioner to step in. Rather, to the extent that Section 3(b) of EO 11 conflicts with Chapter 34 of the City Charter, the proper legal step would be to strike that section from the law – in other words, to conclude that the Special Commissioner *lacks* the "powers of a Deputy Commissioner of Investigation under Chapter 34." [88] In that scenario, the Special Commissioner would have a diminished array of investigatory powers – whatever he or she retained from the BOE resolutions and otherwise – and might have to request assistance from DOI (or from local courts) on a more regular basis. But that – not an automatic assumption of authority by the DOI Commissioner – would be the proper next step.

Note: it appears that, even absent the "powers of a Deputy Commissioner of Investigation under Chapter 34," the Special Commissioner would retain a broad array of investigatory authority, including the power to issue subpoenas. As mentioned above, the 1990 BOE resolution conferred upon the Special Commissioner all "investigatory powers conferred on the Board of Education by the Education Law, the City Charter, or any other law." *Supra* at 21. And Chapter 20 of the City Charter, addressing "Education," expressly confers a wide range of investigatory authority and powers on the BOE:

> [BOE] may investigate, of its own motion or otherwise either in the board or by a committee of its own body, any subject of which it has cognizance or over which it has legal control, including the conduct of any of its members or employees or those of any local school board; and *for the purpose of such investigation,* such board or its president, or committee or its chairman, *shall have and may exercise all the powers which a board of education has or may exercise in the case of a trial under the Education Law or the Civil Practice Law and Rules*.

City Charter § 526 (emphasis added). The CPLR, in turn, provides that "any member of a board . . . authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof may be taken" is authorized to issue subpoenas without a court order. *See* CPLR § 2302(a). Thus, the City Charter expressly grants the BOE the power to issue subpoenas and compel the attendance of witnesses – and the BOE transferred those investigatory powers to the Special Commissioner. He or she would thus appear to have subpoena authority and other related powers by dint of the City Charter *regardless* of whether Section 3(b) of EO 11 is or was valid. It is true, of course, that DOI and SCI traditionally understood the Special Commissioner to be exercising investigatory authority pursuant to EO 11 and, by association, Chapter 34; for example, SCI's subpoenas have always invoked EO 11, and

[88] *See People v. On Sight Mobile Opticians*, 24 N.Y.3d 1107, 1109-10 (2014) (discussing severability principles).

not Section 526 of the City Charter, the Education Law, or the BOE resolutions. But that traditional understanding proceeded from the assumption that EO 11's conferral of broad independence *and* Chapter 34 powers on the Special Commissioner was consistent with the City Charter. If that assumption warrants revisiting, so too does the scope and exercise of the Special Commissioner's powers pursuant to Chapter 20.[89]

Third, Commissioner Peters' interpretation of EO 11 and the City Charter fails as a justification for this particular reorganization. Even if were true that Commissioner Peters' power to direct his "deputies" trumped all other laws and statements to the contrary, Commissioner Peters did not actually name [redacted] a "deputy" – he named [redacted] the "Special Commissioner" and tried to treat [redacted] as an "Inspector General." And Commissioner Peters intentionally did *not* accord [redacted] the powers of a "deputy" of DOI. Rather, one of Commissioner Peters' first acts upon asserting control over SCI was to rescind [redacted] ability to issue subpoenas without others' approval. *See supra* at 44. As such, Commissioner Peters' power to direct "deputies" is of no moment here – he did not appoint [redacted] as a "deputy" in name or function.

In short, while Commissioner Peters' observations about a potential inconsistency between the City Charter and EO 11 are fair enough, his conclusions as to implications of that inconsistency were unwarranted. Section 3(b) of EO 11 could not, does not, and was not intended to swallow the remainder of the enactment. To the extent that Commissioner Peters has questions about EO 11's comportment with the City Charter, his recourse, of course, is to raise those concerns with the Mayor or the City Council.

iv. DOI Claim: The BOE Resolutions Are Void or Unimportant to the Analysis.

During the interview process, numerous DOI witnesses questioned whether the 1990 and 1991 BOE resolutions were still valid. Some affirmatively stated that the resolutions were *not* valid. We find these concerns to be misplaced, and to be offered for dubious reasons.

To start, most of the DOI witnesses' observations proceeded from the premise that the BOE no longer existed. As explained throughout this report, that is not true – the BOE still exists, operating as the PEP, pursuant to the Education Law and the PEP's bylaws. *Supra* at 15. Indeed, absent further action from the state legislature, the BOE/PEP will re-assume control over the city schools next summer. *Supra* at 15. In short, the BOE very much still exists. Whether the BOE resolutions survived the 2002 Education Law amendments is a separate question, but DOI never even got there.

---

[89] Section 526's assignment of investigatory authority to the BOE must be read against the 2002 amendments to the Education Law. That bill established that the BOE "shall exercise no executive power and perform no executive or administrative functions," N.Y. Educ. Law § 2590-g, and transferred the BOE's power to assign trial examiners and conduct investigations to the Chancellor. *Id.* § 2590-h. But that does not affect the analysis. The same law also provided that the Chancellor is a member of the BOE, *id.* § 2590-b, so the Chancellor apparently inherited the city's grant of investigatory authority to the BOE under Section 526 by operation of law. And the 1990 BOE resolution expressly gave the Special Commissioner all of the Chancellor's investigatory powers as well. *Supra* at 21. This section of the Charter could, of course, be streamlined to make the grant of investigatory authority more plain.

More broadly, it is troubling that nobody on the DOI senior staff appeared to be familiar with the governance framework of the organization that DOI proposed to oversee, or bothered to research the issue. To the contrary, DOI senior staff apparently felt comfortable relying on their surface-level understanding of the DOE's role and operations. Alternatively, DOI senior staff proceeded as if the mere positing of "questions" about the validity of the BOE regulations justified ignoring them entirely. Such an approach is entitled to no deference whatsoever. [redacted] testimony on this issue was particularly alarming:

> [redacted] *You said, you know, did my thinking change, and like someone suggested – it might have been the Commissioner – well do those board resolutions . . . are they still even in effect? And the Board of Education doesn't even exist anymore. And so I don't know the answer to that. Maybe? So, it's really like, this is really like a little bit of a gray area.*
> *Question: But you clarify that gray area at some point, don't you?*
> *Question: The question of whether or not the Board of Education is still in existence is an objective question, right?*
> [redacted] *I assume so, but my understanding is that they don't.*
> . . .
> [redacted] *So whether those resolutions are still in effect is . . . I don't know the answer to it.*
> *Question:* [redacted] . . .
> [redacted] *seems to think they are.*
> *Question: There,* [redacted] *would be a really good authority, right?*
> [redacted] *I guess* [redacted] *would. I'm not saying* [redacted] *wrong. I mean, when Corporation A takes over Corporation B, all of Corporation A's debts and obligations carry over. So if it's like that, sure. I mean, I don't know enough about the details of mayoral control, you know, whether was that all voided out? I guess it wasn't.*
> *Question: Okay.*
> [redacted] *But we hadn't really drilled down on it that detail.*

Respectfully, this testimony evidences careless (at best) thinking. [redacted]

Yet [redacted] testimony was that, [redacted], DOI devoted no meaningful attention to that question. Among other things, DOI did not research the issue itself, and did not ask for assistance from DOE or the Law Department in assessing the matter. Later, as of March 12, 2018, [redacted] learned from [redacted] that DOE *did* suspect that the BOE resolutions were still in effect, or that the question was at least close enough to consult the Law Department. But it does not appear that DOI credited [redacted] views (even though DOI *had* relied on [redacted] oral comments extensively when they perceived [redacted] to be taking a position that supported DOI). [redacted] testified as follows:

> *There are a lot of old things written in the Ad[ministrative] Code and the Charter to use other examples that actually* [redacted]*, don't think are actually effective anymore. For, you know, the passage of time or changes in other laws or things like that. And I found [the 1991 BOE resolution] a little confusing, even at that point, where I hadn't done as much thinking on it. . . . I*

certainly could read the words and recognize that the words were inconsistent with paragraph one [of DOI's February 22 letter]. I wasn't positive at that point that the right answer was, "Yep, it's inconsistent." Now, that's my opinion. But leading into that conversation with [redacted] I thought I might have a conversation with the Law Department and we might delve into it and we might find that . . . maybe not. Maybe the old reso[lution] was vestigial.

[redacted] conclusions are consistent with our research on the matter. But the point is – research was done. [redacted] and DOI closed their collective eyes and attempted to wish the BOE resolutions away.

In short, so far as the record reflects, the BOE's 1990 and 1991 resolutions are still good law, yet DOI went out of its way to avoid learning whether that was the case. That decision smacks of indifference to the governing law, and thus amounts to an abuse of authority.

v. DOI Claim: Stancik and [redacted] Autonomy Arose Out of a "Special" or "Informal Arrangement."

During the interview process, various members of the DOI senior staff asserted that the independence enjoyed by [redacted] and Stancik was part of an "informal understanding" between those men and DOI, and not required by the law. We found these observations unpersuasive. [redacted] witnesses who testified to that effect lacked firsthand knowledge about any such "informal" arrangement. Those observations are also inconsistent with the record, which shows [redacted] resisting several attempts by DOI to assert direct control over SCI from 2014 to 2017. *Supra* at 24. If anything, the "informal" relationship ran in the other direction; [redacted] testified that he regularly updated [redacted] about major pending SCI investigations even though he had no legal obligation to do so.

Commissioner Peters did not deny that [redacted] view of EO 11 was one in which SCI was accorded substantial autonomy. However, Commissioner Peters testified that during a meeting with [redacted] in the fall of 2017, [redacted] conceded that Peters "had the legal authority" to reshape the office as Commissioner Peters saw fit. *Supra* at 35. We do not put much, if any, weight on this alleged statement by [redacted] for several reasons: (1) [redacted] denied making it; (2) the comment, if made, was made on the eve of [redacted], and in the same conversation in which [redacted] urged Commissioner Peters not to reorganize SCI; and (3) the comment is not consistent with [redacted] prior actions, which strongly indicate his belief that the Special Commissioner did have the right to resist reshaping of SCI. *See supra* at 35 (recounting incidents).

In the end, EO 11 and the BOE resolutions are formally source of the Special Commissioner's autonomy; the contrary assertions made during this investigation lack foundation and credibility.

vi. DOI Claim: The Takeover of SCI Was Justified on the Ground of Expedience.

Numerous members of DOI senior staff testified that the changes at SCI were justified because they were much needed. Indeed, the DOI witnesses were generally in agreement about the wisdom of the policy rationale for bringing SCI into the DOI fold. For example, numerous witnesses decried the lack of financial investigators and auditors at SCI; [redacted] pointed out that the Gill Commission's report expressly called for the new office to pursue such financial investigations, and that SCI had not done so for many years.

Even if we were to fully credit these concerns, we do not accept that any need for changes at SCI justified ignoring the law during the interim. Whether DOI *should* run SCI is a distinct question from whether DOI *has the authority* to run SCI. Attempts by DOI witnesses to conflate the two questions were neither persuasive nor helpful to DOI's cause.

vii. DOI Claim: DOI Was "Open and Notorious" About Its Takeover of SCI.

Commissioner Peters and other members of DOI's leadership testified that DOI's decision to take over SCI could not have been an "abuse of authority" because DOI informed all relevant stakeholders and the public about its plans, and received no complaints. Commissioner Peters pointed in particular to four relevant disclosures:

1. The fact that the new DOI organizational chart – showing SCI as "Squad 11" – was posted publicly on DOI's website as of January 2018.
2. The February 20 meeting involving Commissioner Peters, [redacted] and [redacted] in which DOI's new organizational chart was discussed.
3. Commissioner Peters' discussion of DOI's new organizational chart – including its assumption of direct control over SCI – with a group of City Councilmembers on March 14, 2018
4. Commissioner Peters' testimony before the City Council on March 26, 2018.

Though he did not specifically mention it during his interview, Commissioner Peters' March 2, 2018 email to [redacted] regarding the funding of the CISO position is also relevant to this issue. *Supra* at 58.

We agree that these disclosures demonstrate that DOI was not trying to hide the bottom-line result of its actions. But all of these episodes share a notable feature – *they involved no discussion of DOI's actual legal authority for its actions*. That makes the disclosures all but irrelevant for current purposes.

First, Commissioner Peters posited that, if any of the City officials with whom he spoke in February and March 2018 thought there was a legal problem with DOI's proposed scheme, they were free to say so. But we do not put much stock in this point. EO 11 and the BOE resolutions provide the legal framework for SCI, but they are decades-old authority, and obscure

at that.[90] We do not think it reasonable to assume that *any* of the relevant individuals – including [redacted] – would have had any working familiarity with the law governing SCI at the time that Commissioner Peters spoke with them. As such, we do not think it is reasonable to assume that any of the listeners would have had any basis to know about any potential legal issues with DOI's actions, much less complain about them in the moment.[91] That would be particularly true if the listeners thought that DOI's exercise of authority over SCI made sense as a matter of policy, as some of them no doubt did.

Second, for related reasons, we find the four disclosures mentioned above to be materially incomplete – at least insofar as DOI proffers them as evidence of its good faith. After all, by mid-October 2017, DOI's senior staff was on notice that there would be serious questions about the legality of their takeover of SCI. By mid-March 2018, the *Times* had written about that very matter. Yet DOI never flagged the issue of EO 11 and DOI's legal authority to oversee SCI to the Mayor or the City Council. That is not transparency by any standard.

The point becomes especially clear when considering the full context of the relevant exchanges. By all accounts, Commissioner Peters' February 20 meeting with [redacted] and [redacted] was a general-purpose meeting to brief [redacted] about DOI's overall portfolio; again, by all accounts, "SCI" was not mentioned, and only a passing reference to "the IG for DOE" (a heretofore nonexistent position) or a close reading of DOI's new organizational chart would have tipped off [redacted] or [redacted] as to the presence of any changes at SCI (or any legal issues surrounding those changes). And Commissioner Peters and [redacted] never mentioned, for example, that they had reached out to DOE for a MOU. [redacted] and [redacted] testified – and we agree – that this exchange did not sufficiently put City Hall "on notice" of the scope and nature of the changes DOI had made at SCI.[92]

Commissioner Peters' March 26 council testimony also contained several statements that were at the very least likely to be misunderstood.

- Commissioner Peters claimed on several occasions that SCI was "also known as the Inspector General for the Department of Investigation." That was technically true, but

[90] For example, [redacted] testified that [redacted] had not looked at EO 11 until the fall of 2017, and has never looked at the BOE resolutions. [redacted] testified that he was not familiar with EO 11 or the BOE resolutions as of February 20, 2018. Even [redacted] testified that he had not done much deep thinking about the survival of the BOE resolutions until mid-March 2018.

[91] [redacted] stated at one point during [redacted] interview that "We met with th[redacted] and [redacted] and [Peters] said 'This is what I'm doing' and they said 'fine.'" To the extent that this testimony was meant to suggest that either [redacted] or [redacted] affirmatively blessed DOI's takeover of SCI, the testimony was inconsistent with Commissioner Peters' note regarding the meeting and the testimony of all other witnesses, and we did not find it persuasive.

[92] We find DOI's contrary representations to be unpersuasive. For example, a set of prepared talking points for an April 4, 2018 discussion with the *Daily News* editorial board contained the following mock exchange: "**13. Was City Hall aware of the reorganization of DOI? Did you blindside them with this?** That is not accurate. We had a conversation with City Hall about the new reporting structure in late-February. They were fully aware." Putting aside the dubious framing of the issue as a "reorganization of DOI," this talking point obscures the fact that the February 20 conversation was not primarily or even broadly about the absorption of SCI, and addressed the matter obliquely if at all.

elided the fact that SCI was "known" in that manner only within the halls of DOI. The novelty of the "IG for DOE" branding and its inconsistency with the governing executive enactment was obviously relevant information; Commissioner Peters did not provide it.

- At several points, Commissioner Peters testified that SCI "had always reported to DOI." That too was technically true, but it was materially misleading. As Commissioner Peters accepted at his interview, Special Commissioners Stancik and [redacted] had a *very* different reporting obligation to DOI than the one Commissioner Peters had imposed on [redacted] and it was the *new* structure that was causing the problem. Saying that "SCI has always reported to DOI" was a too-slick-by-half talking point designed to *obscure* the nature of the dispute rather than address it; this testimony was a mark against the Commissioner, not one for him.

- Commissioner Peters responded to a question about the nature of the dispute between DOI and DOE by agreeing that he was "not clear" about the nature of DOE's concern, testifying that "at no time has anyone from [DOE] contacted me or anyone on my staff to object to anything we're doing." That was not even technically true; on March 12, 2018, [redacted] called [redacted] and told [redacted] that DOE objected to signing the February 22 confirmation letter regarding the scope of DOI's authority over SCI absent further action from the PEP. Commissioner Peters was aware of that interaction. In any event, by framing his response to the question as one regarding whether DOE had "objected to what [DOI was] doing," Commissioner Peters again obscured the nature of DOE's point – that changes to the governing law were required for DOI to do what it wanted to do, and those changes had not yet been implemented.

Finally, Commissioner Peters' March 2 email to [redacted] regarding the use of the CISO position was problematic for similar reasons. The email obliquely referred to the legality of DOI's use of DOE funds as follows: "While DOI and DOE General Counsels have previously discussed the fact that the lines are funded by DOE but operate, like all IG lines, at DOI's discretion I believe it is important that this only be a temporary rather than permanent solution." This statement, like others to the City Council, intentionally conflated DOI's authority over "IG lines" with its authority over SCI's budget. And to the extent that the email implied that [redacted] had agreed that SCI lines operated "at DOI's discretion," that was both inaccurate and legally

[93] While the point was not critical to the outcome of our investigation, we concluded that [redacted] recollection about the substance of his January 26, 2018 conversation with [redacted] – both in the moment, as reported to Commissioner Peters and others at DOI, and during [redacted] interview with the undersigned – was not wholly accurate. In other words, we credi[redacted] testimony that he *did not offer the view that SCI employees were DOI employees or that DOI controlled SCI*, and that [redacted] contrary recollection (and statements to others conveying that view) were wrong. We reach that conclusion because: (1) [redacted] version is consistent with what [redacted] told [redacted] in February 2018, as documented by [redacted] and with [redacted] own notes; (2) [redacted] notes show that [redacted] repeatedly opined that the areas of the draft MOU covering the relationship between DOI and SCI were "between DOI + SCI" – comments that cannot be reconciled with [redacted] claim that [redacted] had affirmatively blessed DOI's control over SCI; (3) it is undisputed that [redacted] told [redacted] on the March 12 call that the issue of who managed SCI was "between DOI and SCI," and so it is also likely (particularly given [redacted] notes) that [redacted] had offered the same views in January; and (4) considering all of the relevant factors, including the respective incentives, [redacted] testimony about the call was more credible than [redacted].

irrelevant. Rather, the person with "sole jurisdiction" over SCI's budget – [redacted] – had objected to the proposed CISO line. That rather relevant fact did not make it into the email.

Third, we find the [redacted] email exchange between Commissioner Peters and [redacted] to cut strongly against the notion that DOI was "open and notorious" about [redacted] its position. To recap, immediately after Commissioner Peters had a "harsh" and "brusque" meeting with [redacted] regarding [redacted] obligation to follow DOI's imposed reporting structure, Commissioner Peters drafted a proposed email to [redacted] and [redacted] copying [redacted] that would have invited them to weigh in on whether changes to EO 11 were required. [redacted] *Supra* at 57. The email was never sent. Instead, two days later, Commissioner Peters wrote an internal memo to file about the meeting with [redacted] and [redacted]

Commissioner Peters explained this episode as follows:

> *Peters: There's a big difference between – I don't believe that either* [redacted] *or* [redacted] *would have or could have ever affirmatively said to me "You may not do this" because the law says I can. But I can certainly see them refusing to ...*
> *Question: Bless.*
> *Peters: Bless it, and then you're left with – I sen[d] this to them and either they don't respond or they respond with, you know, let's have a meeting, and then we end up in, you know, months of meetings.* [redacted] *But on the other hand, people are not particularly anxious to make your life easier so that unlikely – it's easy to refuse to bless something; it's hard to affirmatively say you can't do it when I have the right to do it. Which is – that would have ...*
> *Question: Could I re-interpret that as being: if you just do it, the likelihood of nobody objecting is pretty high. But if you ask them to bless it in, essentially, in writing on the email, they're less likely to extend themselves to having some accountability for what it is that you're doing?*
> *Peters: Said better than I did.*
> *Question: Okay, but that's not because – that's a human nature thing rather than a legal analysis, right?*
> *Peters: Yeah.*

[redacted]

Question: I mean what's [redacted] doing. Is [redacted] gonna start reading the EOs and everything like that. Do you think [redacted] gonna get down and do a full drill down on this issue?
Peters: No, if [redacted] really needed to deal this, [redacted], which is – she'd have [redacted] say "What's this all about?" But I absolutely agree that – No, [redacted] – cause frankly, my guess is [redacted] didn't really care. I mean they would all just assume that [DOI] not be involved with the school system, cause who needs a more activist IG, but neither are they prepared to say you can't do it, because they know we can.
Question: That's the part I'm having – I mean that's just why this sounds really good for you, but at the same time, I'm having a hard time understanding it. Like, why should I believe that they believe you can? . . . The issue of "Because they know we can," that's just speculating, right?
Peters: Yes. It's speculating with – it's speculating with a knowledge that if they're going to say no – saying nothing is easy – like ignoring an email ...
Question: I [...] nothing...
Peters: Okay, saying nothing is easy. Refusing to sign something is easy. Like that takes no – but for them to affirmatively put in writing, we object to your doing this because, they either have to fill out the "because" and that "because" has to have both legal, policy, and political justification.

We take no position on whether or not it would have been good politics for Commissioner Peters to give City Hall and Corporation Counsel a chance to weigh in on the need for changes to EO 11. But it unquestionably would have been consistent with a desire to be *upfront* about DOI's new approach to managing SCI. Commissioner Peters instead chose a different path, one that put the burden on City Hall and others to identify and complain about the legal issues. Whatever else it was, that option was not the "open and notorious" one. Moreover, there is good reason to think that if had Commissioner Peters sent the proposed February 27 email – which contained numerous questionable or at least notable statements[94] – it would have drawn a response from others in City government. In other words, had he sent it, Commissioner Peters' email would have very likely raised red flags, and prompted others in city government to take a look at the legal issues. He did not, and so they did not.

In conclusion, for all the above-described reasons, we find that DOI's unilateral assumption of authority over SCI constituted a clear violation of the governing law, and thus an "abuse of authority" for purposes of the Whistleblower Law.

[94] For one thing, EO 11 did not require the DOI Commissioner "to appoint a Special *Deputy* Commissioner" (emphasis added) as Commissioner Peters stated, much less any obligation to appoint anyone "to serve as the IG for DOE." For another, Commissioner Peters' statement that he did not believe that there was "a need to amend EO 11 given recognition that the person entrusted with this work will be commonly labeled the Inspector General rather than Special Commissioner" made no sense on multiple levels. It was simply not true that "the person entrusted with this work" would be "commonly" known as an IG; both Stancik and [redacted] had been "known" as the "Special Commissioner" for decades. Moreover, the "common labeling" of the position had very little, if anything, to do with the potential need for legal amendments.

C. [redacted] and [redacted] Reasonably Believed That DOI's Actions Constituted an Abuse of Authority.

Even if DOI's takeover of SCI was not actually an "abuse of authority," the record demonstrates that [redacted] and [redacted] reasonably believed it to be so.

At the outset, the record contains some evidence that cuts against the reasonableness of [redacted] and [redacted] belief: specifically, the "notice" they received during their interviews for their respective positions. As described above, Commissioner Peters, [redacted] and others testified that [redacted] was put fully on notice during [redacted] multiple job interviews that DOI intended to treat SCI like an IG's office. The same goes for [redacted] who was apparently eager to combine SCI with DOI at the time [redacted] interviewed for the [redacted] role; among other things, [redacted] memorialized that [redacted] explained his "desire to fold SCI into DOI and the many advantages – and challenges – in doing so." *Supra* at 34.

Both [redacted] and [redacted] denied having been put on notice of DOI's intentions to treat SCI like an IG squad. *Supra* at 32-36. We find their denials to be largely unpersuasive, and we drew negative inferences about their credibility as a result. But we ultimately conclude that whether [redacted] and [redacted] were put "on notice" of DOI's intentions by December 2017 is unimportant for several reasons. As with [redacted] and the City Council, we do not expect that [redacted] and [redacted] were necessarily familiar with the ins and outs of EO 11 and the relevant BOE resolutions at the time they were put "on notice." Put simply, unless and until [redacted] or [redacted] were aware of the surrounding legal framework *and* the full sweep of DOI's plans, they could not have fully appreciated that DOI's actions were legally problematic. There is thus nothing surprising or troubling about [redacted] and [redacted] developing that belief between January and March of 2018.

Another factor supporting the reasonableness of that position is [redacted] understanding that a MOU with DOE was in the process of being executed:

> *Question: Okay. So this idea that an MOU was in the works was being communicated to you by whom?*
> [redacted] *A number of sources. I mean, I think –I do recall [redacted] brought it up during this sort of interim period when I -- before I was officially in the spot and when I was told I would be getting the spot. During that time, oh yeah, we'll have it worked out, [redacted] is working it out with [redacted]*
> *Question: Did [redacted] ever discuss with you the purpose of the MOU as it related to the legal framework?*
> [redacted] *No. It was just -- it was sort of understood. It's going to be -- there will be an MOU.*

[redacted] belief that DOE intended to acquiesce in the proposed changes at SCI would have mitigated any doubts about the legality of DOI's actions, at least for a time. Moreover, the record reflects that a major inciting incident for [redacted] and [redacted] was DOI's February 7, 2018 indication that it planned to take a SCI line for the CISO position. Both [redacted] and

[redacted] testified, and the record reflects, that they immediately viewed this proposal as improper – obviously so – and that it spurred them to reconsider the legal propriety of DOI's takeover. We agree that the CISO issue was of the type and nature that would cause an objective person (including two lawyers) to look more deeply into the surrounding legal framework – particularly [redacted] who reasonably believed [redacted] to be personally responsible for ensuring that the SCI budget was used in a proper way.

However, even if we assumed that [redacted] and [redacted] believed at one time that DOI's takeover of SCI was legally acceptable, that is not dispositive. To the contrary, the record as a whole amply demonstrates that a reasonable person in [redacted] and [redacted] position could have viewed DOI's actions as an abuse of authority.

The law. As should be clear from this report, we think it would have been reasonable to conclude that the governing law did not authorize DOI's actions. That conclusion could have been based not only on the text of EO 11 and the BOE resolutions themselves, but also the unbroken decades of precedent evidencing SCI's autotomy. *See passim*.

Other indicia of abuse of authority. We conclude that Commissioner Peters and [redacted] each made statements to [redacted] and [redacted] in February 2018 that would have caused a reasonable listener to either doubt their fidelity to the law or to question their credibility on the relevant legal issues.

On February 21, during a conversation with [redacted] and [redacted], [redacted] commented that "if we really want to go to the Mayor to officially change the unit's title and all, they will but for now it's going to stay the way it is."[95] This statement evidences DOI leadership's understanding that there was potentially a need to "go to the Mayor to official change the unit's title and all," which DOI had not done. One interpretation of [redacted] comments is that DOI leadership knew that EO 11 conflicted with the changes made at SCI but was indifferent to the conflict; this interpretation plainly would have connoted about a potential abuse of authority. Another interpretation of [redacted] comments is that it would have been easy for DOI to obtain the Mayor's formal approval of DOI's realignment of SCI. This interpretation, though, would have cast considerable doubt on [redacted] credibility. After all, one of the reasons that Commissioner Peters and [redacted] had decided *not* to seek an amendment to EO 11 was because they understood that political tensions between DOI and City Hall would have, at the very least, significantly complicated that process. [redacted] was well aware of those tensions: as [redacted] testified, "it's well understood in my office the battle . . . between the Mayor and the DOI commissioner, that they're not particularly buddies any longer, and this idea of Commissioner Peters or [redacted] or both of them marching up and directing the mayor to do anything . . . seems a little bizarre." [redacted] comments would have been disturbing in either event.

Less than a week later, Commissioner Peters made similar comments during the February 27 "ultimatum" meeting with [redacted] telling [redacted] "I could if I had to go to City Hall and have them just wipe out that Executive Order" and that he "probably should have, but it wasn't worth

[95] While [redacted] did not recall saying this, [redacted] and [redacted] testified to that effect, and [redacted] memorialized [redacted] understanding the day after the incident; we conclude [redacted] made the statement or something directly equivalent.

my time, effort, and energy." A moment later, Commissioner Peters told [redacted] that [redacted] was "also the Special Commissioner of Investigations for the school district because there is still an executive order that I haven't bothered to have eliminated that says I have to appoint one." These statements were objectively troubling. For one thing, [redacted] knew that Commissioner Peters could not, in fact, easily "just wipe out that Executive Order" – in other words, Commissioner Peters' statements were not credible. Moreover, Commissioner Peters' admission to [redacted] that he "probably should have" sought and obtained a change in the law, but did not consider that to be "worth [his] time, effort, and energy" would have alarmed any reasonable listener: this was *the head of a law enforcement agency* telling an employee amidst a dispute about the scope of his legal authority that he did not consider adhering to the law to be a priority.

Other, less sinister interpretations of these comments are possible. But those comments' context made it reasonable to assume they connoted some level of abuse of authority. The February 27 "ultimatum" meeting between Commissioner Peters and [redacted] was, even if not intentionally so, an objectively intimidating setting. And while Commissioner Peters' tone throughout that meeting was brusque, he delivered the comments about "his time, effort, and energy" in manner that practically dripped with contempt, emphasizing the importance of his "time, effort, and energy" in a slowed cadence and a lower register. [redacted] reasonably could have considered those comments to be akin to an assertion that Commissioner Peters was above the law. As for [redacted] both [redacted] and [redacted] testified that [redacted] appeared irritated throughout the February 21 discussion about [redacted] title and role, and that [redacted] tone was caustic. [redacted] also made other comments during the same interaction that bespoke of an indifference to the law – namely, that [redacted] "needs to stop worrying about [redacted] title and start making arrests."

Taken together, [redacted] and [redacted] could have interpreted these comments to mean that DOI leadership was knowingly indifferent to whether DOI's takeover of SCI was legal.

The MOU, the confirmation letter, and DOE. As of late March 2018, it would have been reasonable for [redacted] and [redacted] to believe: (1) that DOI had requested the authority to take over SCI from DOE; (2) that DOI had been rebuffed in that effort; and that (3) DOI had nevertheless proceeded with its takeover of the office, in a manner suggesting an abuse of authority.

Throughout February and March of 2018, [redacted] and others at SCI were in contact with [redacted] was generally aware that a MOU with DOE was in the works, as was [redacted] but the fact that nobody at DOI had updated [redacted] or [redacted] about the status of negotiations with DOE as of February 2018 was itself a red flag. Then, on February 20, 2018, [redacted] learned directly from [redacted] that DOE had not signed the proposed MOU and would not sign it as drafted. [redacted] also learned heard that DOE had declined to take *any* position on several important issues (including the key question of whether DOI controlled SCI). In contrast, [redacted] and [redacted] had been told by [redacted] on February 13, 2018 that [redacted] believed that DOI controlled SCI: or as [redacted] put it, that [redacted] had said that DOI "get[s] to tell SCI what to do." After [redacted] heard otherwise from [redacted], [redacted] would

have reasonably believed that [redacted] had been dissembling, which in turn would have caused a reasonable person to question the validity of DOI's exercise of authority over SCI.[96]

Later, Rashbaum's March 16 *Times* piece made clear to [redacted] and [redacted] that DOE had indeed declined to sign DOI's proposed follow-up letter to DOE – something that they had not previously heard from anyone at DOI. They also could have reasonably gleaned from Rashbaum's article that Commissioner Peters' interview with Rashbaum did not go well. And they might well have interpreted the quote that capped the piece – Commissioner Peters' statements that "Either people cooperate with our investigations or they don't" and "[e]verything else is just noise" – to convey a marked indifference to legal niceties. Ominously, in the two weeks after the *Times* article appeared, nobody at DOI (including [redacted]) spoke to [redacted] or [redacted] about it. Ultimately, when [redacted] spoke to [redacted] about the article on March 27, [redacted] told [redacted] that SCI staff could have brought it up if they thought it was important – a comment that would have reasonably landed as disingenuous, given [redacted] same-day insistence that SCI staff (and [redacted] abandon any lingering questions about DOI's authority to manage SCI. The next day, [redacted] told [redacted] that [redacted] "direction does not come from the *New York Times*" – an odd deflection at best.

[redacted] and [redacted] could have reasonably thought that this sequence of events demonstrated that DOI had approached DOE for an agreement to become its overseer (like DOI had done with NYCHA), and DOE had rejected that overture. To be sure, Commissioner Peters and other DOI witnesses testified that neither the MOU nor the follow-up "confirmation" letter to DOE were *necessary* for DOI to assert control over SCI, and that the only reason that the draft MOU was so comprehensive was that it was based on other MOUs (like those relating to HHC or NYCHA) where legal control over the relevant entity *did* need to be established. Whatever the merits of this position, it would not have been apparent to anyone outside the DOI inner circle that the proposed DOE MOU was intended only for *confirmatory* purposes. Rather, the far more reasonable inference would have been that DOI had been seeking DOE's consent to take over SCI, had failed to do so, and its failure had only recently come to light.[97]

---

[96] During an interview, we asked [redacted] to explain the purpose of or value in seeking [redacted] agreement to the use of funds for the CISO position, given that the entire purpose of EO 11 and the 1990 and 1991 BOE resolutions was to remove school district leadership from the decision-making loop on internal investigations. [redacted] responded that "[i]t wasn't [redacted] agreement that DOI was going to use the line; it was [redacted] agreement that SCI personnel were functionally DOI personnel." When we asked what authority [redacted] perceived [redacted] to possess to pass on these issues, [redacted] responded that "*It wasn't simply* [redacted] *say-so; I mean, if we could get DOE – not just* [redacted] *the whole agency – to memorialize their understanding that these people really work at our direction then I think that would certainly lend credence to the notion that if we take somebody that is on one of their lines and give them a role that's consistent with the understanding.*"

This explanation does not work on a factual or conceptual level. Factually, we do not accept that [redacted] ever offered the "say-so" [redacted] recounted. *Supra at* 111. Moreover, even if [redacted] had offered the oral "understanding" to which [redacted] alluded, that oral understanding would have been objectively valueless, given (among other things) the existence of the 1991 BOE resolution (of which [redacted] was fully aware) expressly assigning control over SCI staff to the Special Commissioner. Indeed, at [redacted] interview, [redacted] implicitly acknowledged that [redacted] oral "say-so" was valueless absent a "memorialize[d] . . . understanding." But in the end, DOI did proceed with posting the CISO position with no more than [redacted] "say-so" in hand – a step that would have reasonable signaled an abuse of authority.

[97] We need not and do not conclude that DOI's pursuit of a MOU – and the timing of that effort, coming immediately on the heels of [redacted] – was itself evidence that DOI leadership knowingly abused its authority. But that would not be an unreasonable conclusion.

The CISO issue. It would have been reasonable for [redacted] and [redacted] to think that DOI's intended use of an SCI line for the CISO position was an abuse of authority, and that DOI had retaliated against [redacted] for raising concerns about the legality of the move.

As an objective matter, DOI's proposed use of the CISO line was plainly problematic; DOI senior staff universally agreed that [redacted] was well within [redacted] rights to query the legal justification for DOI's plans. Indeed, as of mid-February, [redacted] and [redacted] all agreed that it would be important to obtain confirmation about the legal propriety of using an SCI line. *Supra* at 46. But from [redacted] perspective, the promised written legal justification from [redacted] never materialized; instead, DOI went ahead and posted for the position, and then changed its story about its plans for the position after Rashbaum started asking questions. None of those developments would have allayed [redacted] concerns; they would have intensified them.

Worse still from [redacted] standpoint, DOI had punished [redacted] for speaking up about the CISO issue. The full sequence of events, from the perspective of [redacted] and [redacted] was:

- February 7: [redacted] sent [redacted] the CISO posting; the next day, [redacted] requested legal advice from [redacted] asked about whether a MOU with DOE was in place, and the posting did not proceed. *Supra* at 45.
- February 13: [redacted] and [redacted] met with [redacted] who (inaccurately) claimed that [redacted] has told [redacted] that DOI "get[s] to tell SCI what to do"; when [redacted] challenged the accuracy of that assertion, [redacted] – at [redacted] specific direction – agreed to seek a written agreement with DOI. *Supra* at 46. [redacted] also specifically offered that, as to the use of DOE funds, DOI would "dust that off and take a closer look at it."
- February 20: [redacted] met with [redacted] heard numerous things that were inconsistent with [redacted] recent comments about [redacted] views, and conveyed that disturbing inconsistency to [redacted] *Supra* at 47-48.
- February 21: At the restructuring meeting, [redacted] and [redacted] were reassured by [redacted] and [redacted] that [redacted] either had confirmed or would soon confirm the legality of the DOI's "stealing" and "taking" of an SCI line for the CISO position. [redacted] and [redacted] would have had no reason to think that [redacted] and [redacted] claims were accurate.[98] Later in the meeting, [redacted] also politely

[98] During the debriefing meeting with [redacted] that followed, [redacted] specifically advised [redacted] that "part of" the problem with discussing the legality of the CISO position with [redacted] and [redacted] was that "they don't know everything, especially with the [redacted] line and money thing." [redacted] added: "I don't think [redacted] understood prior discussions on that. So . . . they kind of make judgments without full information. Just, you don't really want that to happen." [redacted] advice may well have been sound, but it amounted to a concession – by [redacted] newly minted supervisor – that [redacted] bosses in DOI leadership were apt to leap to unjustified conclusions. That would not have been comforting to [redacted] Moreover, [redacted] had attended the February 13 meeting, where [redacted] had said "Let's get that in writing" and offered specific suggestions about what the written exchange with DOE should include. *Supra* at 46. [redacted] did not voice any objections to that course of action at the time; rather, as of February 21, [redacted] appeared to have either forgotten about or had resolved to ignore [redacted] prior views (as had [redacted] A reasonable person in [redacted] shoes would have found those apparent changes of heart to be highly suspicious.

asked [redacted] whether [redacted] had heard back from DOE; instead of receiving an answer, [redacted] and [redacted] abruptly ended the meeting. Later that day, [redacted] told [redacted] that [redacted] had "already answered [redacted] questions," but eventually agreed to [redacted]

- February 27: Following the "ultimatum" meeting with Commissioner Peters, [redacted] was called to a meeting with [redacted] and [redacted] where [redacted] was informed that [redacted] was being disciplined for, among other things, asking [redacted] about "the DOE funding issue" six days prior. [redacted] asked for a copy of a written disciplinary memo so [redacted] could respond; [redacted] agreed to provide one. [redacted] never did.
- March 2: [redacted] – for reasons that are unclear in the record – instructed [redacted] that the CISO posting on the SCI line had been cleared, and [redacted] posted it. At this point, notwithstanding the assurances [redacted] received on February 13 and 21, [redacted] had heard nothing from [redacted], or anyone else in DOI leadership about the legality of using DOE money for the CISO position; the promised "closer look" was as yet absent. And [redacted] learned shortly thereafter from [redacted] that OMB considered the CISO posting to be troubling.
- March 16: [redacted] and [redacted] read in the *Times* that DOI considered its use of the CISO line to be a temporary fix. [redacted] and [redacted] had never before heard that, and would have reasonably doubted its truth, not least because the quotes from DOE in the *Times* article were flatly inconsistent with [redacted] prior reassurances (and those from [redacted] and [redacted] about DOE's comfort with DOI's domination of SCI. (Note: [redacted] and [redacted] were never informed that Commissioner Peters wrote to [redacted] and [redacted] on the night of March 2 to put them on notice of the posting and its "temporary" nature.)
- March 28: As of the date of [redacted] termination, the CISO posting remained active on the DOE's Galaxy system; DOI leadership had never provided any of the promised legal support for its use of an SCI line.

This sequence of events would have suggested to a reasonable observer that DOI was knowingly abusing its authority to "steal" a line that should have been devoted to DOE oversight.

It is worth pausing for a moment to focus on the fact that [redacted] was "written up" for asking [redacted] a question about the CISO issue at the February 21 "restructuring" meeting. DOI witnesses universally agreed that it was proper for [redacted] to have elevated her concerns about the CISO position to [redacted] Indeed, while they may not have appreciated the effect their phrasing had on [redacted] senior leaders at DOI openly discussed the fact that DOI would be "stealing" and "taking" a line from SCI, terminology that would have further alarmed someone already concerned about the move's legality. However, DOI witnesses claimed that [redacted] was disciplined *not* because [redacted] raised a legal concern, but because: (1) asking [redacted] about the issue after [redacted] had told [redacted] that [redacted] would be handing the matter was insubordinate and showed insufficient respect for the chain of command; and (2) [redacted] tone and approach in raising the issue with [redacted] was disrespectful. On the latter point, the DOI witnesses were clear:

[redacted] testified that [redacted] "totally went off the rails," and that while [redacted] didn't "remember exactly what [redacted] said," [redacted] "tone was certainly inappropriate." [redacted] added that "[a]t some point, [redacted] walked into the office on a separate issue, and [redacted] started demanding 'Where's my memo?' 'Where's my memo?' 'And the CISO, you owe me a memo!' This is just an inappropriate way for [redacted] to be speaking to a [redacted]."

[redacted] testified that [redacted] "demanded something of [redacted] in a way that was, I thought, uncalled for and disrespectful to a [redacted]" – namely, that [redacted] said "Where's that memo you were going to get me?" to [redacted] which took [redacted] aback because it "was completely contrary to what we had just talked about and the manner in which [redacted] said it was off-putting." [redacted] made several additional references to [redacted] "demand" for a memo and the "unprofessional way that [redacted] spoke to [redacted]

[redacted] testified that [redacted] "call[ed] me out and is like 'where are we with that issue with [redacted] and "People were . . . taken aback." [redacted] added that [redacted] personally was not bothered by [redacted] question, but that "[redacted] seemed impertinent," "talking out of turn," and "was really hung up on this issue."

[redacted] did not offer any views about [redacted] tone, but [redacted] "recollection of it is that [redacted], you know, basically – [redacted] walks in and s[redacted] then just kind of like jumps and starts, you know like peppering [redacted] with some questions about it."[99]

We find these explanations for [redacted] discipline to be entirely unsatisfactory. First, the "speaking out of turn" justification for [redacted] discipline is so weak as to be non-existent. It is true that, earlier in the meeting, [redacted] told [redacted] that "[redacted] will confirm" the issue with [redacted] and that [redacted] and [redacted] did not "need to worry about it." But that was the extent of the exchange; [redacted] did not tell [redacted] to desist from speaking to [redacted] Further, as [redacted] later admitted to [redacted] [redacted] almost certainly had no idea that a particular plan of action – to use [redacted] words, the "Let's get something in writing" plan – had been agreed at the February 13 meeting. And in any event, [redacted] did not *seek out* [redacted] rather, [redacted] popped into the meeting unexpectedly some 20 minutes later on another topic. It was entirely reasonable in that setting for [redacted] – who had heard nothing from [redacted] in more than a week – to inquire about [redacted] progress with DOE. To the extent that DOI senior leadership sincerely believes that this type of in-the-moment follow-up inquiry to the [redacted] about an important legal issue is improper, that belief reflects *far* more poorly on the current DOI culture than on [redacted]

Second, this meeting – like many others from February and March 2018 – was recorded, and the recording of the meeting squarely contradicts the DOI witnesses' recollections about the substance and tone of [redacted] question. It was *not* accurate, as [redacted] wrote in his follow-up "disciplinary" memo, that [redacted] "ask[ed] [redacted] to explain [redacted] actions." Nor was it true that [redacted] made demands of [redacted] challenged [redacted] or used a hostile or even arguably

[99] [redacted] only declined to volunteer any views on [redacted] tone *after* we informed [redacted] that the entire February 21 meeting was recorded.

disrespectful tone. The recording reveals [redacted] asking in a measured, modest tenor – almost in an offhand way – whether [redacted] has "heard back from DOE." There is *nothing* on the recording to support the DOI witnesses' testimony about [redacted] attitude. To the contrary, the recording indicates that, several minutes prior, [redacted] and [redacted] were hostile (and [redacted] was particularly agitated) about SCI staff's refusal to provide personal email addresses for COOP purposes.[100]

We do not know why [redacted], and [redacted] misremembered the substance and tone of the February 21 restructuring meeting. It is possible that they inadvertently transferred their memories of [redacted] and [redacted] anger about the COOP issue to [redacted] – in other words, they were angry, so [redacted] must have been angry too. It is possible that their recollections of [redacted] tone and approach were inadvertently colored by their belief that [redacted] had erred by speaking out of turn. It is also, of course, possible that the four DOI witnesses intentionally misrepresented [redacted] tone and approach as a pretext for disciplining [redacted] for asking what would have otherwise been an innocuous (indeed, well-founded) legal question. In any event, the point is that DOI senior leadership's testimony was plainly inaccurate; [redacted] was not hostile, disrespectful, or otherwise out of line. A reasonable person in [redacted] position would have been absolutely stunned to be disciplined for asking [redacted] whether [redacted] had "heard from DOE," and would have reasonably believed that discipline to be a pretext for having made the legal inquiry.

Thus, as of March 28, [redacted] and [redacted] would have had ample reason to think that: (1) DOI was in the process of improperly "stealing" an SCI line without approval from DOE; (2) DOI's leadership, including [redacted] had repeatedly reneged on promises to provide a written legal justification for the move; and (3) [redacted] had been inexplicably disciplined for making a perfectly reasonable follow-up request for that written justification. All of those issues bespoke a potential abuse of authority.

[redacted] **meeting**. On both March 21 and March 23, [redacted] and [redacted] met with [redacted] and [redacted] During those meetings, [redacted] offered the view that Commissioner Peters lacked legal authority to take over SCI. *Supra* at 65. That would have reasonably suggested to [redacted] and [redacted] that their position was correct, and that DOI was in the wrong.[101]

---

[100] We asked [redacted] whether it was unreasonable for [redacted] to have asked [redacted] for a legal opinion on the CISO position. [redacted] responded: "*I think* [redacted] *gave* [redacted] *the answer. . . [and]* [redacted] *was demanding that* [redacted] *write* [redacted] *a memo.*" But this answer is unpersuasive: as of February 13, [redacted] agreed that the oral "answer" [redacted] had given [redacted] was insufficient, and that written confirmation of DOE's position *was* required. [redacted] agreement with [redacted] own position hardly provided any basis for [redacted] to question [redacted] judgment.

[101] Commissioner Peters hypothesized that if [redacted] had not called him to address the issue, that would have been strong evidence that [redacted] did not agree with [redacted] position. We doubt whether it would have been reasonable to draw that inference given the short time frame – [redacted] was fired a week after [redacted] first met with [redacted] But even if Commissioner Peters were right, [redacted] and [redacted] would not have known whether [redacted] had in fact called Commissioner Peters (or had "failed" to do so) unless one of the two [redacted] told them – and as of March 28, the topic had simply not come up. And in any event, [redacted] and [redacted] would have reasonably taken [redacted] at [redacted] word that [redacted] agreed with their understanding of the law.

We need go no further; for all these reasons, [redacted] and [redacted] were justified in their belief that, as of March 28, 2018, DOI's takeover of SCI amounted to, or at least "included," an abuse of authority.

D. Element Five – Causation

If a complainant is shown to have made a colorable report of wrongdoing to a proper individual and to have suffered an adverse personnel action, the final question is whether the adverse action was undertaken "in retaliation for his or her making [the] report." NYC Admin. Code § 12-113(b)(1). This is a causation inquiry; the issue is whether the complainant's whistleblowing conduct *caused* the adverse personnel action.

i. Legal Principles.

The Whistleblower Law does not provide any guidance about how an investigator should evaluate the phrase "in retaliation for," and, as described above, no court has interpreted the Whistleblower Law's causation element. However, other retaliation provisions can provide persuasive authority. For example, in the discrimination context, federal courts have held that "[c]ausation can be established either directly through evidence of retaliatory animus or indirectly by demonstrating that the adverse employment action followed quickly on the heels of the protected activity or through other evidence such as disparate treatment of fellow employees." *Balko v. Ukrainian Nat. Fed. Credit Union*, No. 13 CIV. 1333 (LAK) (AJP), 2014 WL 1377580, at *20 (S.D.N.Y. Mar. 28, 2014), *report and recommendation adopted sub nom. Balko v. Ukrainian Nat'l Fed. Credit Union*, No. 13 CIV. 1333 (LAK), 2014 WL 12543813 (S.D.N.Y. June 10, 2014).

Federal anti-discrimination laws require a complainant to show that the protected activity was a "but-for" cause of an adverse employment action. "A plaintiff may prove that retaliation was a but-for cause of an adverse employment action by demonstrating weaknesses, implausibilities, inconsistencies, or contradictions in the employer's proffered legitimate, nonretaliatory reasons for its action." *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 846 (2d Cir. 2013). The complainant must show "that the adverse action would not have occurred in the absence of the retaliatory motive," but this "does not require proof that retaliation was the only cause of the employer's action." *Id.*

For some local laws, the causation standard is far looser. For example, in 2005, the New York City Council amended the New York City Human Rights Law ("NYCHRL") by passing the Local Civil Rights Restoration Act of 2005 (the "Restoration Act"):

> In amending the NYCHRL, the City Council expressed the view that the NYCHRL had been "construed too narrowly" and therefore "underscore[d] that the provisions of New York City's Human Rights Law are to be construed independently from similar or identical provisions of New York state or federal statutes." Restoration Act § 1. To bring about this change in the law, the Act established two new rules of construction. First, it created a "one-way ratchet," by which interpretations of state and federal civil rights statutes can serve only "'as a

> floor below which the City's Human Rights law cannot fall." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 277 (2d Cir. 2009) (quoting Restoration Act § 1). Second, it amended the NYCHRL to require that its provisions "be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title[,] have been so construed." Restoration Act § 7 (amending N.Y.C. Admin. Code § 8–130).

Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 109 (2d Cir. 2013). As to retaliation, the NYCHRL provides that employers may not "retaliate . . . in any manner against any person because such person has . . . opposed any practice forbidden under this chapter." N.Y.C. Admin. Code § 8–107(7). The Restoration Act amended this section to further provide that "The retaliation or discrimination complained of under this subdivision need not result in an ultimate action with respect to employment, . . . or in a materially adverse change in the terms and conditions of employment, . . . provided, however, that the retaliatory or discriminatory act or acts complained of must be reasonably likely to deter a person from engaging in protected activity." Restoration Act § 3. Thus, "to prevail on a retaliation claim under the NYCHRL, the plaintiff must show that she took an action opposing her employer's discrimination, . . . and that, as a result, the employer engaged in conduct that was reasonably likely to deter a person from engaging in such action." *Mihalik*, 715 F.3d at 112.

For other laws, the causation inquiry is more circumscribed. Under the state's whistleblower law for public employees, N.Y. Civ. R. L. § 75-b, a complainant covered by the state's civil service laws cannot establish causation so long as the employer can assert a "separate and independent basis" for the adverse action. *See id.* § 75-b(3)(a). However, that limitation does not apply to non-civil service employees like [redacted] and [redacted] *Id.* § 75-b(2)(a).

Even under the strictest causation standards, an employer's claim that an employee was "insubordinate" will not defeat a claim of retaliation when the insubordination directly relates to the alleged whistleblowing conduct. *See Zielonka v. Town of Sardinia*, 120 A.D.3d 925, 927 (4th Dep't 2014) (in case arising under Section 75-b(3)(a), "reject[ing] defendants' contention that plaintiff's purported act of insubordination for failing to carry out the allegedly unlawful directive constitutes a 'separate and independent basis' for the termination . . . , inasmuch as the purported act of insubordination related directly to plaintiff's act of disclosure" (internal citations and quotations omitted)).[102]

[102] In the First Amendment and state constitutional context, a public employer can assert a defense arising out of the U.S. Supreme Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968) – namely, that "a government employer may take an adverse employment action against a public employee for speech on matters of public concern if: (1) the employer's prediction of the disruption that such speech will cause is reasonable; (2) the potential for disruption outweighs the value of the speech; and (3) the employer took the adverse employment action not in retaliation for the employee's speech, but because of the potential for disruption." *Caruso v. City of New York*, 973 F. Supp. 2d 430, 458 (S.D.N.Y. 2013) (quoting *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 115 (2d Cir. 2011)). But so-called "*Pickering* balancing" is a judge-made constitutional doctrine; it does not apply to a statutory whistleblower scheme like the Whistleblower Law. *See, e.g., Garcetti v. Ceballos*, 547 U.S. 410, 425–26 (2006) ("The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."); *Ross v.*

ii. Application.

Applying the above-described principles, the record demonstrates a causal link between [redacted] and [redacted] complaints of wrongdoing at DOI and the adverse employment actions they respectively suffered.

1. [redacted]

The analysis for [redacted] is relatively straightforward. Commissioner Peters made the decision to terminate [redacted] He agreed that, as of February 5, 2018 ([redacted] first day), he was confident that [redacted] – a highly qualified candidate who had sailed through the interview process, *see supra* at 32– was the right person for the job.[103] As a result, the fact that [redacted] was fired less than two months later, and nearly immediately after having engaged in a protected complaint, would ordinarily create a strong inference of retaliatory intent. *See, e.g.*, *Summa v. Hofstra Univ.*, 708 F.3d 115, 128 (2d Cir. 2013) ("This Court has recently held that even gaps of four months can support a finding of causation").

Commissioner Peters testified that [redacted] was fired for a single reason: [redacted] was unwilling to follow [redacted] instructions, and thus had shown [redacted] unwilling to follow direction from Commissioner Peters through the chain of command he had established. *See supra* at 107. He expressly disavowed reliance on other factors; for example, Commissioner Peters testified that the "disciplinary" issues captured in [redacted] memoranda played no role in his decision to terminate [redacted][104] Nor did Commissioner Peters share the broader job-performance concerns expressed by other DOI witnesses, such as [redacted] supposed reluctance to take on "big, systemic investigations." Indeed, Commissioner Peters acknowledged that [redacted] alleged refusal to follow directions from [redacted] and [redacted] was at the very least intertwined with [redacted] expressed concerns about the legality of DOI's newly imposed reporting structure – namely, that [redacted] had no legal authority to give [redacted] any orders:

> *Question:* [redacted] *been there since [February] 5th, okay. Most people spend the first three days watching [videos] and filling out paperwork.*

Breslin, 693 F.3d 300, 307 (2d Cir. 2012) ("[C]omplaints about workplace misconduct, while they may be unprotected by the First Amendment if made as part of the plaintiff's job duties, still may be protected by whistleblower laws or other similar employment codes.").

[103] [redacted] testified that [redacted] perceived several "red flags" after [redacted] hiring but before [redacted] start date, including an issue uncovered in [redacted] background interview process. We do not consider these "red flags" to be material – among other things, the background unit cleared [redacted] for service, and Commissioner Peters testified that he was not concerned about these issues.

[104] As a result, we need not analyze [redacted] alleged "performance issues" in any detail. In particular, we need not consider whether: (1) any conclusion that [redacted] suffered from termination-worthy performance failings during her 51 days at SCI would have been justified in light of, *inter alia*, DOI senior staff's acknowledgment of the scale, difficulty, and long-term nature of the turnaround job they envisioned for SCI, such as [redacted] testimony that the revamping of SCI "was a five to ten year plan"; (2) [redacted] contemporaneous comments to [redacted] many of which are inconsistent with any suggestion that [redacted] was not performing [redacted] job adequately; and (3) whether DOI's preparation of disciplinary memoranda that were never shared with [redacted] is evidence of pretext.

Peters: True.
Question: It's two weeks and change tha[redacted] on the job. Nobody has any real expectation tha[redacted] going to be bringing down a systemic case at this point.
Peters: Totally.
Question: And I think you would agree, for better or worse, [redacted] taken on a very difficult, a very challenging position because not only is there's a new method in place, but the people over whom [redacted] now charged with supervising and motivating and becoming a change agent for appear to be resistant to the entire idea. Right?
Peters: Yeah.
Question: So, is it fair to say that the main problem at [the February 27 "ultimatum"] meeting, that [redacted] is demonstrating, is not a failure to do a systemic cases or to buy into the idea of doing big cases, is that [redacted] challenging the authority of the new regime? That [redacted] saying, "Look, I've got . . . What is my title here?" Right, because[redacted] used to work at DOI. [redacted] was an IG for like a decade.
Peters: Uh-huh.
Question:[redacted] knew all about [redacted] [redacted] knew all about wha[redacted] position was. Is . . . am I wrong? Isn't that what this is all about?
Peters: Yes and no. Yes. This is clearly, [redacted] ***challenging,*** *[redacted]* ***is in fact choosing to challenge the new regime and [redacted] only a couple of weeks on the job and [redacted]s already challenging the new regime and challenging who[redacted] has to report to*** *and that's really troubling to me because, and I've already, [redacted] only on the job three weeks and I've already spent significant time in meetings hearing from [redacted] about how I can't get [redacted] to respond to me. Hearing from [redacted] being upset. Hearing from [redacted] being upset. Honestly, you're right. Most IGs, I don't hear anything about them for the first couple of months they're there.* ***So I'm already three weeks in, having [redacted] essentially objecting to getting to the chain of command*** *and it's clear to me, even in those first couple weeks, that this is a huge turnaround job. In other words, the SCI, it was clear to me even before [redacted] got there. Which means it's all the more important that people like [redacted] and [redacted] be deeply involved, because it is a turnaround. It's not like, you know, when we hired [redacted] to run the squad [redacted]. It was a really great functioning squad. [redacted] doesn't have to do the turnaround, [redacted] just has to keep it going. So it's all the more important to be involved, and [redacted]* ***like three weeks in and [redacted] already challenging the authority. I thought it was important, I thought about this, to be brusque with [redacted] so that [redacted] would get in no uncertain terms that [redacted] part of a hierarchy. [redacted] needs to abide by the hierarchy. My hope was that this was the last time this was ever going to come up. That [redacted] would be like, "Okay, I stepped out of line. My boss yelled at me for stepping out of line. I now get the boundaries. Let me go do my job."***

(Emphasis added.) Commissioner Peters' position, then, was that (1) [redacted] was free to disagree with his legal analysis so long as [redacted] continued to obey DOI directives; and (2) [redacted] failure to do so resulted in [redacted] termination.

We must consider whether there are "weaknesses, implausibilities, inconsistencies, or contradictions in [DOI's] proffered legitimate, nonretaliatory reason[ ] for its action." *Zann Kwan*, 737 F.3d at 846. There are. We conclude that [redacted] was terminated at least in part because [redacted] had made a complaint to the Commissioner about the scope of DOI's authority, and not because of [redacted] supposed insubordination. In other words, we conclude "the adverse action would not have occurred in the absence of the retaliatory motive." *Id.* Three points are decisive.

First, we conclude that Commissioner Peters lacked a sufficient basis to conclude that [redacted] had actually been "insubordinate." It is clear from the record that Commissioner Peters himself never heard [redacted] refuse to follow any directives from [redacted] or even himself. This was true as of the February 27 "ultimatum" meeting, when Commissioner Peters knew only that he "*had somebody who was giving my AC a hard time, not following direction and I wanted to sort of nip this thing in the bud, quickly and make it clear to my AC, who was* [redacted] *and right, that I had* [redacted] *back and also make it clear to this IG, whatever you want to call* [redacted]*, that I expected* [redacted] *to stop giving my AC a hard time and to do* [redacted] *job.*" "Giving someone a hard time" is not the same thing as insubordination. And around this time, [redacted] was telling [redacted] to [redacted] face that [redacted] thought that [redacted] and [redacted] were "*doing a really great job in a very challenging situation,*" and that [redacted] did not "*want to see little things like the [COOP] email discussion, like, sidetrack people's views of how well everything actually is going.*" [redacted] was certainly asking questions that went to the scope of DOI's authority over SCI – questions that Commissioner Peters, for obvious reasons, wanted to quickly tamp down – but that is not insubordination.

The same was true as of March 28:

- [redacted] met with [redacted] early in the morning and told [redacted] in effect, that [redacted] believed that EO 11 barred DOI's actions. The recording of the conversation reveals that [redacted] *did not tell* [redacted] that [redacted] would refuse to follow [redacted] commands; rather, the furthest [redacted] went was to state that "I think what you are asking me to do is not following Executive Order 11. It really is what's happening and I don't feel comfortable with that." But [redacted] – apparently out of frustration – ended the conversation within minutes.
- [redacted] then met with Peters; again, the recording confirms that neither [redacted] nor Commissioner Peters said *anything* about [redacted] failing to follow [redacted] directions. At most, Commissioner Peters said that "this isn't working out" and that SCI "has to be fully integrated into DOI" and "to operate the way everyone else does," which prompted a discussion about EO 11.
- Later that day, [redacted] and [redacted] sent their "whistleblower" email. The email said nothing about any unwillingness on [redacted] or [redacted] part to follow orders from DOI senior staff. (That was no doubt intentional.)

In other words, at the time Commissioner Peters terminated [redacted] [redacted] simply had not committed the supposedly fireable act – refusing to take direction from [redacted] or Peters in any concrete way.

We accept for purposes of this analysis that [redacted] subjectively interpreted [redacted] statement that [redacted] did not "feel comfortable with . . . what you are asking me to do" as a refusal to act, and that [redacted] conveyed as much to Commissioner Peters and DOI senior staff that morning, and likely on other occasions.[105] But that is too slender a reed on which to balance a termination. Even if we do not impute [redacted] mis- or over-reading of [redacted] comments to the Commissioner, this was still a situation where, by Commissioner Peters' own account, fine distinctions mattered greatly: a statement that [redacted] was "not comfortable" with DOI's actions would *not* have been enough to terminate, whereas a statement from [redacted] that [redacted] was "not comfortable and would not proceed" *would* have been. Yet Commissioner Peters did not have [redacted] confirm [redacted] position in his presence, or ask [redacted] any questions about the scope of [redacted] refusal. That shows indifference to the details of [redacted] alleged insubordination, and thus retaliatory intent.

That was also true because the assignment that [redacted] and [redacted] had been discussing that morning was particularly fraught: [redacted] wanted [redacted] to lead individual meetings with SCI staff to *convince them to stop asking questions about EO 11 and the propriety of DOI's takeover of SCI. Supra* at 13. As [redacted] later put it in a memo, [redacted] had a "responsibility to manage" the SCI staff's "questions relating to [EO 11] and the unit's independence." In other words, the instant assignment was not focused on DOI's policy initiatives at SCI, *i.e.*, to hire auditors and work on systemic cases; nor did it relate to [redacted] title, or to even the CISO issue. Rather, [redacted] sought to have [redacted] convince SCI's staff of a particular view – EO 11 and the BOE resolutions authorized DOI's control over SCI– that [redacted] believed to be false.[106]

---

[105] As to the morning of March 28, [redacted] testified as follows: "*I mean, I'll just be open. Like, I had something I was directed to do. I was trying to do what I could to fulfill it, right? I didn't feel like – and I know that* [redacted] *has questions about, you know, EO 11, about authority. We weren't on the same team. Clearly. We didn't see eye to eye on this. So, you know, at that point in time, maybe other people would have continued the conversation, but from my perspective, we were finished with further discussion of that. And I needed to seek out guidance from my supervisors. My view was that* [redacted] *had made it pretty clear what* [redacted] *could do or couldn't do.*" Though not necessary to reach our decision, we disagree that being "pretty clear" on what a subordinate will or will not do is, in fact, sufficient basis on which to ground a termination.

[106] [redacted] script for the anticipated individual meetings with SCI staff was (bolding in original; spaces omitted):

- This office is part of DOI.
    - Purpose of relevant authorities including EO 11 and Board resolutions was to make the office independent of DOE and part of DOI.

  Understand?
- Squad 11 is the Inspector General for the DOE (IG-DOE).
    - IG-DOE describes functions of the office to provide oversight of fraud and corruption at DOE.
    - Squad 11 / IG-DOE conforms to names of all other units in DOI serving this function.
    - Special Commissioner of Investigation is the civil service title for the person at head of this office; nothing requires it to be the name of the office.
    - We will no longer be using name SCI in letters, memos, or reports.

  Understand?
- IG-DOE must comply with DOI structure and procedures.
    - This means staff report up chain from IG-DOE to me to Susan to [redacted] to Commissioner.
    - This means staff must follow procedures all other squads do (e.g. subpoenas, criminal referrals, etc.).

  Understand?

Whether failure to follow a directive to *contradict one's own sincerely held legal interpretation* could justify an adverse personnel action appears to be an issue of first impression; we could find no precedent on the question. Our view is that [redacted] insistence that [redacted] take the lead on quashing SCI staff's questions relating to EO 11 was itself a retaliatory act. [redacted] knew that [redacted] herself had serious questions about the legality of DOI's actions, *see supra* at 69, and yet [redacted] had instructed [redacted] on March 26 that "It's not your job or [redacted] job to question the realignment or transition," adding that "if you think there is an issue with communicating that, I don't want to hear EO 11 this, EO 16 that." [redacted] appeared to conclude that one way to avoid "hear[ing] EO 11 this, EO 16 that" in the future was to force [redacted] to take a different line in front of [redacted] staff. "Where the employer provokes a reaction from an employee, that reaction should not justify a decision to impose a disproportionately severe sanction." *Anderson v. State of New York, Office of Court Admin. of Unified Court Sys.*, 614 F. Supp. 2d 404, 431 (S.D.N.Y. 2009), *aff'd sub nom. Anderson v. Cahill*, 417 F. App'x 92 (2d Cir. 2011). And in any event, the question of what *precisely* [redacted] had supposedly refused to do was highly important and relevant in this context, and Commissioner Peters devoted insufficient attention to that key issue.

Second, regardless of whether [redacted] was in fact "insubordinate," substantial direct and indirect evidence shows that [redacted] was fired because of [redacted] views regarding EO 11, and not due to any supposed failure to follow DOI directives. The first crucial factor is that, during Commissioner Peters' initial meeting with [redacted] on March 28, *he explicitly said that* [redacted] *had to leave SCI because of* [redacted] *views*. It is worth re-quoting his statement in full:

> *Peters: You are entitled to disagree with me about how to read Executive Order 11. You're a smart person and you don't agree with my reading of it, you are entitled to not agree with my reading of it.* ***But you are not entitled to both work for me and disagree with my reading, right? So I think, you know, I think frankly, yes you are entitled to disagree, but you are not entitled to both disagree and be the IG of Squad 11.*** *I think that I want to do this in a way that is, I want to do this in a way that minimizes problems for you. I want to do this in the most decent way possible. I* ***think you need to resign because I think your view of the laws and requirements are different from mine and at the end of the day, I get to make that decision.***

(Emphasis added.) *See also supra* at 77. Commissioner Peters did not describe [redacted] failings as "insubordination" or "failure to follow directions." Rather, [redacted] needed to go because "[redacted] view of the laws and requirements [is] different from mine." This is not ambiguous; it is a clear statement from Commissioner Peters that [redacted] could not remain in

---

- IG-DOE must implement the vision and goals of the DOI Commissioner and his designees including IG-DOE and me.
    - This means implementing the vision and goals as described by IG-DOE and me.
    - This means staff must, among other things, pursue systemic investigations of fraud and corruption at DOE.

  Understand?
- Your role is ____. In that role, you will be expected to pursue this mission. This means, among other things, communicating to staff reports to you what we have discussed today.

  Are you willing and able to do this?

[redacted] position because [redacted] "disagree[d] with his reading" of EO 11. That is certainly how [redacted] interpreted it; [redacted] follow-up email to Commissioner Peters later that day does not address "insubordination" at all, but rather contains a lengthy recitation of [redacted] view of the governing law.

The second crucial point is that [redacted] termination letter *also* says nothing about [redacted] supposed insubordination. The letter describes the issue as "an intractable disagreement . . . regarding the scope of [DOI's] oversight" – in other words, a disagreement about a legal question. The bulk of the letter presents DOI's interpretation of EO 11 and other legal authorities, and concludes that termination is warranted because the Commissioner lacked "complete confidence" in [redacted] as a result of [redacted] "actions and performance."[107] Like Commissioner Peters' comments to [redacted] earlier that day, the only reasonable inference to draw from the termination letter is that [redacted] was fired because of a "disagreement" about the law, and not because [redacted] refused to follow directions.

Put simply, oral and written evidence simultaneous with [redacted] firing demonstrates that Commissioner Peters terminated [redacted] because [redacted] did not share his "reading" of EO 11 or his "view of the laws." It is hard to imagine *post hoc* testimony about the cause of [redacted] firing that could be more persuasive than this clear-cut contemporary evidence. And we heard none.

Third, we conclude that even if [redacted] was fired for failure to follow [redacted] directions, that failure was too closely intertwined with [redacted] complaints about the legality of DOI's actions as to be actionable. That would be true even if the inciting directive had been something *other* than forcing [redacted] to contradict [redacted] beliefs about EO 11. *Supra* at 92-95. [redacted] core complaint was that EO 11 and the BOE resolutions made clear that DOI lacked the authority to directly oversee and manage SCI. If DOI's senior staff did not understand that before they received [redacted] email on March 28, they surely knew it afterwards. Any supposed failure to follow [redacted] directives was thus inextricably tied to [redacted] (protected) "whistleblowing" complaints. Put another way, the failure to follow orders would have been no more than a manifestation of [redacted] legal dispute. Logic and the case law supports our understanding that whistleblower laws should protect complainants who refuse to follow an illegal order. *See Zielonka*, 120 A.D.3d at 927. In such circumstances, it is all but impossible to conclude "that the adverse action would not have occurred in the absence of the retaliatory motive." *Zann Kwan*, 737 F.3d at 846. And because "retaliation [need not be] the only cause of the employer's action," *id.*, the requisite causal nexus is present.

For those reasons, and considering the record as a whole,[108] we conclude that [redacted] was terminated "in retaliation for" informing Commissioner Peters of her view that DOI's takeover of SCI violated the governing law.

---

[107] The letter's penultimate paragraph invokes "performance" issues "documented in several memoranda written by [redacted] but as discussed herein, Commissioner Peters testified that those performance issues were not the true cause of [redacted] termination.

[108] The record contains other evidence of retaliatory intent. *First*, Commissioner Peters' concededly "brusque" treatment of [redacted] at the February 27 "ultimatum" meeting – an approach that he testified was designed to "back up" [redacted] and induce [redacted] to desist any questioning of the DOI-imposed reporting structure – was both sufficiently unusual and close in time to [redacted] questioning of Commissioner Peters' authority as to be

2. [redacted]

[redacted] is an easier case, both because the circumstances of his demotion are clear-cut, and because [redacted] actions subsequent to the demotion present unmistakable evidence of retaliatory intent.

The timeline is undisputed. Like [redacted] had been elevated to his new role as deputy less than two months prior, having been regarded as a highly promising and qualified candidate. Unlike [redacted] had not acquired even a perfunctory disciplinary record during his brief time as [redacted] deputy; there is no evidence that [redacted] was anything other than a model employee during this period. Then, on March 28, [redacted] wrote [redacted] an email asking [redacted] to "confirm whether [redacted] email reflect[ed his] views." [redacted] responded that the email did "accurately reflect [his] views." [redacted] was demoted the next day. A 24-hour gap between the protected report and the adverse employment action is highly probative of retaliatory intent. *See supra* at 128.[109]

[redacted] also confirmed that [redacted] agreement with or adoption of the legal positions expressed in [redacted] email was the proximate cause of his demotion. As [redacted] explained to [redacted] during their March 29 meeting, [redacted] agreement with the "views" in [redacted] had caused [redacted] to lose faith in [redacted] ability to perform. The key claim was:

> *So, my interpretation of* [redacted] *views, which are now interpreted as your views as well, are that, included in that view, um, is not accepting direction from the DOI commissioner or his designees.*

From this, [redacted] concluded that [redacted] could not "*trust* [redacted] *in the first DIG position to be the person who is communicating and implementing the direction of the commissioner of DOI.*" [redacted] then reaffirmed [redacted] position during an interview for this investigation.

That logic does not justify [redacted] demotion, for at least two reasons.

---

retaliatory. We note for the record that we find [redacted] testimony about the source of the tension at that meeting – [redacted] supposed unwillingness "to do cases and to be proactive" – strains credulity, given that: (1) [redacted] had been at SCI for barely three weeks; (2) [redacted] had been praised by [redacted] direct manager, [redacted] the week before, following the February 21 restructuring meeting; and (3) the sequence of events and Commissioner Peters' own testimony confirms that [redacted] supposed failure to follow the chain of command had triggered the "brusque" response. *Second*, [redacted] termination on March 28 was itself sufficiently "brusque" as to create the same inference. [redacted] was kept waiting in a DOI conference room for nearly 90 minutes; when DOI leadership arrived, they brought two armed Peace Officers and proceeded to march [redacted] through the SCI offices to clean out [redacted] desk. There was, so far as the record reflects, no policy governing procedure for terminations or any relevant precedent. So while we cannot and do not conclude that there was a retaliatory deviation from a particular policy or practice for terminating high-level employees, we can and do conclude that DOI's handling of [redacted] termination was objectively excessive in the circumstances, in a manner that appeared designed to single out and intimidate [redacted] and that this further bolsters a finding of retaliation.

[109] [redacted] testified that [redacted] "adoption" of [redacted] views made [redacted] realize that [redacted] "*was part of the* [redacted] *team that weren't getting tat mission done.*" For obvious reasons, we do not credit this self-serving testimony. [redacted] agreement with [redacted] "views" did not and could not have retroactively done anything to change his job performance.

First, [redacted] "interpretation" of [redacted] March 28 email to include a refusal to "accept[ ] direction from the DOI commissioner or his designees" was unreasonable. Put simply, [redacted] email did not say anything about refusing direction from DOI. Rather, it expressed certain views about the law, and about the impropriety of DOI's actions. *Supra* at 79. Indeed, the email consisted of nothing *but* legal and policy "views" – there were no action items, bottom lines, or other ultimatum-like statements to be seen. That is no doubt why, when [redacted] wrote to [redacted] that same day, [redacted] asked whether the email "reflects your views."

We have no doubt that [redacted] email was carefully worded – all the main players in this particular drama ([redacted] Peters, [redacted] are or were attorneys. But the email said what it said, and what it said was that Commissioner Peters and DOI's senior staff had exceeded their legal authority; [redacted] was *not* free to read anything [redacted] wanted into the email, much less the particular thing that [redacted] felt would justify [redacted] demotion. Doing so was reckless and wrong, and creates a strong inference that [redacted] retaliated against [redacted] because [redacted] had told the Commissioner that DOI's takeover of SCI exceeded DOI's legal authority.[110]

Second, even if [redacted] had refused DOI's direction in the way that [redacted] thought, that refusal would still not be actionable for the reasons addressed above – declining to follow day-to-day direction from [redacted] would have been too tightly intertwined with [redacted] protected concerns about the illegality of DOI's actions. *Supra* at 87.[111]

Moreover, if we had questions about [redacted] motives in demoting [redacted] [redacted] dogged pursuit of [redacted] salary reduction from March through July 2018 would have removed all doubt. *See supra* at 87. Those actions were patently retaliatory. It is true that, in many instances, the salary reduction that accompanied [redacted] demotion would have been processed immediately, and so there would have been no "need" for [redacted] to follow up with DOE and DCAS to carry the pay cut forward. *See supra* at 87. However, there was no "need" to do so as things stood. [redacted] (and the others at DOI with whom [redacted] testified that [redacted] would have consulted, such as [redacted] were well aware that [redacted] had filed a whistleblower claim, and that this investigation would ultimately pass on the question of whether [redacted] was entitled to his first deputy-level salary. [redacted] acknowledged as much during the June 5 meeting with [redacted] and [redacted] *supra* at 88, the point being that if [redacted] prevailed, [redacted] was going to recoup his full salary, and if [redacted] did not, [redacted] was going to have to pay back the difference. In other words: someone was going to owe someone something at the end of the day.

---

[110] [redacted] also testified that [redacted] failure to discuss his legal concerns with [redacted] personally led [redacted] to conclude that [redacted] could not be trusted. We do not find this testimony persuasive in light of: (1) [redacted] contrary testimony regarding the import of following DOI's chain of command (*i.e.*, [redacted] testimony that "if you have a problem, you go to your direct report" and "we decide what to escalate," *supra* at 56); and (2) the fact that [redacted] *did* discuss his legal concerns about the CISO issue with [redacted] at the February 13 meeting with [redacted] – concerns that [redacted] acknowledged and validated in the moment, but ignored the next week, *see supra* at 46, 49.

[111] [redacted] also testified that she "needed change agents in that job." But the only reason [redacted] offered for why [redacted] could not be a "change agent" was his agreement with [redacted] legal views. Moreover, the fact that [redacted] was demoted for expressing a view that [redacted] *specifically asked* [redacted] *to provide* raises strong equitable, entrapment-style concerns. *See Anderson.*, 614 F. Supp. 2d at 431.

There was thus little point to [redacted] insistence that [redacted] salary be reduced *in the meantime* other than to inflict short-term pain on [redacted]

Even if it was reasonable to pursue the salary reduction in the abstract, the particular way in which [redacted] did so was not. Indeed, [redacted] May 5 letter to DCAS highlights the remarkable lengths to which [redacted] was willing to go to ensure that [redacted] salary was reduced forthwith. Namely, in that letter, [redacted] (1) misstated facts to a fellow City agency; and (2) made representations that squarely contradicted DOI's position as to [redacted]

To induce DCAS to approve (or at least not block) [redacted] salary reduction, [redacted] wrote that [redacted] had "demoted [redacted] . . . as a result of *his expressed unwillingness and inability* to carry out directives and receive assistance that the DOI Commissioner, and I, deem necessary to carry out his managerial duties . . . " (emphasis added). That was inaccurate: [redacted] had never "expressed" any "unwillingness" or "inability" to do *anything* – a point [redacted] made during his March 29 demotion meeting with [redacted] and thereafter. To the contrary, [redacted] had supposedly divined [redacted] unwillingness to follow DOI directions from [redacted] "interpretation of [redacted] views [in the March 28 email], which are now interpreted as your views as well." *Supra* at 83. As stated above, that interpretation was neither reasonable nor actionable. But whatever it was, [redacted] position was clearly an *interpretation* – [redacted] understood that [redacted] had not affirmatively refused to follow directions or voiced any inability to do so. As such, Lambiase's May 5 representation to DCAS that [redacted] had "*expressed unwillingness and inability* to carry out directives" was simply not true, and might be construed as an intentional smear on [redacted] professional reputation in service of a perceived short-term benefit to DOI senior staff.

Moreover, the May 5 letter contained multiple descriptions of the Special Commissioner's broad power to control his or her office: namely, that (1) "The Special Commissioner . . . is the head of the unit commonly referred to as SCI"; (2) "all SCI unit staff are . . . hired and overseen by the Special Commissioner"; and (3) "[a]s Acting Special Commissioner, it is [redacted] responsibility to determine [how] and when SCI employees may be hired, terminated, and demoted." As discussed above, these are all accurate statements. But they are all inconsistent with the restrictions that DOI imposed on [redacted] during her tenure. If the Special Commissioner has hiring and oversight responsibility, then DOI had no authority, as [redacted] and [redacted] had stated, to "steal" or "take" a SCI line for the CISO position, *see supra* at 49; [redacted] and [redacted] lacked the power to direct [redacted] to hire auditors or desist from hiring intake personnel, *supra* at 44; and DOI could not unilaterally

[112] [redacted] testified that [redacted] felt obliged to pursue the salary reduction for two reasons: (1) because [redacted] was no longer performing First Deputy-level work, [redacted] was not entitled to the accompanying salary; and (2) reducing [redacted] salary earlier rather than later would limit the amount of money that [redacted] might have to eventually pay back to City, thus reducing the financial strain on [redacted] We find neither explanation persuasive. As to the first point: it is true that [redacted] was not "entitled" to the higher salary, but the question is whether it evidences retaliatory intent for [redacted] to take the time and make the substantial effort required to cut through the DOE/DCAS bureaucracy to secure that salary reduction, *see supra* at 87 – all during a time when, by [redacted] own testimony, [redacted] was stretched thin by serving in two roles (DOI Deputy Commissioner, and Acting Special Commissioner). Put another way, given the circumstances, the fact that [redacted] salary reduction remained a high priority is suspect. Second, the record demonstrates that [redacted] was perfectly happy to continue to receive the higher salary and take the risk that [redacted] might have to pay back the City in the future. *Supra* at 135. [redacted] was not helping [redacted] by contravening his wishes.

impose DOI's employment and investigative policies on SCI staff, *supra* at 19, even if those policies were objectively superior to SCI's.

The gap between [redacted] views about [redacted] own authority as acting Special Commissioner and [redacted] powers cannot be fairly bridged. We assume that [redacted] did not intend, via the May 5 letter, to contradict any of DOI's prior positions as to [redacted] But the problem is that the facts speak for themselves. Under the law, the Special Commissioner does have legal authority to "oversee" his or her own staff as he or she sees fit; that is what Stancik and [redacted] did. In [redacted] capacity as a DOI Deputy Commissioner, [redacted] told [redacted] (and testified to the undersigned) otherwise. Both cannot be true. It is ironic (at best) that DOI senior staff chose to *accurately* portray the scope of the Special Commissioner's powers in a letter to DCAS seeking to further punish [redacted] for agreeing with that precise understanding of the law.

For the foregoing reasons, we conclude that [redacted] demotion was "in retaliation for" the assertions [redacted] and [redacted] made via email on March 28, and was thus impermissible.[113]

[redacted]

E. Other Concerns

During interviews, DOI senior staff expressed concerns about the baleful consequences that would result if these whistleblower complaints are sustained. Among other things, DOI

[113] We do not conclude that [redacted] demotion was "in retaliation for" [redacted] March 2018 whistleblowing report to Councilperson Lander. The record does show that, after the March 26 City Council hearing, Commissioner Peters immediately suspected that [redacted] had been the person "at SCI" in contact with [redacted], and that [redacted] communicated his suspicions to [redacted] and [redacted] *Supra* at 68. And in many circumstances, [redacted] demotion on March 29 – three days later – would be strong circumstantial evidence of causation. Here, however, the significant events of March 28 – *i.e.*, [redacted] request that [redacted] affirm his agreement with [redacted] "views" and [redacted] explicit reliance on that affirmation – were an intervening cause that swamped the import of [redacted] dealings with Lander. That said, if we had any doubts about the sufficiency of the evidence supporting causation as to [redacted] the Lander exchange would cut meaningfully in [redacted] favor.

witnesses testified that a finding against DOI would reward [redacted] and [redacted] "sandbagging" behavior, *i.e.*, the dissonance between their agreement with DOI senior staff during the interview process about the need for changes at SCI and their subsequent voicing of legal concerns. Commissioner Peters also testified that sustaining the complaints would inhibit his ability to effectively lead DOI, because: (1) as Commissioner, he regularly makes authoritative legal decisions for the agency; and (2) if disputes about the propriety of those decisions are protected under the Whistleblower Law, that would be a license to second-guess his leadership, which would lead to chaos. We believe these concerns are overstated; they certainly do not change our conclusions.

As to the "sandbagging" concerns, we understand why DOI senior staff might feel aggrieved by what they considered to be an about-face by [redacted] and [redacted] As several witnesses testified, while DOI leadership expected to receive pushback about the SCI reorganization, they did not expect the pushback to come from their new appointees. All the same, the record does not support a finding that either [redacted] or [redacted] knowingly misled DOI during the interview process. At the time [redacted] applied for the Special Commissioner role, [redacted] was gainfully employed at [redacted] University, in an objectively excellent job. It is inconceivable that [redacted] would have left that role to take on a new job at SCI *knowing* that [redacted] intended to immediately raise serious concerns about the legality of [redacted] new putative bosses' actions. (As [redacted] testified, that would have simply been irrational; we find no evidence to support the notion that [redacted] was irrational.) Given his position and tenure at SCI, it is more plausible that [redacted] harbored legal concerns about the SCI reorganization and knowingly withheld them until his promotion was secured. But it is unclear whether and to what extent the *legal issues* governing the SCI takeover arose during any of [redacted] interviews, and so the degree of any "sandbagging" is unclear. [redacted] also testified that [redacted] was told by [redacted] in the fall of 2017 that DOI was working out formalities of the takeover with [redacted] and DOE – a promise that would have assuaged [redacted] concerns in the short term, but obviously not in the long run.

In the end, we think any concerns about [redacted] and [redacted] candor are ultimately irrelevant. The relevant question under the Whistleblower Law is whether a complainant's belief that she was reporting abusive conduct was reasonable *at the time she made the complaint*. Here, even if [redacted] and [redacted] had no "legal" concerns at all as of December 2017, numerous intervening events over the next four months would have caused a reasonable person to reevaluate that position, including but not limited to: (1) learning the full extent of DOI's takeover of SCI, and the "brusque" manner in which they intended to proceed, *supra* at 55; (2) the CISO issue, *supra* at 45; (3) revelations about DOI's failed attempt to reach agreement on a MOU and letter agreement with DOE, *supra* at 75; and (4) subsequent legal discussions with [redacted] and others, *supra* at 65. We also conclude that DOI witnesses' concern about [redacted] and [redacted] lack of candor was colored by the obvious breakdown in trust that occurred between February and March 2018 – a breakdown for which DOI senior staff, at the least, shared blame – and subsequent revelations that [redacted] and [redacted] had been recording meetings and conversations during that period (a practice that, whatever else one might say about it, has nothing to do with the "sandbagging" issue).

As to Commissioner Peters' slippery-slope argument: we very much doubt that a ruling sustaining the instant complaint will prove to be a practical problem, and even if it was, it is a result compelled by the Whistleblower Law.

Initially, it is simply not accurate to say that DOI staff have (or will have) free license to second-guess Commissioner Peters' legal decisions. As reflected by the above discussion, not all inaccurate legal interpretations will constitute "abuses of authority." The vast majority of those decisions will not resemble the decision here – an overturning of decades of established practice based on an ill-conceived legal basis. Indeed, we think the circumstances of the instant independent investigation – by all accounts, the first Whistleblower Law claim ever brought against DOI senior management – demonstrate that such claims are and will continue to be rare.

Further, even if we thought the Whistleblower Law generated bad policy outcomes as a matter of internal DOI management, we (and DOI) still would be bound to follow it. The problem, such as it is, is that Whistleblower Law was not written specifically *for* DOI. But the Whistleblower Law clearly applies *to* DOI, and protects DOI and SCI employees; it also provides that DOI is the only valid outlet for Whistleblower Law claims. There is simply no way around the awkwardness, other than to treat complaints *to* the DOI Commissioner *about* the DOI Commissioner's alleged abuses of authority as protected complaints.

Moreover, if the practical effect of the Whistleblower Law is that DOI must tread slightly more carefully than other agencies in meting out discipline to employees after abuse-of-authority claims have been advanced, we do not think that result is inappropriate. Indeed, we can think of few agencies better suited for that task than DOI: an entity that is, at the end of the day, charged with maintaining high standards of public trust and governance.[114]

V. RECOMMENDATIONS FOR REMEDIAL ACTION

Under the Whistleblower Law, "[u]pon a determination that a retaliatory adverse personnel action has been taken . . . the commissioner shall . . . report his or her findings and, if appropriate, recommendations to the head of the appropriate agency." N.Y. Admin Code § 12-113(e)(1). The commissioner must also provide the complainants with "a written statement of the final determination" which "shall include the commissioner's recommendations, if any, for remedial action." *Id.* § 12-113(d)(3).

The head of the agency "determine[s] whether to take remedial action," *id.*, and reports that determination to DOI, *id.* Under the Whistleblower Law, "[r]emedial action" means "an appropriate action to restore the officer or employee to his or her former status, which may include one or more of the following: (i) reinstatement . . . to a position the same as or comparable to the position the officer or employee would have held if not for the adverse personnel action . . . (iii) payment of lost compensation [and] (iv) other measures necessary to address the effects of the adverse personnel action." *Id.* § 12-113(a)(2). If the commissioner determines that the agency "has failed to take appropriate remedial action, the commissioner shall consult with the agency . . . head and afford [him or her] reasonable opportunity to take such action." *Id.* § 12-113(e)(1). If the commissioner still believes that appropriate remedial

[114] To the extent DOI senior staff disagrees, they can and ought to propose amendments to the Whistleblower Law.

action has not been taken, he or she "shall report his or her findings and the response of the agency . . . head to," as relevant here, "the mayor." *Id.*

Here, we stand in the shoes of the "commissioner" and "DOI," while Commissioner Peters is the relevant "agency head." Our recommendations for remedial action are as follows.

Initially, [redacted] should be restored to the Special Commissioner position, with back pay, restoration of any relevant seniority rights or accrued service time, and compensation for the interim loss of benefits, as appropriate. Likewise, [redacted] should be restored to the First Deputy role, also with back pay and restoration of any pertinent privileges. (The pending DOE garnishment action as to [redacted] should be cancelled forthwith, and the effects of the garnishment reversed.)

The next question is whether "other measures [are] necessary to address the effects of the adverse personnel action." *Id.* § 12-113(a)(2). The adverse personal actions here were prompted by [redacted] and [redacted] avowed disagreement with the various measures taken to bring SCI into the DOI fold. We have concluded that DOI lacked and currently lacks the legal authority to swallow SCI. That means that the various steps DOI took to consummate the merger – among other things, undertaking an external and internal rebranding of SCI, absorbing SCI's email domain/website, imposing DOI's policies, practices, and investigatory priorities on SCI, and crafting a new reporting structure – were and are legally unsupportable.

Absent further action, we would anticipate additional and perhaps immediate conflict between [redacted] and DOI over these same issues. We will not provide [redacted] with a copy of this report, and thus we will not apprise them of the extent of our legal conclusions. But they would undoubtedly draw strongly favorable inferences from the fact of their reinstatement, which would be layered on top of their already existing reasonable beliefs about DOI's abuse of authority. Further challenges to DOI's actions would be inevitable; those challenges would engender new (or renewed) rancor and would almost certainly cause further disruption at both DOI and SCI.

We think this conflict is entirely avoidable. Based on the record assembled for this investigation, it appears that [redacted] and DOI are in fact *aligned* on the need for a wide array of changes at SCI – *i.e.*, the need to focus on "systemic" investigations, the creation of a new team staffed by auditors and financial investigators, and the updating of many of SCI's investigatory policies and practices. The record reflects that the vast majority of [redacted] and [redacted] concerns related to *process* and *authority*, and not to substance; we are confident that [redacted] will continue many if not all of the investigatory reforms underway at SCI.

Moreover, we understand that Commissioner Peters is prepared to promptly seek changes to the laws governing SCI, either in the form of amendments to EO 11 and the BOE resolutions, legislation from the City Council, or both. We credit Commissioner Peters' testimony that he will be able to present a compelling case on the merits in support of providing DOI with the legal authority to oversee and manage SCI. Either way, the question of SCI's independence from DOI will be debated and resolved in transparent and conclusive fashion.

Accordingly, we recommend the following set of interim measures:

A. Restoration of Pre-December 2017 status quo.

a. [redacted] title is restored to "Special Commissioner of Investigation for the New York City School District." SCI's office title is restored to the "Office of the Special Commissioner of Investigation the New York City School District."

b. The reporting relationship between DOI and SCI is reset to the one provided for in EO 11, *i.e.*, an annual status report from the Special Commissioner to the DOI Commissioner, EO 11 § 3(f), and, where an "investigation . . . results in a written report or statement of findings," the Special Commissioner "shall provide a copy of the report or statement to the [DOI] Commissioner," *id.* § 3(e).

c. The Special Commissioner's existing legal privileges and authority are acknowledged to be restored (including but not limited to the powers to "investigate complaints . . . upon [her] own initiative," EO 11 § 3(a); to "refer such matters" and "recommend such remedial action as . . . she deems necessary," *id.* & *id.* § 3(d); to "exercise the powers conferred on a Deputy Commissioner of Investigation," *id.* § 3(b), and "all those powers of the [BOE] and the Chancellor which are necessary to conduct [investigations]," including all "investigatory powers conferred on the Board of Education by the Education Law, the City Charter, or any other law," *see* 1990 BOE resolution; to seek and obtain cooperation from all appropriate sources, *see* EO 11 § 4 & 1990 BOE resolution; and to exercise "sole jurisdiction" over SCI's staff and budget, including hiring and firing authority, *see* 1991 BOE resolution

d. The costs of the above reversal should be borne by DOI.

e. As soon as is practicable following [redacted] reinstatement, Commissioner Peters, Special Commissioner [redacted] First Deputy [redacted] and any other appropriate personnel should meet and confer regarding any pending "joint" or "cross-squad" investigations involving SCI and DOI, and address whether the staffing and management of those investigations should be continued as currently organized pending the meeting described in Point 2 below.

B. Joint Status Meeting Between DOI and SCI

f. A meeting should be set for no later than 30 days after [redacted] reinstatement. The meeting should be attended by at least: (1) Commissioner Peters, [redacted] and [redacted] and any other appropriate DOI employees; and (2) Special Commissioner [redacted] First Deputy [redacted] and any other appropriate SCI employees. Prior to the meeting, Commissioner Peters and Special Commissioner [redacted] should meet and confer regarding whether any other individuals – such as [redacted] or the undersigned – should also attend.

g. At that meeting, all parties should be prepared to address in good faith, as a matter of good governance, efficiency, and a collective mission to best serve the City and its school district:
    i. Whether and to what extent any back-end operational/technological changes made at SCI between December 2017 and the present – including but not limited to the consolidation of IT infrastructure and functions, evidence collection, press office functions, and other public-facing materials – should be retained.
    ii. Whether and to what extent SCI should retain (or, if not yet adopted, adopt) DOI policies for investigations and operations, including but not limited to policies relating to the taking of sworn testimony, issuance of subpoenas, certification of peace officers, and use of official vehicles.
    iii. The status of any pending "joint" or "cross-squad" investigations; and whether those investigations should continue as joint/cooperative endeavors between SCI and DOI.
    iv. Whether and to what extent the impending move into 180 Maiden Lane will affect any of the above issues.
    v. Any other relevant points of contact between DOI and SCI.
h. No later than 7 days prior to the scheduled meeting, and in consultation with SCI staff as needed, DOI should circulate an agenda for the meeting; the agenda should contain a list of operational/technological functions (Point 2.b.i), DOI policies (Point 2.b.ii), pending joint investigations (Point 2.b.iii), and any other relevant matters (Point 2.b.v) for discussion.
i. After that meeting, DOI and SCI should jointly prepare a memorandum memorializing any understandings reached regarding these issues.

We also make the following additional recommendation:

C. Discipline of Commissioner Peters. We recommend that Commissioner Peters issue a self-admonishment for attempting to mislead and intimidate [redacted] during the February 27 "ultimatum" meeting. Our focus is not on the commissioner's initial direction that [redacted] should not sit (although we find that unwarranted and distasteful), or other aspects of the meeting (like [redacted] exclusion) that suggest an intent to isolate [redacted] Rather, our focus is on the following statement:

> *Okay, you know what, this is really . . . I thought I was being clear, maybe I'm not. I could, if I had to, go to City Hall and have them just wipe out that executive order. I probably should have, but it wasn't worth my time, effort, and energy. You are the inspector general for the school system. You are also the Special Commissioner of Investigations [sic] for the school district because there is still an executive order that I haven't bothered to have eliminated that says I have to appoint one.*

This statement was unprofessional and unbecoming of the Commissioner of Investigation, not only because it suggested that following the law was not "worth

[his] time, effort, and energy," but because it was knowingly false. Commissioner Peters knew (and testified under oath to the undersigned) that he could *not* "go to City Hall and have them just wipe out" EO 11. This reality was obvious to anyone who follows the news. Yet it did not stop Commissioner Peters from snarling that very sentiment at [redacted]

The Commissioner of Investigation's position of authority and public trust is such that he or she should not be so cavalier with the truth. Nor should the Commissioner of Investigation attempt to convey the sense that he or she is above the law. That is particularly so when a false and menacing statement is obviously intended – as it was here – to cow a subordinate into submission. As such, we recommend that Commissioner Peters draft a statement acknowledging his error and apologizing to [redacted] and order it to be placed in his personnel file (with a copy to [redacted]

VI. CONCLUSION

On DOI's website, Commissioner Peters states that "DOI's work -- providing transparency to government operations and assuring all New Yorkers that the City is providing services honestly, efficiently and effectively -- is more important now than ever." We agree. It is also important for New Yorkers to retain confidence that DOI – the City's watchdog – itself furthers those goals and operates within the limits of its legal authority. The question of "quis custodiet ipsos custodes?" – who can watch the watchmen? – has occupied concerned citizens for millennia; the actions described in this report illustrate why. DOI seized control of a sister investigative agency, one made independent by law and custom, based on little more than Commissioner Peters' view that he could put that agency's resources to better use. The law did not permit him to make that unilateral decision. We decide here that Commissioner Peters and his senior staff unlawfully retaliated against two fellow investigators who challenged DOI's power to take control of SCI.

For the foregoing reasons, we conclude that [redacted] claim under the Whistleblower Law fails, but that [redacted] should be reinstated to their prior positions, and that further remedial action is warranted to cure the effects of those adverse personnel actions.

October 10, 2018

Respectfully submitted,

JAMES G. MCGOVERN
Acting Deputy Commissioner of Investigation

Acting Examining Attorneys
Benjamin A. Fleming
Asmaa Awad-Farid
Jonathan Coppola